

**THE SADC TRIBUNAL: ITS JURISDICTION, ENFORCEMENT OF ITS JUDGMENTS  
AND THE SOVEREIGNTY OF ITS MEMBER STATES**

by

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## STATEMENT

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I, Moses Retselisitsoe Phooko, do hereby declare that ***The SADC Tribunal: Its Jurisdiction, the Enforcement of its Judgments and the Sovereignty of its Member States*** is my own work. I further affirm that all the sources and/or references that I have used and/or quoted have been indicated and acknowledged by means of complete references.



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Mr Moses Retselisitsoe Phooko

07 July 2016

Date

*For my wife: Matilda  
and  
our daughter: Tshiamo*

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## ABSTRACT

The Southern African Development Community Tribunal (the Tribunal) is the only judicial organ of the Southern African Development Community (the SADC). Its mandate includes ensuring “adherence to and the proper interpretation of the provisions of the Southern African Development Community Treaty” (the Treaty). The decisions of the Tribunal are final and binding in the territories of member states party to a dispute before it.

The responsibility to ensure that the decisions of the Tribunal are enforced lies with the Southern African Development Community Summit (the Summit). The Summit is the supreme policy-making body of the SADC. It comprises the Heads of State or Government of all SADC member states. The decisions of the Summit are binding on all member states and, upon referral from the Tribunal, it has the power to take appropriate action against a member state who refuses to honour a decision of the Tribunal.

The Tribunal was established primarily to deal with disputes emanating from the SADC’s economic and political units and not with human rights. A dispute concerning allegations of human rights violations in Zimbabwe was brought before the Tribunal by farmers affected by the country’s land-reform policy. The Tribunal, through reliance on the doctrine of implied powers, and the principles and objectives of the SADC as contained in the Treaty, extended its jurisdiction. In particular, the Tribunal found that it had jurisdiction to hear cases involving human rights violations and that there had indeed been human rights violations in the case before it. It consequently ruled against Zimbabwe. This decision has been welcomed by many within the SADC region as showing the Tribunal’s commitment to interpreting the Treaty in a way that does not run counter the rights of SADC citizens. However, the Tribunal’s decision has met with resistance from Zimbabwe and has not been implemented on the ground, *inter alia*, that the Tribunal acted beyond its mandate.

The Tribunal has on several occasions referred cases of non-compliance to the Summit for appropriate action against Zimbabwe. The Summit, however, has done nothing concrete to ensure that the Tribunal’s decisions are enforced in Zimbabwe. Instead, in an unexpected move that sent shockwaves through the SADC region and beyond, the Summit suspended the Tribunal and resolved that it should neither receive nor adjudicate any cases. During the SADC summit in August 2014, a Protocol on the Tribunal in the Southern African Development Community was adopted and signed (the 2014 Protocol). In terms of this Protocol the

jurisdiction of the (new) Tribunal will be limited to inter-state disputes. Unfortunately, it also does not provide any transitional measures to address issues such as the manner to deal with pending cases and the enforcement of judgments. When it comes to the execution and enforcement of judgments, it can be argued that the 2014 Protocol is largely a replica of the original 2000 Tribunal Protocol. The reason for this is that the envisaged mechanisms to enforce the decisions of the new Tribunal is to a large extent similar to the previous one.

Unsatisfied over the non-compliance with the decision by Zimbabwe, the litigants approached the South African courts to enforce the Tribunal's decision in South Africa.<sup>1</sup> The South African courts found that South Africa is obliged under the SADC Treaty to take all the necessary measures to ensure that the decisions of the Tribunal are enforced, and ruled against Zimbabwe. However, the decision is yet to be enforced.

The non-compliance with the judgments and a lack of mechanisms to enforce the decisions of the Tribunal, are crucial issues as they undermine the authority of the Tribunal. This thesis explores whether the Tribunal acted within its mandate in receiving and hearing a human rights case. It further considers whether, in the absence of a human rights mandate, the Tribunal enjoys implied powers under international law to invoke the powers necessary for the fulfilment of the objectives set out in the Treaty. It also reviews the concept of state sovereignty and the extent to which it has been affected by human rights norms post-World War II; regionalism; and globalisation.

An important aspect examined, is the relationship between SADC Community law and the national law of member states. The relationship between national courts and the Tribunal also receives attention. Ultimately, the discourse addresses compliance and enforcement of the Tribunal's decisions in the context of international law. To the extent relevant, I draw on other regional (the European Court of Justice) and sub-regional (the ECOWAS Community Court of Justice, and the East African Court of Justice) courts to establish how they have dealt with human rights jurisdiction and the enforcement of their judgments.

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<sup>1</sup> *Government of the Republic of Zimbabwe v Fick and Others* (657/11) [2012] ZASCA 122 (20 September 2012); *Government of the Republic of Zimbabwe v Fick and Others* (47954/2011, 72184/2011, 77881/2009) [2011] ZAGPPHC 76 (6 June 2011)).

**KEY WORDS:** SADC Tribunal, human rights jurisdiction, state sovereignty, enforcement of judgments, SADC Community law, international law, domestic law.

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# CHAPTER 1

## INTRODUCTION

### 1 EMERGENCE OF SUB-REGIONAL COMMUNITIES AND THEIR MANDATE OVER HUMAN RIGHTS

The creation of an African regional organisation can be traced back to 25 May 1963 when the Organisation of African Unity (OAU) was established in Addis Ababa, Ethiopia.<sup>1</sup> The OAU's main objectives included the promotion of unity among African states and resistance to colonisation and apartheid.<sup>2</sup> On 9 July 2002, the OAU was replaced by a new regional body, the African Union (AU), established in terms of the Constitutive Act<sup>3</sup> of the African Union.<sup>4</sup> This move has been hailed as putting "human rights firmly on the African agenda".<sup>5</sup> The AU was inaugurated in Durban, South Africa. Its Secretariat is based in Addis Ababa, Ethiopia.<sup>6</sup>

Over the past decades, apart from the creation of the AU, Africa has witnessed the emergence of several sub-regional communities such as the Economic Community of West African States (ECOWAS), the East African Community (EAC), and the Southern African Development Community (SADC) (formerly the Southern African Development Coordinating Conference (SADCC)).<sup>7</sup> In this thesis I focus specifically on the sub-regional level. The sub-regional

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<sup>1</sup> See the AU website <http://www.au.int/en/about/nutshell> (Date of use: 23 July 2012).

<sup>2</sup> Article II of the OAU Charter. The full text can be accessed on the African Union website at [http://www.au.int/en/sites/default/files/OAU\\_Charter\\_1963\\_0.pdf](http://www.au.int/en/sites/default/files/OAU_Charter_1963_0.pdf). (Date of use: 23 July 2012). For a detailed discussion of the OAU, see Gawanas B "The African Union: Concepts and implementation mechanisms relating to human rights" available at: [http://www.kas.de/upload/auslandshomepages/namibia/Human\\_Rights\\_in\\_Africa/6\\_Gawanas.pdf](http://www.kas.de/upload/auslandshomepages/namibia/Human_Rights_in_Africa/6_Gawanas.pdf) (Date of use: 23 July 2012).

<sup>3</sup> The Constitutive Act of the African Union was adopted at the 36<sup>th</sup> Ordinary Session of the Assembly of Heads of State and Government of the OAU on 11 July 2000 in Togo. The AU consists of 54 member states. The full text can be accessed at <http://au.int/en/content/constitutive-act-african-union> (Date of use: 20 July 2012).

<sup>4</sup> Dugard *International Law* 540; see also the website of the AU available at <http://www.au.int/en/about/nutshell> (Date of use: 23 July 2012); Murray *Human Rights in Africa* 31.

<sup>5</sup> Dugard *International Law* 552; Viljoen *International Human Rights Law in Africa* 178-179; Gawanas available at [http://www.kas.de/upload/auslandshomepages/namibia/Human\\_Rights\\_in\\_Africa/6\\_Gawanas.pdf](http://www.kas.de/upload/auslandshomepages/namibia/Human_Rights_in_Africa/6_Gawanas.pdf) (Date of use: 23 July 2012).

<sup>6</sup> Dugard *International Law* 542.

<sup>7</sup> These were formed under various treaties such as the Treaty Establishing the East African Community which was adopted in 1999 and became operational on 18 July 2010; Treaty of the Economic Community of Western African States which was founded on 28 May 1975 (Treaty of ECOWAS); the Treaty of the Southern African Development Community which was adopted on 17 August 1999. Other sub-regional organisations officially recognised by the AU Assembly are:

communities above have their own tribunals established in terms of their respective constitutive documents. These tribunals are responsible for interpreting and applying treaty provisions when a dispute arises as a result of sub-regional economic integration.<sup>8</sup> The sub-regional communities' main objective is to "facilitate a process of economic convergence through closer economic and financial cooperation and harmonisation of policies and programmes".<sup>9</sup> In this way states may, through sharing resources such as water and agriculture, work together and close the ethnic divides resulting from colonisation.<sup>10</sup> One of the advantages of these sub-regional communities is that member states become part of an economic community thereby strengthening their role and competitiveness in the global market.<sup>11</sup> It is clear, therefore, that the protection of human rights was not originally one of the objectives of the sub-regional community tribunals.<sup>12</sup>

In recent years, however, the mandates of these sub-regional tribunals appear to have been extended to deal with the promotion and protection of human rights, the rule of law, and democracy.<sup>13</sup> The integration of a human rights mandate into the mandates of the sub-regional tribunals creates, *inter alia*, an appropriate "investment climate that is critical in furthering economic development [and] establish[ing] confidence for investors and trading partners".<sup>14</sup> This is both a new step and a shift away from the original mandate which focused solely on economic issues with no thought for issues related to human rights. Apart from the justifications for the extension of these tribunals' mandates noted above, the adoption of the African Charter

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the Economic Community of Central African States (ECCAS); the Common Market for Eastern and Southern Africa (COMESA); the Intergovernmental Authority on Development (IGAD); the Arab Maghreb Union (UMA); and the Community of Sahel-Saharan States (CEN-SAD). In all, there are eight officially recognised sub-regional organisations in Africa which include the ECOWAS, the SADC and the EAC. See Viljoen *International Human Rights Law in Africa* 488. See also the discussion by Moller B "Africa's sub-regional organizations: Seamless web or patchwork?" available at <http://eprints.lse.ac.uk/28486/1/WP56.2MollerRO.pdf> (Date of use: 27 July 2012); Decision on the moratorium on the recognition of regional economic communities (RECs) Doc EX.CL/278/(IX) Assembly/AU/Dec.112(VII) available at [http://www.africa-union.org/root/au/Conferences/Past/2006/july/summit/doc/Decisions\\_and\\_Declarations/Assembly-AU-Dec.pdf](http://www.africa-union.org/root/au/Conferences/Past/2006/july/summit/doc/Decisions_and_Declarations/Assembly-AU-Dec.pdf) (Date of use: 27 July 2012).

<sup>8</sup> Viljoen *International Human Rights Law in Africa* 503.

<sup>9</sup> Viljoen *International Human Rights Law in Africa* 495; Murungi and Gallinetti 2010 (7) *Human Rights Law Journal* 119.

<sup>10</sup> Viljoen *International Human Rights Law in Africa* 495.

<sup>11</sup> Viljoen *International Human Rights Law in Africa* 485.

<sup>12</sup> Viljoen *International Human Rights Law in Africa* 485.

<sup>13</sup> Ebobrah 2009 (17) *African Journal of International and Comparative Law* 80; Murungi and Gallinetti 2010 (7) *International Journal on Human Rights* 119.

<sup>14</sup> Murungi and Gallinetti 2010 (7) *International Journal on Human Rights* 121.

on Human and Peoples' Rights has raised human rights to a common feature in interstate relations on the continent.<sup>15</sup> These tribunals could play an indispensable role in the protection and promotion of human rights through the adjudication of human rights cases. However, certain authors have raised concerns about the absence of explicit jurisdiction authorising sub-regional tribunals to adjudicate human rights issues.<sup>16</sup> This is the result of various factors, including the lack of explicit empowerment of certain of the tribunals with a human rights mandate or direct human rights obligations.

There are, however, several advantages to including human rights in the mandates of sub-regional tribunals. As observed by certain writers, sub-regional tribunals are better placed to respond to the specific human rights concerns of the region.<sup>17</sup> This view is supported to an extent, but ultimately it remains up to the political will of a member state to uphold human rights. Lasseko raises concerns as to “whether there exists sufficient political will in the [SADC] region to guarantee the success of the enforcement mechanisms present for human rights litigation”.<sup>18</sup> Where member states of a particular region are committed to upholding human rights as their main priority, they will fulfil this obligation. However, where these states are in one way or another shielding their allies who are involved in human rights violations, this may create an obstacle in the way of victims demanding respect and protection for their human rights. An example of a sub-regional community that has arguably been too lenient in acting against its members is the SADC which has remained silent on the serious allegations of human rights abuses in countries such as Zimbabwe and Swaziland.

When it comes to access to courts, certain sub-regional tribunals allow individuals access as opposed to the traditional limitation of jurisdiction to states only.<sup>19</sup> Some of the tribunals allow individuals to institute cases without first having to exhaust local remedies.<sup>20</sup> This is

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<sup>15</sup> Ebobrah 2009 (17) *African Journal of International and Comparative Law* 80.

<sup>16</sup> Murungi and Gallinetti 2010 (7) *International Journal on Human Rights* 124; Nkhata 2012 (20) *African Journal of International and Comparative Law* 93; Ebobrah ST “A critical analysis of the human rights mandate of the ECOWAS Community Court of Justice” available at [http://www.escr-net.org/usr\\_doc/S\\_Ebobrah.pdf](http://www.escr-net.org/usr_doc/S_Ebobrah.pdf) (Date of use: 20 April 2012).

<sup>17</sup> Murungi and Gallinetti 2010 (7) *International Journal on Human Rights* 127.

<sup>18</sup> Lasseko M “Avenues for access to information litigation: The legitimacy of supra-national judicial bodies in Southern Africa” available at <http://www.southernafricalawcenter.org/library/folder/39> (Date of use: 19 July 2012).

<sup>19</sup> Viljoen *International Human Rights in Africa* 507.

<sup>20</sup> See art 10(d) of the Supplementary Protocol A/SP.1/01/05 Amending Protocol A/P.1/7/91 of the Community Court of Justice (ECOWAS CCJ).

advantageous to those seeking protection of their rights, especially where local mechanisms are ineffective. However, international or sub-regional tribunals should always be seen as tribunals of last resort in that national courts are arguably better placed (and more easily accessible) to deal with cases involving human rights abuses.

Other than the concerns surrounding the seemingly new human rights mandate of sub-regional tribunals, there are also concerns regarding the enforcement of the decision of the tribunals. The question remains whether the decisions of international tribunals such as the SADC Tribunal (the Tribunal) will be respected and implemented by the respondent state.<sup>21</sup> The difficulty in enforcing decisions of international tribunals which arises from the consensual nature of international law, also faces sub-regional tribunals.<sup>22</sup> Furthermore, the lack of enforcement agencies, such as a regional police force, is cause for concern.<sup>23</sup> The resources expended on initial litigation in national courts, subsequent litigation at sub-regional level (if unsuccessful at the national level), and re-litigation at the national level to enforce a community judgment will in all likelihood be prohibitive and constitute a barrier to justice. In addition, certain tribunals have stated unequivocally that they will not comply with the decisions of sub-regional tribunals. An example of a state which has followed this route as regards the Tribunal, is the Republic of Zimbabwe<sup>24</sup> with the courts in Zimbabwe ruling that decisions of the Tribunal are not binding in Zimbabwe. In the case of *Gramara v the Republic of Zimbabwe*,<sup>25</sup> the High Court of Zimbabwe ruled that the recognition and enforcement of the Tribunal's decision in Zimbabwe would be "fundamentally contrary to the public policy" as it would, *inter alia*, seek to nullify Zimbabwe's constitutionally-mandated, land-reform programme.<sup>26</sup> In another ruling in the matter between *Etheredge v Minister of National Security*<sup>27</sup> the Zimbabwean High Court held, *inter alia*, that the SADC Protocol on the Tribunal and its Rules of Procedure<sup>28</sup> (2000 Tribunal Protocol) did not intend to create a sub-regional forum that would be superior to the courts in the member

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<sup>21</sup> Mutangi T "Executing judgments of the SADC Tribunal rendered under its human rights-related jurisdiction by utilizing the foreign judgments (registration and enforcement) procedure: Prospects and challenges" available at <http://ssrn.com/abstract=1907891> (Date of use: 16 June 2012).

<sup>22</sup> Murungi and Gallinetti 2010 (7) *International Journal on Human Rights* 15.

<sup>23</sup> Hans-Peter 2007 (6) *Washington University Global Studies Law Review* 578.

<sup>24</sup> Adeleke 2011 (1) *SADC Law Journal* 209.

<sup>25</sup> HC 33/09 [2010] ZWHHC 1 (26 January 2010).

<sup>26</sup> *Gramara (Private) Limited & Another v Government of the Republic of Zimbabwe* HC 33/09 at 18 - 20.

<sup>27</sup> HC 3295/08 [2009] ZWHCC 1 (4 February 2009) (hereafter the *Etheredge* decision).

<sup>28</sup> SADC Protocol on Tribunal and Rules of Procedure thereof (2000/2001) available at <http://www.sadc.int/index/browse/page/163> (Date of use: 1 November 2011).



states. The Court also ruled that its jurisdiction is superior to that of the Tribunal.<sup>29</sup> The result of these defiant statements and decisions is that the individual who has obtained judgment in his or her favour from the Tribunal, will be unable to enforce the judgment against the Zimbabwean state.

A month after the *Etheredge* decision by the Zimbabwean Court, the South African High Court recognised and registered the Tribunal's judgment in the matter between the *Government of the Republic of Zimbabwe v Fick and Others* and issued an order for the attachment of non-diplomatic property owned by Zimbabwe in South Africa.<sup>30</sup> This move may be viewed as a step forward and indicates the willingness of certain SADC member states to uphold human rights in the region.<sup>31</sup> However, the judgment also begs the question of whether the other national courts in the SADC region will follow South Africa's example. The South African court failed to provide substantive reasons for its decision, stating merely that it had relied on the documents before it to arrive at its conclusion.<sup>32</sup> The Government of Zimbabwe appealed the decision of the North Gauteng High Court. The Supreme Court of Appeal dismissed Zimbabwe's appeal against the order of the North Gauteng High Court, thereby clearing the way for the attachment of certain property of the Zimbabwean government which will be sold on auction in order to satisfy the debt owed to the farmers.

The Government of Zimbabwe unsuccessfully approached the Constitutional Court of South Africa challenging the bases upon which a South African court can assume jurisdiction and enforce the SADC Tribunal's decision when South Africa has not incorporated the SADC Treaty into its domestic law.<sup>33</sup>

The concerns raised by the Zimbabwean courts, and the questions left open by certain of the Tribunal's judgments – such as the failure convincingly and adequately to justify the exercise of jurisdiction over human rights cases – cannot be ignored. These are further examined in the thesis in relation to the future of the Tribunal with specific reference to its jurisdiction, the

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<sup>29</sup> *Etheredge* decision at 9.

<sup>30</sup> 2009 Case No 77881/2009 North Gauteng High Court, Pretoria (6 June 2011).

<sup>31</sup> See *Southern African Litigation Centre and Another v National Director of Public Prosecutions and Others* Case No 77150/09 North Gauteng High Court, Pretoria (8 May 2012). This ruling illustrates the commitment of South Africa as a SADC member state, to fulfil its international obligation to investigate and prosecute Zimbabwean officials for alleged human rights violations committed outside South Africa.

<sup>32</sup> See *Government of Zimbabwe v Fick and Others* Case No 657/11 (20 September 2012).

<sup>33</sup> *Government of the Republic of Zimbabwe v Fick and Others* 2013 (10) BCLR 1103 (CC).

sovereignty of member states, the enforcement of its judgments, and its effectiveness in protecting human rights in the region.

## 2 ROAD LEADING TO THE ESTABLISHMENT OF THE SOUTHERN AFRICAN DEVELOPMENT COMMUNITY

The apartheid system in South Africa united many African states, influenced the regional integration of Southern African countries, and moved them to work together in the fight against the then white-minority rule in South Africa.<sup>34</sup> This sense of unity resulted in the establishment of the Southern African Development Coordination Conference (the SADCC) on 1 April 1980 under the Lusaka Declaration: Southern Africa: Towards Economic Liberation.<sup>35</sup>

The SADCC's main aim was to "coordinat[e] development projects in order to lessen economic dependence on the then apartheid South Africa".<sup>36</sup> Other objectives were to forge links for equitable regional coordination, to mobilise resources for regional investment, and to secure international cooperation within its stated strategy of cooperation and economic liberation.<sup>37</sup> It is clear from these objectives that the motive behind the formation of the SADCC was to defeat apartheid and to reduce Southern Africa's economic dependence on South Africa. The SADCC is silent on the protection and promotion of human rights in the region – save for the pursuit of economic independence from South Africa. There is a relationship between economic growth and human rights. The protection and promotion of human rights, such as education and access to housing, requires resources which are difficult to access in low-income countries.<sup>38</sup> Therefore,

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<sup>34</sup> Saurombe 2010 (5) *Journal of International Law and Technology* 124; Viljoen *International Human Rights Law in Africa* 492; Lieberman ES "Organizational cloaking in Southern Africa, South Africa and the SADCC after apartheid transformation" (1997) available at [http://www.princeton.edu/~esl/esl/papers\\_&\\_publications\\_files/Lieberman%20Organizational%20Cloaking%20in%20Southern%20Africa.pdf](http://www.princeton.edu/~esl/esl/papers_&_publications_files/Lieberman%20Organizational%20Cloaking%20in%20Southern%20Africa.pdf) (Date of use: 24 April 2012); Schoeman M "From SADCC to SADC and beyond: The politics of economic integration" available at [http://www.alternativeregionalisms.org/wpcontent/uploads/2009/07/schoemar\\_fromsadcetosadc.pdf](http://www.alternativeregionalisms.org/wpcontent/uploads/2009/07/schoemar_fromsadcetosadc.pdf) (Date of use: 24 April 2012).

<sup>35</sup> See the SADC website <http://www.sadc.int/index/browse/page/52> (Date of use: 24 April 2012). The SADCC was formed by nine countries namely; Angola, Botswana, Lesotho, Malawi, Mozambique, Swaziland, Tanzania, Zambia and Zimbabwe. Namibia became the SADCC's tenth member.

<sup>36</sup> Viljoen *International Human Rights Law in Africa* 492; Saurombe 2010 (5) *Journal of International Law and Technology* 124; Bowen 1990 *Trocaire Development Review* 33.

<sup>37</sup> Viljoen *International Human Rights Law in Africa* 492.

<sup>38</sup> McKay A and Vizard P "Rights and economic growth: Inevitable conflict or 'common ground'?" available at <http://www.odi.org/sites/odi.org.uk/files/odi-assets/publications-opinion-files/4353.pdf> (Date of use: 16 October 2015).

it was important for the SADCC countries to reduce their economic dependence on South Africa in order to grow their economies and fulfil the rights of their citizens. There is no gainsaying that the struggle against apartheid was simultaneously a broader call for human rights to be acknowledged, respected and promoted.

During its existence, the SADCC was able to access external aid and embarked on several projects that were allocated<sup>39</sup> to various SADCC member states.<sup>40</sup> However, the attempts to realise its main objective of reversing the economic dependence of its members on South Africa failed.<sup>41</sup> Various factors gave rise to a major challenge to the existence and functioning of the SADCC. For example, members of the SADCC were expected to provide funds for their coordination activities on behalf of the SADCC. Due to poverty and the lack of resources in many SADCC member states, certain sectors – for example, the human resources development sector which was the responsibility of Swaziland – were neglected.<sup>42</sup> The organisation was largely dependent on donor funding sourced by the individual sectors for their specific projects.<sup>43</sup> This raised problems of uneven performance in various sectors and different approaches to meeting the organisation’s objectives. It also opened the door to manipulation and undue influence by donors as they were, by implication, dealing with the SADCC on a bilateral basis.<sup>44</sup> Furthermore, donors were reluctant to “provide financial assistance that they had pledged, because the relevant sectors did not have the capacity to utilize such aid, a problem that has also plagued the Southern African Development Community”.<sup>45</sup> During this period clear signs that South Africa was rapidly moving towards democracy and the rule of law also started to emerge. In Saurombe’s words:

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<sup>39</sup> Angola was responsible for Energy, Botswana was responsible for Livestock Production and Animal Disease Control, Lesotho was responsible for Tourism, Mozambique was responsible for Transport and Communications, Swaziland was responsible for Manpower Development, Tanzania was responsible for Industry and Trade, Zambia was responsible for Mining and Zimbabwe was responsible for Food Security.

<sup>40</sup> Saurombe 2012 (5) *Journal of International Law and Technology* 125; Moyo *Towards a Supranational Order for Southern Africa* 53.

<sup>41</sup> Schoeman [http://www.alternative-regionalisms.org/wp-content/uploads/2009/07/schoemar\\_fromsadcctosadc.pdf](http://www.alternative-regionalisms.org/wp-content/uploads/2009/07/schoemar_fromsadcctosadc.pdf) (Date of use: 24 April 2012).

<sup>42</sup> Schoeman [http://www.alternative-regionalisms.org/wp-content/uploads/2009/07/schoemar\\_fromsadcctosadc.pdf](http://www.alternative-regionalisms.org/wp-content/uploads/2009/07/schoemar_fromsadcctosadc.pdf) (Date of use: 24 April 2012).

<sup>43</sup> Schoeman [http://www.alternative-regionalisms.org/wp-content/uploads/2009/07/schoemar\\_fromsadcctosadc.pdf](http://www.alternative-regionalisms.org/wp-content/uploads/2009/07/schoemar_fromsadcctosadc.pdf) (Date of use: 24 April 2012).

<sup>44</sup> Schoeman [http://www.alternative-regionalisms.org/wp-content/uploads/2009/07/schoemar\\_fromsadcctosadc.pdf](http://www.alternative-regionalisms.org/wp-content/uploads/2009/07/schoemar_fromsadcctosadc.pdf) (Date of use: 24 April 2012).

<sup>45</sup> Schoeman [http://www.alternative-regionalisms.org/wp-content/uploads/2009/07/schoemar\\_fromsadcctosadc.pdf](http://www.alternative-regionalisms.org/wp-content/uploads/2009/07/schoemar_fromsadcctosadc.pdf) (Date of use: 24 April 2012).

When it became clear, in the early 1990s, that a democratic South Africa was becoming an irreversible prospect, and against the background of changes in the global economy and severe droughts in the sub-region, the Heads of States of SADCC on 17 August 1992 turned SADCC into the Southern African Development Community (SADC).<sup>46</sup>

This was a positive development as it would be counterproductive to pursue economic independence from South Africa once apartheid had collapsed. Further, there was a need for the transformation of the SADCC by Southern African leaders so as to focus on new challenges facing the region, as opposed to pursuing economic independence alone. As a result of these developments, the SADCC was replaced by the SADC.

### 3 SOUTHERN AFRICAN DEVELOPMENT COMMUNITY

Following the demise of the SADCC, the Heads of State or Government of the SADCC met in Windhoek, Namibia, on 17 August 1992 and adopted the Treaty of the Southern African Development Community (the Treaty).<sup>47</sup> The original 1992 Treaty was subsequently amended in 2001.<sup>48</sup> The Treaty was signed by the then ten member states of the SADCC and came into force on 5 October 1993 after having been ratified by all the member states.<sup>49</sup> The SADC has a membership of fifteen states, namely: Angola, Botswana, Democratic Republic of Congo, Lesotho, Madagascar, Malawi, Mauritius, Mozambique, Namibia, Seychelles, South Africa, Swaziland, United Republic of Tanzania, Zambia, and Zimbabwe. Madagascar was suspended from the SADC over an unconstitutional change of government in March 2009.

The SADC region has a population of 257,7 million inhabitants.<sup>50</sup> Its vision is “that of a common future, a future within a regional community that will ensure economic well-being, improvement of the standards of living and quality of life, freedom and social justice, and peace and security for the people of Southern Africa”.<sup>51</sup> The SADC is an international organisation with legal

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<sup>46</sup> Saurombe 2010 (5) *Journal of International Law and Technology* 125.

<sup>47</sup> During the mid-1990's, the SADC undertook a review and rationalisation process targeting, *inter alia*, the SADC's decentralised model and the lack of clarity and specificity in its ambitions. This process resulted in the 2001 the SADC “Report and on the Review of the Operations of the SADC Institutions”. This was approved by the Summit in March 2001. The recommendations from the review report were incorporated in the Agreement Amending the Treaty of the SADC (AAT of the SADC). The AAT of the SADC became operational on 14 August 2001. See Saurombe 2010 (5) *Journal of International Law and Technology* 125.

<sup>48</sup> To avoid confusion, the study will not refer to the Amended SADC Treaty but will merely refer to it as the SADC Treaty. See Consolidated Text in Ebobrah and Tanoh *Compendium* 339.

<sup>49</sup> Ebobrah and Tanoh *Compendium* 339.

<sup>50</sup> Ebobrah and Tanoh *Compendium* 339.

<sup>51</sup> See the SADC website <http://www.sadc.int/> (Date of use: 05 November 2011).

personality.<sup>52</sup> Article 4 of the Treaty sets out the principles in accordance with which the SADC and its member states ought to act.<sup>53</sup> These principles are: (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.

The objectives of the SADC are found in article 5(1) of the Treaty and include: the promotion of sustainable and equitable economic growth and socio-economic development; the promotion of common political values, systems and other shared values transmitted through democratic, legitimate and effective institutions; the consolidation, defence and maintenance of democracy, peace, security and stability; and the promotion of self-sustaining development on the basis of collective self-reliance and the interdependence of member states.<sup>54</sup> The SADC's objectives are clearly more ambitious than the four goals of the SADCC. As was the case with the SADCC, the protection of human rights is not included in the objectives of the SADC. However, it can be argued that by requiring SADC member states to act in accordance with the principles of human rights, democracy, and the rule of law, the Treaty gives the Tribunal a mandate to hear human rights issues. The reasons for this are discussed in Chapter 2 where I examine the jurisdiction of the Tribunal in detail.

#### **4 SOUTHERN AFRICAN DEVELOPMENT COMMUNITY INSTITUTIONS**

The drafters of the Treaty realised that for the proper functioning of the SADC, there was a need for supporting institutions within the SADC structure. Chapter 5 of the Treaty provides for the establishment of various institutions, namely:

- (a) the Summit of Heads of State or Government;
- (b) the Organ on Politics, Defence and Security;
- (c) the Council of Ministers;
- (d) the Integrated Committee of Ministries;
- (e) the Standing Committee of Officials;
- (f) the Secretariat;
- (g) the Tribunal; and
- (h) the SADC National Committees.<sup>55</sup>

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<sup>52</sup> Article 3 of the SADC Treaty.

<sup>53</sup> Ebobrah and Tanoh *Compendium* 339.

<sup>54</sup> Ebobrah and Tanoh *Compendium* 340-341.

<sup>55</sup> Chapter 5, art 1 of the SADC Treaty.

These institutions perform various tasks necessary for the fulfilment of the Treaty objectives. This thesis focuses specifically on two institutions – the Summit of Heads of State or Government, and the SADC Tribunal.

#### 4.1 The Summit

In terms of article 10 of the Treaty, the Summit is the supreme policy-making institution of the SADC and consists of the Heads of States or Government of all member states. The Summit is “responsible for the overall policy direction and control of the functions of SADC”.<sup>56</sup> It also has the power to enact legal instruments to ensure the implementation of the provisions of the Treaty. The Summit is authorised to delegate such powers to the Council or any other institution of the SADC as it deems appropriate.<sup>57</sup> The decisions of the Summit are taken by consensus and bind all member states.<sup>58</sup> The Summit meets annually.<sup>59</sup> It has the power to oversee that the decisions of the Tribunal are enforced by member states.

The Summit, as will be discussed in Chapter 3, has unfortunately not been able to assist in executing and enforcing the judgments of the Tribunal. It has, as stated earlier, also adopted a silent approach to allegations of human rights violations in member states such as Zimbabwe and Swaziland. The *Campbell* case and other decisions that have been referred to the Summit for appropriate action against the government of Zimbabwe,<sup>60</sup> remain unenforced. This study will offer certain proposals on how to make the Summit a more supportive institution for the Tribunal, as opposed to its current status as a largely powerless institution which makes minimal, if any, contribution to the effective functioning of the Tribunal. It also remains uncertain what should happen to unenforced decisions delivered by the Tribunal. Differently phrased: What is the status of the decided but unenforced decisions of the Tribunal? There would appear

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<sup>56</sup> Article 10(2) of the SADC Treaty.

<sup>57</sup> Article 10(3) of the SADC Treaty.

<sup>58</sup> Article 10(8) of the SADC Treaty.

<sup>59</sup> Article 10(7) of the SADC Treaty.

<sup>60</sup> *Fick and Another v Republic of Zimbabwe* (SADC (T) 01/2010); [2010] SADCT 8 (16 July 2010); *Kethusegile-Juru v Southern African Development Community Parliamentary Forum* (SADC (T) 02/2009); [2010] SADCT 7 (11 June 2010); *Nixon Chirinda and Others v Mike Campbell (Pvt) Limited and Others* (09/08); [2008] SADCT 1 (17 September 2008); *Campbell v Republic of Zimbabwe* SADC (T) 03/2009); [2009] SADCT 1 (5 June 2009); *United Republic of Tanzania v Cimexpan (Mauritius) Ltd and Others* (SADC (T) 01/2009); [2010] SADCT 5 (11 June 2010); *Mike Campbell (Pvt) Ltd and Others v Republic of Zimbabwe* (2/2007); [2008] SADCT 2 (28 November 2008); *Mike Campbell (Pvt) Limited and Another v Republic of Zimbabwe* (2/07); [2007] SADCT 1 (13 December 2007).

to be proposals that the Tribunal should finalise all partly-heard and pending cases,<sup>61</sup> and that any decisions already taken by the Tribunal will remain valid and enforceable. What remains uncertain is whether the Council of Ministers and the Summit will adopt these proposals. These are some of the questions that the thesis will address.

#### 4.2 *The Southern African Development Community Tribunal*

The drafters of the 1992 SADC Treaty envisaged the establishment of a Tribunal at some later stage. This is evident from article 9(f) of the Treaty which provides for the establishment of the Tribunal. The Tribunal, as envisaged in article 9(f) of the Treaty, was established as a SADC institution in 1992 in terms of article 2 of the 2000 Tribunal Protocol.<sup>62</sup> The Summit of Heads of State or Government, acting under article 4(4) of the 2000 Tribunal Protocol, appointed judges to the Tribunal in Gaborone, Botswana on 18 August 2005.<sup>63</sup> The inauguration of the Tribunal and the swearing-in of judges took place on 18 November 2005 in Windhoek, Namibia.<sup>64</sup> In terms of article 12 of the 2000 Tribunal Protocol, the Tribunal is empowered to appoint a Registrar and employ staff in order to perform its work. The Tribunal derives its role and powers from article 16(1) of the Treaty which provides:

The Tribunal 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 disputes as may be referred to it.

The role of the Tribunal is clearly set out above and anything outside these functions could be argued to fall beyond the scope and ambit of the Tribunal. The Tribunal only started functioning in 2007 after the appointment of the Registrar in 2006.<sup>65</sup> As indicated above, in terms of article 16(5) of the Treaty, and article 24(3) of the 2000 Tribunal Protocol, the decisions of the Tribunal are final and binding on the parties to the dispute.<sup>66</sup> The Tribunal is the court of final instance and its decisions are not subject to appeal.

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<sup>61</sup> These are the views expressed by Lloyd Kuveya from the Southern African Litigation Centre at the Transitional Law Group Roundtable discussion on: "The role, responsibilities and terms of reference of the Southern African Development Community (SADC Tribunal)" held at the University of Pretoria on 13 March 2012.

<sup>62</sup> Ruppel "Regional Economic Communities" 296.

<sup>63</sup> Ruppel "Regional Economic Communities" 296.

<sup>64</sup> Ruppel "Regional Economic Communities" 296.

<sup>65</sup> Ebobrah 2009 (17) *African Journal of International and Comparative Law* 83.

<sup>66</sup> See also art 32(3) of the SADC Protocol on the Tribunal which provides: "Decisions of the Tribunal shall be binding upon the parties to the dispute in respect of that particular case and enforceable within the states concerned."

After the complaints referred to the Summit by the Tribunal regarding non-compliance with its rulings by Zimbabwe, the Summit deferred action against Zimbabwe.<sup>67</sup> This move resulted in Zimbabwe bringing a “politico-legal challenge” questioning the legal existence of the Tribunal.<sup>68</sup> In particular, in a report Zimbabwe challenged the existence and functioning of the Tribunal.<sup>69</sup> The main issue raised by Zimbabwe was the call for a review of the founding instruments of the Tribunal.<sup>70</sup> It appears that the Summit acknowledged Zimbabwe’s concerns as it later called for the review of, *inter alia*, the role and functions of the Tribunal.

This was followed by several developments which hindered the operation of the Tribunal, including an announcement that the lapsed tenure of the judges would not be renewed during the review process.<sup>71</sup> According to Ebobrah, the move to suspend the Tribunal was in support of the request made by Zimbabwe for a review of the Tribunal’s responsibilities.<sup>72</sup> This view is supported in that the Summit took no steps to compel Zimbabwe to comply with the Tribunal’s decisions, despite several requests from the Tribunal for it to do so.

In an unprecedented move that sent shockwaves through the SADC region and beyond, the Summit decided to limit access to the new Tribunal to disputes between member states,<sup>73</sup> so effectively preventing individuals from bringing cases before the Tribunal. The decision, by implication also means that the Tribunal is to remain dysfunctional.

On 18 August 2014, the Summit confirmed its initial decision to limit access to the new Tribunal to disputes between member states, by adopting and signing the 2014 Protocol on the Tribunal in the Southern African Development Community at Victoria Falls, Zimbabwe.<sup>74</sup> The 2014

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<sup>67</sup> Ebobrah 2010 (4) *Malawi Law Journal* 200.

<sup>68</sup> Ebobrah 2010 (4) *Malawi Law Journal* 200.

<sup>69</sup> Ebobrah 2010 (4) *Malawi Law Journal* 200.

<sup>70</sup> Ebobrah 2010 (4) *Malawi Law Journal* 201.

<sup>71</sup> Ebobrah 2010 (4) *Malawi Law Journal* 202; SADC: Communiqué by the Southern African Development Community Heads of State, on the 30<sup>th</sup> Jubilee SADC Summit (19/08/2010) available at <http://www.zimeye.org/?p=20977> (Date of use: 24 May 2012); Request for Proposals for Provisions of Consultancy Services to the SADC Secretariat available at <http://www.sadc.int/index/browse/page/790> (Date of use: 21 May 2012). The outcome of the review process and other developments which resulted in the suspension of the SADC Tribunal are discussed fully in Chapter 5.

<sup>72</sup> Ebobrah 2010 (4) *Malawi Law Journal* 201.

<sup>73</sup> Final Communiqué of the 32<sup>nd</sup> Summit of SADC Heads of State and Government available at [http://www.sadc.int/files/3413/4531/9049/Final\\_32nd\\_Summit\\_Communique\\_as\\_at\\_August\\_18\\_2012.pdf](http://www.sadc.int/files/3413/4531/9049/Final_32nd_Summit_Communique_as_at_August_18_2012.pdf) (Date of use: 23 August 2012).

<sup>74</sup> Hereinafter referred to as the 2014 Tribunal Protocol. A copy of the 2014 Protocol is on file with the author. Nine SADC countries have to date signed the 2014 Protocol. These states are



Protocol clearly states that the “Tribunal shall have jurisdiction on the interpretation of the SADC Treaty and Protocols relating to disputes between Member States”.<sup>75</sup> The Summit’s decision has serious implications for the protection of human rights in the sub-region. It also undermines the rule of law, democracy, and the protection of human rights in the SADC region. This is especially true where local mechanisms to address human rights complaints are ineffective, and further calls into serious question the emerging jurisprudence of the Tribunal on human rights issues. The recent developments mean that the “new” Tribunal’s jurisdiction will only be open to disputes between member states and not SADC citizens. This decision has been condemned by many commentators on the basis that it, *inter alia*, undermines human rights.<sup>76</sup> Erasmus also raises valid concerns about the 2014 Tribunal Protocol, in relation to its silence on the transitional arrangements that will address existing issues, such as, pending cases, staff disputes and the enforcement of the Tribunal’s judgments.<sup>77</sup>

As individuals will in future have no access to the Tribunal, we must consider whether it is possible for one or more state to bring to the Tribunal, a case involving human rights violations against another state which has violated human rights.<sup>78</sup> To determine whether this possibility exists, the principle of state reciprocity, which refers to the “interdependence of obligations assumed by participants within the legal schemes created by [*inter alia*] human rights law”, is discussed.<sup>79</sup> Reciprocity is an important principle of international law “constituting the foundation of obligations between states” to enforce certain acceptable norms and/or agreements such as human rights treaties.<sup>80</sup> These obligations are said to be reciprocal because their “creation,

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Zambia, Tanzania, Zimbabwe, Namibia, Mozambique, Malawi, Lesotho, South Africa and the Democratic Republic of Congo.

<sup>75</sup> Article 33 of the 2014 Protocol.

<sup>76</sup> Ndlovu R “Sadc Tribunal back with mandate reduced to interstate cases” available at <http://www.bdlive.co.za/africa/africanews/2014/08/20/sadc-tribunal-back-with-mandate-reduced-to-interstate-cases> (Date of use: 18 February 2016).

<sup>77</sup> Erasmus G “The new Protocol for the SADC Tribunal: Jurisdictional changes and implications for SADC community law” available at <http://www.tralac.org/images/docs/6900/us15wp012015-erasmus-new-protocol-sadc-tribunal-20150123-fin.pdf> (Date of use: 18 February 2016).

<sup>78</sup> Henkin *et al Human Rights* 316.

<sup>79</sup> Hallstrom P “The European Union-From reciprocity to loyalty” available at <http://www.scandinavianlaw.se/pdf/39-5.pdf> (Date of use: 14 October 2012); Provost 1994 (65) *British Yearbook of International Law* 383.

<sup>80</sup> Parisi and Ghei 2003 (36) *Cornell International Law Journal* 1; Hallstrom <http://www.scandinavianlaw.se/pdf/39-5.pdf> (Date of use: 14 October 2012).

execution and termination depend on the imposition of connected obligations on others”.<sup>81</sup> Reciprocity is explored further in Chapter 3.

#### 4.2.1 Access to and jurisdiction of the SADC Tribunal

The Tribunal was constituted to ensure adherence to and the proper interpretation of the Treaty and its subsidiary instruments, and to adjudicate disputes referred to it.<sup>82</sup> The 2000 Tribunal Protocol regulates access to the Tribunal and also sets out the basis for its jurisdiction. In particular, article 14 of the 2000 Tribunal Protocol fully sets out the jurisdiction of the Tribunal which relates, *inter alia*, to the interpretation and application of the Treaty.<sup>83</sup>

Before the Summit’s recent decision to deny individuals access to the Tribunal, article 15(1) of the 2000 Tribunal Protocol empowered the Tribunal to “have jurisdiction over disputes between States, and between natural or legal persons and States”. Article 15(2) required natural or legal persons to first exhaust local remedies before bringing an action against a state.<sup>84</sup> Article 15(3) provides that “where a dispute is referred to the Tribunal by any party the consent of other parties to the dispute shall not be required”. It is therefore safe to suggest that disputes arising from the interpretation or application of the Treaty which cannot be resolved nationally, will be referred to the Tribunal.<sup>85</sup> As of 2007, the Tribunal had received seventeen cases.<sup>86</sup> Of these cases, none involved disputes between member states.<sup>87</sup> Two of the cases involved labour disputes between employees and certain SADC institutions,<sup>88</sup> while the remaining fifteen cases concerned disputes between natural or legal persons and individual member states.<sup>89</sup>

According to Viljoen, the Tribunal was set up primarily to resolve disputes arising from closer economic and political unity rather than the protection of human rights.<sup>90</sup> Eboobrah and others

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<sup>81</sup> Provost 1994 (65) *British Yearbook of International Law* 383.

<sup>82</sup> Article 16(1) of the SADC Treaty.

<sup>83</sup> Article 14 of the SADC Treaty.

<sup>84</sup> 2000 Tribunal Protocol.

<sup>85</sup> Article 32 of the SADC Treaty.

<sup>86</sup> See Case Report for matters filed in the SADC Tribunal since 2007 to date available at <http://www.sadc-tribunal.org/docs/CaseReport.pdf> (Date of use: 24 April 2012); Ruppel “Regional Economic Communities” 296.

<sup>87</sup> Ruppel “Regional Economic Communities” 296.

<sup>88</sup> See for example, *Ernest Francis Mtingwi v the SADC Secretariat* (1/2007) [2008] SADC (T) (27 May 2008).

<sup>89</sup> Ruppel “Regional Economic Communities” 301.

<sup>90</sup> Viljoen *International Human Rights Law in Africa* 488.

have also taken the view that the Tribunal lacks a clear mandate on issues of human rights.<sup>91</sup> The views of these authors are supported only to the extent that the Tribunal was originally established to resolve economic disputes. However, this does not mean that the Tribunal was precluded from adjudicating human rights issues in that the preamble to the Treaty and its article 4(c) indeed refer to “human rights”.<sup>92</sup> It must nonetheless be noted that the provision in the 2000 Tribunal Protocol which sets out its jurisdiction, makes no mention of jurisdiction over human rights.<sup>93</sup> Despite this *lacuna*, the Tribunal has adopted a flexible approach and ruled in the *Campbell* case that it had jurisdiction to hear human rights cases. Zenda has noted with concern, the Tribunal’s reasoning on its competence to deal with human rights.<sup>94</sup> Zenda’s concerns are fully addressed in Chapter 2.

There are two schools of thought with regard to the interpretation of a treaty establishing an international organisation. The orthodox approach requires that the text of the treaty be narrowly interpreted so as to respect the sovereign rights of the member states and reflect the agreement at the time when the treaty was adopted.<sup>95</sup> The flexible approach, on the other hand, allows an organisation to be deemed to have those powers which, though not expressly provided in its constituent document, are conferred upon it by necessary implication on the basis of their being essential to the performance of its duties.<sup>96</sup> These different approaches are further explored in Chapter 2 where the preferred approach will be indicated as this may provide direction in answering the research question.

A comparative study of the Tribunal – only to the extent that it is relevant to human rights jurisdiction – with the Economic Community of West African States’ Community Court of Justice, (ECOWAS CCJ), and the East African Court of Justice, will be useful in assessing how these sub-regional tribunals have dealt with human rights cases. The various and unique features of these tribunals will be helpful in formulating recommendations aimed at making the Tribunal an effective sub-regional tribunal for the SADC region. This is discussed further in Chapter 2.

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<sup>91</sup> Ebobrah 2009 (9) *African Journal of International and Comparative Law* 332; Murungi and Gallinetti 2010 (7) *International Journal on Human Rights* 119; Nkhata 2012 (20) *African Journal of International and Comparative Law* 87.

<sup>92</sup> Article 4(c) contains principles to the SADC Treaty.

<sup>93</sup> Article 15(1) of the 2000 Tribunal Protocol in part provides: “The Tribunal shall have jurisdiction over disputes between States, and between natural or legal persons and States.”

<sup>94</sup> Zenda *SADC Tribunal and Judicial Settlement* 41.

<sup>95</sup> Capps *et al Asserting Jurisdiction* 129; Brownlie *Principles of Public International Law* 651.

<sup>96</sup> *Reparation for Injuries suffered in the Service of the United Nations*, Advisory Opinion, 1949 ICJ Reports at 182 (hereafter the *Reparation* case).

#### 4.2.2 Relationship between community law and national law

The Tribunal Protocol provides an operational sphere by guiding the Tribunal on the law it must apply in its day-to-day business. The Tribunal Protocol requires the Tribunal, when adjudicating cases, to apply the Treaty, its Protocols, and all subsidiary instruments adopted by the Summit, by the Council, or by any other institution or organ of the Community pursuant to the Treaty or protocols.<sup>97</sup> The Tribunal Protocol further obliges the Tribunal to “develop its own Community jurisprudence having regard to applicable treaties, general principles and rules of public international law, and any rules and principles of the law of States”.<sup>98</sup> These provisions were useful during the early stages of the Tribunal when it had developed no jurisprudence of its own. It was therefore necessary for the drafters of the Tribunal Protocol to provide it with an operational framework to assist in the development of its jurisprudence. In particular, it was to have regard to the law of individual states.

Even though the 2000 Tribunal Protocol gives the Tribunal the power to develop its own jurisprudence, there is nothing in the Treaty or the 2000 Tribunal Protocol which provides or clarifies the nature of the relationship between SADC Community law and national law. This gap may cause a problem when a conflict arises between the two systems of law. Olivier and others have taken the view that in closing this gap, the Tribunal may use the provisions of article 21 of the 2000 Tribunal Protocol and seek guidance from the jurisprudence of other regional or international courts or tribunals.<sup>99</sup> Moyo considers that even though the Treaty does not contain a supremacy clause, it is clear that SADC norms constitute a higher law.<sup>100</sup> He submits that where there is a conflict between member states’ national law and SADC law, SADC law should be preferred.<sup>101</sup> In support of his views, Moyo points out that:

The SADC Treaty expressly prohibits member states from taking any measures (including the passing of legislation) which jeopardises the implementation of SADC treaties. This appears to be an express statement that as long as SADC has legislated in a specific area, member states may not partake of [in] any measures whose effect will be to derogate from such.<sup>102</sup>

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<sup>97</sup> Article 21(a) of the 2000 Tribunal Protocol.

<sup>98</sup> Article 21(b) of the 2000 Tribunal Protocol.

<sup>99</sup> Ruppel *et al* “Regional Integration” 18.

<sup>100</sup> Moyo *Towards a Supranational Order for Southern Africa* available at <http://www.duo.uio.no/publ/jus/2008/84111/KHULEKANIXMASTERSXXTHESIS.PDF> (Date of use: 28 June 2012).

<sup>101</sup> Moyo <http://www.duo.uio.no/publ/jus/2008/84111/KHULEKANIXMASTERSXXTHESIS.PDF> (Date of use: 28 June 2012).

<sup>102</sup> Moyo <http://www.duo.uio.no/publ/jus/2008/84111/KHULEKANIXMASTERSXXTHESIS.PDF> (Date of use: 28 June 2012).

He nonetheless concedes that “it would have been helpful though for the SADC Treaty to state expressly as to the relationship between national law and SADC law as such will be of assistance should there be a divergence between the national law and SADC law”.<sup>103</sup> In the absence of a supremacy clause or a decision by the Tribunal clarifying the relation between national law and community law, there is a potential for conflict or confusion as to which law enjoys precedence. Generally, the constitutions of the countries indicate that they are supreme in the national sphere. However, when a state has international obligations, they may be affected in that a national law may not be invoked to evade international obligations.<sup>104</sup> The nature of the relationship between national law and international law is explored in Chapter 4.

In an attempt to find an answer to the relationship between SADC Community law and domestic law, I shall draw on the principle of subsidiarity as understood in the context of the European Union. The principle of subsidiarity appears somewhat illogical in that it “limits the state, yet empowers it and justifies it”.<sup>105</sup> It also “limits intervention, yet requires it”.<sup>106</sup> This it does by requiring that member states adopt national legislation unless there is a need to enact it at community level.<sup>107</sup> In this regard, subsidiarity promotes the legitimacy of the legislation as it enforces democracy – something often lacking in international institutions – by requiring that the “decisions should be taken as closely as possible to the citizen”.<sup>108</sup> Subsidiarity also protects state sovereignty against incursion by ever-increasing international and/or sub-regional institutions.<sup>109</sup> In the context of the SADC region, this principle would assist in clarifying the nature of the relationship between SADC Community law and the national law of member states. This would be the case where the SADC member states were to be given an opportunity

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<sup>103</sup> Moyo <http://www.duo.uio.no/publ/jus/2008/84111/KHULEKANIXMASTERSXXTHESIS.pdf> (Date of use: 28 June 2012).

<sup>104</sup> Zou *Encyclopedia of Public International Law* 101.

<sup>105</sup> Caroza “Subsidiary as a structural principle of international human rights law” available at <http://www.asil.org/ajil/Carozza.pdf> (Date of use: 29 July 2012).

<sup>106</sup> Caroza <http://www.asil.org/ajil/Carozza.pdf> (Date of use: 29 July 2012); Ferreira-Snyman 2009 (42) *The Comparative and International Law Journal of Southern Africa* 195.

<sup>107</sup> Ferreira-Snyman 2009 (42) *Comparative and International Law Journal of Southern Africa* 194; Marquardt 1995 (18) *Fordham International Law Journal* 617; Caroza “Subsidiary as a structural principle of international human rights law” <http://www.asil.org/ajil/Carozza.pdf> (Date of use: 29 July 2012).

<sup>108</sup> Ferreira-Snyman 2009 (42) *The Comparative and International Law Journal of Southern Africa* 194; Marquardt 1995 (18) *Fordham International Law Journal* 617; Caroza “Subsidiary as a structural principle of international human rights law” <http://www.asil.org/ajil/Carozza.pdf> (Date of use: 29 July 2012).

<sup>109</sup> Ferreira-Snyman 2009 (42) *The Comparative and International Law Journal of Southern Africa* 195; Marquardt 1995 (18) *Fordham International Law Journal* 617.

to clarify the relationship between SADC Community law and national law through the adoption of an additional protocol. Leaving this up to each state, may result in legal uncertainty as to which law should prevail in cases of conflict.

As Moyo has rightly observed, it would have been better had a supremacy clause been included in the SADC Treaty. There has, unfortunately, been no case before the Tribunal dealing specifically with the nature of the supremacy and/or relationship between SADC Community law and national law and so there is currently no guidance as to which law should prevail in the case of conflict. Even though article 6(1) of the Treaty requires that member states should, *inter alia*, “refrain from taking any measure likely to jeopardise the sustenance of its principles, the achievement of its objectives and implementation of the provisions of [the SADC] Treaty”, this does not appear to mean that SADC Community law is superior to national law. What the provision does is to prevent member states from taking any action that would defeat the objectives of the Treaty, but it remains silent on supremacy. Furthermore, as far as I could establish, there is currently no SADC member state which has adopted national legislation clarifying the nature of the relationship between SADC Community law and its national constitution. The doctrine of supremacy<sup>110</sup> of European community law over national law that has been developed in the jurisprudence of the European Court of Justice may provide guidance when a conflict arises between SADC Community law and national law. The principles of direct application and direct effect, which are discussed in Chapter 4, as developed by the European Court of Justice will be useful in this regard.

The Court of Justice of the European Union (the European Court of Justice) was originally established in 1952 under the Treaty Establishing the European Coal and Steel Community<sup>111</sup> to implement the legal framework of the European Coal and Steel Community. In cases of conflict between European Union community law and the national law of member states, the European Union community law will prevail.<sup>112</sup> Generally, member states have a good record of compliance with the decisions of the European Court of Justice.<sup>113</sup> In Chapter 4 I consequently

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<sup>110</sup> Ferreira-Snyman 2009 (42) *The Comparative and International Law Journal of Southern Africa* 201.

<sup>111</sup> The ECSC Treaty was signed in Paris on 18 April 1951 and became operational on 24 July 1952. It was meant to be valid for 50 years and thus expired on 23 July 2002.

<sup>112</sup> *Costa v ENEL* (Case 6/64) [1964] ECR 585.

<sup>113</sup> Garrubba CJ and Gabel M “Do governments sway European Court of Justice decision-making?: Evidence from governments court briefs” available at <http://www.ifigr.org/workshop/fall05/gabel-workshop.pdf> (Date of use: 15 October 2012).

consider the current functioning of the European Court of Justice and the relationship between community law and national law to the extent relevant to this study.

The Treaty Establishing the East African Community may also be useful as it captures the nature of the relationship between community law and national law. In particular, article 8(4) states that: "Community organs, institutions and laws shall take precedence over similar national ones on matters pertaining to the implementation of this Treaty".<sup>114</sup> These provisions are useful as they offer guidance on what should happen in the event of a conflict between the community law and national law.

## 5 PROBLEM STATEMENT

The Tribunal was first faced with a human rights case in 2007 when it adjudicated the *Campbell* case.<sup>115</sup> The applicant in this case brought an action before the Tribunal for interim relief alleging, *inter alia*, that the acquisition of agricultural land by the respondent (Zimbabwe) was discriminatory as it targeted only white Zimbabwean farmers. The Tribunal ruled in favour of the applicant. The decision has been hailed by many as a significant achievement in the protection of human rights and in upholding the rule of law in the SADC region.<sup>116</sup> Unfortunately, the enforcement of the *Campbell* decision is yet to happen. The difficulties surrounding the implementation of all Tribunal judgments eventually resulted in SADC member states restricting access to the Tribunal to disputes between member states.<sup>117</sup> As a result, individuals can no longer bring cases before the Tribunal.<sup>118</sup> This study is thus important because it will investigate whether regional economic communities should allow access to individuals and whether they should be given more a precise mandate and jurisdiction to hear human rights cases. An effective enforcement mechanism for the Tribunal's decisions, based primarily on the experiences of the suspended Tribunal, will also be considered.

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<sup>114</sup> Treaty Establishing the East African Community which was adopted in 1999 and became operational on 18 July 2010. The full text is available at <http://www.eac.int/> (Date of use: 24 April 2014).

<sup>115</sup> *Mike Campbell (PVT) Limited and Another v Republic of Zimbabwe* (2/07); [2007] SADCT 1 (13 December 2007) (hereafter the *Campbell* case).

<sup>116</sup> Ebobrah 2009 (9) *African Human Rights Law Journal* 330; Bell A "Southern Africa: Top lawyers say SADC turning its back on human rights" available at <http://allafrica.com/stories/201106040073.html> (Date of use: 3 June 2011).

<sup>117</sup> Final Communiqué of the 32<sup>nd</sup> Summit of SADC Heads of State and Government [http://www.sadc.int/files/3413/4531/9049/Final\\_32nd\\_Summit\\_Communique\\_as\\_at\\_August\\_18\\_2\\_012.pdf](http://www.sadc.int/files/3413/4531/9049/Final_32nd_Summit_Communique_as_at_August_18_2_012.pdf) (Date of use: 23 August 2012).

<sup>118</sup> Scholtz 2011 (1) *SADC Law Journal* 10.

The Tribunal was created to act as an institution for the enforcement of economic disputes and did not have a clear mandate or jurisdiction to adjudicate human rights matters. It was also unable to enforce its decisions and this rendered it a toothless sub-regional judicial body. In the *Government of the Republic of Zimbabwe v Fick and Others*, litigants resorted to enforcing the judgments of the Tribunal in the South African jurisdiction, as opposed to where the violation had occurred (Zimbabwe).<sup>119</sup> On the one hand, it may be argued that this is contrary to the provisions of article 32(3) of the 2000 Tribunal Protocol which provides that “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”. On the other hand, it may be contended that South Africa acted in compliance with article 32(2) of the 2000 Tribunal Protocol which requires, *inter alia*, that SADC members take all the necessary measures to ensure the execution of the decisions of the Tribunal. Whatever the case may be, any non-compliance with the decisions of the Tribunal is a clear violation of article 32(3) of the 2000 Tribunal’s Protocol as explained above.

The lack of a mechanism to enforce the judgments of the Tribunal relates to two issues:

- (a) the absence of a SADC Protocol on Human Rights which provides clear provisions governing the protection of human rights; and
- (b) that the rules of civil procedure for the registration and enforcement of foreign judgments may be used to implement the Tribunal’s decisions.<sup>120</sup>

The first issue raises questions of jurisdiction over human rights. The Tribunal still has an unfulfilled obligation to eliminate the controversy surrounding its assumed jurisdiction over human rights by articulating how the principle in article 4(c) of the Treaty empowers it to adjudicate human rights cases.<sup>121</sup> It is not clear whether the provisions of article 4(c) impose obligations on SADC member states as regards human rights.<sup>122</sup> An explanation must also be sought for why the Tribunal elected to rely on international law sources to found jurisdiction, in preference to the 2000 Tribunal Protocol.

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<sup>119</sup> *Government of the Republic of Zimbabwe v Fick and Others* Case No 77881/2009 North Gauteng High Court, Pretoria (6 June 2011).

<sup>120</sup> See art 32(1) of the 2000 Tribunal Protocol.

<sup>121</sup> Nkhata 2012 (20) *African Journal of International and Comparative Law* 97.

<sup>122</sup> Ebobrah 2010 (4) *Malawi Law Journal* 210.



The second issue is problematic because it requires a litigant who has been successful before the Tribunal to undertake a further legal process and approach a national court for the recognition and enforcement of the Tribunal's decision. In *Gramara v the Republic of Zimbabwe*, the High Court of Zimbabwe declined to register the judgments because it considered that there were, *inter alia*, legal and practical consequences in recognising and enforcing the Tribunal's judgments.<sup>123</sup> The High Court of Zimbabwe nonetheless recognised that it was under an international obligation to enforce the judgments of the Tribunal. The procedure for the registration of foreign judgments that should be followed at national level raises its own demands as the applicant is required to meet several requirements before the community judgment can be recognised and enforced.<sup>124</sup> The conditions, *inter alia*, require that that the judgment delivered must have been final and conclusive, and that the recognition and enforcement of the judgment would not be against public policy.<sup>125</sup> This is tantamount to bringing a new court application at the national level in addition to the one finalised by the Tribunal. This may further constitute a bar to those who lack the economic means to have the community judgment recognised at the national level. The SADC countries signed the Treaty voluntarily and agreed not to act in any manner that would defeat the purposes of the Treaty.<sup>126</sup> By doing so, SADC countries have to a certain extent limited their state sovereignty. As a result of the undertakings, it can further be argued that the decisions of the Tribunal ought to be directly enforceable in national courts. Contrary to this, the Zimbabwean government's reluctance to respect and comply with the ruling in the *Campbell* case shows that some states are unwilling to "surrender some aspects of their sovereignty to SADC".<sup>127</sup>

The procedure for the recognition and enforcement of a foreign judgment appears to have traditionally aimed at enforcing monetary judgments as opposed to human rights judgments, such as the *Campbell* case where the Tribunal ordered respect for and protection of human rights.<sup>128</sup> Therefore, it appears that the Tribunal's decision requiring a member state to take all necessary measures, through its agents, to protect the possession, occupation and ownership of the lands of an individual (as in the *Campbell* case<sup>129</sup>), will be excluded by the current

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<sup>123</sup> HC 33/09 [2010] ZWHHC 1 (26 January 2010).

<sup>124</sup> Forsyth *Private International Law* 319.

<sup>125</sup> Forsyth *Private International Law* 319.

<sup>126</sup> See art 6 of the SADC Treaty.

<sup>127</sup> Scholtz 2011 (1) *SADC Law Journal* 13.

<sup>128</sup> Forsyth *Private International Law* 58.

<sup>129</sup> See para 3 of the Order in the *Campbell* case at 33.

procedure for the recognition and enforcement of foreign judgments.<sup>130</sup> Furthermore, the procedure for the recognition and enforcement of foreign judgments in national courts, as seen in cases such as *Campbell*, appears to depend on the willingness of the member state or national courts to recognise and enforce the Tribunal's judgments. This may not help the victims of human rights violations, especially when it comes to states that are reluctant to respect human rights and the rule of law. As observed by Opong, there is a need for SADC member states to create a "new and special regime" that will enforce the Tribunal's decisions on the national level in SADC states.<sup>131</sup> Opong's view is supported because it proposes a new model for enforcing the Tribunal's decisions. The thesis will investigate how the Tribunal's decisions should be enforced in the national courts of all SADC member states.

The Tribunal had no machinery to order compliance with its decisions. The only mechanism in place was that "any failure by a State to comply with a decision of the Tribunal may be referred to the Tribunal by any party concerned".<sup>132</sup> Where the Tribunal finds that there has indeed been non-compliance with its ruling, the Tribunal Protocol mandates it to refer the matter to the Summit of Heads of States or Government for appropriate action.<sup>133</sup> The Summit has, however, not been effective in enforcing the Tribunal's judgments.

In *Gondo v The Republic of Zimbabwe*, the applicants were victims of acts of violence by the National Police and National Army of the Republic of Zimbabwe.<sup>134</sup> They were successful in seeking remedies before the national courts of Zimbabwe and were awarded damages for the violence suffered at the hands of the respondent's security agents.<sup>135</sup> However, the respondent failed to comply with the orders of its courts. The applicants were unable to enforce the judgment because section 5(2)<sup>136</sup> of the State Liability Act prevented the execution of judgments

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<sup>130</sup> Mutangi T "Executing judgments of the SADC Tribunal rendered under its human rights-related jurisdiction by utilizing the foreign judgments (registration and enforcement) procedure: Prospects and challenges" available at <http://www.ssrn.com/abstract=1907891> (Date of use: 02 July 2012).

<sup>131</sup> Opong "Enforcing the judgments of the SADC Tribunal" 116.

<sup>132</sup> See art 32(4) of the 2000 Tribunal Protocol.

<sup>133</sup> See art 32(5) of the 2000 Tribunal Protocol.

<sup>134</sup> *Gondo v The Republic of Zimbabwe* (5/2008) [2008] SADCT at 1 (9 December 2010) (hereafter the *Gondo* case). In delivering this ruling, the SADC Tribunal, *inter alia*, relied on the South African Constitutional Court decision in *Nyathi v Member of the Executive Council for the Department of Health Gauteng and Another* 2008 (9) [BCLR] 865 (CC).

<sup>135</sup> *Gondo* case at 2.

<sup>136</sup> The relevant part of section 5(2) provides: "Subject to this section, no execution, or attachment, or process in the nature thereof shall be issued against the defendant or respondent in any action or proceedings... against any property of the State, but the nominal defendant or respondent may cause to be paid out of the Consolidated Revenue Fund such sum of money as may, by a

against the respondent's property. The applicants therefore approached the Tribunal and challenged section 5(2) of the State Liability Act on the basis that it was incompatible with the respondent's obligation under articles 4(c) and 6(1)<sup>137</sup> of the Treaty, because section 5(2) of the Act prevented the respondent from ensuring that effective remedies were available to the applicants. The Tribunal held that section 5(2) of the State Liability Act violated, *inter alia*, the rule of law, and was therefore contrary to the fundamental rights and the right to an effective remedy.<sup>138</sup> There is no doubt that, in theory, the Tribunal's decision provided a remedy for the applicant. Unfortunately, the ruling was not implemented and the applicant did not benefit in any tangible way. The *Gondo* ruling raises issues specifically as regards the impact of the decision in other SADC countries with similar legislation. For example, what would the impact of a Tribunal decision be on other states not party to the proceedings, especially in view of article 32(2) of the Tribunal Protocol which provides that the decisions of the Tribunal bind only the parties to the particular case and are enforceable only within the territories of those states? It is therefore necessary to examine whether the Tribunal's decisions are binding on states involved in the dispute, or whether its decisions should be binding on all the SADC member states. Assuming that the decisions of the Tribunal enjoy a status superior to that of national courts, would the doctrine of precedent (in the sense that lower courts are bound by the decisions of higher courts) result in a decision initially issued against Zimbabwe, binding the entire SADC region? These are some of the difficult questions that this study seeks to address.

## 6 RESEARCH QUESTION

In view of the above exposition, the research question may be formulated in the following terms: "Does the SADC Tribunal have jurisdiction to adjudicate human rights issues and if so, how should its judgments be enforced and how would the enforcement of these judgments impact on state sovereignty?" In answering this question attention will be paid to the following sub-questions.

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judgment or order of the court, be awarded to the plaintiff, the applicant or petitioner, as the case may be."

<sup>137</sup> Article 6 of the SADC Treaty provides: "Member states undertake to adopt adequate measures to promote the achievement of the objectives of SADC, and shall refrain from taking any measure likely to jeopardise the sustenance of its principles, the achievement of its objectives and the implementation of the provisions of this Treaty."

<sup>138</sup> *Gondo* case at 16.

- (a) Whether Tribunal decisions are to be regarded as foreign judgments, or whether they must be regarded as decisions of a sub-regional court that are directly enforceable in national courts without following the procedure for the registration and enforcement of foreign judgments on the basis of the state involved's international obligations arising from the relevant SADC instruments it has signed or ratified.
- (b) What is the relationship between SADC Community law and national law?
- (c) Whether the judgments of the Tribunal should be directly enforceable in the national courts of the parties to the dispute (without the need to follow the procedure for foreign judgments).
- (d) Whether the decisions of the Tribunal should be binding on all SADC Treaty member states (and not only parties to the dispute) and enforceable in these states' national courts.
- (e) Can a SADC country (eg South Africa) recognise the Tribunal's ruling in its own jurisdiction and order the execution of a judgment against another SADC country (eg Zimbabwe) and what implications does this hold for state sovereignty?

The approach undertaken in answering the research question and sub-questions is outlined in the summary of the individual chapters.

## **7 SCOPE OF THE STUDY**

The scope of the thesis covers issues relating to the jurisdiction of the Tribunal, the enforcement of its decisions in national courts, and the implications this holds for state sovereignty. To the extent necessary, I compare the ECOWAS CCJ, the East African Court of Justice, and the European Court of Justice in order to establish best practice with regard to jurisdiction over human rights cases and the enforcement of decisions.

## **8 METHODOLOGY**

A detailed review, critical analysis, and interpretation of the SADC treaties and protocols relating to the Tribunal, case law, and academic literature is conducted. Reliance on relevant international human rights law forms part of this study. Because of existing sub-regional courts on the African continent – such as the East African Court of Justice and the ECOWAS CCJ – I evaluate, where relevant, the work of these sub-regional courts and ascertain how they have dealt with jurisdiction over human rights and the enforcement of judgments against member states. The relevant treaties and protocols are consulted. To establish best practice from other regions, I also, where relevant, refer to the European Court of Justice (ECJ). Although I am mindful of the fact that the socio-political and legal context may be different in the European Union, the manner in which the ECJ dealt with state sovereignty and interpreted the status of Community law, may give direction to African courts on issues relating to regional integration.

## **9 SUMMARY OF CHAPTERS**

The current chapter is followed by Chapter 2 which provides a background to and an evaluation of the current status of the Tribunal. The chapter addresses and evaluates the Tribunal's assumed competence to adjudicate human rights issues. It also considers the general principles of international law to establish what guidance they offer when a treaty is silent or overly broad as to a specific mandate or the obligations of an international organisation. The point of departure is to examine the Treaty and the Tribunal Protocol better to understand the precise role and scope of the Tribunal. To this end, reference to the ECOWAS CCJ, the East African Court of Justice, and the European Court of Justice are useful in establishing how the two sub-regional and the regional court have been empowered to receive and decide on human rights issues. It is important to establish whether on their inception, the two sub-regional courts had a clear mandate over human rights. If not, we need to investigate how they grappled with and assumed jurisdiction over human rights cases. It is also important to evaluate some of the initial cases brought before the Tribunal which triggered the claim of human rights violations and so to establish how these claims were handled as regards jurisdiction. This compels an extensive consideration of the nature of express *vis-à-vis* implied mandates of the Tribunal and other tribunals. Insofar as it proves relevant, reference is made to the European Court of Justice to establish best practice which will, it is hoped, make the Tribunal more effective in the future. There is no doubt that good practice from other sub-regional and regional tribunals is useful in making an effective Tribunal a reality.

In Chapter 3 I discuss the concept of state sovereignty from the Treaty of Westphalia and post-1945. In particular, I consider how the understanding of state sovereignty has evolved and been affected by human rights and *jus cogens* norms. Further, humanitarian intervention and the immunity of heads of states are explored in light of the developments in international criminal law, and I consider whether a state can rely on the principle of state sovereignty to refuse to comply with the judgment of a sub-regional court upholding human rights. A further question is whether a foreign country, such as South Africa, can order the execution of judgment against another SADC state (Zimbabwe in our case) despite the fact that the violation of the rights complained of occurred within Zimbabwean territory. This entails the application of reciprocity in human rights treaties. Developments in international law have impacted on state sovereignty including that of member states. Accordingly, I examine whether by becoming parties to the Treaty and Tribunal Protocol, Southern African states have surrendered a part of their sovereignty.

In Chapter 4 I review the nature of the relationship between SADC Community law and national law. The Treaty and the Tribunal Protocol are silent on this point. Ruppel has asked whether “in the event that there is a conflict between community law and domestic laws of member states, which law should prevail?”<sup>139</sup> An analogous problem presented itself in the *Campbell* case where, on the one hand, the supreme law of Zimbabwe authorised expropriation of land without compensation.<sup>140</sup> On the other hand, the Tribunal had ruled that Zimbabwe’s national law violated the principles of SADC Community law, for example, that of equality.<sup>141</sup> This needs to be clarified to avoid a similar situation in future. The answer depends on how an individual state incorporates international law in its national law. This, however, raises the further question of whether SADC Community law and international law mean one and the same thing?<sup>142</sup> Hartley’s discussion of international and European Union law provides useful guidance where he states that “community law derives its legal validity from international law”.<sup>143</sup> As the Tribunal is an international organisation, it is on these laws of international organisations that the Tribunal was founded. Hartley’s work on the relationship between community law and international law in the European Union is consequently useful in this study and the position in the European Union will therefore be discussed, where relevant. For example, South Africa follows a dualist approach

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<sup>139</sup> Ruppel *et al* “Regional Integration” 18.

<sup>140</sup> *Campbell* case at 3.

<sup>141</sup> *Campbell* case at 30 and 32.

<sup>142</sup> This issue is addressed in Chapter 4 of the study.

<sup>143</sup> Hartley 2001 (72) *British Yearbook of International Law* 3.

which perceives international and national law as two distinct systems of law.<sup>144</sup> In terms of this theory, international law may only be applied by national courts if transformed into national law through legislation.<sup>145</sup> The monist theory, on the other hand, views international law and national law as forming part of as a single system of law.<sup>146</sup> As a result, international law does not need to be transformed into national law as the act of ratifying an international treaty immediately incorporates the law into national law. It is therefore necessary to discuss both the monist and the dualist theories of international law to establish how SADC member states incorporate international law in their national law and the status of international law in their national systems. The East African Court of Justice and the ECOWAS CCJ are useful as the Treaty Establishing the East African Court of Justice contains a provision dealing with the relationship between national law and community law<sup>147</sup> while the Revised Treaty of ECOWAS also provides that the community legal system exists because member states have ceded a certain portion of their sovereignty.<sup>148</sup>

The relationship between the Tribunal and national courts is also discussed. In coming to the conclusion that the Tribunal is not recognised by the Zimbabwean Constitution as superior to the national courts in Zimbabwe, Gorowa J held in *Etheredge v Minister of National Security*, that the Tribunal Protocol was silent as to the nature of the relationship between the Tribunal and the domestic courts of SADC member states.<sup>149</sup> She went further to hold that if it was the intention to elevate the Tribunal to a status superior to the national courts of SADC member states, this intention would have been clearly stated. This question cannot be taken lightly as it triggers pertinent questions as to the relationship between the Tribunal and national courts. I therefore also explore whether decisions of the Tribunal enjoy a status superior to national court decisions? For example, what would happen if a national court were to uphold a particular law, and the Tribunal were to invalidate that same law?

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<sup>144</sup> Dugard *International Law* 42; Starke 1936 (17) *British Yearbook of International Law* 70; Marian B “The dualist and monist theories. International law’s comprehension of these theories” available at [http://revcurentjur.ro/arhiva/attachments\\_200712/recjurid071\\_22F.pdf](http://revcurentjur.ro/arhiva/attachments_200712/recjurid071_22F.pdf) (Date of use: 29 July 2012).

<sup>145</sup> See generally section 231 of the Constitution of the Republic of South Africa, 1996, which deals with the incorporation of international law in South African domestic law.

<sup>146</sup> Dugard *International Law* 42; Starke 1936 (17) *British Yearbook of International Law* 70; Marian B [http://revcurentjur.ro/arhiva/attachments\\_200712/recjurid071\\_22F.pdf](http://revcurentjur.ro/arhiva/attachments_200712/recjurid071_22F.pdf) (Date of use: 29 July 2012).

<sup>147</sup> Article 8(4) Treaty Establishing the East African Community.

<sup>148</sup> Preamble to the Revised Treaty of ECOWAS.

<sup>149</sup> *Etheredge v Minister of National Security* HC 3295/08 at 9 (hereafter the *Etheredge* case).

In answering this question, I consider how the ECOWAS CCJ, East African Court of Justice,<sup>150</sup> and the European Court of Justice have approached the principle of state sovereignty, in particular with regard to the relationship between community and national courts, as well as community and national law. Finally, I evaluate whether Tribunal decisions ought to be superior to national decisions and thus be directly enforceable in the national courts of all member states, and whether there is a future need to regard the decisions of the Tribunal as foreign judgments as provided for in article 32(1) of the Tribunal Protocol. In the alternative, I ask whether the decisions of the Tribunal should be regarded as national judgments accommodating both monetary and non-monetary orders.

In Chapter 5 compliance with and enforcement of judgments of international tribunals, such as the SADC Tribunal, are considered. It is necessary to discuss and analyse the Tribunal's human rights' decisions to establish whether or not there has been compliance with the decisions. If not, it becomes necessary to enquire into the status of the decisions in the light of the suspension of the Tribunal. The factors that led up to the suspension, such as the political challenge by the Republic of Zimbabwe claiming that the Tribunal Protocol had not formally entered into force and was consequently not binding on member states who had not expressed their intention to be bound by it, are considered; as is the question of whether the Treaty and Tribunal Protocol contain any provisions authorising the suspension of the Tribunal in any given situation. If not, the question is then whether there was any legal basis for the Summit to dissolve/suspend the Tribunal. The consequences (if any) of the continued non-operation of the Tribunal are also explored.

The issue of pending cases also demands attention. In particular, whether the litigants should be advised to withdraw their cases or whether they will be heard at some future stage. This raises the issue of what remedy is available to victims of human rights violations whose cases were pending before the Tribunal when it was suspended. Can they approach another competent tribunal to seek redress whilst their cases are still before the defunct Tribunal, or is there nowhere for them to seek redress? This is arguably one of the most unique challenges facing a sub-regional tribunal and leaves those seeking justice in limbo. The study will further explore whether it could be argued that the suspension of the Tribunal violates the right of

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<sup>150</sup> Article 33(2) of the Treaty Establishing the East African Court of Justice provides: "Decisions of the Court on the interpretation and application of this Treaty shall have precedence over decisions of national courts on a similar matter."



access to courts as contained in regional and international instruments. To learn from other jurisdictions, I shall, to the extent relevant, tap into the jurisprudence of the European Court of Justice and establish how it has dealt with the enforcement of its judgments.

In Chapter 6 I present my conclusions together with a summary of key findings of the study, and offer recommendations.

## CHAPTER 2

### POWERS OF INTERNATIONAL AND SUB-REGIONAL ORGANISATIONS AND THEIR JUDICIAL ORGANS

#### 1 THE CONCEPT OF JURISDICTION

Since the establishment of the International Court of Justice in 1920, the international community has seen the establishment of various international,<sup>1</sup> regional,<sup>2</sup> and sub-regional<sup>3</sup> tribunals with differing mandates. International law is dynamic and ever-changing. So too, the “international court [and the SADC sub-regional] order is fragile, complex and inadequate for modern needs”.<sup>4</sup> It is therefore pivotal that sub-regional tribunals are given express and precise jurisdiction<sup>5</sup> to ensure that they are fully aware of the extent to which they can exercise the powers conferred upon them.

Jurisdiction is a legal term meaning the power or competence of a tribunal to hear and adjudicate a legal issue.<sup>6</sup> Jurisdiction creates the capacity to generate legal norms and to alter the position of those subject to such norms.<sup>7</sup> It further relates to the power of a court to determine a case before it in terms of an instrument either creating it or defining its jurisdiction.<sup>8</sup> Van Zyl J has described jurisdiction as a power of the court to dispose of a legal issue between the parties before it. He further points out that this power may be limited by territory, amongst other things.<sup>9</sup> According to Koroma, the “notion of jurisdiction is highly intertwined with the concept of competence”,<sup>10</sup> and the two terms are often used interchangeably although there is

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<sup>1</sup> For example, the International Criminal Court, the International Tribunal for the former Yugoslavia, and the International Tribunal for Rwanda.

<sup>2</sup> The European Court of Justice, the African Court on Human and Peoples’ Rights, the African Court of Justice, and the Inter- American Court of Human Rights, amongst others.

<sup>3</sup> The Economic Community of West African States Court of Justice (hereinafter referred to as the ECOWAS CCJ), the Southern African Development Community Tribunal (hereafter the SADC Tribunal), and the East African Court of Justice.

<sup>4</sup> Shabtai *The Law and Practice of International Court 1920 – 2005* 34.

<sup>5</sup> The terms “power”, “mandate”, “competency” and “jurisdiction” will be used interchangeably in this chapter.

<sup>6</sup> Capps *et al Asserting Jurisdiction* xix; *Mgijima v Eastern Cape Appropriate Technology Unit & Another* (2000) 21 ILJ 291 (Tk); *Ewing McDonald & Co Ltd v M & M Products Co* 1991 (1) SA 252 (A) at 256G; Spencer 2006 (73) *University of Chicago Law Review* 617.

<sup>7</sup> Alexy *Theory of Constitutional Rights* 132.

<sup>8</sup> Cheng *International Courts and Tribunals* 259.

<sup>9</sup> *Mgijima v Eastern Cape Appropriate Technology Unit & Another* (2000) 21 ILJ 291 (Tk) 296 E-H.

<sup>10</sup> Koroma “Assertion of Jurisdiction” 189.

literature indicating that they apply in different scenarios.<sup>11</sup> Jurisdiction, therefore, means the capacity of a tribunal to decide a case and issue a final and binding judgment.<sup>12</sup> Competence “adds to jurisdiction the notion of propriety”.<sup>13</sup> What can be deduced from the above exposition is that a tribunal is not competent to act beyond its jurisdiction.<sup>14</sup> As a result, any judgment by a tribunal which has acted beyond its jurisdiction, will be null and void.<sup>15</sup>

The term “human rights jurisdiction” refers to the power of a court to receive and adjudicate over cases brought by those who have *locus standi* against the state (or corporations as specified in the constituent document) alleging that the state or corporation in question have violated a certain human rights treaty that the state has ratified.<sup>16</sup>

In this chapter I discuss the jurisdiction and powers of the judicial organs of international organisations as contained in their founding documents, including where such founding documents are silent about certain mandates, such as that capacity to adjudicate human rights cases. A comparative analysis is undertaken to establish how the ECOWAS CCJ, and the East African Court of Justice have been mandated to adjudicate human rights cases. The doctrine of implied powers, coined by the International Court of Justice, is also considered, before I discuss the jurisdiction of the SADC Tribunal and ascertain whether it has been given the power to hear and decide issues involving human rights.

## 2 JURISDICTION AND POWERS OF INTERNATIONAL ORGANISATIONS

The constitution of an international organisation is the source of its authority and guides the organisation in the execution of its mandate.<sup>17</sup> There are often problems associated with the powers of international organisations, as the competency and/or objectives of the organisation

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<sup>11</sup> Koroma “Assertion of Jurisdiction” 189.

<sup>12</sup> Rosenne *Law and Practice* 536.

<sup>13</sup> Rosenne *Law and Practice* 536.

<sup>14</sup> Cheng *International Courts and Tribunals* 259.

<sup>15</sup> Reisman 1986 *American Journal of International Law* 128; See also *Lewis & Marks v Middel* 1904 TS 291 and 303 where the then Supreme Court of the Transvaal stated that a “court must have jurisdiction for its judgment and/or order to be valid. If the court does not have jurisdiction its judgment and/or order is a nullity. No pronouncement to that effect is required. It is simply treated as such”.

<sup>16</sup> Eno RW “The Jurisdiction of the African Court on Human and Peoples’ Rights” 2002 (2) *African Human Rights Law Journal* 225-226 and 229.

<sup>17</sup> Brownlie *Principles of Public International Law* 651; Bartels “Jurisdiction and applicable law clauses” 115; Ebobrah “A critical analysis of the human rights mandate of the ECOWAS Community Court of Justice” available at [http://www.escri-net.org/usr\\_doc/S\\_Ebobrah.pdf](http://www.escri-net.org/usr_doc/S_Ebobrah.pdf) (Date of use: 26 June 2012).

are at times couched in broad terms in its constitutive document.<sup>18</sup> This makes it necessary for the organisation's tribunal to interpret the constitutive document in an attempt to provide clarity as to where the powers in dispute start and where they end. The International Court of Justice has adopted a "flexible approach" to the interpretation of the constitution of an international organisation.<sup>19</sup> In doing so it has, by implication, conferred upon the United Nations powers "essential to the performance of its duties".<sup>20</sup> This has generated considerable controversy as it is said that it disregards the treaty obligations agreed upon by member states,<sup>21</sup> and opens the way for the discussion of express and implied powers which follows.

## 2.1 Express powers

As mentioned above, international tribunals, including sub-regional tribunals, derive their powers from their respective treaties adopted by member states.<sup>22</sup> In other words, the relevant treaties and/or protocols specify the nature and extent of the powers a tribunal may exercise. These powers are termed "express powers". For this reason, in fulfilling its mandate, it appears that only powers explicitly contained in the treaty establishing a particular organisation can be exercised by the tribunal serving that organisation.<sup>23</sup> The SADC Treaty, the 2000 Tribunal Protocol, and its Rules of Procedure<sup>24</sup> are the sources of the current (suspended) Tribunal's powers. In terms of the concept of express powers this means that in discharging its obligations, the Tribunal can only do what is set out in these two constitutive documents. From this, the proponents of express powers argue that any other activities not expressly provided for in the constituent documents, fall outside of the scope of the Tribunal's work. Nkhata asserts that any attempt by an organisation to impose new obligations that are not in its founding instrument on its member states, would be an act falling beyond the powers originally given to the institution to interpret the treaty.<sup>25</sup> In contrast, Brownlie acknowledges<sup>25</sup> that the doctrine of implied powers

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<sup>18</sup> Warbrick "Original intention and new world orders" 129.

<sup>19</sup> Warbrick "Original intention and new world orders" 237; *Reparation for Injuries suffered in the Service of the United Nations*, Advisory Opinion, 1949 ICJ Reports 174 (hereafter the *Reparation case*).

<sup>20</sup> *Reparation case* at 182.

<sup>21</sup> Warbrick "Original intention and new world orders" 129.

<sup>22</sup> See Sarooshi D "The powers of the United Nations International Criminal Tribunals" available at [http://www.mpil.de/shared/data/pdf/pdfmpunyb/sarooshi\\_2.pdf](http://www.mpil.de/shared/data/pdf/pdfmpunyb/sarooshi_2.pdf) (Date of use: 13 August 2012).

<sup>23</sup> Ebobrah [http://www.escr-net.org/usr\\_doc/S\\_Ebobrah.pdf](http://www.escr-net.org/usr_doc/S_Ebobrah.pdf) (Date of use: 26 June 2012).

<sup>24</sup> SADC Protocol on Tribunal and Rules of Procedure thereof (2000/2001) available at <http://www.sadc.int/index/browse/page/163> (Date of use: 1 November 2011).

<sup>25</sup> Nkhata 2012 (20) *African Journal of International and Comparative Law* 97. Campbell 1983 (32) *The International and Comparative Law Quarterly* 523.

may be used to interpret an organisation's founding instrument.<sup>26</sup> Brownlie's view is tenable because the rigid approach advocated by proponents of the notion of express powers appears to be an obstacle to justice. For example, does it mean that when there is a dispute regarding the powers of a tribunal, such as the SADC Tribunal, the Tribunal cannot engage in an interpretative process that will provide a solution? Must the Tribunal refer the matter back to the member states for deliberation and consensus in order to provide clarity even though it is part of the Tribunal's mandate to interpret and apply the provisions of the Treaty? If this is indeed that the case, it is clear that those who approach any tribunal seeking protection of their rights would have no immediate redress.

In light of the above discussion, including the negative effect of a rigid interpretation of powers, the proponents of the notion of express powers would still maintain that for any of the tribunal's decision(s) to be legitimate, the notion of express powers requires that it perform its duties within the scope of its authority as expressly set out in the constitutive document. Otherwise this may have a negative impact on the decision, especially if the ruling is regarded as falling beyond the power of the tribunal that issued it.<sup>27</sup> Parties to a dispute may also be reluctant to abide by a decision issued by a tribunal whose jurisdiction is questionable<sup>28</sup> in that it opens many doors for challenging the tribunal's authority and may render its legitimacy doubtful in regard to a specific decision.<sup>29</sup>

## 2.2 *Implied powers*

In the absence of express powers in the constitutive instrument establishing a tribunal, that tribunal can resort to implied powers to establish the jurisdiction necessary for the organisation to fulfil its mandate.<sup>30</sup> There is an obvious tension between the doctrines of implied and express powers. The former is more concerned with the protection of community interests, whereas the latter appears to cling to the old notion of state sovereignty.<sup>31</sup> The test used to determine whether an international organisation has implied powers under international law, is "whether

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<sup>26</sup> Brownlie *Principles of Public International Law* 651.

<sup>27</sup> Murungi and Gallinetti 2010 (7) *Human Rights Law Journal* 132.

<sup>28</sup> Murungi and Gallinetti 2010 (7) *International Journal of Human Rights* 132.

<sup>29</sup> Murungi and Gallinetti 2010 (7) *International Journal of Human Rights* 132.

<sup>30</sup> *Katabazi & 21 Others v Secretary General of the East African Community and Another* (Ref No 1 of 2007) [2007] EACJ 3 (1 November 2007) (hereafter the *Katabazi case*); *Mike Campbell (Pvt) Ltd and Others v Republic of Zimbabwe* (2/2007) [2008] SADCT 2 (28 November 2008) at 23-26 (hereafter the *Campbell main case*). Murungi and Gallinetti 2010 (7) *International Journal on Human Rights* 119; Ruppel "Regional economic communities" 307.

<sup>31</sup> Klabbers *International Institutional Law* 6.

the exercise of the [implied] power is necessary for the attainment by the organisation of its object and purpose as specified in the constituent document”.<sup>32</sup> The doctrine of implied powers is recognised by international law as it was developed by the International Court of Justice.<sup>33</sup> The four cases discussed below illustrate the application of the doctrine of implied powers by the International Court of Justice.

### 2.2.1 The *Reparation for Injuries Suffered in the Service of the United Nations*

In the *Reparation* case, the United Nations General Assembly requested an advisory opinion from the International Court of Justice on, *inter alia*, whether the United Nations had the capacity to bring an international claim against the responsible government for people who had died while in the service of the United Nations. The claim was brought with a view to obtaining the reparation due in respect of the damage caused to the victim, or to persons entitled to such reparations through the victim. The International Court of Justice first remarked that the United Nations 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”.<sup>34</sup> It then posed the following question:

Whether the provisions of the Charter concerning the functions of the Organization, and the part played by its agents in the performance of those functions, imply for the Organization power to afford its agents the limited protection that would consist in the bringing of a claim on their behalf for reparation for damage suffered in such circumstances.<sup>35</sup>

In response to this question, the International Court of Justice held that in terms of international law an organisation must be construed as having by implication been given the powers necessary for it to discharge its duties.<sup>36</sup> This is so even if such powers are not expressly provided for in the constitutive document.<sup>37</sup> Since this advisory opinion, the doctrine of implied

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<sup>32</sup> Sarooshi available at [http://www.mpil.de/shared/data/pdf/pdfmpunyb/sarooshi\\_2.pdf](http://www.mpil.de/shared/data/pdf/pdfmpunyb/sarooshi_2.pdf) (Date of use: 13 August 2012).

<sup>33</sup> *Reparation* case at 182.

<sup>34</sup> *Reparation* case at 182.

<sup>35</sup> *Reparation* case at 182.

<sup>36</sup> *Reparation* case at 182. See also *Reparation* case at 180 where the Court said that: “Whereas a State possesses the totality of international rights and duties recognized by international law, the rights and duties of an entity such as the Organization must depend upon its purposes and functions as specified or implied in its constituent documents and developed in practice”.

<sup>37</sup> *Reparation* case at 182.

powers has been applied in subsequent decisions of the International Court of Justice<sup>38</sup> and is generally accepted in many jurisdictions.<sup>39</sup>

### 2.2.2 Advisory Opinion on the *Legality of the Use by a State of Nuclear Weapons in Armed Conflict*<sup>40</sup>

This is one of the opinions in which the International Court of Justice again applied the doctrine of implied powers but reached a different conclusion. In the *Nuclear Weapons* case, the International Court of Justice was asked, *inter alia*, to give an advisory opinion on whether a state that used nuclear weapons (which may have an effect on health and the environment) during a war would be in breach of its obligations under international law and the constitution of the World Health Organisation, 1948.<sup>41</sup> According to the Court, the starting point in identifying the duties of an international organisation is to have due regard to its constitution.<sup>42</sup> The Court observed that international organisations are created by member states through the adoption of a constitutive document which sets out the function(s) of the organisation. It considered the functions of the World Health Organisation as embodied in its constitution and concluded that none of the express powers refers to the legality of any activity hazardous to health, and that no functions of the World Health Organisation depend “upon the legality of the situations upon

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<sup>38</sup> See for example, *Certain Expenses of the United Nations (Article 17, paragraph 2, of the Charter)*, Advisory Opinion, 1962 ICJ Reports 151 (hereafter *Certain Expenses of the United Nations* case) where the Court determined at 159 that: “Since no such qualification is expressed in the text of the Charter, it could be read in, only if such qualification must necessarily be implied from the provisions of the Charter considered as a whole, or from some particular provision thereof which makes it unavoidable to do so in order to give effect to the Charter”. It is also worth noting that the constituent document of the European Union did not confer the European Union with international legal personality. However, the European Court of Justice has recognised that the European Union has competence to enter into international agreements even where express authorisation is absent from the constituent document. See Judgment of the Court of 31 March 1971 *Commission of the European Communities v Council of the European Communities*. - *European Agreement on Road Transport* Case 22-70 para 16 where the Court said: “Such authority arises not only from an express conferment by the Treaty - as in the case with Articles 113 and 114 for tariff and trade agreements and with Article 238 for association agreements - but may equally flow from other provisions of the Treaty and from measures adopted, within the framework of those provisions, by the Community institutions”.

<sup>39</sup> Wouters J and De Man P “International organizations as law-makers” available at [https://ghum.kuleuven.be/ggs/publications/working\\_papers/new\\_series/wp21-30/wp21.pdf](https://ghum.kuleuven.be/ggs/publications/working_papers/new_series/wp21-30/wp21.pdf) (Date of use: 15 June 2013); Weiler JHH “Some preliminary remarks on the conferral by states of powers on international organizations” available at <http://centers.law.nyu.edu/jeanmonnet/archive/papers/03/030401.pdf> (Date of use: 14 June 2013); Rama-Montaldo 1970 (44) *British Yearbook of International Law* 124.

<sup>40</sup> 1996 ICJ Reports 226 at 226 (hereafter the *Nuclear Weapons* case).

<sup>41</sup> *Nuclear Weapons* case at 68.

<sup>42</sup> *Nuclear Weapons* case at 74.

which it must act”.<sup>43</sup> It nonetheless recognised that an organisation may have subsidiary powers to enable it to achieve its objectives and that this is generally accepted under international law which allows an organisation to exercise implied powers.<sup>44</sup> It further emphasised that “international organizations are subjects of international law which do not, unlike States, possess a general competence”.<sup>45</sup> According to the court, international organisations are governed by the principle of speciality in that they are created by states and exercise their powers within restraints as mandated by states.<sup>46</sup> Consequently, the powers given to international organisations are generally expressed in its constituent document or may be implied from the constitutive document provided that they are necessary for the performance of the organisation’s duties.<sup>47</sup>

The court indicated that the UN Charter has provided a platform upon which international cooperation is comprehensively organised. This has been achieved by vesting the United Nations with general powers and then bringing it into relationships with a variety of other complementary organisations which enjoy sectoral powers.<sup>48</sup> It further stated that the exercise of these powers by United Nations’ agencies is coordinated by the agreements concluded between the United Nations and each of its specialised organisations.<sup>49</sup> Accordingly, the World Health Organisation’s Constitution cannot be interpreted by considering only the powers conferred on it; the “logic of the overall system” as envisaged by the UN Charter must also be considered.<sup>50</sup> In addition, the court stated, *inter alia*, that in terms of the rules upon which the system is based – globally – the World Health Organisation has broad duties which are limited to the sphere of public health under the UN Charter. However, these activities cannot assume the responsibilities of other sectors within the United Nations system.<sup>51</sup> It ultimately ruled that

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<sup>43</sup> *Nuclear Weapons* case at 76.

<sup>44</sup> *Nuclear Weapons* case at 79; see also *Competence of the International Labour Organization to regulate, incidentally, the personal work of the employer*, Advisory Opinion, ICJ Series B – No 13 July 23<sup>rd</sup>, 1926 at 18 where the International Court of Justice said “...[i]t is not conceivable that they intended to prevent the Organization from drawing up and proposing measures essential to the accomplishment of that end [measures to ensure conducive working conditions and the protection of workers]...”.

<sup>45</sup> *Nuclear Weapons* case at 78.

<sup>46</sup> *Nuclear Weapons* case at 78

<sup>47</sup> *Nuclear Weapons* case at 79; see also *Reparation* case at 57.

<sup>48</sup> *Nuclear Weapons* case at 80.

<sup>49</sup> *Nuclear Weapons* case at 80.

<sup>50</sup> *Nuclear Weapons* case at 80.

<sup>51</sup> *Nuclear Weapons* case at 80.



the request for an advisory opinion submitted to it by the World Health Organisation fell outside the ambit of the work of the Organisation as laid out in its constitutive document.<sup>52</sup>

In this ruling the court reiterated the doctrine of implied powers and acknowledged its existence in instances where it can be appropriately applied. However, for the reasons indicated above, it found that the doctrine of implied powers did not apply in this case in that the World Health Organisation lacks competence to deal with issues involving nuclear weapons.

### 2.2.3 Advisory Opinion on the *Competence of the International Labour Organisation to regulate, incidentally, the Personal Work of the Employer*<sup>53</sup>

In the *Competence of the ILO* case, the International Court of Justice was asked to consider whether it was within the ambit of the functions of the International Labour Organisation (ILO) to propose a law that was aimed directly at protecting certain employees when that same law had a direct impact on other employers who performed work of the same scope.<sup>54</sup> The court examined various factors, such as the Preamble to the constitution of the ILO which requires the improvement of the working conditions and the protection of employees' rights.<sup>55</sup> It further highlighted that article 387 to the Treaty of Versailles declared that the ILO was created to promote the objectives provided for in the Preamble to the Treaty of Versailles.<sup>56</sup> It then answered this question in the affirmative and held, *inter alia*, that the member states had intended to give the ILO broad powers to adopt measures to promote humane working conditions.<sup>57</sup>

### 2.2.4 The *Certain Expenses of the United Nations (Article 17, paragraph 2, of the Charter)*<sup>58</sup>

In the *Certain Expenses of the United Nations* case, the International Court of Justice was asked to consider whether expenditure authorised by various General Assembly resolutions constituted "expenses of the Organisation" within the meaning of article 17, paragraph 2, of the Charter of the United Nations.<sup>59</sup> It answered the question in the affirmative and held, *inter alia*,

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<sup>52</sup> *Nuclear Weapons* case at 81.

<sup>53</sup> ICJ Series B – No 13 23 July 1926 (hereafter the *Competence of the ILO* case).

<sup>54</sup> *Nuclear Weapons* case at 66.

<sup>55</sup> *Nuclear Weapons* case at 14-15.

<sup>56</sup> *Competence of the International Labour Organization* case at 14; see also Part XIII of the Versailles Treaty June 28, 1919 : Part XIII available at <http://avalon.law.yale.edu/imt/partxiii.asp> (Date of use: 13 June 2013).

<sup>57</sup> *Competence of the ILO* case at 18. See also Engström *Constructing the Powers* 29-30.

<sup>58</sup> Advisory Opinion of 20 July 1962 1962 ICJ Reports 159.

<sup>59</sup> *Certain Expenses of the United Nations* case at 152.

that "...when the Organization takes action which warrants the assertion that it was appropriate for the fulfilment of one of the objectives of the United Nations, the presumption is that such action is not *ultra vires* the Organization".<sup>60</sup> As in the *Reparations* case, the International Court of Justice adopted a flexible approach in implying powers for the United Nations' General Assembly. As observed by Akande, the court has not only restricted itself to what is contained in particular provisions of its constitutive document, but has implied powers for the Organisation by considering its general purposes and the conditions of international life.<sup>61</sup>

This reasoning is persuasive and in line with the provisions of the Vienna Convention on the Law of Treaties.<sup>62</sup> In particular, articles 31(1) and (2), and 31(3)(c) of the Vienna Convention on the Law of Treaties require, *inter alia*, that a treaty be interpreted in good faith and that words be given their ordinary meaning with reference to the objectives and purposes of the Vienna Convention. In addition, the Vienna Convention on the Law of Treaties also requires the Preamble to be considered during the process of interpretation. In other words, a treaty should not be interpreted selectively but should be read as a whole, including its Preamble.<sup>63</sup>

From the above, it follows that actions of an organisation that can be shown to be necessary for the realisation of its objectives, fall within the competence of the organisation provided that they have not been expressly excluded.<sup>64</sup>

### **3 JURISDICTION OVER HUMAN RIGHTS IN AFRICA'S SUB-REGIONAL COURTS**

Africa's sub-regional tribunals faced challenges regarding their human rights jurisdiction during their early stages of operation. The doctrine of implied powers as developed by the International Court of Justice has also been applied by some of the sub-regional tribunals in Africa. Here I consider how the ECOWAS CCJ, the East African Court of Justice, and the SADC Tribunal have grappled with the challenges regarding their competence to adjudicate issues involving human rights, especially where their constitutive documents are silent in this regard.

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<sup>60</sup> *Certain Expenses of the United Nations* case at 168.

<sup>61</sup> Akande 1998 (9) *European Journal of International Law* 446.

<sup>62</sup> Vienna Convention on the Law of Treaties, 1155 UNTS 331, 8 ILM 679, entered into force 27 Jan 1980.

<sup>63</sup> Fitzmaurice 1957 (33) *British Yearbook of International Law* 208-209; Rogoff 1996 (11) *American Journal of International Law and Policy* 590.

<sup>64</sup> Akande 1998 (9) *European Journal of International Law* 446; Phooko 2015 (18) *Potchefstroom Electronic Law Journal* 541.

### 3.1 The ECOWAS CCJ

The Economic Community of West African States (ECOWAS) was established by a treaty signed in Lagos on 28 May 1975 (Original ECOWAS Treaty).<sup>65</sup> The Original ECOWAS Treaty made no reference to human rights.<sup>66</sup> The treaty was revised and the revision signed on 24 July 1993 (Revised ECOWAS Treaty).<sup>67</sup> The Revised ECOWAS Treaty provides for the “recognition, promotion and protection of human and peoples’ rights”.<sup>68</sup> In addition, it provides for the establishment of the ECOWAS CCJ.<sup>69</sup>

The ECOWAS CCJ was created by Protocol A/P.1/7/91 (Protocol) which was signed in Abuja, Nigeria on 6 July 1991 and entered into force after having been incorporated into the Revised ECOWAS Treaty on 5 November 1996.<sup>70</sup> The ECOWAS CCJ became operational on 5 November 2006. This Protocol<sup>71</sup> did not, however, confer human rights jurisdiction and competence on the ECOWAS CCJ.<sup>72</sup> The court was therefore not established as a forum for the adjudication of human rights cases<sup>73</sup> but to settle economic disputes. This is clear from the fact that only member states had access to the tribunal and could bring any cases regarding the interpretation and application of ECOWAS treaties or protocols on behalf of their nationals.<sup>74</sup>

#### 3.1.1 Competence and jurisdiction of the ECOWAS CCJ

The ECOWAS CCJ’s powers were first set out in the Revised ECOWAS Treaty which empowers the court to adjudicate disputes between member states, or between member states and ECOWAS institutions.<sup>75</sup> In addition, the Protocol provides that a member state may institute

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<sup>65</sup> Enabulele 2010 (12) *International Community Law Review* 111.

<sup>66</sup> Ebobrah available at [http://www.escr-net.org/usr\\_doc/S\\_Ebobrah.pdf](http://www.escr-net.org/usr_doc/S_Ebobrah.pdf) (Date of use: 26 June 2012); The Original Treaty of ECOWAS is available at <http://www.comm.ecowas.int/sec/index.php?id=treaty> (Date of use: 13 June 2013).

<sup>67</sup> The Revised Treaty of ECOWAS available at <http://www.comm.ecowas.int/sec/index.php?id=treaty&lang=en> (Date of use: 22 November 2012).

<sup>68</sup> Article 4(g).

<sup>69</sup> Articles 6(1)(e) and 15(1).

<sup>70</sup> Enabulele 2010 (12) *International Community Law Review* 115.

<sup>71</sup> A/P.1/7/91. The text of the Protocol is available at [http://www.courtecowas.org/site2012/index.php?option=com\\_content&view=article&id=2&Itemid=5](http://www.courtecowas.org/site2012/index.php?option=com_content&view=article&id=2&Itemid=5) (Date of use: 13 June 2013).

<sup>72</sup> Ebobrah 2009 (17) *African Journal of International and Comparative Law* 86.

<sup>73</sup> Ebobrah 2007 (7) *African Human Rights Law Journal* 312; Alter *et al* 2013 (107) *The American Journal of International Law* 746.

<sup>74</sup> Ebobrah 2009 (17) *African Journal of International and Comparative Law* 86.

<sup>75</sup> See art 76(2) of Protocol A/P1/7/91.

proceedings on behalf of its nationals against another member state or ECOWAS institution as regards the interpretation and application of the provisions of the treaty.<sup>76</sup>

In light of the above, it is clear that access to and the powers of the ECOWAS CCJ were initially limited to disputes between member states. Individuals had no direct access to the court. In Enabulele's words, the jurisdiction of the court was narrow and influenced by the Statute of the International Court of Justice, modelled on the traditional view of international law which only allows states access to a court.<sup>77</sup> Expecting member states to bring human rights cases on behalf of their nationals is highly unlikely in that one cannot readily conceive of a state instituting a human rights case on behalf of its national, especially if that state is itself accused of the human rights violation. Even if another state could bring a case before the ECOWAS CCJ on behalf of an individual who is a national of a different state, this would probably also not happen for political and diplomatic reasons. Therefore, in both instances, the protection of individuals' human rights is limited indirectly.

To establish whether individuals could access the ECOWAS CCJ in a matter against their own state, a human rights case – *Afolabi Olajide v Federal Republic of Nigeria*<sup>78</sup> – was brought before the court. In this case, a Nigerian businessman instituted action against the government of Nigeria challenging the closure by Nigeria of its common border with Benin in 2009. The plaintiff argued that the closure of the border negatively affected his business and was in violation of free movement of his person and goods as embodied the Revised ECOWAS Treaty and the African Charter on Human and Peoples' Rights. As a result, he suffered financial damage. The defendant filed a preliminary objection claiming that the court had no jurisdiction and/or competence to hear the case.<sup>79</sup>

The court ruled that under Protocol A/P1/7/91 only member states could bring cases before it. This decision has been criticised and labelled a retrogressive step in the protection of human rights.<sup>80</sup> In *Frank Ukor v Rachad Lalaye*<sup>81</sup> the plaintiff's claim was also dismissed on the basis of the individual's lack of standing to bring cases before the court. In this case the plaintiff sought

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<sup>76</sup> Article 9.

<sup>77</sup> Enabulele 2010 (12) *International Community Law Review* 116; Gathii "The Under-Appreciated Jurisprudence of Africa's Regional Trade Judiciaries" 2010 (12) *Oregon Review of International Law* 266.

<sup>78</sup> *Olajide Afolabi v Fed Rep of Nigeria* ECW/CCJ/APP/01/03, (2003) (hereafter the *Olajide* case).

<sup>79</sup> For a full discussion of the case, see Banjo 2007 (22) *Africa Journal Online* 69–87.

<sup>80</sup> Viljoen *International Human Law Rights in Africa* 507.

<sup>81</sup> No APP/01/04 (hereafter the *Ukor* case).

to challenge an order for seizure of his truck and the goods on the basis that it violated his fundamental right to the free movement of goods.

It consequently appears that the ECOWAS CCJ has adopted a narrow interpretation of the Protocol by relying on the doctrine of express powers. This has resulted in individuals having no redress for the alleged human rights violations they may have suffered. Article 4(c) of the treaty provides, *inter alia*, for the “recognition, promotion and protection of human and peoples’ rights in accordance with the provisions of the African Charter on Human and Peoples’ Rights”.<sup>82</sup> From this, it may be construed that the court enjoys implied power to hear human rights matters.

The jurisdiction over human rights was redefined when the Protocol<sup>83</sup> was amended in 2005 by a Supplementary Protocol.<sup>84</sup> Article 3 of Supplementary Protocol extends the jurisdiction and competence of the court by introducing a new article 9.<sup>85</sup> Article 9(4) of the Supplementary Protocol empowers the ECOWAS CCJ to receive and adjudicate cases brought by individuals which involve alleged violations of human rights occurring in the territory of any member state.

Since the expansion of the ECOWAS CCJ jurisdiction to cover human rights cases, the court has received and decided several such cases.<sup>86</sup> The express and operational jurisdiction over the promotion and protection of human rights distinguishes the ECOWAS CCJ from the SADC Tribunal and the East African Court of Justice. It is interesting to note that the ECOWAS CCJ did not attempt to invoke the doctrine of implied powers to assume jurisdiction and competence over human rights in the *Olajide* and *Ukor* cases, despite the existence of persuasive judgments from the International Court of Justice regarding the application of the doctrine of implied powers.

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<sup>82</sup> Article 4(c) of the Revised Treaty of ECOWAS.

<sup>83</sup> Protocol A/P.1/7/91 limited the adjudicative jurisdiction of the ECOWAS CCJ to issues dealing with the interpretation and application of the ECOWAS Treaty.

<sup>84</sup> Supplementary Protocol A/SP.1/01/05 Amending the Preamble and arts 1, 2, 9 and 30 of Protocol A/P.1/7/91 relating to the Community Court of Justice and art 4 para 1 of the English version of the Protocol (hereafter the Supplementary Protocol); Banjo 2007 (22) *Africa Journal Online* 78-82; Enabulele 2010 (12) *International Community Law Review* 117; Murungi and Gallinetti 2010 (7) *International Journal on Human Rights* 122.

<sup>85</sup> Alter KJ *et al* “A new international human rights court for West Africa: The ECOWAS Community Court of Justice” (2013) [http://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=5546&context=faculty\\_scholarship](http://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=5546&context=faculty_scholarship) (Date of use: 8 August 2013).

<sup>86</sup> For example, cases such as *Manneh v The Gambia* (2008) AHRLR 171 (ECOWAS 2008) and *The Gambia: Essein v The Republic of the Gambia* (2007) AHLR 131 (ECOWAS 2007).

### 3.2 *The East African Court of Justice*

The Treaty Establishing the East African Community<sup>87</sup> (Treaty Establishing the Community) was adopted in 1993 by three founding states: Kenya, Tanzania and Uganda.<sup>88</sup> It establishes the East African Court of Justice as the judicial organ of the East African Community.<sup>89</sup> The court commenced operation on 30 November 2000.

#### 3.2.1 Competence and jurisdiction of the East African Court of Justice

The jurisdiction and competence of the East African Court of Justice is set out in the Treaty Establishing the Community. Article 27(1) of this treaty gives the East African Court of Justice initial jurisdiction over the interpretation and application of the Treaty Establishing the East African Community. Article 27(2) of the Treaty Establishing the Community extends the jurisdiction of the court to human rights matters, subject to a future date to be determined by the Council. In order to trigger the operation of the human rights jurisdiction, member states are required to adopt an additional protocol that will give effect to article 27(2) of the Treaty Establishing the Community. No protocol has however yet been adopted to operationalise the jurisdiction of the court to adjudicate over human rights cases.

However, the East African Court of Justice decided to hear human rights cases in the absence of the envisaged additional protocol.<sup>90</sup> In the *Katabazi* case, twenty-one applicants charged, *inter alia*, with treason, were arrested and remanded in custody.<sup>91</sup> The High Court of Uganda granted bail to fourteen of the accused. Soon after having granted bail, the court was surrounded by security personnel who interfered with the preparation of bail documents, re-arrested the men, and returned them to jail.<sup>92</sup> The applicants later appeared before a military court on similar charges<sup>93</sup> and were remanded in custody. The Uganda Law Society approached the Constitutional Court of Uganda and challenged the security personnel's

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<sup>87</sup> The full text of the treaty is available at <http://www.eac.int/treaty/> (Date of use: 15 June 2013).

<sup>88</sup> The economic integration in East Africa, however, dates back to the East African Co-operation Treaty concluded in 1967 by Kenya, Tanzania and Uganda. This collapsed in 1977 following a dispute between the three main founders. See Ebobrah 2007 (7) *African Human Rights Law Journal* 218; Murungi and Gallinetti 2010 (7) *International Journal on Human Rights* 123.

<sup>89</sup> See art 9 of the Treaty Establishing the East African Community.

<sup>90</sup> See, *inter alia*, *Nyong'o and 10 Others v Attorney General of Kenya & 2 Others*, EACJ Ref No 1/2006 (unreported) and *Katabazi and 21 Others v Secretary General of the East African Community and Another* (Ref No 1/2007) [2007] EACJ 3 (1 November 2007) (hereafter the *Katabazi* case).

<sup>91</sup> *Katabazi* case at 1.

<sup>92</sup> *Katabazi* case at 2.

<sup>93</sup> *Katabazi* case at 2.

interference in the court process and the constitutionality of prosecuting the applicants in both civilian and military courts.<sup>94</sup> The Constitutional Court ruled in favour of the Ugandan Law Society. However, the applicants (complainants) were not released from detention and the matter was brought before the East African Court of Justice.<sup>95</sup>

In the East African Court of Justice, the applicants alleged, *inter alia*, the violation of the rule of law contrary to articles 7(2) and 8(1)(c) of the Treaty Establishing the East African Community.<sup>96</sup> The Attorney-General of the Republic of Uganda (second respondent) challenged the court's jurisdiction to deal with human rights cases.<sup>97</sup> In response the court stated that "[t]he quick answer is: No it does not have [jurisdiction]".<sup>98</sup> It further stated that:

It is very clear that jurisdiction with respect to human rights requires a determination of the Council and a conclusion of a Protocol to that effect. Both of those steps have not been taken. It follows, therefore, that this Court may not adjudicate on disputes concerning violation of human rights *per se*.<sup>99</sup>

Despite this negative response, the court further asserted that:

While the court will not assume jurisdiction to adjudicate on human rights disputes, it will not abdicate from exercising its jurisdiction of interpretation under Article 27(1) merely because the reference includes allegation of human rights violation.<sup>100</sup>

It held that the intervention by the Ugandan armed security agents to prevent the execution of a court order violated both the principle of the rule of law and the Treaty Establishing the East African Community. In this case, despite a clear absence of jurisdiction<sup>101</sup> over human rights, the Court opted to extend its powers to include implied powers in human rights cases based on the overall objectives (cooperation among member states) and principles (such rule of law and the promotion and the protection of human and peoples' rights) of the

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<sup>94</sup> *Katabazi* case at 2.

<sup>95</sup> *Katabazi* case at 2.

<sup>96</sup> In the *Katabazi* case, in particular, the applicants, *inter alia*, sought the following order declaring that the conduct of the members of the Ugandan Armed Forces who surrounded the High Court amounted to an infringement of the Fundamental Principles of the Community, in particular as regards the peaceful settlement of disputes.

<sup>97</sup> *Katabazi* case at 12.

<sup>98</sup> *Katabazi* case at 14.

<sup>99</sup> *Katabazi* case at 14–15.

<sup>100</sup> *Katabazi* case at 16.

<sup>101</sup> Murungi and Gallinetti 2010 (7) *International Journal on Human Rights* 133; Viljoen *International Human Rights Law in Africa* 504.

treaty.<sup>102</sup> This decision is commendable as it shows the ability of the court not to interpret selective provisions of a treaty, but rather to consider the overall objectives of the document as a whole.

The Court's decision in the *Katabazi* case has resulted in divergent views from various scholars as to the suitability of the Court to receive and entertain human rights cases. Some authors are of the view that the East African Court of Justice does not, pending the adoption of a protocol, enjoy jurisdiction over human rights.<sup>103</sup> In this regard, Ruppel is of the view that the Court "lacks jurisdiction over human rights".<sup>104</sup> The implication of these viewpoints is that the Court cannot yet receive and adjudicate a human rights case.<sup>105</sup> Viljoen has expressed the view that it is uncertain whether the court enjoys human rights jurisdiction, by indicating that the provision on the human rights mandate of the Court is imprecise as its jurisdiction "may be extended to human rights matters at some time in the future, when the members adopt a Protocol to [that] effect".<sup>106</sup> As Viljoen observes, the current factual situation in terms of the Treaty Establishing the Community is that the appellate human rights jurisdiction of the Court will be determined by the Council at some future date. It is therefore not clear whether this prevents the Court from hearing human rights cases as there is nothing in the treaty which prevents it from exercising its powers, *inter alia*, to interpret and apply the treaty. Ebobrah is, however, of the view that the Tribunal does "not have an express human rights jurisdiction".<sup>107</sup>

In light of the above, the East African Court of Justice acted within the powers (to interpret and apply the Treaty Establishing the East African Community) conferred upon it by its constitutive treaty, when it decided to deal with human rights cases. Even though the Court stated that it did not have human rights jurisdiction, and that it could not merely assume such jurisdiction, through the interpretation of the treaty it found a legal basis on which to hear the case. This way of extending a tribunal's jurisdiction is to be commended as it assists the courts to fulfil their

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<sup>102</sup> *Katabazi* case at 15-16. See also Gathii 2012 (12) *Oregon Review of International Law* 262; Ruppel "Regional economic communities" 307; Viljoen *International Human Law Rights in Africa* 504.

<sup>103</sup> See Bbosa "A critique of the East African Court of Justice as a human rights court" 283; Ebobrah 2009 (9) *African Human Rights Law Journal* 315; Ojienda 2008 (2) *East African Journal on Human Rights* 98.

<sup>104</sup> Ruppel "Regional economic communities" 306.

<sup>105</sup> Murungi and Gallinetti 2010 (7) *International Journal on Human Rights* 123.

<sup>106</sup> Viljoen *International Human Rights Law in Africa* 504.

<sup>107</sup> Ebobrah 2011 (11) *African Human Rights Law Journal* 224.



mandates speedily by reading-in the powers necessary for the fulfilment of the objectives of the treaty.

### 3.3 *The SADC Tribunal*

The Tribunal was established as a SADC institution in 1992 in terms of article 2 of the 2000 Tribunal Protocol. In terms of this Protocol, access to the Tribunal is open to “disputes between States, and between natural or legal persons and States”.<sup>108</sup> Individuals may only approach the Tribunal once they have exhausted local remedies.<sup>109</sup> However, the Summit decided to limit access to the envisaged “new” SADC Tribunal when it resolved that a new Protocol on the Tribunal should be negotiated and that “its mandate should be confined to interpretation of the SADC Treaty and Protocols relating to disputes between Member States”.<sup>110</sup> To this end, the 2014 Protocol, which deals with inter-state disputes only, has been adopted. In contrast to article 15(1) of the 2000 Tribunal Protocol which provided for access by individuals to the Tribunal, the limitation of access to member states only, indicates that the Tribunal has been stripped of any possibility of receiving individual cases dealing with allegations of human rights violations. The 2014 Protocol also does not determine whether the SADC member states may bring cases of allegations of human rights abuses on behalf of their citizens. As was pointed out above in discussing ECOWAS, states will in all probability not bring cases before the Tribunal on behalf of their nationals for alleged human rights abuses these very states have committed.

#### 3.3.1 Competence and jurisdiction of the SADC Tribunal under the SADC Treaty and the 2000 Tribunal Protocol

The Tribunal’s powers and functions are set out in the Treaty which provides that a Tribunal shall be established to ensure adherence to and the proper interpretation of the provisions of

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<sup>108</sup> Article 15(1) of the 2000 Tribunal Protocol.

<sup>109</sup> Article 15(2) of the Tribunal Protocol. See also the *Interhandel Case* 1959 ICJ Reports 6 at 26 where the International Court of Justice said: “The rule that local remedies must be exhausted before international proceedings may be instituted is a well-established rule of customary international law; the rule has been generally observed in cases in which a State has adopted the cause of its national whose rights are claimed to have been disregarded in another State in violation of international law. Before resort may be had to an international court in such a situation, it has been considered necessary that the State where the violation occurred should have an opportunity to redress it by its own means, within the framework of its own domestic legal system.”

<sup>110</sup> Final Communique of the 32<sup>nd</sup> Summit of SADC Heads of State and Government available at [http://www.sadc.int/files/3413/4531/9049/Final\\_32nd\\_Summit\\_Communique\\_as\\_at\\_August\\_18\\_2012.pdf](http://www.sadc.int/files/3413/4531/9049/Final_32nd_Summit_Communique_as_at_August_18_2012.pdf) (Date of use: 23 August 2012).

the Treaty.<sup>111</sup> In addition to this provision, article 14 of the 2000 Tribunal Protocol gives the Tribunal jurisdiction and competence over all disputes and applications referred to it in accordance with the Treaty and the Protocol which relate to:

- (a) the interpretation and application of the Treaty;
- (b) the interpretation, application or validity of the Protocols, all subsidiary instruments adopted within the framework of the Community, and acts of the institutions of the Community;
- (c) ...<sup>112</sup>

As was already mentioned, a major shift from the aforesaid jurisdiction is that the jurisdictional clause contained in the 2014 Protocol has been curtailed, and shows a major and negative change from the jurisdiction of the suspended Tribunal. As will be discussed below, the suspended Tribunal had jurisdiction and competence over all disputes and applications referred to it in accordance with the Treaty and the 2000 Protocol which related to the interpretation and application of the Treaty, the interpretation, application or validity of the Protocols, all subsidiary instruments adopted within the framework of the Community, and acts of the institutions of the Community. The jurisdiction in article 33 of the 2014 Protocol is limited and provides that “the Tribunal shall have jurisdiction on the interpretation of the SADC Treaty and Protocols relating to disputes between member states.” This means that other parties, such as individuals, including SADC officials, will have no access to the Tribunal. Further, article 33 of the 2014 Protocol fails to indicate whether the Tribunal’s jurisdiction includes the competency to adjudicate over disputes involving the application and interpretation of the SADC Treaty, Protocols or all subsidiary instruments of SADC.<sup>113</sup> This is something that was contained in the 2000 Tribunal Protocol.<sup>114</sup>

Notwithstanding this, plain reading of article 14 of the provisions of the Tribunal Protocol (quoted above) clearly sets out the jurisdiction of the Tribunal and the extent to which such powers can be exercised. Although the Treaty is silent on the express human rights jurisdiction of the Tribunal, it is submitted that it does not follow that anything outside of the powers here listed, falls beyond the scope and ambit of the work of the Tribunal. It is clear from the judgment in

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<sup>111</sup> Article 16(1) of the SADC Treaty.

<sup>112</sup> Article 14 of the 2000 Tribunal Protocol.

<sup>113</sup> Erasmus <http://www.tralac.org/images/docs/6900/us15wp012015-erasmus-new-protocol-sadc-tribunal-20150123-fin.pdf> (Date of use: 18 February 2016).

<sup>114</sup> Article 14 of the 2000 Tribunal Protocol.

*Mike Campbell (Pvt) Ltd and Others v Republic of Zimbabwe*<sup>115</sup> that the Tribunal applied the doctrine of implied powers in order to enable it to adjudicate human rights cases.

It is important to note that the Treaty does indeed refer to human rights. A reference to human rights can be found in the Preamble to the Treaty which reads in part that member states are fully aware of the need to guarantee democratic rights and observe human rights and the rule of law. In addition, the jurisdiction of the Tribunal applies to the interpretation and application of the Treaty. Reference to human rights is also found in article 4(c) of the Treaty which requires the SADC and its member states to act in accordance with the principles of human rights, democracy, and the rule of law.

The doctrine of implied powers can also be brought into play to ensure that human rights are protected. Relying on the principles in article 4(c) of the Treaty, the Tribunal accepted a case involving violations of human rights in the matter between *Mike Campbell (PVT) Limited and Another v Republic of Zimbabwe*.<sup>116</sup> In this case the applicants sought interim measures preventing the respondent (the government of Zimbabwe) from, *inter alia*, removing them from their farms pending the finalisation of the application in the “main” *Campbell* case which dealt with the acquisition of agricultural lands by the government. In addressing the issue of jurisdiction, the Tribunal indicated that its basis for jurisdiction over human rights emanated from article 4(c) of the Treaty and article 14(a) of the Tribunal Protocol which gives it jurisdiction over all disputes over the interpretation and application of the Treaty.<sup>117</sup> According to the Tribunal’s analysis of article 4(c) of the Treaty which requires SADC member states to, *inter alia*, act in accordance with the principles of human rights, democracy, and the rule of law, SADC states, collectively and as individual member states, are under a legal obligation to respect and protect the human rights of SADC citizens.<sup>118</sup> The Tribunal ruled in the applicant’s favour.

The Tribunal also dealt extensively with the challenge to its human rights’ jurisdiction in the main *Campbell* case where the applicants challenged the compulsory acquisition of their agricultural

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<sup>115</sup> (2/2007) [2008] SADCT 2 (28 November 2008) (hereafter the *Campbell* main case).

<sup>116</sup> (2/07) [2007] SADCT 1 (13 December 2007) at 3 (hereafter referred to as the *Campbell* interim application). Chapter 2 will only deal with the issue of jurisdiction in the *Campbell* main case. Other relevant matters dealt with by the SADC Tribunal will be discussed in Chapter 4.

<sup>117</sup> *Campbell* main case at 17-18, 24 - 25.

<sup>118</sup> *Campbell* interim application at 3. See also *Campbell* main case at 27.

land by the Zimbabwean government.<sup>119</sup> The acquisitions were made in accordance with the land-reform programme adopted by the respondent. In terms of section 16B of the Constitution of Zimbabwe “no compensation shall be payable for land referred to in paragraph (a) except for any improvements effected on such land before it was acquired”.<sup>120</sup> The Constitution further ousted the jurisdiction of Zimbabwean courts to receive and hear any challenge to land acquisition.<sup>121</sup> The applicants argued that the acquisition of their land breached the respondent’s obligations to act in accordance with the principles of human rights, democracy, and the rule of law. In addition, they argued that the respondent violated its obligation under the Treaty not to discriminate against any person on the basis of, *inter alia*, race and that they had been denied access to the respondent’s domestic courts as a means of challenging the legality of the compulsory acquisition of their lands without compensation.<sup>122</sup>

In response to the applicants’ submissions, the respondent argued that the Tribunal had no jurisdiction to adjudicate a human rights case under the Treaty.<sup>123</sup> To substantiate this claim, it claimed that the Treaty “only sets out the principles and objectives of SADC”.<sup>124</sup> Therefore, according to the respondent, the Treaty failed to “set out the standards against which actions of Member States can be assessed”.<sup>125</sup> It further argued that the Tribunal could not “borrow” these standards from other treaties as to do so would “amount to legislating on behalf of SADC Member States”.<sup>126</sup> Relying on various protocols adopted under the Treaty, the respondent asserted that there is no protocol dealing with human rights or land reform.<sup>127</sup> To give effect to the principles in the Treaty, the respondent claimed, there ought to be a protocol dealing with human rights and land reform.<sup>128</sup> In addition, the respondent submitted that the Tribunal “is required to interpret what has already been set out by the Member States”.<sup>129</sup> If the member states failed to set standards by which they could be held accountable, “the [SADC] Tribunal

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<sup>119</sup> *Campbell* main case at 7.

<sup>120</sup> Section 16B(2) of the Constitution of Zimbabwe (Amendment No 17, 2005); see also *Campbell* main case at 8 - 12.

<sup>121</sup> Section 16B(4)(a) of the Constitution of Zimbabwe (Amendment No 17, 2005). See also *Campbell* main case at 11.

<sup>122</sup> *Campbell* main case at 13-14.

<sup>123</sup> *Campbell* main case at 14.

<sup>124</sup> *Campbell* main case at 23.

<sup>125</sup> *Campbell* main case at 23.

<sup>126</sup> *Campbell* main case at 23.

<sup>127</sup> *Campbell* main case at 23.

<sup>128</sup> *Campbell* main case at 23.

<sup>129</sup> *Campbell* main case at 23.

appears to have no jurisdiction to rule on the validity or otherwise of the land reform programme carried out in Zimbabwe”.<sup>130</sup>

In response to the challenge to its human rights jurisdiction, the Tribunal referred to article 21(b) of the Tribunal Protocol which empowers it to “develop its own Community jurisprudence through the use of applicable treaties, general principles, and rules of public international law and any rules and principles of the law of States”. According to the Tribunal, this provision directs it to consult other sources in order to find answers where the Treaty appears to be silent.<sup>131</sup> The Tribunal further did not see the need for an additional protocol on human rights in order to give effect to the principles contained in the Treaty.<sup>132</sup> In particular, in assuming jurisdiction over human rights, the Tribunal relied on principle 4(c) of the Treaty which requires member states to act in accordance with the principles of human rights, democracy and the rule of law.<sup>133</sup> According to the Tribunal, this provision gives it jurisdiction over of any human rights case.<sup>134</sup> Put differently, the Tribunal read the Tribunal Protocol and the Preamble to the Treaty – including its objectives and the principles – together in order to establish the basis for its human rights jurisdiction.<sup>135</sup> There would be no need for resorting to the doctrine of implied powers if all the founding treaties of an organisation were drafted with sufficient clarity. However, this is not the case. At times, it happens that the treaty and/or protocol establishing a tribunal is ambiguous as regards certain powers. As result, there is a need to apply a flexible interpretation.

The reference in the Tribunal to article 21(b) of the Tribunal Protocol as the basis of its jurisdiction has merit because this article deals with the sources of law.<sup>136</sup> Articles 21(b) and 14(a) of the Tribunal Protocol are therefore interconnected. In terms of article 14(a) of the Tribunal Protocol, the Tribunal has jurisdiction over any dispute involving the interpretation and application of the Treaty. In order to interpret the Treaty and establish whether it has a human rights mandate, the Tribunal may consult other sources as per article 21(b) of the Tribunal Protocol.

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<sup>130</sup> At 24.

<sup>131</sup> At 24.

<sup>132</sup> At 24.

<sup>133</sup> At 24-25.

<sup>134</sup> At 25.

<sup>135</sup> Cowel 2013 (1) *Human Rights Law Review* 5.

<sup>136</sup> Zenda *SADC Tribunal and Judicial Settlement* 41.

There are different academic views regarding the Tribunal's decision to hear the main *Campbell* case. According to Zenda, it was unnecessary for the Tribunal to refer to international law under article 21 of the Tribunal Protocol to support its findings on its competence to adjudicate human rights issues, as the basis for its jurisdiction lies in article 14 of the Tribunal Protocol.<sup>137</sup> Zenda, therefore, disagreed with Zimbabwe's contention that there was a need for a further protocol to trigger the application of the human rights provisions in the Treaty – the latter contained only objectives and principles which do not create obligations.<sup>138</sup> Zenda argued further that there was no need for a further protocol on human rights to be in place before the Tribunal could enjoy jurisdiction, as the answer to whether the Treaty required an additional protocol before its provisions could be invoked, depends on whether it has direct effect.<sup>139</sup> In addition, Zenda avers that the content of certain of the notions of human rights, democracy and the rule of law “are sufficiently precise and unconditional to be capable of having direct effect”.<sup>140</sup> However, according to him, democracy is a broad, political concept on which the SADC Tribunal was not well placed to rule.<sup>141</sup> With regard to human rights, Zenda indicates, *inter alia*, that there is uncertainty as to other rights that may need to be protected in that certain states place greater emphasis on the economic rights, while others prioritise social and cultural rights in their laws.<sup>142</sup> In essence, his view is that the SADC should have adopted an additional protocol specifically indicating the scope of the rights that need to be protected in the SADC region.<sup>143</sup> In his words, “what is more worrying is the Tribunal's casual reference” to the concepts of human rights, democracy, and the rule of law as if there is consensus as to their precise scope and meaning.<sup>144</sup> According to him, the SADC Tribunal appears to have operated under the view that article 4(c) of the Treaty which refers to human rights, democracy, and the rule of law, is binding on member states without the need for an additional instrument.<sup>145</sup> In this light, Zenda is of the view that the Tribunal incorrectly stated that article 4(c) of the Treaty is the basis for its jurisdiction over human rights when in fact this provision does not confer jurisdiction on the

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<sup>137</sup> Zenda *SADC Tribunal and Judicial Settlement* 40.  
<sup>138</sup> Zenda *SADC Tribunal and Judicial Settlement* 40.  
<sup>139</sup> Zenda *SADC Tribunal and Judicial Settlement* 40.  
<sup>140</sup> Zenda *SADC Tribunal and Judicial Settlement* 103.  
<sup>141</sup> Zenda *SADC Tribunal and Judicial Settlement* 103.  
<sup>142</sup> Zenda *SADC Tribunal and Judicial Settlement* 105.  
<sup>143</sup> Zenda *SADC Tribunal and Judicial Settlement* 104.  
<sup>144</sup> Zenda *SADC Tribunal and Judicial Settlement* 105.  
<sup>145</sup> Zenda *SADC Tribunal and Judicial Settlement* 105.

Tribunal.<sup>146</sup> Instead, the jurisdiction of the Tribunal is found in article 14 of the Tribunal Protocol.<sup>147</sup>

However, it should be noted that the concepts human rights, democracy and the rule of law are interdependent and interrelated.<sup>148</sup> At the very least, it is generally accepted that a democratic state must respect human rights including the rule of law. The concept of the rule of law, even though it has been approached from various angles, includes human rights.<sup>149</sup> Therefore, the rule of law would be compromised where there is no observance of democratic principles such as human rights and access to courts.<sup>150</sup> In addition, the idea that some states place greater emphasis on some rights than on others is difficult to comprehend.<sup>151</sup> Human rights are indivisible, interrelated and interconnected.<sup>152</sup> Therefore, they cannot be promoted in isolation from other rights. They need each other. They must all be treated equally and placed on the same footing and enjoy the same degree of recognition.<sup>153</sup> For example, the right to decent housing ensures that people live with dignity. In this instance, the provision of an economic right also ensures the protection of human dignity.

These views are, therefore, based on the mutual dependence described earlier in articles 21 and 14 of the Tribunal Protocol. Article 21 deals with the interpretation of the Treaty. Therefore, it is submitted, the Tribunal correctly relied on article 4(c) of the Treaty to found jurisdiction, as this is the provision that had to be interpreted to establish whether its reference to human rights

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<sup>146</sup> Zenda *SADC Tribunal and Judicial Settlement* 105.

<sup>147</sup> Zenda *SADC Tribunal and Judicial Settlement* 105.

<sup>148</sup> Bingham 2007 (66) *The Cambridge Law Journal* 75. See also the African Commission on Human and Peoples' Rights Resolution on the Establishment of a Committee on the Protection of the Rights of People Living with HIV, and Those at Risk, Vulnerable to and Affected by AIDS, ACHPR/Res 163(XLVII) 2010 where it states that where the rule of law and human rights are not respected, those who are most vulnerable suffer.

<sup>149</sup> Bingham 2007 (66) *The Cambridge Law Journal* 75-77.

<sup>150</sup> Moyo 2009 (9) *African Human Rights Law Journal* 601; Gumedze 2005 (5) *African Human Rights Law Journal* 273.

<sup>151</sup> It must nonetheless be mentioned that some states rely on cultural relativism and argue that human rights are relative because they are embedded in and dependent on a specific cultural context. This is the reason, therefore, that some states decide to make reservations to treaties when it comes to certain human rights. For a detailed discussion on cultural relativism, see Ferreira-Snyman *The Erosion of State Sovereignty* 207-209; Donnelly 1984 (6) *Human Rights Quarterly* 400-403.

<sup>152</sup> See art 5 of the Vienna Declaration, World Conference on Human Rights, Vienna, 14-25 June 1993, UN Doc A/CONF.157/24 (Part I) at 20 (1993). See also para 4 of the Maastricht Guidelines on Violations of Economic, Social and Cultural Rights, Maastricht, 22-26 January 1997.

<sup>153</sup> Nickel 2008 (30) *Human Rights Quarterly* 988.

was sufficient to give the Tribunal the power to adjudicate a human rights case and/or whether there were human rights' obligations flowing from this article.<sup>154</sup>

The reasoning of the Tribunal as regards human rights jurisdiction is set out by Johnson as follows:

The SADC Tribunal stated, in effect, that because this case is being adjudicated on the premise of international law, and has elements of human rights, it has jurisdictional authority to hear the case; but just in case that wasn't enough, it also has express authority based upon the reference to human rights in the SADC Treaty.<sup>155</sup>

Relying on Fleshman,<sup>156</sup> Johnson proceeds to explain that international courts are generally governed by a treaty, and the treaty provisions "govern the types of cases that can be heard and the international court's jurisdiction of authority to hear cases".<sup>157</sup> The ruling in the main *Campbell* case, in particular the jurisdiction assumed over human rights, has generated considerable debate.<sup>158</sup> Johnson's reasoning, which claims that international tribunals are created by treaties, and the conventions govern the nature of cases that should be heard by these tribunals, aligns him with the proponents of the doctrine of express powers. In other words, he is of the view that anything that is not expressly contained in the treaty cannot be

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<sup>154</sup> Zenda *SADC Tribunal and Judicial Settlement* 41; Ebobrah 2009 (17) *African Journal of International and Comparative Law* 83-84.

<sup>155</sup> Johnson J "Enforcing judgments in international law: An analysis of the Southern African Development Community ("SADC") Tribunal's decision in the case, *Mike Campbell, Ltd & Others v The Republic of Zimbabwe and Robert Gabriel Mugabe, NO* in his capacity as President of Zimbabwe" available at <http://www.jdsupra.com/legalnews/enforcing-judgments-in-international-law-69044/> (Date of use: 9 January 2012).

<sup>156</sup> Fleshman M "*Africa Ending Impunity for Rights Abuses*" 20 #4 AFRICA RENEWAL 7 (January 2007) available at <http://www.un.org/ecosocdev/geninfo/afrec/vol20no4/204-ending-impunity.html> (Date of use: 9 January 2013).

<sup>157</sup> Johnson <http://www.jdsupra.com/legalnews/enforcing-judgments-in-international-law-69044/> (Date of use: 09 January 2012). See also Fleshman <http://www.un.org/ecosocdev/geninfo/afrec/vol20no4/204-ending-impunity.html> (Date of use: 9 January 2013).

<sup>158</sup> See, *inter alia*, Moyo 2009 (9) *African Human Rights Law Journal* 590; Ndlovu 2011 (1) *SADC Law Journal* 63; Ziegler AR "Regional Economic Integration Agreements and Investor Protection in Africa – The case of SADC" available at [http://www.nccr-trade.org/fileadmin/user\\_upload/nccr-trade.ch/wp2/publications/wp\\_2011\\_59.pdf](http://www.nccr-trade.org/fileadmin/user_upload/nccr-trade.ch/wp2/publications/wp_2011_59.pdf) (Date of use: 15 August 2012); Murungi and Gallinetti 2010 (7) *International Journal on Human Rights* 133; Viljoen *International Human Rights Law in Africa* 504; Ruppel "Regional economic communities" 297-301; Coleman G "Regional Dispute Resolution: The SADC Tribunal's first test" available at [http://www.tralac.org/wp-content/blogs.dir/12/files/2011/uploads/20080205\\_hotseat.pdf](http://www.tralac.org/wp-content/blogs.dir/12/files/2011/uploads/20080205_hotseat.pdf) (Date of use: 15 August 2012); Ebobrah 2009 (9) *African Human Rights Law Journal* 330; Ebobrah 2009 (17) *African Journal of International and Comparative Law* 80; Ruppel OC "Land issues before the SADC Tribunal: A case for human rights?" (2011) available at <http://www.nai.uu.se/ecas-4/panels/121-140/panel-133/Oliver-Ruppel-full-paper.pdf> (Date of use: 15 August 2012); Nkhata 2012 (20) *African Journal of International and Comparative Law* 87.



read so as to create obligations binding on member states. It is, however, submitted that since the Treaty provides in article 4(c) that member states have the obligation to act in accordance with the principles of human rights, the rule of law, and democracy, the Tribunal, which has jurisdiction on issues relating to the interpretation and application of the Treaty, should by implication then have jurisdiction to adjudicate matters involving human rights.

It may be argued that the omission of an express mandate over human rights in the Treaty and Tribunal Protocol does not necessarily suggest that member states did not envisage the inclusion of a human rights mandate in the current mandate of the suspended Tribunal. This exclusion could be read to mean that the drafters of the Treaty failed to reach consensus on the issue of human rights jurisdiction and therefore left it open for future determination.<sup>159</sup> Ebobrah's view on this is that "competency over human rights was not expressly granted to the SADC Tribunal despite provisions relating to human rights in the [SADC Treaty]".<sup>160</sup> In addition, Ebobrah has said that, by necessary implication, the Tribunal lacks the express human rights jurisdiction conferred on the ECOWAS CCJ.<sup>161</sup> To support his submissions, he refers to the "proposed and rejected" efforts by a panel of legal experts<sup>162</sup> in 1997 to grant the Tribunal a mandate over human rights cases.<sup>163</sup>

Other authors are, however, of the view that this is not a significant concern as the Treaty refers to human rights in one way or another.<sup>164</sup> In support of this contention, Ruppel makes the point that the objective of alleviating and eradicating poverty contributes, amongst others, to ensuring a decent standard of living and education.<sup>165</sup> These are all human rights, contends Ruppel.<sup>166</sup> His comments are helpful and relate to the theory of implied powers. SADC member states would not achieve the objectives set out in the Treaty if they were to fail to ensure that democracy, human rights, and the rule of law are respected in their respective countries. It is submitted that the formulation of the provisions that refer to human rights in the Preamble to the Treaty are mandatory and empower the Tribunal to exercise jurisdiction over human rights. In

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<sup>159</sup> Viljoen *International Human Rights Law in Africa* 492. According to Viljoen: "In the initial early drafting process [of the SADC Treaty] the inclusion of human rights in the mandate of the SADC Tribunal was considered, but eventually rejected".

<sup>160</sup> Ebobrah *Legitimacy and Feasibility of Human Rights* 309; Ebobrah 2009 (17) *African Journal of International and Comparative Law* 84.

<sup>161</sup> Ebobrah *Legitimacy and Feasibility of Human Rights* 309.

<sup>162</sup> Ruppel "Regional economic communities" 291.

<sup>163</sup> Ebobrah *Legitimacy and Feasibility of Human Rights* 309.

<sup>164</sup> Ruppel "Regional economic communities" 292.

<sup>165</sup> Ruppel "Regional economic communities" 292.

<sup>166</sup> Ruppel "Regional economic communities" 292.

addition, the Tribunal can adjudicate cases involving allegations of human rights abuse by relying on the general undertakings by member states in articles 6(1)<sup>167</sup> and 5(c)<sup>168</sup> of the Treaty. This is supported by the recent decision of the Constitutional Court of South Africa where it ruled that the SADC Tribunal was, *inter alia*, created to adjudicate complaints relating to human rights.<sup>169</sup>

Ebobrah argues that SADC member states are entitled to challenge the Tribunal's jurisdiction to receive and decide human rights matters, since no agreement to grant the tribunal such powers was reached.<sup>170</sup> It is, however, submitted that a state which has consented to act in accordance with the principles of democracy, human rights, and the rule of law has, by implication, agreed that it can be brought before a sub-regional tribunal regarding claims of the violation of human rights. Were this not the case, the duty to act in accordance with the principles of human rights would be frustrated. Therefore, the view that it is within a member state's right to refuse to abide by any order that purports to create implied obligations to which it did not expressly consent, is untenable.<sup>171</sup> This may, however, have implications for state sovereignty.<sup>172</sup>

According to Viljoen, the Tribunal was established primarily to resolve disputes arising from closer economic and political union rather than the protection of human rights.<sup>173</sup> It is submitted that in the main *Campbell* decision the Tribunal acted within its powers when it assumed jurisdiction over human rights. Nkhata's view is that the approach followed by the Tribunal is not persuasive if one adopts a strict positivistic reading of the Treaty.<sup>174</sup> He argues further that it is problematic that the Tribunal avoided undertaking a precise and deliberate discussion on how it arrived at jurisdiction to hear a human rights case.<sup>175</sup> According to Nkhata, this is something with which a regional community cannot simply deal with.<sup>176</sup> The Tribunal, however, articulated

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<sup>167</sup> In terms of this provision, member states, *inter alia*, undertook to refrain from taking any measure likely to compromise the accomplishment of the principles set forth in the SADC Treaty.

<sup>168</sup> This is one of the objectives of the SADC to "promote and defend peace and security". These are, in the author's view, the ideals of a democratic state.

<sup>169</sup> *The Government of the Republic of Zimbabwe v Fick and Others* (CCT 101/12) [2013] ZACC 22 (27 June 2013).

<sup>170</sup> Ebobrah *Legitimacy and Feasibility of Human Rights Realization* 310.

<sup>171</sup> Ebobrah ST "A critical analysis of the human rights mandate of the ECOWAS Community Court of Justice" (2008) available at [http://www.escri-net.org/usr\\_doc/S\\_Ebobrah.pdf](http://www.escri-net.org/usr_doc/S_Ebobrah.pdf) (Date of use: 26 June 2012).

<sup>172</sup> State sovereignty is dealt with in Chapter 3.

<sup>173</sup> Viljoen *International Human Rights Law in Africa* 488.

<sup>174</sup> Nkhata 2012 (20) *African Journal of International and Comparative Law* 97.

<sup>175</sup> Nkhata 2012 (20) *African Journal of International and Comparative Law* 97.

<sup>176</sup> Nkhata 2012 (20) *African Journal of International and Comparative Law* 97.

clearly how it assumed powers to adjudicate human rights cases in the main *Campbell* case, by relying on article 4(c) of the Treaty which refers, *inter alia*, to human rights. Viljoen also supports the decision of the Tribunal by stating that even if regional economic communities were initially focused at increasing trade and improving economic relations and not building a sound culture of good governance and human rights within their countries, there is a link between their objective of regional integration – such as improving the welfare of the people in member states – and the realisation of socio-economic rights.<sup>177</sup>

Another persuasive line of reasoning is offered by Bartels who correctly relies on the “longstanding usage in international law of the term ‘principles’ to refer to binding obligations”.<sup>178</sup> Bartels proceeds to assert that

[t]he verbal phrase (‘shall act’) in article 4(c) of the SADC Treaty is in the usual language of obligations, and the object of the sentence (‘in accordance with the following principles ...’) is clearly defined.<sup>179</sup> On its face, article 4(c) therefore constitutes a binding obligation.<sup>180</sup>

These are clear obligations. This fortunately also addresses Zenda’s concern over what he refers to as the “worrying” SADC Tribunal’s “casual reference” to the concepts of human rights, democracy and the rule of law because there was no meaning agreed upon regarding the said concepts.<sup>181</sup>

According to Bartels, article 4(c) of the Treaty “therefore constitutes a binding obligation”. As if responding to the concerns raised above, Bartels correctly disputes the view that principles are not binding based on the reasons above. He further substantiates this by relying on article 38(1)(c) of the Statute of International Court of Justice (ICJ) which mandates the ICJ to apply the general principles of law recognised by civilized nations.<sup>182</sup> Bartels also rejects any

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<sup>177</sup> Viljoen *International Human Rights Law in Africa* 495-496.

<sup>178</sup> Bartels L “Review of the Role, Responsibilities and Terms of Reference of the SADC Tribunal” (draft report) 6 March 2011 available at <http://www.scribd.com/doc/115660010/WTIA-Review-of-the-Role-Responsibilities-and-Terms-of-Reference-of-the-SADC-Tribunal-Final-Report> (Date of use: 6 February 2013) at 10.

<sup>179</sup> Bartels <http://www.scribd.com/doc/115660010/WTIA-Review-of-the-Role-Responsibilities-and-Terms-of-Reference-of-the-SADC-Tribunal-Final-Report> (Date of use: 6 February 2013).

<sup>180</sup> Bartels L “Review of the Role, Responsibilities and Terms of Reference of the SADC Tribunal” 6 March 2011 available at <http://www.scribd.com/doc/115660010/WTIA-Review-of-the-Role-Responsibilities-and-Terms-of-Reference-of-the-SADC-Tribunal-Final-Report> (Date of use: 6 February 2013).

<sup>181</sup> Zenda *SADC Tribunal and Judicial Settlement* 105.

<sup>182</sup> Bartels <http://www.scribd.com/doc/115660010/WTIA-Review-of-the-Role-Responsibilities-and-Terms-of-Reference-of-the-SADC-Tribunal-Final-Report> (Date of use: 6 February 2013) at 10.

suggestion that the principles of human rights, democracy, and the rule of law are not “susceptible of objective determination, and are consequently non-justiciable”.<sup>183</sup> In my view, Bartels correctly supports this by reliance on a judgment of the European Court of Justice in the joined cases of *P Yassin Abdullah Kadi and Al Barakaat International Foundation v Council of the European Union and Commission of the European Communities*.<sup>184</sup> In this case the United Nations Security Council (UN SC) issued various resolutions (with an annexure of suspects) requiring all UN member states to freeze the funds and other financial resources controlled directly or indirectly by individuals and entities associated with, *inter alia*, the Al-Qaeda group. To give effect to this, the European Community Council adopted a regulation ordering the freezing of the funds and other economic resources of the persons and entities whose names appeared in a list annexed to that regulation. The applicants’ names were on the list and their assets were frozen. Their attempts to have the European Community regulation annulled failed in the court of first instance. They then appealed to the European Court of Justice challenging the lawfulness of the measures taken against them. The Court relied on the then provisions of article 6(1) of the EU Treaty and indicated that liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, form the foundations of the principles of the Community legal order which are common to the member states.<sup>185</sup> It proceeded to hold that “[t]hose provisions cannot, however, be understood to authorise any derogation from the principles of liberty, democracy and respect for human rights and fundamental freedoms enshrined in Article 6(1) EU as a foundation of the Union”.<sup>186</sup> It therefore, *inter alia*, nullified the regulation that imposed restrictions directed at persons associated with the Al-Qaeda network. This judgment supports the assertion that principles are binding obligations.

Finally, Bartels states that “[i]t goes without saying that a simple reference to the principles of ‘human rights’ is sufficiently clear to be interpreted and applied by any tribunal, especially when read in the light of more detailed applicable human rights norms.”<sup>187</sup> In light of, in particular, the

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<sup>183</sup> Bartels <http://www.scribd.com/doc/115660010/WTIA-Review-of-the-Role-Responsibilities-and-Terms-of-Reference-of-the-SADC-Tribunal-Final-Report> (Date of use: 6 February 2013) at 10.

<sup>184</sup> Joined Cases C-402/05 P and C-415/05 P *Yassin Abdullah Kadi and Al Barakaat International Foundation v Council of the European Union and Commission of the European Communities* available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62005J0402:EN:HTML> (Date of use 11 August 2013).

<sup>185</sup> At paras 5, 285, 303 and 304.

<sup>186</sup> At para 303.

<sup>187</sup> Bartels <http://www.scribd.com/doc/115660010/WTIA-Review-of-the-Role-Responsibilities-and-Terms-of-Reference-of-the-SADC-Tribunal-Final-Report> (Date of use: 6 February 2013) at 10.

views of Viljoen, Ruppel and Bartels, it is unthinkable that the SADC region could achieve its economic objectives without protecting and promoting human rights through the Tribunal. I consequently find myself in agreement with Bartels and Nkhata that the SADC Tribunal can deal with human rights by relying on, *inter alia*, general undertakings of members states in articles 6(1), the obligations to defend and maintain peace in article 5(c), and the statement of principle in article 4(c) of the SADC Treaty read together with the provisions of several protocols that the organisation has adopted.<sup>188</sup>

It is submitted that this argument is convincing and that the Tribunal in fact deliberated along these lines. Unfortunately, in *Gramara (Pvt) Ltd and Another v The Government of Zimbabwe and Others*<sup>189</sup> the High Court of Zimbabwe was incorrect when it found that it was not entirely convinced that the provisions of article 4(c) of SADC Treaty were sufficient to empower the Tribunal to deal with human rights cases.<sup>190</sup>

The Tribunal's jurisdiction to hear cases involving human rights was clearly based on implied powers. The view that the text of treaty agreed upon between member states should be interpreted narrowly to respect the sovereign rights of member states and in the light of their understandings at the time the agreement was reached, would limit the interpretative powers of tribunals.<sup>191</sup> To do so would further restrict any tribunal from ensuring that treaty objectives are fulfilled. In the case of SADC, this would significantly hamper the protection and promotion of human rights.

#### **4 LESSONS FROM OTHER REGIONAL, SUB-REGIONAL AND INTERNATIONAL TRIBUNALS ON IMPLIED POWERS**

In the *Reparations, Nuclear Weapons, and Certain Expenses of the United Nations* cases the ICJ invoked the doctrine of implied powers to give an organisation powers that were not provided for in the constitutive document but necessary for achieving the organisation's objectives.

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<sup>188</sup> Nkhata 2012 (20) *African Journal of International and Comparative Law* 100; Bartels [http://www.scribd.com/doc/115660010/WTIA-Review-of-the-Role-Responsibilities-and\\_Terms-of-Reference-of-the-SADC-Tribunal-Final-Report](http://www.scribd.com/doc/115660010/WTIA-Review-of-the-Role-Responsibilities-and_Terms-of-Reference-of-the-SADC-Tribunal-Final-Report) (Date of use: 6 February 2013) at 10.

<sup>189</sup> HH 169-2009 HC 33/09 (hereafter the *Gramara* case).

<sup>190</sup> *Gramara* case at 13.

<sup>191</sup> Warbrick "Original intention and New World Orders" 129.

On a regional level, the European Court of Justice, in the joined cases of *P Yassin Abdullah Kadi and Al Barakaat International Foundation v Council of the European Union and Commission of the European Communities*,<sup>192</sup> found that principles constitute binding obligations which must be complied with. In addition, the court has also recognised that the European Union has competence to enter into international agreements even where there is no express authorisation from its constituent document.<sup>193</sup> This is also instructive for the way in which implied powers may be applied on a (sub-) regional level.

Various observations can be made with regard to the exercise of implied and express jurisdiction on a sub-regional level by the ECOWAS CCJ, East African Court of Justice, ICJ and the SADC Tribunal. Firstly, the instrument establishing the ECOWAS CCJ did not empower it to adjudicate human rights issues. Access to the court was also limited to member states. The *Olajide* and the *Ukor* cases came before the ECOWAS CCJ and the court declined to exercise jurisdiction on the basis that it had no power to do so. It is unfortunate that the ECOWAS CCJ adopted a strict, in preference to a more proactive, approach to the assumption of jurisdiction over human rights.<sup>194</sup> To address the absence of human rights jurisdiction and individual access, the ECOWAS member states adopted an additional protocol that allowed individuals to bring cases involving human rights violations before the court. As a result, legal certainty has been largely achieved in the ECOWAS CCJ.

Secondly, the instrument creating the East African Court of Justice empowered it to adjudicate human rights issues subject to a future protocol triggering the operation of the Court's human rights' mandate. To date, no protocol has been adopted to give effect to the Court's jurisdiction over human rights cases. Despite the absence of the additional protocol, a human rights case has been brought before the Court.<sup>195</sup> The Court acknowledged that it had no express mandate over human rights but it nonetheless heard the case on the basis of implied powers. The *Olajide* and *Katabazi* cases can be contrasted in that even in the absence of jurisdiction over human

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<sup>192</sup> Joined Cases C-402/05 P and C-415/05 P *Yassin Abdullah Kadi and Al Barakaat International Foundation v Council of the European Union and Commission of the European Communities* available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62005J0402:EN:HTML> (Date of use: 11 August 2013).

<sup>193</sup> See Judgment of the Court of 31 March 1971 *Commission of the European Communities v Council of the European Communities*. - *European Agreement on Road Transport Case 22-70* at para 16.

<sup>194</sup> See Viljoen *International Human Rights Law in Africa* 507.

<sup>195</sup> *Katabazi* case.

rights, the Court in *Katabazi* opted to extend its jurisdiction through implied powers. As in the case of the ECOWAS CCJ, legal certainty has now been achieved in the East African Court of Justice.

The SADC Tribunal also opted, using implication, to assume jurisdiction over human rights. Given the fact that the Tribunal has the powers to deal with any matter that involves the application and interpretation of the Treaty, there should be no protest when the tribunal adopts a flexible interpretation in assuming the powers necessary for the fulfilment of the objectives of the Treaty. Member states have voluntarily submitted themselves to the SADC order and therefore ought not to act contrary to its principles.

A brief comparison of Africa's sub-regional tribunals gives us an indication that the express jurisdiction in the ECOWAS Treaty, and the ECOWAS CCJ's exercise of this jurisdiction in dealing with human rights issues, distinguishes the ECOWAS CCJ from the SADC Tribunal and the East African Court of Justice which assumed jurisdiction, by implication, over human rights. It is submitted that the ECOWAS CCJ's approach is the most appropriate for ensuring legal certainty in that it adopted a Protocol which clearly set out its jurisdiction. The East African Court of Justice and the SADC Tribunal acted within their powers when they assumed jurisdiction over human rights pending a protocol triggering such a mandate.

It is necessary to point out that the doctrine of implied powers should be resorted to as a matter of last resort due to changing circumstances which at times necessitate a wider interpretation of the treaty. Consequently, the doctrine of implied powers should be used as a tool for according a tribunal the power to protect the foundational principles of a particular organisation without referring the matter to member states for deliberation. However, if a tribunal uses the doctrine of implied powers to assume jurisdiction, its actions should be properly explained and have a clear legal basis. They should, therefore, be based on a sound interpretation of the treaty. Especially where the application of the doctrine of implied powers is necessary, an interpretation of the treaty that best serves to protect human rights, must be followed.

The doctrine of implied powers has its own shortfalls. As observed by Murungi and Gallinetti, there are various issues underlying the exercise of implied powers, as the exercise of jurisdiction could be seen as exceeding the powers initially given on the tribunal or inviting parties to challenge the jurisdiction of the tribunal and by so doing drag the proceedings out.

Lastly, it allows the judges a discretion to determine the extent of the tribunal's power.<sup>196</sup> To avoid confusion, it is advisable that human rights' obligations and jurisdiction over human rights issues, be drafted in precise terms in order to ensure that there are no challenges as to the competence of the tribunal to adjudicate human rights cases. According to Murungi and Gallinetti, an implied mandate for human rights does not necessarily prevent an exercise of jurisdiction.<sup>197</sup> However, because of the challenges that may arise, it fails to protect human rights fully as envisaged by the commitment of regional economic communities and their founding documents.<sup>198</sup>

If tribunals are given vague human rights powers and are called upon to interpret and provide a clear answer, the answer they give may be rejected by those who are not committed to the promotion and protection of human rights. This may also result in a lack of respect for the tribunal and its judgments – as happened in the main *Campbell* case. It is submitted that the doctrine of implied powers is helpful as it extends the mandate of an organisation to deal with matters necessary for the performance of its duties. The doctrine does not give a court the power to do what is explicitly prohibited by a particular treaty, but does ensure that all the aims and purposes of the treaty as accepted by the member states, can be achieved. It is self-evident that the application of implied powers will have an impact on state sovereignty. However, African states cannot hide behind their sovereignty to avoid the consequences of their violation of human rights, as Zimbabwe clearly attempted to do in the *Campbell* case. Furthermore, by signing and ratifying the Treaty, SADC member states have inevitably limited certain aspects of their sovereignty. They should, therefore, act in a way that does not defeat the purpose and object of the Treaty.

## 5 CONCLUSION

In light of the exposition above, in the absence of a clear indication of the nature of the obligations imposed on member states, especially when these advance the protection and promotion of human rights, resort must be had to implied powers. The doctrines of express and implied powers should, therefore, not be seen as in conflict with each other but as complementing one another.

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<sup>196</sup> Murungi and Gallinetti 2010 (7) *Human Rights Law Journal* 133.

<sup>197</sup> Murungi and Gallinetti 2010 (7) *Human Rights Law Journal* 133-134.

<sup>198</sup> Murungi and Gallinetti 2010 (7) *Human Rights Law Journal* 133-134.



## CHAPTER 3

### THE ROLE AND EVOLUTION OF STATE SOVEREIGNTY

#### 1 THE CONCEPT SOVEREIGNTY

In the late 1990s, in the matter of *Prosecutor v Tadic*, the International Criminal Tribunal for the former Yugoslavia (ICTRY) remarked that sovereignty was initially perceived as an inviolable and unquestionable characteristic of statehood.<sup>1</sup> However, the concept has over the years “suffered progressive erosion” on the basis of the protection and promotion of human rights, amongst other factors.<sup>2</sup> Perhaps it is this constant erosion that, *inter alia*, influenced Ebobrah to assert that the notion of sovereignty “is one of the intriguing features of modern statehood”.<sup>3</sup> As will be pointed out below, in international law sovereignty and human rights are often viewed as opposing concepts.<sup>4</sup>

Before the Second World War, international law prohibited intervention by one state in matters occurring in another state’s territory without the latter’s consent.<sup>5</sup> However, since the war, the international community has, through the United Nations Security Council (UN SC), intervened on humanitarian grounds in the domestic affairs of certain states – for example Somalia.<sup>6</sup> A recent example of this intervention is the UN SC action against the regime of the late leader Moammar Gadhafi by requiring that all necessary measures be taken in order to prevent the

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<sup>1</sup> Decision on Jurisdiction (Appeals Chamber), Judgment of 2 October 1995, 105 ILR 453 para 55 (hereafter the *Tadic* case).

<sup>2</sup> Annan KA “Two concepts of sovereignty” available at <http://www.tamilnet.com/img/publish/2008/01/TwoconceptsofsovereigntyAnnan.pdf> (Date of use: 30 October 2013). According to Annan, the notion of state sovereignty, in its traditional sense, is “being redefined” by not only forces of globalization and international cooperation, but also by the need to protect human rights, as the world can no longer just watch when systematic gross violations of human rights are committed.

<sup>3</sup> Ebobrah *Legitimacy and Feasibility of Human Rights* 30.

<sup>4</sup> Donnelly J “State sovereignty and human rights” available at <http://www.du.edu/korbel/hrhw/workingpapers/2004/21-donnelly-2004.pdf> (Date of use: 30 September 2013).

<sup>5</sup> Dugard *International Law* 146; Henkin 1999 (93) *The American Journal of International Law* 824. The humanitarian intervention in Kosovo received mixed reactions. It was welcomed by many but also criticised by others. Various questions arose such as whether the military intervention by North Atlantic Treaty Organisation forces was justified and lawful under the Charter of the United Nations and international law.

<sup>6</sup> SC res 1993, UN Doc S/RES/837 (6 June 1993).

human rights violations perpetrated against protestors in Libya.<sup>7</sup> Since the 1990s,<sup>8</sup> there have been a number of humanitarian interventions, for example in Kosovo.<sup>9</sup> It is on this basis that sovereignty and human rights are seen as fundamentally opposing notions. The obligation to protect human rights is seen as increasingly eroding state sovereignty.<sup>10</sup>

“Sovereignty” is an elusive term and a controversial topic in international law.<sup>11</sup> As one scholar observes:

Few subjects in international law and international relations are as sensitive as the notion of sovereignty. Steinberger refers to it in the *Encyclopaedia of Public International Law* as “the most glittering and controversial notion in the history, doctrine and practice of international law.” On the other hand, Henkin seeks to banish it from our vocabulary and Lauterpacht calls it a “word which has an emotive quality lacking meaningful specific content,” while Verzijl notes that any discussion on this subject risks degenerating into a Tower of Babel. More affirmatively, Brownlie sees sovereignty as “the basic constitutional doctrine of the law of nations” and Alan James sees it as “the one and only organising principle in respect of the dry surface of the globe, all that surface now ... being divided among single entities of a sovereign, or constitutionally independent kind.” As noted by Falk, “There is little neutral ground when it comes to sovereignty”.<sup>12</sup>

These varying views highlight that the use and meaning of the term sovereignty has generated significant debate amongst scholars. During the 16<sup>th</sup> century, Bodin defined sovereignty as an “absolute and perpetual power”.<sup>13</sup> This definition reflects the positive “side” of sovereignty which

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<sup>7</sup> See generally SC res 1973, UN Doc S/RES/1973 (17 March 2011); Payandeh 2012 (52) *Virginia Journal of International Law* 373-382; Williams and Popken 2011 (44) *Case Western Reserve Journal of International Law* 225.

<sup>8</sup> Williams and Popken 2011 (44) *Case Western Reserve Journal of International Law* 225.

<sup>9</sup> Henkin 1999 (93) *The American Journal of International Law* 824.

<sup>10</sup> Donnelly J “State sovereignty and human rights” available at <http://www.du.edu/korbel/hrhw/workingpapers/2004/21-donnelly-2004.pdf> (Date of use: 13 October 2013)

<sup>11</sup> Sarooshi *International Organizations* 3.

<sup>12</sup> Schrijver 1999 (70) *British Yearbook of International Law* 69-70.

<sup>13</sup> Bodin “On sovereignty” 345; Jennings “Sovereignty and international law” 27; Nijman “Sovereignty and personality” 114. Sovereignty has further been eloquently defined by the then Arbiter M Huber in *The Island of Palmas Arbitration Case (United States of America v The Netherlands)* 1928 at 8, 9 as follows: “... [s]overeignty in relation to a portion of the surface of the globe is the legal condition necessary for the inclusion of such portion in the territory of any particular State. ... Sovereignty in the relations between States signifies independence. Independence in regard to a portion of the globe is the right to exercise therein, to the exclusion of any other State, the functions of a State. The development of the national organisation of States during the last few centuries and, as a corollary, the development of international law, have established this principle of the exclusive competence of the State in regard to its own territory in such a way to make it the point of departure in settling most questions that concern international relations. ... Territorial sovereignty, as has already been said, involves the exclusive right to display the activities of a State. This right has as corollary a duty: the obligation to protect

entails the provision of political benefit to the citizens, collaboration with other governments, and the ability of a sovereign state to protect its independence.<sup>14</sup> Even though the definition above is Bodin's, he also recognised that there were laws superior to those created by the sovereign such as divine law and the laws of nature or reason.<sup>15</sup> In other words, state sovereignty has never in reality been superior to all other law. According to the 2004 World Trade Organisation Report, "sovereignty is one of the most used and also misused concepts of international affairs and international law".<sup>16</sup> It is used repeatedly without much thought as to its true significance in that it covers a variety of hugely complicated aspects – for example the extent of a government's authority over its citizens.<sup>17</sup> This indicates the difficulty associated with capturing the precise meaning of the term "sovereignty".<sup>18</sup> Since Bodin's definition of sovereignty, several other attempts have been made to define the concept. It is in this regard that the efforts by Walker and others<sup>19</sup> are to be welcomed as they contribute to the discussion and understanding of what sovereignty entails. Walker defines sovereignty as:

[T]he discursive form in which a claim concerning the existence and character of a supreme ordering power for a particular polity is expressed, which supreme ordering power purports to establish and sustain the identity and status of the particular polity

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within the territory the rights of other States, in particular their right to integrity and inviolability in peace and in war, together with the rights which each State may claim for its nationals in foreign territory. Without manifesting its territorial sovereignty in a manner corresponding to circumstances, the State cannot fulfil this duty. Territorial sovereignty cannot limit itself to its negative side, i.e. to excluding the activities of other States; for it serves to divide between nations the space upon which human activities are employed, in order to assure them at all points the minimum of protection of which international law is the guardian."

<sup>14</sup> Jackson *Quasi-States: Sovereignty, International Relations and the Third World* 29.

<sup>15</sup> Jennings *Sovereignty and international law* 28.

<sup>16</sup> Sutherland P *et al* "The future of the WTO: Addressing institutional challenges in the new millennium" para 110, available at [http://www.ipu.org/splz-e/wto-symp05/future\\_WTO.pdf](http://www.ipu.org/splz-e/wto-symp05/future_WTO.pdf) (Date of use: 13 October 2013).

<sup>17</sup> Sutherland *et al* [http://www.ipu.org/splz-e/wto-symp05/future\\_WTO.pdf](http://www.ipu.org/splz-e/wto-symp05/future_WTO.pdf) (Date of use: 13 October 2013).

<sup>18</sup> Ferreira-Snyman 2006 (12) *Fundamina: A Journal of Legal History* 1.

<sup>19</sup> Bodley 1999 (31) *New York University Journal of International Law and Politics* 419. According to Bodley, "[s]overeignty is the most extensive form of jurisdiction under international law. In general terms, it denotes full and unchallengeable power over a piece of territory and all the persons from time to time therein". See also Winston *et al* 2004 (43) *Columbia Journal of Transnational Law* 143-145. Wilson *et al* have identified at least thirteen different overlapping meanings of sovereignty. According to them, "sovereignty may refer to a personalized monarch (real or ritualized), a symbol for absolute, unlimited control or power, as a symbol of political legitimacy, a symbol of political authority, a symbol of self-determined, national independence, a symbol of governance and constitutional order, a criterion of jurisprudential validation of all law, a symbol of the juridical personality of sovereign equality, a symbol of recognition, a formal unit of legal system, a symbol of powers, immunities, or privileges, a symbol of jurisdictional competence to make and/or apply law, and a symbol of basic governance competencies".

qua polity and to provide a continuing source and vehicle of ultimate authority for the juridical order of that polity.<sup>20</sup>

From this, it can be deduced that, at the very least, sovereignty involves an exercise in and control of absolute power over something in order to maintain a particular status. The exercise of such authority previously excluded other states.<sup>21</sup> As will be discussed in due course, this position is no longer supported by the majority of the international community.

There are four ways in which sovereignty has been applied in international law.<sup>22</sup> First is “domestic or internal sovereignty”, which refers to the organisation and effectiveness of a political authority within in a state.<sup>23</sup> The power or control exercised by the state is unrelated to Westphalian sovereignty. Authority can therefore refer either to internal or to Westphalian sovereignty.<sup>24</sup> Second, is ‘interdependence sovereignty’ which denotes that in current times it is generally accepted that forces of globalisation are eroding state sovereignty and creating the need for states to cooperate with each other in order to achieve the common good within an interdependent world.<sup>25</sup> The main focus is the control of various aspects, such as the health-care system, and has little to do with the exercise of power. In this regard, the inability to control, *inter alia*, people and diseases across the globe has been described as a loss of sovereignty. Therefore, interdependence sovereignty does not relate to Westphalian sovereign as a state can be recognised as equal to other states. The inability to control these factors across borders, does not necessarily mean that a state is subject to external control. It is therefore important to distinguish between internal and external sovereignty. The former refers to the ability of the state to exercise its functions and manage its affairs within its territory.<sup>26</sup> The latter has traditionally been understood as a government exercising control over its affairs to the exclusion of all foreign states.<sup>27</sup> It was characterised by international independence, the right to self-help, and the power to participate in the affairs of the international community.<sup>28</sup>

Thirdly, sovereignty denotes international legal sovereignty which involves compliance with the requirements for statehood as a political entity in international law as set out in the Montevideo

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<sup>20</sup> Walker “Late sovereignty in the European Union” 6.

<sup>21</sup> Dugard *International Law* 146.

<sup>22</sup> Krasner “*Sovereignty: Organized Hypocrisy*” 690-692.

<sup>23</sup> Krasner *Sovereignty: Organized Hypocrisy* 9.

<sup>24</sup> Krasner *Sovereignty: Organized Hypocrisy* 4.

<sup>25</sup> Krasner *Sovereignty: Organized Hypocrisy* 10-11; Perrez *Cooperative Sovereignty* 139.

<sup>26</sup> Ferreira-Snyman *The Erosion of State Sovereignty* 36.

<sup>27</sup> Ferreira-Snyman *The Erosion of State Sovereignty* 36.

<sup>28</sup> Ferreira-Snyman *The Erosion of State Sovereignty* 36; Perrez *Cooperative Sovereignty* 16.

Convention on the Rights and Duties of States, 1933.<sup>29</sup> In other words, a state must be recognised as sovereign by other states if it is, *inter alia*, capable of entering into agreements with other states. In this sense, the state is treated as distinct from the individual and international legal sovereignty does not guarantee that domestic authorities will be able to regulate their internal affairs – including movement across their borders.

Fourthly, we find “Westphalian sovereignty” based on the Westphalian model. This means that a state chooses how to conduct its internal affairs to the exclusion of other states.<sup>30</sup> Even though those in power may choose how to manage their domestic affairs, they may be limited by external factors. However, the ultimate decision remains theirs. This form of sovereignty would be violated when external actors decide to intervene and influence domestic issues or policies.<sup>31</sup> The Westphalian model of sovereignty is, however, no longer supported by modern international law in that “no state is immune from international scrutiny, or even sanction”.<sup>32</sup> To this end Depaigne has said that the “sovereign is no longer the king but a nation” that must conform to standards of human rights.<sup>33</sup>

These four ways in which the term state sovereignty is used, support Reisman’s view that since the time of Aristotle, “the word sovereignty has had a long and varied history during which it has been given different meanings, hues and tones, depending on the context and the objectives of those using the word”.<sup>34</sup> For purposes of this thesis, the discussion focuses on how state sovereignty has evolved as a result of regionalism, globalisation, *jus cogens* norms, head-of-state immunity, humanitarian intervention, and the importance of protecting and promoting

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<sup>29</sup> The Convention was signed at Montevideo on 26 December 1933 and it entered into force on 26 December 1934 (hereafter The Montevideo Convention). The text of the Convention is available at <http://www.taiwandocuments.org/montevideo01.htm> (Date of use: 29 October 2013). In *S v Banda* 1989 (4) SA 519 at 529-31 (B) the accused persons were charged with treason. They argued that treason could only be committed against a state and therefore their charges could not stand as Bophuthatswana was not a state. The Bophuthatswana General Division relied on the provisions in the Montevideo Convention and held that Bophuthatswana satisfied the Montevideo criteria and was therefore a state. This judgment resulted in many debates. For example, even though Bophuthatswana was recognised by some of the countries internationally, it did not have defined borders. People were, *inter alia*, required to produce passports when they were under the impression that they were within the territories of Bophuthatswana only to be told that they were in South African borders. Krasner *Sovereignty* 14-20.

<sup>30</sup> Krasner *Sovereignty: Organized Hypocrisy* 20-23.

<sup>31</sup> Krasner *Sovereignty: Organized Hypocrisy* 20.

<sup>32</sup> Moagoto 2005 (7) *Notre Dame Law Review* 3.

<sup>33</sup> Depaigne 2007 (10) *The Bologna Center Journal of International Affairs* 35-49; Williams and Popken 2011 (44) *Case Western Reserve Journal of International Law* 225.

<sup>34</sup> Reisman 1990 (84) *The American Journal of International Law* 866.

human rights. Regionalism and human rights, amongst others, have resulted in states no longer regarding human rights as matters falling solely within the rubric of 'domestic affairs'. I shall further discuss how certain African countries have relinquished aspects of their sovereignty by becoming members of regional and sub-regional organisations such as the African Union (AU) and the Southern African Development Community (SADC).

## 2 THE EVOLUTION OF STATE SOVEREIGNTY

As mentioned above, there are two forms of state sovereignty, namely, *internal* and *external* sovereignty.<sup>35</sup> The former relates to the power of the state to discharge its functions as a state within its boundaries and freely to control its domestic affairs; the latter refers to the autonomy of the state to exercise its powers and to protect its territory without outside interference.<sup>36</sup> The concept of state sovereignty as originally understood in international law, originated from the Westphalian state.<sup>37</sup> This notion has been deconstructed over the years in an attempt to dispel the traditional view that sovereignty is absolute.<sup>38</sup> Absolute sovereignty has, therefore, become an outdated notion in contemporary international law in the face of factors such as interdependence and cooperation among states.<sup>39</sup>

### 2.1 Westphalian sovereignty

The core elements of state sovereignty can be traced back to the Montevideo Convention of 1933. In terms of the Montevideo Convention, to qualify as a state, the territory must have a defined territory and a functioning government, amongst others.<sup>40</sup> The requirement of a defined territory is important in international law as it is that portion of the "earth's surface" over which the sovereign state may exercise control.<sup>41</sup>

Westphalian sovereignty entailed the absolute right of states to choose how they wished to conduct their political affairs free from external influence.<sup>42</sup> Its main purpose was to "preserve

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<sup>35</sup> Ferreira-Snyman 2006 (12) *Fundamina: A Journal of Legal History* 4.

<sup>36</sup> Ferreira-Snyman 2006 (12) *Fundamina: A Journal of Legal History* 4.

<sup>37</sup> Deng 2010 *Africa Institute of South Africa Policy Brief* 1.

<sup>38</sup> Deng 2010 *Africa Institute of South Africa Policy Brief* 1; Deng 2010 *Africa Institute of South Africa Policy Brief* 4.

<sup>39</sup> Ferreira-Snyman 2006 (12) *Fundamina: A Journal of Legal History* 1.

<sup>40</sup> See art 1 of the Montevideo Convention.

<sup>41</sup> Hassan 2006 (9) *Yearbook of New Zealand Jurisprudence* 62.

<sup>42</sup> Anghie 1999 (40) *Harvard International Law Journal* 37; Howe 1995 (66) *The Political Quarterly Publishing* 129; Donley <http://www.du.edu/korbel/hrhw/workingpapers/2004/21-donnely-2004.pdf>

the self-interest of the state”.<sup>43</sup> The primacy of state sovereignty was therefore undisputed.<sup>44</sup> States could only limit their sovereignty through accepting responsibilities flowing from treaty law or compulsory obligations that arose from customary international law.<sup>45</sup> The notion of state sovereignty as an absolute, unrestricted power of a state originated with the Treaty of Westphalia in 1648 (Westphalia).<sup>46</sup> Westphalia marked an end of a Thirty Years War in Europe.<sup>47</sup> It also introduced the principle of sovereignty which permitted states to have control over their territories without external influence.<sup>48</sup> Article 2(7) of the Charter of the United Nations also recognises the principle of non-intervention and provides that

Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter; but this principle shall not prejudice the application of enforcement measures under Chapter VII.<sup>49</sup>

The said principle of non-intervention was reaffirmed in the *Corfu Channel* case, where the International Court of Justice (ICJ), the principal judicial organ of the United Nations, stated that “... [b]etween independent States, respect for territorial sovereignty is an essential foundation of international relations...”<sup>50</sup> This principle was also upheld in *Military and Paramilitary Activities*

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(Date of use: 13 October 2013); Scott *International Law in World Politics* 29-30; Krasner *Sovereignty: Organized Hypocrisy* 20; Antonov M “The philosophy of sovereignty, human rights, and democracy in Russia” available at <http://dx.doi.org/10.2139/ssrn.2309369> (Date of use 13 October 2013); Reisman 1990 (84) *The American Journal of International Law* 867; Henkin 1999-2000 (68) *Fordham Law Review* 3-4; Kearns 2000-2001 (25) *Nova Law Review* 503; Henkin 1995-1996 (25) *Georgia Journal of International and Comparative Law* 32; Bettati “The international community and limitations of sovereignty” 92-93; Sarooshi *International Organizations* 4; Aceves 2002 (25) *Hastings International and Comparative Law Review* 261; Ayoub 2002 (6) *The International Journal of Human Rights* 82; Ebobrah *Legitimacy and Feasibility of Human Rights* 30.

<sup>43</sup> Brus “Bridging the gap” 3.

<sup>44</sup> Brus “Bridging the gap” 4.

<sup>45</sup> Brus “Bridging the gap” 4.

<sup>46</sup> Gandois H “Sovereignty as responsibility: Theory and practice in Africa” available at [http://www.academia.edu/152155/Sovereignty\\_as\\_responsibility\\_Theory\\_and\\_practice\\_in\\_Africa](http://www.academia.edu/152155/Sovereignty_as_responsibility_Theory_and_practice_in_Africa) (Date of use: 14 October 2013); Winston P *et al* 2004 (43) *Columbia Journal of Transnational Law* 145; Antonov <http://dx.doi.org/10.2139/ssrn.2309369> (Date of use: 13 October 2013). For a detailed discussion on the Treaty of Westphalia, see Hassan 2006 (9) *Yearbook of New Zealand Jurisprudence* 64-68 and Claire 2001 (27) *Review of International Studies* 141.

<sup>47</sup> Maranga 2011 (1) *Journal of Global Affairs and Public Policy* 4.

<sup>48</sup> Maranga 2011 (1) *Journal of Global Affairs and Public Policy* 4.

<sup>49</sup> The exception to the principle of non-intervention is where members of the United Nations take measures under articles 41 and 42 of the Charter in order to restore international peace and security. Such measures may include the deployment of peacekeeping forces in the territory of the state concerned in order to restore peace as was the case in the Democratic Republic of Congo.

<sup>50</sup> *Corfu Channel* case, Judgment, 1949 ICJ Reports 4 at 35.

*in and against Nicaragua (Nicaragua v United States of America)*<sup>51</sup> where the United States of America (USA), *inter alia*, conducted military activities in and against Nicaragua with the aim of overthrowing the Nicaraguan government. Nicaragua approached the ICJ alleging, *inter alia*, that the USA was funding militants and that some of the shots fired by USA military forces were in violation of international law. The issues for determination by the ICJ included whether the USA had breached its customary international law obligation not to intervene in the domestic affairs of another state when it aided the military and paramilitary activities against Nicaragua. The ICJ first remarked that

...[h]owever the regime in Nicaragua be defined, adherence by a State to any particular doctrine does not constitute a violation of customary international law; to hold otherwise would make nonsense of the fundamental principle of State sovereignty, on which the whole of international law rests, and the freedom of choice of the political, social, economic and cultural system of a State. Consequently, Nicaragua's domestic policy options, even assuming that they correspond to the description given of them by the Congress finding [dictatorship], cannot justify on the legal plane the various actions of the Respondent complained of. The Court cannot contemplate the creation of a new rule opening up a right of intervention by one State against another on the ground that the latter has opted for some particular ideology or political system.<sup>52</sup>

It consequently ruled that the USA had acted in breach of its obligation under customary international law not to intervene in the affairs of Nicaragua.<sup>53</sup> According to Brownlie, the “principal corollaries of the sovereign state and equality of states [include] a duty of non-intervention in the area of exclusive jurisdiction of other states”.<sup>54</sup> The principle of non-intervention is provided for in the Charter of the United Nations and prohibits member states from interfering in the domestic affairs of another member state.<sup>55</sup> However, this does not mean that intervention may never take place in the territory of another state as the UN SC may recommend (or even take) measures<sup>56</sup> intended to address, *inter alia*, threats to international peace or breaches of the peace, and this constitutes an exception to the principle of non-intervention.<sup>57</sup> The principle of non-intervention was indeed based on the traditional view which

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<sup>51</sup> *Jurisdiction and Admissibility*, Judgment, 1984 ICJ Reports 263 (hereafter the *Nicaragua* judgment).

<sup>52</sup> At para 263.

<sup>53</sup> At para 292.

<sup>54</sup> Brownlie *Principles of Public International Law* 289.

<sup>55</sup> Article 2(7) of the Charter of the United Nations.

<sup>56</sup> Articles 40, 41 and 42 of the Charter of the United Nations.

<sup>57</sup> Ferreira-Snyman 2010 (48) *The Comparative and International Law Journal of Southern Africa* 141. There have been various opinions regarding the interpretation of art 2(7) of the Charter of the United Nations. Some writers are of the view that it should be interpreted restrictively, whereas others argue for an interpretation embodying the principle of proportionality. It is



regarded states as the sole subjects of international law.<sup>58</sup> Accordingly, international law was concerned only with inter-state relations. Individuals were regarded as objects which possessed no rights under international law.<sup>59</sup> In other words, a country could do anything, including oppressing its citizens, and thereafter hide “behind the veil of sovereignty”.<sup>60</sup> For example, the apartheid government in South Africa sought the international community not to interfere in its racial policies as these were domestic issues. This argument no longer holds true. Largely due to the importance of human rights, state sovereignty is limited and states can no longer hide behind their sovereignty to prevent intervention where human rights violations are committed.

According to Antonov, “the sovereign has [had] the right to arbitrarily decide on any domestic issue”.<sup>61</sup> The sovereign government enjoyed “final and absolute authority” within its borders.<sup>62</sup> It, therefore, did not matter how a state treated its people – it was simply not a matter of international concern.<sup>63</sup> This applied even when a sovereign state opted to kill its own people; no other state could intervene.<sup>64</sup> To illustrate the exercise of absolute sovereignty, Bettati offers the example of Bernheim, a German Jew, who unsuccessfully approached the League of Nations for the denunciation of the Nazi atrocities committed against his people.<sup>65</sup> The League of Nations was persuaded by the arguments presented by Joseph Goebbels who represented Germany. Goebbels, in defending his country policies, said the following to the League of Nations:

Ladies and Gentlemen, a man’s home is his castle. We are a sovereign State: nothing that this individual has said concerns you. We will do what we want with our Socialists, our pacifists, our Jews; we will not accept the control of either humanity or the League of Nations.<sup>66</sup>

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submitted that this article should be interpreted broadly but with great care. It should not be used to shield gross violations of human rights on grounds that a certain aspect is a purely domestic concern. For a more detailed discussion of the various interpretations, see Ferreira-Snyman 2010 (48) *The Comparative and International Law Journal of Southern Africa* 151-152.

<sup>58</sup> Bharadwaj 2003 (27) *Strategic Analysis* 12.

<sup>59</sup> Bharadwaj 2003 (27) *Strategic Analysis* 12.

<sup>60</sup> Bharadwaj 2003 (27) *Strategic Analysis* 12.

<sup>61</sup> Antonov <http://dx.doi.org/10.2139/ssrn.2309369> (Date of use: 13 October 2013).

<sup>62</sup> Held 2002 (8) *Legal Theory* 3.

<sup>63</sup> Henkin 1999-2000 (68) *Fordham Law Review* 4; Henkin 1995-1996 (25) *Georgia Journal of International and Comparative Law* 32. According to Henkin, before the Second World War it was a fundamental principle under international law for states “to leave each other alone”. See also Bettati “The international community and limitations of sovereignty” 92-93.

<sup>64</sup> Bettati “The international community and limitations of sovereignty” 93.

<sup>65</sup> Bettati “The international community and limitations of sovereignty” 93.

<sup>66</sup> Bettati “The international community and limitations of sovereignty” 93. The principle of non-interference was also emphasised in *Duke of Brunswick v The King of Hanover* (1848) 2 HL

Goebbels's submissions were in line with the then principle of absolute state sovereignty which prevented other states from concerning themselves in matters that were the domestic affairs of other states. Coming closer to the SADC region, specifically in South Africa, the National Party defended its apartheid policies that violated human rights. It claimed that the United Nations' General Assembly was not in a position to discuss the internal affairs of member states as per article 2(7) of the United Nations Charter.<sup>67</sup> Accordingly, the then South Africa justified its apartheid policies (the oppression of people) and hid behind the veil of state sovereignty.<sup>68</sup> There was no limit on sovereignty. This is what Jackson classified as negative sovereignty which entailed "freedom from outside interference".<sup>69</sup> It is submitted that this aspect of absolute state sovereignty was often misused and resulted in many human rights abuses.<sup>70</sup> The importance of the principle of state sovereignty under international law cannot be gainsaid.<sup>71</sup> It acts as a shield for small states against interference and bullying by powerful states. In addition, state sovereignty constitutes "the backbone of the world order".<sup>72</sup>

Before 1945, states were very protective of their sovereignty. However, states can no longer use their sovereignty to escape their international responsibility to protect human rights. Today there are numerous widely-accepted factors which limit state sovereignty.<sup>73</sup> For example, during

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Cas.1. The applicant claimed, *inter alia*, that the respondent was responsible for removing him from his position as reigning Duke. In dismissing the applicant's case, the court said the following regarding sovereignty, "[a] foreign Sovereign, coming into this country cannot be made responsible here for an act done in his Sovereign character in his own country; whether it be an act right or wrong, whether according to the constitution of that country or not, the Courts of this country cannot sit in judgment upon an act of a Sovereign, effected by virtue of his Sovereign authority abroad, an act not done as a British subject, but supposed to be done in the exercise of his authority vested in him as Sovereign". See also *Hatch v Baez* (1876) 7 Hun 596 where it was held that, "... [e]ach state is sovereign throughout its domain. The acts of the defendant for which he is sued were done by him in the exercise of that part of the sovereignty of St. Domingo which belongs to the executive department of that government. To make him amenable to a foreign jurisdiction for such acts, would be a direct assault upon the sovereignty and independence of his country...".

<sup>67</sup> Shearar *Against the World* 71 and 200.

<sup>68</sup> Dugard and Reynolds 2013 (24) *The European Journal of International Law* 867.

<sup>69</sup> Jackson *Quasi-States: Sovereignty, International Relations and the Third World* 27.

<sup>70</sup> Gandois

[http://www.academia.edu/152155/Sovereignty\\_as\\_responsibility\\_Theory\\_and\\_practice\\_in\\_Africa](http://www.academia.edu/152155/Sovereignty_as_responsibility_Theory_and_practice_in_Africa)  
(Date of use: 14 October 2013).

<sup>71</sup> Ferreira-Snyman 2006 (12) *Fundamina: A Journal of Legal history* 1; Aceves 2002 (25) *Hastings International and Comparative Law Review* 261.

<sup>72</sup> Brus "Bridging the gap" 3.

<sup>73</sup> International Commission on Intervention and State Sovereignty: *The Responsibility to Protect - Supplementary Volume to the Report of the International Commission on Intervention and State Sovereignty* (International Development Research Centre 2001) 5.

the 18<sup>th</sup> century a distinction was made between “absolute, perfect or full sovereignty on the one hand and relative, imperfect or half sovereignty on the other”.<sup>74</sup> The former belonged to monarchs who had absolute independence within and outside of their states.<sup>75</sup> The latter was accorded those monarchs who were in some way dependent on other monarchs for running the internal and external affairs of the state.<sup>76</sup> It was on the basis of this distinction between absolute and relative sovereignty, that it was recognised that sovereignty is divisible.<sup>77</sup> Divisible sovereignty means the division of the sovereign authority “into different components which, together, form a full sovereignty”.<sup>78</sup> However, the divisibility of sovereignty was not internationally recognised during the 18<sup>th</sup> century.<sup>79</sup> Today, in light of numerous factors – for example, the transfer of power to regional and international organisations – sovereignty can no longer be viewed from the perspective of the earlier theorists such as Jean Bodin and Hugo Grotius as indivisible.<sup>80</sup> The norm of restricting how states should treat their citizens constitutes an infringement of the principle of sovereignty and would support the argument that sovereignty is divisible.<sup>81</sup> Additionally, it is submitted that globalisation and international cooperation has resulted in the demise of sovereignty because states have responded to the need to act together for the sake of common interests such as combating terrorism. However, Fremuth has questioned whether sovereignty may be divisible.<sup>82</sup> According to him:

Member States remain sovereign but they accept restrictions on their sovereign rights to benefit from working together in the supranational EU. That shows that sovereignty means the right to allocate tasks and sovereign rights to a level of authority that could best serve the goals. However, states reserve the decision of if, when and to what degree to integrate in a form of supra-state cooperation.<sup>83</sup>

It is submitted that Fremuth’s view is correct because in today’s world, states can no longer always do as they wish since they operate in the collective interests of the common good, such

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<sup>74</sup> Ferreira-Snyman *The Erosion of State Sovereignty* 43.

<sup>75</sup> Ferreira-Snyman *The Erosion of State Sovereignty* 43.

<sup>76</sup> Ferreira-Snyman *The Erosion of State Sovereignty* 43.

<sup>77</sup> Ferreira-Snyman *The Erosion of State Sovereignty* 44.

<sup>78</sup> Deng 2010 *Africa Institute of South Africa Policy Brief* 5.

<sup>79</sup> Ferreira-Snyman *The Erosion of State Sovereignty* 44.

<sup>80</sup> Schwarz and Jutersonke 2005 (26) *Third World Quarterly* 652; Aufricht 1944 (30) *Cornell Law Review* 139-141; Lake DA “Delegating divisible sovereignty: Some conceptual issues” available at <https://law.duke.edu/publiclaw/pdf/workshop06sp/lake.pdf> (Date of use: 26 March 2015).

<sup>81</sup> Lake <https://law.duke.edu/publiclaw/pdf/workshop06sp/lake.pdf> (Date of use: 26 March 2015).

<sup>82</sup> This is the view of Dr L Fremuth who presented a paper titled “Sovereignty - (quo) vadis? Reflections on a lasting concept” at the University of Pretoria on 9 October 2014 (paper on file with author).

<sup>83</sup> Fremuth “Sovereignty - (quo) vadis? Reflections on a lasting concept” 9 October 2014 (the presentation is on file with author).

as respect for human rights. Moreover, when member states transfer certain competencies to a regional body, such as the EU, they cannot at a later stage decide to disregard this as and when they wish. For example, Zimbabwe transferred some of its sovereign power to protect its citizens to the SADC Tribunal, but later decided to ignore the rulings of the Tribunal.

It is therefore submitted that due to the developments such as human rights and regionalism sovereignty should be seen as divisible.<sup>84</sup> Specifically as a result of the atrocities committed during the Second World War, international law changed significantly and international governance can no longer be seen to be based “purely on voluntary co-operation of member states”.<sup>85</sup> A need for global governance arose, and with it the call for the establishment of a body such as the United Nations based on shared community interests.<sup>86</sup> According to Brus, a community interest is not something that should be viewed as opposing national interest.<sup>87</sup> Instead, it should be seen as a “continuation, or even strengthening of the national interests in an interdependent world”.<sup>88</sup> The creation of an international community through the United Nations signifies the reality that states are dependent on one another and that there is a need for international cooperation to achieve the common good, such as upholding human rights. Sovereignty is, therefore, increasingly viewed as a “status consideration”. A state needs to cooperate with other members of the international community in order to pursue common interests. In the past, an individual state exercised its sovereignty by acting independently to achieve its own national interest.<sup>89</sup> This is no longer the position. In today’s world, states transfer some aspects of their national sovereignty to regional and international bodies and by doing so, to a large extent limit their freedom to act independently.<sup>90</sup> This entails that state sovereignty is divisible as it is “neither inherently territorial nor exclusively in the hands of

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<sup>84</sup> Fawcett 2004 (80) *International Affairs* 429, 433; Ferreira-Snyman 2011 (44) *The Comparative and International Law Journal of Southern Africa* 362-368.

<sup>85</sup> Brus “Bridging the gap” 4; Schermers “Aspects of sovereignty” 185. According to Schermers, “[i]n a growing number of fields States become bound by universal rules irrespective of any express adherence to these rules”.

<sup>86</sup> Brus “Bridging the gap” 4.

<sup>87</sup> Brus *Third Party Dispute* 198.

<sup>88</sup> Brus *Third Party Dispute* 198.

<sup>89</sup> Chayes and Chayes *The New Sovereignty* 26. See also Ferreira-Snyman *The Erosion of State Sovereignty* 57.

<sup>90</sup> Schrijver 1999 (70) *British Yearbook of International Law* 76; Ferreira-Snyman *The Erosion of State Sovereignty* 57.

states”.<sup>91</sup> In this way, a state can only act in accordance with a consensual decision taken by members of the relevant bodies. As pointed out by Schermers, “[n]o State can isolate itself from the world community”.<sup>92</sup> As a result, it is said that the involvement of states in regional and international organisations in fact strengthens state sovereignty.<sup>93</sup> The basis for this claim is that through participation in regional and international organisations, states promote their individual “ability to gain access to new resources and secure other benefits needed to operate in a globalized world”.<sup>94</sup> It is therefore submitted that the exercise of sovereignty is no longer viewed from the perspective a state’s independence, but by the extent to which a state participates in or becomes a member of international organisations.<sup>95</sup> In this light it may be asserted that sovereignty has changed and is now a question of status.<sup>96</sup> The factors that are increasingly eroding state sovereignty are dealt with separately in what follows.

## 2.2 Regionalism

In her recent statement at the inauguration of the Africa Maritime Indaba, the AU chairperson, Dr Dlamini-Zuma, said that states should not be protective of their sovereignty and that certain elements of state sovereignty “need to be exercised collectively”.<sup>97</sup> Indeed, if African states need to cooperate in the achievement of issues that affect the continent such as peace and security, they must be willing to relinquish certain aspects of their sovereignty. It is increasingly evident that because of, *inter alia*, regionalism and globalisation, absolute state sovereignty is something of the past. Regionalism and globalisation “go hand in hand” because one cannot talk of regionalism in isolation of certain of the aspects arising from globalisation.<sup>98</sup> The concepts of regionalism and globalisation are addressed separately.

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<sup>91</sup> Oliver J and Schwarz R “Slicing up the cake: Divisible sovereignty in the pre and post Westphalian order” available at [http://www.eisa-net.org/be-bruga/eisa/files/events/turin/Schwarz-divsov\\_and\\_westphalian\\_order.pdf](http://www.eisa-net.org/be-bruga/eisa/files/events/turin/Schwarz-divsov_and_westphalian_order.pdf) (Date of use: 18 September 2015).

<sup>92</sup> Schermers “Aspects of sovereignty” 185.

<sup>93</sup> Ferreira-Snyman *The Erosion of State Sovereignty* 57.

<sup>94</sup> Ferreira-Snyman *The Erosion of State Sovereignty* 57.

<sup>95</sup> Chayes and Chayes *The New Sovereignty* 22; Ferreira-Snyman *The Erosion of State Sovereignty* 58.

<sup>96</sup> Ferreira-Snyman *The Erosion of State Sovereignty* 58.

<sup>97</sup> Munshi R “Sharing sovereignty ‘key to float continent’s maritime integration strategy” available at <http://www.bdlive.co.za/national/science/2013/10/27/sharing-sovereignty-key-to-floatcontinentsmaritime-integration-strategy> (Date of use: 27 October 2013).

<sup>98</sup> Ferreira-Snyman 2011 (44) *The Comparative and International Law Journal of Southern Africa* 362.

Regionalism may be described as an “ideology and political movement” that seeks to promote the interest of a particular region(s).<sup>99</sup> Further, it is a process in which states and non-state actors come together in a given region to cooperate in the achievement of mutual objectives such as the promotion of economic, political and security interests.<sup>100</sup> To assist in understanding the concept of regionalism, the International Law Commission has divided the term *regionalism* into three categories: (a) Regionalism as a set of approaches and methods for examining international law; (b) Regionalism as a technique for international law-making; and (c) Regionalism as the pursuit of geographical exceptions to universal international-law rules.<sup>101</sup> These categories are discussed below.

(a) Regionalism as a set of approaches and methods for examining international law

In terms of this approach, which is in common use, regionalism refers to “particular orientations of legal order, thought and culture”.<sup>102</sup> For example, the requirement that members of the International Law Commission should represent various cultures and be drawn from the various legal systems of the world so as to promote the development of international law, fits with this conception of regionalism.<sup>103</sup> The composition of other international law bodies, such as the General Assembly of the United Nations (UNGA) also consists of members from various regions in the international community.<sup>104</sup> It is said that there have always been regional and local approaches to cultures under international law.<sup>105</sup> To this end, sociological, political and cultural factors have influenced international law significantly.<sup>106</sup> However, studies do not indicate that certain rules should be read in a particular way, despite the fact that such rules originated in a

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<sup>99</sup> Gochhayat 2014 (8) *African Journal of Political Science and International Relations* 10.

<sup>100</sup> Fawcett 2004 (80) *International Affairs* 429, 433. For a comprehensive discussion on regionalism, see Ferreira-Snyman 2011 (44) *The Comparative and International Law Journal of Southern Africa* 362-368.

<sup>101</sup> Koksenniemi M “Fragmentation of international law: difficulties arising from the diversification and expansion of international law” available at [http://legal.un.org/ilc/documentation/english/a\\_cn4\\_l682.pdf](http://legal.un.org/ilc/documentation/english/a_cn4_l682.pdf) (Date of use: 26 March 2025).

<sup>102</sup> Koksenniemi [http://legal.un.org/ilc/documentation/english/a\\_cn4\\_l682.pdf](http://legal.un.org/ilc/documentation/english/a_cn4_l682.pdf) (Date of use: 26 March 2025).

<sup>103</sup> Koksenniemi [http://legal.un.org/ilc/documentation/english/a\\_cn4\\_l682.pdf](http://legal.un.org/ilc/documentation/english/a_cn4_l682.pdf) (Date of use: 26 March 2025).

<sup>104</sup> Koksenniemi [http://legal.un.org/ilc/documentation/english/a\\_cn4\\_l682.pdf](http://legal.un.org/ilc/documentation/english/a_cn4_l682.pdf) (Date of use: 26 March 2025).

<sup>105</sup> Koksenniemi [http://legal.un.org/ilc/documentation/english/a\\_cn4\\_l682.pdf](http://legal.un.org/ilc/documentation/english/a_cn4_l682.pdf) (Date of use: 26 March 2015).

<sup>106</sup> Koksenniemi [http://legal.un.org/ilc/documentation/english/a\\_cn4\\_l682.pdf](http://legal.un.org/ilc/documentation/english/a_cn4_l682.pdf) (Date of use: 26 March 2015).

regional discourse.<sup>107</sup> Instead, these regional influences “appear significant precisely because they have lost their originally geographically limited character” and contributed to the growth of international law.<sup>108</sup>

(b) Regionalism as a technique for international law-making

In this instance, regionalism is perceived as offering a privileged forum for creating international law.<sup>109</sup> The basis for this lies in the perception that regions have common interests which will ensure, *inter alia*, efficient implementation of the rules.<sup>110</sup> Shared community interests ensure the legitimacy of the norms and their coherent application.<sup>111</sup> As a result, it is said that this may form the basis for human rights and free trade laws to originate at regional level.<sup>112</sup> The same applies to economic growth for various regions. Further, it is said that the need for cooperation and interdependence among states and the sociology of globalisation, need to be governed independently of the state level (ie regional level).<sup>113</sup> This is supported by the conclusion of various trade agreements at a regional level, despite the existence of a well-developed international trade system in the General Agreement on Tariffs and Trade and the World Trade Organisation.<sup>114</sup> The General Agreement on Tariffs and Trade and the World Trade Organisation do not operate at a national level unless empowered to do so by the state concerned.

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<sup>107</sup> Koksenniemi [http://legal.un.org/ilc/documentation/english/a\\_cn4\\_l682.pdf](http://legal.un.org/ilc/documentation/english/a_cn4_l682.pdf) (Date of use: 26 March 2015).

<sup>108</sup> Koksenniemi [http://legal.un.org/ilc/documentation/english/a\\_cn4\\_l682.pdf](http://legal.un.org/ilc/documentation/english/a_cn4_l682.pdf) (Date of use: 26 March 2015).

<sup>109</sup> Koksenniemi [http://legal.un.org/ilc/documentation/english/a\\_cn4\\_l682.pdf](http://legal.un.org/ilc/documentation/english/a_cn4_l682.pdf) (Date of use: 26 March 2015).

<sup>110</sup> Koksenniemi [http://legal.un.org/ilc/documentation/english/a\\_cn4\\_l682.pdf](http://legal.un.org/ilc/documentation/english/a_cn4_l682.pdf) (Date of use: 26 March 2015).

<sup>111</sup> Koksenniemi [http://legal.un.org/ilc/documentation/english/a\\_cn4\\_l682.pdf](http://legal.un.org/ilc/documentation/english/a_cn4_l682.pdf) (Date of use: 26 March 2015).

<sup>112</sup> Koksenniemi [http://legal.un.org/ilc/documentation/english/a\\_cn4\\_l682.pdf](http://legal.un.org/ilc/documentation/english/a_cn4_l682.pdf) (Date of use: 26 March 2015).

<sup>113</sup> Koksenniemi [http://legal.un.org/ilc/documentation/english/a\\_cn4\\_l682.pdf](http://legal.un.org/ilc/documentation/english/a_cn4_l682.pdf) (Date of use: 26 March 2015).

<sup>114</sup> Koksenniemi [http://legal.un.org/ilc/documentation/english/a\\_cn4\\_l682.pdf](http://legal.un.org/ilc/documentation/english/a_cn4_l682.pdf) (Date of use: 26 March 2015).

(c) Regionalism as the pursuit of geographical exceptions to universal international law rules

Finally, it is said that regionalism may be stronger if “it is meant to connote a rule or a principle with a regional sphere of validity or a regional *limitation* to the sphere of validity of a universal rule or principle”.<sup>115</sup> In the positive sense, the rule and/or principle would only be binding on members who belong to a specific region.<sup>116</sup> In a negative sense, regionalism would exempt those states within a particular geographic area from the binding authority of an international rule.<sup>117</sup> The concern with the above approaches lies in identifying the relevant region and the imposition of a norm that would generally not be relevant for everyone in the region.<sup>118</sup> Another difficulty is the imposition of a regional rule on a state that has not accepted it.<sup>119</sup> The notion of regionalism is, therefore, not straightforward as emerges from the various approaches adopted in an attempt to explain it.<sup>120</sup>

It is said that because the world is has not yet created a fully effective global authority for the maintenance of world peace, regionalism is a first step “in establishing areas of consensus toward eventual (full) intergovernmental coordination or integration”.<sup>121</sup> Further, regionalism promotes transparency, helps in controlling the effects of globalisation, and makes states more accountable as they have not only to act in their own interest, but in the interest of the region as a whole.<sup>122</sup> Accordingly, the need for cooperation and interaction among states at a regional level requires states to be prepared to revisit the traditional view of state sovereignty as absolute.<sup>123</sup>

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<sup>115</sup> Koksenniemi [http://legal.un.org/ilc/documentation/english/a\\_cn4\\_l682.pdf](http://legal.un.org/ilc/documentation/english/a_cn4_l682.pdf) (Date of use: 26 March 2015).

<sup>116</sup> Koksenniemi [http://legal.un.org/ilc/documentation/english/a\\_cn4\\_l682.pdf](http://legal.un.org/ilc/documentation/english/a_cn4_l682.pdf) (Date of use: 26 March 2015).

<sup>117</sup> Koksenniemi [http://legal.un.org/ilc/documentation/english/a\\_cn4\\_l682.pdf](http://legal.un.org/ilc/documentation/english/a_cn4_l682.pdf) (Date of use: 26 March 2015).

<sup>118</sup> Koksenniemi [http://legal.un.org/ilc/documentation/english/a\\_cn4\\_l682.pdf](http://legal.un.org/ilc/documentation/english/a_cn4_l682.pdf) (Date of use: 26 March 2015).

<sup>119</sup> Koksenniemi [http://legal.un.org/ilc/documentation/english/a\\_cn4\\_l682.pdf](http://legal.un.org/ilc/documentation/english/a_cn4_l682.pdf) (Date of use: 26 March 2015).

<sup>120</sup> Gochhayat (2014) 8 *African Journal of Political Science and International Relations* 13.

<sup>121</sup> Ferreira-Snyman 2011 (44) *The Comparative and International Law Journal of Southern Africa* 363; Bennett and Oliver *Principles and Issues* 237.

<sup>122</sup> Fawcett 2004 (80) *International Affairs* 429.

<sup>123</sup> Ferreira-Snyman 2011 (44) *The Comparative and International Law Journal of Southern Africa* 368.



From the 1980s what has come to be known as the “new regionalism” has emerged.<sup>124</sup> This was a result of, *inter alia*, economic change, globalisation and the transformation of the state.<sup>125</sup> Boutros-Ghali views new regionalism “not as a resurgence of ‘spheres of influence’”, but as a “healthy complement to internationalism”.<sup>126</sup> He is further of the view that regional actors should not be limited to states, but should extend to non-governmental organisations as there is a greater demand for resources for international action.<sup>127</sup> Indeed, there has been a reduction in donor funding in most countries and a shift of focus from one area to another because of new challenges – such as terrorism – which demand attention.<sup>128</sup> In this light, it is vital for regional groups and the United Nations to cooperate in the search for solutions to the problems facing the international community.

Despite the positive aspects of regionalism referred to above, there are arguments that prefer universalism<sup>129</sup> over regionalism. It is said that because of, *inter alia*, the interdependence of states, some political and social problems that emanate from various border regions require global solutions.<sup>130</sup> Further, proponents of universalism are of the view that regional resources are limited and unable to resolve various challenges within regions.<sup>131</sup> They also contend that the existence of several universal organisations is evidence that governments prefer to cooperate at an international level, rather than using regional organisations to address concerns affecting regions.<sup>132</sup> Whilst it is true that some problems, such as terrorism, require international

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<sup>124</sup> Fawcett 2004 (80) *International Affairs* 438.

<sup>125</sup> Mansfield and Milner 1999 (53) *International Organization* 589; Fawcett 2004 (80) *International Affairs* 438.

<sup>126</sup> Boutros-Ghali *An Agenda for Democratization* 33.

<sup>127</sup> Boutros-Ghali *An Agenda for Democratization* 33.

<sup>128</sup> Boutros-Ghali *An Agenda for Democratization* 33.

<sup>129</sup> Crawford, is of the view that the International Law Commission has placed more emphasis on universalism at the expense of regionalism. In his own words, “the Commission’s record reveals not merely an absence of reference to the issues of regionalism but even a deliberate attempt to eschew any such ideas ...”. This is indeed an unfortunate situation. As noted by Fawcett, “regionalism has become a more important, indeed a well-established feature of world politics”. Some of the problems can be better managed at regional level because members of the region are better placed to know the political and specific needs of the affected area. See Crawford “Universalism and regionalism” 113; Fawcett L “Regionalism in world politics: Past and present” available at <http://www.garnet-eu.org/pdf/Fawcett1.pdf> (Date of use: 25 March 2015).

<sup>130</sup> Bennett and Oliver *Principles and Issues* 237-238.

<sup>131</sup> Bennett and Oliver *Principles and Issues* 238.

<sup>132</sup> Bennett and Oliver *Principles and Issues* 238.

cooperation, there has been a move to create regional organisations to handle other issues which can be addressed on the regional level.<sup>133</sup>

Regionalism is not something new as the United Nations system also contains certain regionalist features in that various bodies within the UN are composed of people from various regions.<sup>134</sup> The General Assembly and other plenary bodies within the UN, are made up of various groupings with the result that a “highly elaborate group system” for discussion and decision-making has emerged.<sup>135</sup> The composition of these groupings shows regional features in that they are characterised by geographic or cultural ties (such as Africa), or membership of a regional organisation (such as the European Union).<sup>136</sup> Further, regionalism can be traced back to the composition of the UN SC which can be said to have regional features because of the allocation of non-permanent seats to certain regions.<sup>137</sup> The demand for the equitable distribution of seats (permanent and non-permanent) in the restructuring of the UN SC to reflect representation of certain regions, also evidences the relevance of regionalism within the United Nations system.<sup>138</sup> Further, the United Nations system recognises regional mechanisms necessary for the maintenance of, *inter alia*, peace and security.<sup>139</sup> Regionalism in the United Nations system plays a pivotal role as it ensures democracy in the decision-making process by member states in various UN structures, such as the General Assembly which is the body’s chief deliberative organ.<sup>140</sup>

The AU serves as an example of a regional organisation created by African states to, *inter alia*, promote the integration process of African states in order to enable them to participate

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<sup>133</sup> Ferreira-Snyman 2011 (44) *The Comparative and International Law Journal of Southern Africa* 364.

<sup>134</sup> Ferreira-Snyman 2011 (44) *The Comparative and International Law Journal of Southern Africa* 365.

<sup>135</sup> Ferreira-Snyman 2011 (44) *The Comparative and International Law Journal of Southern Africa* 365; Schreuer 1995 *European Journal of International Law* 479.

<sup>136</sup> Ferreira-Snyman 2011 (44) *The Comparative and International Law Journal of Southern Africa* 364; Schreuer 1995 *European Journal of International Law* 479.

<sup>137</sup> Ferreira-Snyman 2011 (44) *The Comparative and International Law Journal of Southern Africa* 365. For a detailed discussion about regionalism within the United Nations see, Schreuer 1995 *European Journal of International Law* 479-481.

<sup>138</sup> Ferreira-Snyman 2011 (44) *The Comparative and International Law Journal of Southern Africa* 365; Schreuer 1995 *European Journal of International Law* 480.

<sup>139</sup> Article 52(1) of the Charter of the United Nations.

<sup>140</sup> Ferreira-Snyman 2011 (44) *The Comparative and International Law Journal of Southern Africa* 364; Schreuer 1995 *European Journal of International Law* 479.

meaningfully in the global economy.<sup>141</sup> Further, the motive behind the establishment of the Southern African Development Coordination Conference (now SADC) in the 1980s by the independent countries of Southern Africa, was to reduce their economic dependence on the then apartheid South Africa.<sup>142</sup> This move represented a “peculiar experiment of economic regionalism in Africa”.<sup>143</sup> In addition, at a sub-regional level, the SADC was established and member states undertook to act in accordance with the principles of democracy, human rights and the rule of law.<sup>144</sup> The cooperation among SADC member states is further supported by the adoption of the Protocol on the Facilitation of Movement of Persons in SADC in 2005, the aim of which is to facilitate the free movement of people between countries in the region.<sup>145</sup> This Protocol shows the commitment of SADC member states whose undertakings involve the promotion of “inter-dependence and integration of our [SADC] national economies for the harmonious, balanced and equitable development of the region”.<sup>146</sup> Indeed, Madakufamba has correctly observed that there is a “need to involve ordinary citizens of the region centrally in the process of development and integration”.<sup>147</sup> There is little doubt that the relaxation of stringent border entry requirements impact on state sovereignty as people from the entire SADC region will eventually be able to move freely between SADC member states. In addition, it is submitted that the commitment of member states to act in accordance with the principles of human rights, democracy, and the rule of law entitles any SADC member state to call on other SADC states to observe and respect these principles. This is supported by SADC’s decision to discuss the violence inflicted on opposition parties in Zimbabwe during the 2000 parliamentary elections.<sup>148</sup> It is in this regard that Fawcett has stated that the “regional momentum has proved unstoppable, constantly extending into new and diverse domains”.<sup>149</sup> Indeed, cooperation entails working

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<sup>141</sup> Article 3 of the Constitutive Act of the African Union, OAU Doc CAB/LEG/23.15, entered into force 26 May 2001 (hereafter the Constitutive Act).

<sup>142</sup> Pallotti 2013 (35) *Strategic Review for Southern Africa* 25.

<sup>143</sup> Pallotti 2013 (35) *Strategic Review for Southern Africa* 25.

<sup>144</sup> Article 4(c) of the Treaty of the Southern African Development Community available at [http://www.sadc.int/files/9113/5292/9434/SADC\\_Treaty.pdf](http://www.sadc.int/files/9113/5292/9434/SADC_Treaty.pdf) (Date of use: 20 April 2014).

<sup>145</sup> The Protocol on the Facilitation of Movement of Persons in SADC is not yet operational but SADC citizens are now free to move without a visa among all SADC member states. The full document is available at <http://www.sadc.int/documents-publications/show/800> (Date of use: 20 April 2014).

<sup>146</sup> Preamble to the Treaty of the Southern African Development Community (hereafter the SADC Treaty). To be found at <http://www.sadc.int/documents-publications/sadc-treaty/> (Date of use: 27 April 2014).

<sup>147</sup> Madakufamba M “Cross-border movement of people” available at <http://www.sardc.net/editorial/sadctoday/view.asp?vol=220&pubno=v8n4> (Date of use: 20 April 2014).

<sup>148</sup> Pallotti 2013 (35) *Strategic Review for Southern Africa* 31.

<sup>149</sup> Fawcett 2004 (80) *International Affairs* 429, 431.

together in areas of mutual concern, including matters that were initially perceived as falling squarely within the competence of the sovereign state and which tolerated no external interference.<sup>150</sup>

Globalisation or a global world has become one of the most common terms in our current lexicon.<sup>151</sup> It is said that there is a growing “interconnection and interdependence” between all countries of the world.<sup>152</sup> Writing on the “values for the global neighbourhood” or global world, Karatoprak and Tamsen have reported that there is a greater need for cooperation among global citizens in order to uphold peace and to protect the environment,<sup>153</sup> as global concerns which require the attention of world citizenry if they are to be resolved for the betterment of the international community and mankind.<sup>154</sup> The authors have also stated that security concerns have gone beyond “state issues to include the security of the people” which is threatened by factors such as terrorism.<sup>155</sup> Some writers have even gone so far as to suggest that all national societies will merge into one global village because of their interdependence on one another.<sup>156</sup> Henkin correctly indicates that the “global economy is slowly replacing and overwhelming national and regional economies”.<sup>157</sup> Further, companies that are created in one country may have their principal headquarters in another. They also have branches and subsidiaries in various countries.<sup>158</sup> Henkin therefore asks a relevant question when he enquires: “What is globalization doing, or what has it done to that concept of sovereignty?”<sup>159</sup> International trade

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<sup>150</sup> Ferreira-Snyman 2011 (44) *The Comparative and International Law Journal of Southern Africa* 367-368.

<sup>151</sup> Teubner “Global Bukowina” 3.

<sup>152</sup> Staden and Vollaard “The erosion of state sovereignty” 166, 168; Ferreira-Snyman 2006 (12-2) *Fundamina: A Journal of Legal History* 1; Antonov <http://dx.doi.org/10.2139/ssrn.2309369> (Date of use: 13 October 2013).

<sup>153</sup> Karatoprak A and Tamsen B *Our Global Neighbourhood: The Report of the Commission on Global Governance* available at <http://www.centerforunreform.org/?q=node/216> (Date of use: 23 March 2015).

<sup>154</sup> Karatoprak and Tamsen <http://www.centerforunreform.org/?q=node/216> (Date of use: 23 March 2015).

<sup>155</sup> Karatoprak and Tamsen <http://www.centerforunreform.org/?q=node/216> (Date of use: 23 March 2015). See also Nagan and Hammer 2004 (43) *Columbia Journal of Transnational Law* 170; Baldry R “Is terrorism the greatest threat to security today?” available at [http://www.academia.edu/6412281/Is\\_terrorism\\_the\\_greatest\\_threat\\_to\\_security\\_today](http://www.academia.edu/6412281/Is_terrorism_the_greatest_threat_to_security_today) (Date of use: 23 March 2015).

<sup>156</sup> Teubner “Global Bukowina” 3.

<sup>157</sup> Henkin 1995-1996 (25) *Georgia Journal of International and Comparative Law* 5.

<sup>158</sup> Henkin 1995-1996 (25) *Georgia Journal of International and Comparative Law* 5.

<sup>159</sup> Henkin 1995-1996 (25) *Georgia Journal of International and Comparative Law* 5.

has also arguably forced states to take an interest in other states for various reasons.<sup>160</sup>

Akindele *et al* have said of the impact of globalisation on African states:

[G]lobalisation is an awesome and terrifying phenomenon for African countries ... Its universalization of communication, mass production, market exchanges and redistribution, rather than engendering new ideas and developmental orientation in Africa, subverts its autonomy and powers of self-determination. It is rather by design than by accident that poverty has become a major institution in Africa despite this continent's stupendous resources ... Nation-states in Africa today, rarely define the rules and regulations of their economy, production, credits and exchanges of goods and services due to the rampaging menace of globalisation. They are hardly now capable of volitionally managing their political, economic and socio-cultural development. Globalisation has imposed heavy constraints on the internal management dynamics of most if not all the polities in Africa ....<sup>161</sup>

The forces of globalisation identified above, arguably limit the ability of states freely to make their own decisions without taking global economic issues into account. It is therefore submitted that the concept of sovereignty as understood in the traditional sense, is gradually being eroded by internationalisation.<sup>162</sup>

Inter-state relations have resulted in the establishment of specialised institutions such as the SADC which have become "obvious and typical vehicles for interstate cooperation".<sup>163</sup> Therefore, where the need for cooperation in various spheres has given rise to the establishment of international organisations and courts, such as the SADC and the International Criminal Court,<sup>164</sup> member states are regarded as having "accepted obligations and considerable limitations on their powers and liberties which were a consequence of their sovereign character".<sup>165</sup> From the above discussion, it is clear that the notions of regionalism and globalisation are increasingly restricting state sovereignty.<sup>166</sup>

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<sup>160</sup> Dugard *International Law* 146.

<sup>161</sup> Akindle ST "Globalisation, its implications and consequences for Africa" available at <http://www.postcolonialweb.org/africa/akindele1d.html> (Date of use: 28 October 2013).

<sup>162</sup> Ferreira-Snyman 2006 (12-2) *Fundamina: A Journal of Legal History* 1.

<sup>163</sup> Klabbers J *International Institutional Law* 28.

<sup>164</sup> Even though the International Criminal Court has jurisdiction over states party to the Rome Statute of the International Criminal Court (Rome Statute), the UN SC may make a referral to the court and this has been done in cases such as Sudan (North Sudan). States can therefore not rely on sovereignty or on the fact that they have not ratified the Rome Statute. Sovereignty is accordingly limited. See Phooko 2011 (1) *Notre Dame Journal of International, Comparative and Human Rights Law* 186, 187 and 196.

<sup>165</sup> Amerasinghe *Principles of Institutional Law* 8.

<sup>166</sup> Ferreira-Snyman 2011 (44) *The Comparative and International Law Journal of Southern Africa* 363.

### 2.3 Human rights

The human rights atrocities of the Second World War have fundamentally affected the understanding of sovereignty under traditional international law. Sovereignty is now a changed concept that needs to be aligned with modern developments. Unlike the position before 1945, how a state treats its citizens in its own territory is no longer regarded as a purely domestic issue.<sup>167</sup> Individuals are now also subjects of international law who possess rights that are deserving of protection.<sup>168</sup> In Ferreira-Snyman's words, "[t]he idea of absolute sovereignty is in many respects an outdated concept in modern international law" for various reasons, not least human rights.<sup>169</sup>

The gross violations of human rights committed during the Second World War resulted in the international community agreeing that states should be held responsible and accountable for crimes that they commit in their territories.<sup>170</sup> Accountability is important as states can no longer treat their people as objects. Therefore, states must act in a way that protects their citizens' rights. In other words, states should never be allowed to commit gross violations of human rights and hide behind the veil of state sovereignty. This is confirmed by the decision of the ICTY in *Prosecutor v Tadic*,<sup>171</sup> where the appellant challenged the establishment of the tribunal to adjudicate crimes committed in his country. According to the appellant, the tribunal was created to "invade an area essentially within the domestic jurisdiction of States" and thus violate the principle of state sovereignty.<sup>172</sup> In response to this contention, the ICTY held that

...[i]t would be a travesty of law and a betrayal of the universal need for justice, should the concept of State sovereignty be allowed to be raised successfully against human rights. Borders should not be considered as a shield against the reach of the law and as a protection for those who trample underfoot the most elementary rights of humanity...<sup>173</sup>

This statement indicates clearly that the importance to protect and promote human rights has eroded the traditional international law perception of state sovereignty. A state, therefore, should

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<sup>167</sup> Ferreira-Snyman *The Erosion of State Sovereignty* 57; Henkin 1999-2000 (68) *Fordham Law Review* 4; Ferreira-Snyman 2006 (12) *Fundamina: A Journal of Legal History* 1.

<sup>168</sup> Henkin 1999-2000 (68) *Fordham Law Review* 4, 8.

<sup>169</sup> Ferreira-Snyman 2006 (12) *Fundamina: A Journal of Legal History* 1.

<sup>170</sup> Kearns 2000-2001 (25) *Nova Law Review* 504.

<sup>171</sup> Decision on Jurisdiction (Appeals Chamber), Judgment of 2 October 1995, 105 ILR 453.

<sup>172</sup> Decision on Jurisdiction (Appeals Chamber), Judgment of 2 October 1995, 105 ILR 453 at para 55.

<sup>173</sup> Decision on Jurisdiction (Appeals Chamber), Judgment of 2 October 1995, 105 ILR 453 at para 58.

be able to protect its citizens within, and arguably also outside of, its territory.<sup>174</sup> It is in this regard that a “state sovereignty-oriented approach has been gradually supplanted by a human-being-oriented approach”.<sup>175</sup> The adoption of numerous human rights treaties (including the so-called International Bill of Rights<sup>176</sup>) after the Second World War is a clear indication that human rights now top the international law agenda.

The adoption of the Universal Declaration of Human Rights (UDHR) by the international community further evidenced a surrender of sovereignty in that countries accepted international human rights standards as set out in the Declaration.<sup>177</sup> In other words, states have chosen to replace “their own once-sovereign standards” with those set up by the international community and contained in the UDHR. The UDHR’s main objective is to set a common standard for the global achievement and protection of human rights.<sup>178</sup> Today certain rights in the UDHR, such as the right to protection from racial discrimination, have attained the status of customary international law and are binding on all states.<sup>179</sup> Further, many other rights set out in the UDHR have been translated into binding obligations in the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights.<sup>180</sup> Therefore, state sovereignty is being limited. In addition, most states today embrace the idea of human rights and are party to various international,<sup>181</sup> regional,<sup>182</sup> and sub-regional<sup>183</sup> human rights

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<sup>174</sup> Etzioni 2006 (1) *Orbis* 71; Falk “Sovereignty and human dignity” 697.

<sup>175</sup> Decision on Jurisdiction (Appeals Chamber), Judgment of 2 October 1995, 105 ILR 453 para 97.

<sup>176</sup> The International Covenant on Civil and Political Rights, GA res 2200A (XXI), 21 UN GAOR Supp (No 16) at 52, UN Doc A/6316 (1966), 999 UNTS 171, entered into force 23 March 1976; International Covenant on Economic, Social and Cultural Rights, GA res 2200A (XXI), 21 UN GAOR Supp (No 16) at 49, UN Doc A/6316 (1966), 993 UNTS 3, entered into force 3 January 1976 and the Universal Declaration of Human Rights GA Res 217A (III), UN Doc A/810 (1948).

<sup>177</sup> Universal Declaration of Human Rights at 71.

<sup>178</sup> Preamble to the UDHR.

<sup>179</sup> Reisman 1990 (84) *The American Journal of International Law* 866; Henkin 1999-2000 (68) *Fordham Law Review* 4; Henkin 1995-1996 (25) *Georgia Journal of International and Comparative Law* 32.

<sup>180</sup> Kaczorowska-Ireland *Public International Law* 515.

<sup>181</sup> See, for example, the International Covenant on Civil and Political Rights, GA res 2200A (XXI), 21 UN GAOR Supp (No 16) at 52, UN Doc A/6316 (1966), 999 UNTS 171, entered into force 23 March 1976; International Covenant on Economic, Social and Cultural Rights, GA res 2200A (XXI), 21 UN GAOR Supp (No 16) at 49, UN Doc A/6316 (1966), 993 UNTS 3, entered into force 3 January 1976; Convention on the Elimination of All Forms of Discrimination against Women, GA res 34/180, 34 UN GAOR Supp (No 46) at 193, UN Doc A/34/46, entered into force 3 September 1981; Slavery, Servitude, Forced Labour and Similar Institutions and Practices Convention of 1926 (Slavery Convention of 1926), 60 LNTS 253, entered into force 9 March 1927; Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, GA res 39/46, [annex, 39 UN GAOR Supp (No 51) at 197, UN Doc A/39/51 (1984), entered into force 26 June 1987; Convention on the Rights of the Child, GA res 44/25,

treaties. They have assumed treaty obligations and submit periodic reports to the relevant treaty bodies. This shows that they are now accountable for how they treat their citizens within their jurisdictions. It is submitted that through voluntarily signing and accepting to abide by international human rights standards contained in various treaties, states have relinquished certain aspects of their sovereignty.

#### 2.4 *The role of jus cogens and obligations erga omnes*

It is imperative to note at the outset that the SADC Tribunal does not enjoy criminal or universal jurisdiction<sup>184</sup> to adjudicate crimes such as genocide.<sup>185</sup> These crimes can only be heard by courts with the necessary criminal jurisdiction, such as the International Criminal Court.

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annex, 44 UN GAOR Supp (No 49) at 167, UN Doc A/44/49 (1989), entered into force 2 September 1990; Geneva Convention relative to the Treatment of Prisoners of War, 75 UNTS 135, entered into force 21 October 1950; Geneva Convention relative to the Protection of Civilian Persons in Time of War, 75 UNTS 287, entered into force 21 October 1950; International Convention on the Suppression and Punishment of the Crime of Apartheid, GA res 3068 (XXVIII), 28 UN GAOR Supp (No 30) at 75, UN Doc A/9030 (1974), 1015 UNTS 243, entered into force 18 July 1976; Convention concerning the Protection of Wages (ILO No 95), entered into force 24 September 1952; Convention concerning Indigenous and Tribal Peoples in Independent Countries (ILO No 169), 72 ILO Official Bull 59, entered into force 5 September 1991.

<sup>182</sup> See for example, the African Charter on the Rights and Welfare of the Child, OAU Doc CAB/LEG/24.9/49 (1990), entered into force 29 November 1999; Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, adopted by the 2nd Ordinary Session of the Assembly of the Union, Maputo, CAB/LEG/66.6 (Sept 13, 2000); reprinted in *African Human Rights Law Journal* 40, entered into force 25 November 2005; African [Banjul] Charter on Human and Peoples' Rights, adopted June 27, 1981, OAU Doc CAB/LEG/67/3 rev 5, 1982 (21) *ILM* 58, entered into force 21 October 1986; Convention for the Protection of Human Rights and Fundamental Freedoms, 213 UNTS 222, entered into force 3 September 1953, as amended by Protocols Nos 3, 5, 8, and 11 which entered into force on 21 September 1970, 20 December 1971, 1 January 1990, and 1 November 1998 respectively; the New Partnership for Africa's Development (NEPAD) 2001.

<sup>183</sup> See for example, the SADC Protocol on Education and Training (1997/2000); SADC Social Charter (2003/2003); SADC Principles and Guidelines Governing Democratic Elections (2004); SADC Protocol on Health (1999/2004); Treaty of the Southern African Development Community (1992/1993).

<sup>184</sup> Universal jurisdiction is a controversial issue under international law. For example, in the matter between the *Democratic Republic of the Congo v Belgium*, Judgment, 2002 ICJ Reports 3. Some of the judges were of the view that it can only be exercised over piracy, war crimes and genocide. Whereas other judges found that universal jurisdiction was unknown under international law save for the crime of piracy. At the very least, it has been accepted that all states have an interest in combating piracy and crimes giving rise to universal jurisdiction. In other words, it is immaterial in whose sovereignty/territory the crime was committed, it must be punished. It is submitted that this on its own is eroding state sovereignty.

<sup>185</sup> There are, however, proposals to extend the powers of the African Court on Human and Peoples' Rights to handle international crimes. See Menya W "Africa: Leaders' summit to discuss regional war crimes court" available at <http://allafrica.com/stories/201301231408.html> (Date of use: 10 February 2013).



Therefore, *jus cogens* norms are discussed only as an illustration that states can no longer hide behind their sovereignty in order to prevent external intervention where gross human rights violations have occurred.

*Jus cogens* norms are peremptory rules of general international law from which no derogation is permissible.<sup>186</sup> The effect of *jus cogens* norms is that states are bound to observe them.<sup>187</sup> The violation of the obligations flowing from a peremptory norm gives rise to a legal interest for other states to have the *jus cogens* norm respected.<sup>188</sup> In cases of conflict between *jus cogens* norms and other general rules of international law, *jus cogens* norms prevail over those other rules.<sup>189</sup> It is therefore evident that sovereignty is being limited by higher norms.<sup>190</sup>

Traditionally, international law was based on the premise that it is a body of law created by consenting states in order to regulate relations between states.<sup>191</sup> The then narrow understanding of international law failed to take into account that the international community also accords certain human rights and norms special status within the international law setting.<sup>192</sup> However, over the years, the international community has accepted that there are norms, such as *jus cogens*, that now compete with the “sovereignty norm of primacy”.<sup>193</sup> For example, there is widespread acceptance that the prohibition on torture<sup>194</sup> and genocide<sup>195</sup> have risen to the level of *jus cogens* norms which constitute *erga omnes* duties.<sup>196</sup> These norms do

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<sup>186</sup> Article 53 of the Vienna Convention on the Law of Treaties 1969 provides “... a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as 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.” See also Byers 1997 (66) *Nordic Journal of International Law* 211; Talmon 2012 (25) *Leiden Journal of International Law* 986. For a detailed discussion on the origin and nature of *jus cogens* and *erga omnes* norms, see Ferreira-Snyman *The Erosion of State Sovereignty* 226-233.

<sup>187</sup> Ferreira-Snyman *The Erosion of State Sovereignty* 226; Zenovic P “Human rights enforcement via peremptory norms – A challenge to state sovereignty” available at [http://www.rgsl.edu.lv/uploads/files/RP\\_6\\_Zenovic\\_final.pdf](http://www.rgsl.edu.lv/uploads/files/RP_6_Zenovic_final.pdf) (Date of use: 21 April 2014).

<sup>188</sup> Talmon 2012 (25) *Leiden Journal of International Law* 995; Ferreira-Snyman *The Erosion of State Sovereignty* 226.

<sup>189</sup> Byers 1997 (66) *Nordic Journal of International Law* 211, 213.

<sup>190</sup> Ferreira-Snyman *The Erosion of State Sovereignty* 227; Byers 1997 (66) *Nordic Journal of International Law* 213.

<sup>191</sup> Dugard *International Law* 38.

<sup>192</sup> Dugard *International Law* 38.

<sup>193</sup> Bassiouni 1996 (59) *Law and Contemporary Problems* 63; Dugard *International Law* 38.

<sup>194</sup> Henkin 1995-1996 (25) *Georgia Journal of International and Comparative Law* 38-39; Ruddick 1997 (77) *Boston University Law Review* 429.

<sup>195</sup> Dugard *International Law* 38.

<sup>196</sup> Bassiouni 1996 (59) *Law and Contemporary Problems* 63. See art 53 of the Vienna Convention on the Law of Treaties, 23 May 1969, entered into force, 27 January 1980, available at

not require state consent and, it is said, enjoy a higher status in international law.<sup>197</sup> As was stated by the ICTY in *Prosecutor v Anto Furundzija*, a norm against torture is *jus cogens* “because of the importance of the values it protects”.<sup>198</sup>

In terms of article 53 of the Vienna Convention on the Law of Treaties, a *jus cogens* norm is a “peremptory norm of general international law”, that is

a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having similar character.<sup>199</sup>

A *jus cogens* norm thus also entails *erga omnes* duties for states – obligations owed not only to the victims, but to all states and the international community.<sup>200</sup> According to Posner “[e]rga omnes norms are those that give third-party states, rather than just the victim, legal claims against states that violate them”.<sup>201</sup> Each state, therefore, has a legal interest in their protection.<sup>202</sup> It is apparent that these obligations are “compelling” and binding on all states. Consequently, all states have an interest in protecting norms that have been accorded a special status in international law such as torture. To this end, the ICJ said the following in the *Barcelona Traction, Light and Power Company, Limited, Judgment* concerning *erga omnes* obligations:

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<sup>197</sup> [http://untreaty.un.org/ilc/texts/instruments/english/conventions/1\\_1\\_1969.pdf](http://untreaty.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf) (Date of use: 09 January 2013).  
Bianchi 1999 (10) *European Journal of International Law* 262; Ferreira-Snyman *The Erosion of State Sovereignty* 226, 227; Ferreira-Snyman correctly observes that some states are reluctant to accept the status of *jus cogens* norms such as torture as higher norms especially when they conflict with their own interests. She rightly refers to waterboarding used by the United States of America on terrorism suspects. Since the terrorist attacks in the United States of America on 11 September 2001, there has been an increased concern about torture of those suspected of terrorism – especially those held at Guantanamo Bay. For a full discussion on torture, see generally Bassiouni *The Institutionalization of Torture by the Bush Administration* 1.

<sup>198</sup> Case No IT-95-17/1-T, Appeal Judgment, 10 December 1998, para 153.

<sup>199</sup> See also Bassiouni 1996 (59) *Law and Contemporary Problems* 67; Criddle and Fox-Decent 2009 (34) *The Yale Journal of International Law* 331; Hossain 2005 (3) *Santa Clara Journal of International Law* 73. See also art 64 of the Vienna Convention on the Law of Treaties which provides that “[i]f a new peremptory norm of general international law emerges, any existing treaty which is in conflict with that norm becomes void and terminates”.

<sup>200</sup> Dugard *International Law* 12; UN Human Rights Committee, Gen Comment 31 para 2 provides that “the rules concerning the basic human rights of the human person are *erga omnes* obligations”. See <http://www.unhchr.ch/tbs/doc.nsf/0/58f5d4646e861359c1256ff600533f5f?Opendocument> (Date of use: 7 January 2013).

<sup>201</sup> Posner EA “*Erga omnes* norms, institutionalization, and constitutionalism in international law” available at <http://www.law.uchicago.edu/Lawecon/index.html> (Date of use: 09 January 2013); Byers 1997 (66) *Nordic Journal of International Law* 211.

<sup>202</sup> Dugard 1996 (8) *African Journal of International and Comparative Law* 549.

In particular, an essential distinction should be drawn between the obligations of a State towards the international community as a whole, and those arising vis-à-vis another State in the field of diplomatic protection. By their very nature the former are the concern of all States. In view of the importance of the rights involved, all States can be held to have a legal interest in their protection; they are obligations *erga omnes*.<sup>203</sup>

The ICJ, relying on its earlier decision,<sup>204</sup> further elaborated that *erga omnes* obligations originate in international law and especially from the “outlawing of acts of ... genocide, as also from the principles and rules concerning the basic rights of the human person.”<sup>205</sup> Accordingly, the violation of these norms “gives rise to a claim for compliance accruing to each and every member, which then has the right to insist on fulfilment of the obligation or in any case to call for the breach to be discontinued”.<sup>206</sup> With regard to torture and genocide, which have also attained the status of *jus cogens* norms, there is an obligation on all states not to grant impunity to the violators of these norms.<sup>207</sup>

Even though national,<sup>208</sup> regional,<sup>209</sup> and international courts have invoked *jus cogens* norms and pronounced on them, it was only recently in *Democratic Republic of the Congo v Rwanda*,<sup>210</sup> that the ICJ took the opportunity to endorse *jus cogens* norms. In this case, the Democratic Republic of Congo (DRC) approached the Court on the basis that Rwanda had, *inter alia*, allegedly committed gross violations of human rights and of international humanitarian law in the territory of the DRC. These rights, according to the DRC, constituted *jus cogens* norms and entitled the Court to hear the case. The DRC asked the Court to declare that Rwanda had violated human rights which are one of the goals of the United Nations Charter (maintenance of

<sup>203</sup> Advisory Opinion, 1970 ICJ Reports 6 at 33 (hereafter the *Barcelona* case).

<sup>204</sup> *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, Advisory Opinion, 1951 ICJ Reports 15 at 23.

<sup>205</sup> *Barcelona* case at para 34.

<sup>206</sup> *Prosecutor v Anto Furundzija (Trial Judgement)*, IT-95-17/1-T at para 1561.

<sup>207</sup> Bassiouni 1996 (59) *Law and Contemporary Problems* 66. *Jus cogens* norms gives rise to universal jurisdiction. However, this is a controversial issue under international law and there are divided opinions. For example, in the matter between the *Democratic Republic of the Congo v Belgium*, Judgment, 2002 ICJ Reports 3. Some of the judges in the case were of the view that universal jurisdiction can only be exercised over piracy, war crimes and genocide. Whereas other judges found that universal jurisdiction was unknown under international law save for the crime of piracy. See also Brown 2001 (35) *New England Law Review* 384; GA/L/3415 “Principle of ‘universal jurisdiction’ again divides Assembly’s Legal Committee Delegates; further guidance sought from International Law Commission” available at <http://www.un.org/press/en/2011/gal3415.doc.htm> (Date of use: 19 February 2016).

<sup>208</sup> See, *inter alia*, Bianchi 2005 (99) *The American Journal of International Law* 242.

<sup>209</sup> See, *inter alia*, Bartsch and Elberling 2003 (4) *German Law Journal* 477. The authors discuss various cases in which *jus cogens* norms were applied and upheld.

<sup>210</sup> *Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v Rwanda)*, Jurisdiction and Admissibility, Judgment, 2006 ICJ Reports 6.

international peace and security) and the Charter of the Organisation of African Unity (right to life and protection of the law).<sup>211</sup> Rwanda raised a preliminary objection and asked the Court to dismiss the DRC's applications as the Court lacked jurisdiction to entertain the case.<sup>212</sup> This was so because Rwanda had not consented to the Court's jurisdiction and had entered a reservation to article 9 of the Genocide Convention which empowers the ICJ, at the request of any of the parties to the dispute, to receive disputes between state parties as to the interpretation and application of the Genocide Convention.<sup>213</sup> The ICJ found that it had no jurisdiction to hear the case as Rwanda had not consented to its jurisdiction through the Genocide Convention. In the words of the Court, the mere fact that the rights affected are *jus cogens* norms such as genocide, "cannot of itself provide a basis for the jurisdiction of the Court to entertain that dispute" because jurisdiction is based on the consent of states.<sup>214</sup>

What is, however, significant is that this is the first instance in which the Court has recognised and accepted *jus cogens* norms.<sup>215</sup> In a separate opinion Judge *ad hoc* Dugard states:

This is the first occasion on which the International Court of Justice has given its support to the notion of *jus cogens*. It is strange that the Court has taken so long to reach this point because it has shown no hesitation in recognizing the notion of obligation *erga omnes*, which together with *jus cogens* affirms the normative hierarchy of international law.<sup>216</sup>

Indeed, this move is encouraging and further boosts the recognition and application of *jus cogens* norms. This was long overdue as the ICJ is the principal judicial organ of the United Nations which reflects the Court's authoritative deliberations on various significant issues of international law involving disputes between sovereign states. The importance of a decision by the court on any aspect of international law cannot be underestimated in the present global community.<sup>217</sup>

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<sup>211</sup> *Democratic Republic of Congo v Rwanda* at paras 11-12.

<sup>212</sup> *Democratic Republic of Congo v Rwanda* at para 12.

<sup>213</sup> *Democratic Republic of Congo v Rwanda* at paras 12, 60-61, 63, 69-70.

<sup>214</sup> *Democratic Republic of Congo v Rwanda* at para 64.

<sup>215</sup> *Democratic Republic of Congo v Rwanda* at para 64.

<sup>216</sup> Separate opinion of Judge *ad hoc* Dugard in the *Democratic Republic of Congo v Rwanda* at para 4.

<sup>217</sup> Greenwood JC "The role of the International Court of Justice in the global community" available at <http://jilp.law.ucdavis.edu/issues/Volume%2017.2/Greenwood%20-%20Final%20PDF.pdf> (Date of use: 21 October 2013).

The serious nature of *jus cogens* norms and obligations *erga omnes* cannot be gainsaid.<sup>218</sup> Their breach gives non-injured states the right to institute legal action against the violating state on behalf of the entire international community.<sup>219</sup> This route was previously seldom taken by states as they were, before the Second World War, reluctant to interfere in the domestic affairs of other states.<sup>220</sup> However, this is no longer the position. As discussed earlier, it is increasingly accepted that human rights cannot be regarded as a purely domestic matter. The requirement therefore for the international community to respect, protect and promote human rights in their territories challenges state sovereignty,<sup>221</sup> as it may be regarded as an infringement of article 2(1) of the Charter of the United Nations which requires member of the United Nations to act in accordance with the principle of the sovereign equality of all its members. There are, however, certain justifications for the prohibition of heinous crimes because of the commitment by members of the international community to protect and promote human rights.<sup>222</sup> Furthermore,

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<sup>218</sup> It must nonetheless be highlighted that *jus cogens* norms are difficult to establish and it is not clear how a certain rule qualifies as a *jus cogens* norm. The fact that these norms are established without state consent also creates a problem as other states are reluctant to accept them. Ferreira-Snyman gives an example in which former President Bush's Administration vetoed the American legislation that prohibited torture of those suspected of committing terrorism. See Ferreira-Snyman *The Erosion of State Sovereignty* 229.

<sup>219</sup> Ferreira-Snyman *The Erosion of State Sovereignty* 229.

<sup>220</sup> Ferreira and Ferreira-Snyman 2005 (38) *The Comparative and International Law Journal of Southern Africa* 158.

<sup>221</sup> Sriram CL "Human rights claims vs. the state: Is sovereignty really eroding?" available at [http://digitalcommons.law.umaryland.edu/cgi/viewcontent.cgi?article=1005&context=fac\\_pubs](http://digitalcommons.law.umaryland.edu/cgi/viewcontent.cgi?article=1005&context=fac_pubs) (Date of use: 24 March 2015).

<sup>222</sup> Ferreira-Snyman *The Erosion of State Sovereignty* 205-206. Academics, Heads of State, and Governments have expressed divergent ideologies on the universality of human rights. For example, some scholars note that the change to the then proposed "International Declaration of Human Rights" better shows the universal nature of the rights contained therein. Others have noted that although the UDHR was merely a declaration that contained certain aspirations of the international community to protect and promote human rights, it has now become a very influential political document in the entire world the authority of which binds all states. Further, some of the rights contained in the UDHR have attained the status of customary international law through usage and practice. Others have gone to the extent of expressing the view that all states accept the authority of the UDHR in so far as the meaning of rights and international relations are concerned. When it comes to states, some states are of the opinion that rights such as the right to equality and freedom of speech display a universal character when it comes to their general content. They see human rights as claims and entitlements to which every human being is entitled by virtue of birth. They are not gifts from a government, but are inherent in every individual. These rights precede any state structure. Accordingly, they must be respected and applied by governments equally without distinction relating to cultural differences between states. On the other side, some states view human rights as relative because they are rooted in and dependent on a specific cultural context. This is because some nations register certain reservations to some human rights treaties because of cultural diversity. To this end, human rights exist in society and the state only to the extent that the concerned state specifically recognises the rights concerned. The state thus accords its citizens these rights but limits them as it wishes in line with its laws. From the African cultural perspective, even though one school of

the fact that some human rights have attained the status of *jus cogens* or *erga omnes* norms shows a significant “development in the process of universalizing human rights”.<sup>223</sup>

Instead of punishing those responsible for human rights violations, some third party states have rather opted for avenues of conflict resolution other than prosecution, so promoting impunity in the process. For example, the AU has adopted a conciliatory approach, for example negotiation, in dealing with the current Sudanese President who is allegedly responsible for war crimes and crimes against humanity.<sup>224</sup> The SADC countries, have also taken a moderate approach to the Government of Zimbabwe for its alleged human rights abuses in Zimbabwe. Even if this is the case, Ferreira and Ferreira-Snyman have correctly stated that although states are usually not comfortable to litigate against (or investigate) other states to enforce a human rights treaty, it does not follow that it is legally impossible to do so.<sup>225</sup> For example, in *National Commissioner of The South African Police Service v Southern African Human Rights Litigation Centre and Another*,<sup>226</sup> the Constitutional Court of South Africa was asked to determine whether South Africa’s international and domestic obligations imposed a duty on the South African Police Service to investigate allegations of torture committed by Zimbabwean police against Zimbabwean nationals in Zimbabwe? The Court found that there was indeed such a duty and held that “the duty to combat torture travels beyond the borders of Zimbabwe”.<sup>227</sup> It further indicated that torture is a crime against humanity and that under customary international law all states have an interest in combatting it.<sup>228</sup> Additionally, the Court held that: “South Africa may, through universal jurisdiction” take measures to investigate the alleged perpetrators with a view

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thought recognises the universality of basic human rights, there are those who argue for a unique concept of African human rights. In contrast, the other school of thought questions the Western approach to the universality of human rights as it is based on state-individual human rights. This is so because in Africa, more emphasis is placed on the collectivist approach to rights and duties compared to the Western individual-state human rights approach. For a detailed discussion of this aspect, see, *inter alia*, Ferreira-Snyman *The Erosion of State Sovereignty* 205-217; Robbins 2005 (35) *California Western International Law Journal* 280, 283-284; Donnelly 2007 (29) *Human Rights Quarterly* 280, 283-284, 285, 290-291; Brems *Universality and Diversity* 27, 476; Cassese *Human Rights in a Changing World* 48.

<sup>223</sup> Ferreira-Snyman *The Erosion of State Sovereignty* 217.

<sup>224</sup> Assembly/AU/Dec.296(XV) 5, July 27, 2010, available at <http://www.dirco.gov.za/diaspora/docs/audecision/summitJul2010Decisions.pdf> (Date of use: 09 January 2012).

<sup>225</sup> Ferreira and Ferreira-Snyman 2005 (38) *The Comparative and International Law Journal of Southern Africa* 158.

<sup>226</sup> 2015 (1) SA 315 (CC).

<sup>227</sup> *The South African Police Service v Southern African Human Rights Litigation Centre and Another* at para 49.

<sup>228</sup> *The South African Police Service v Southern African Human Rights Litigation Centre and Another* at para 49.

to prosecution.<sup>229</sup> The South African Police Service was consequently instructed to investigate the complaints of alleged torture. This is an important decision as it indicates that international law does permit allegations of torture to be investigated regardless of where they have been committed. In addition, the fact that the AU has initiated the negotiation process in Zimbabwe and elsewhere to restore peace, is testimony that other states are concerned and prepared to intervene. It is therefore not an issue of exclusive concern to Zimbabwe but implicates the international community as a whole. Consequently, as the international prohibition on torture and genocide have already attained the status of *jus cogens* norms which entail *erga omnes* obligations, states are obliged to respect these norms without having consented to them. It is submitted that this is a significant limitation on state sovereignty.

## 2.5. Humanitarian intervention

### 2.5.1 Humanitarian intervention with the approval of the UN SC

As stated earlier in the discussion, article 2(7) of the Charter of the United Nations prohibits Members of the United Nations from interfering in the domestic affairs of other states. However, articles 40, 41 and 43 of the Charter of the United Nations, which authorises the UN SC to take measures that may include entering the territory of another state in order to restore peace, are an exception to the principle of non-intervention. The basis for this is that Members of the United Nations have a collective international responsibility through the UN SC to maintain international peace and security. This means that sovereignty or the principle of non-intervention cannot be used to pre-empt an action that has been approved by the UN SC to deter conduct that is a threat to international peace.<sup>230</sup> It therefore follows that an action taken by the UN SC under article 39<sup>231</sup> of the Charter of the United Nations will erode state sovereignty. Indeed, the UN SC has over the years taken various measures which allow (or allowed) its troops to enter a sovereign state with the aim of responding to gross violations of human rights. One of the examples is the UN SC resolution that authorised external intervention through member states

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<sup>229</sup> *The South African Police Service v Southern African Human Rights Litigation Centre and Another* at para 49.

<sup>230</sup> International Commission on Intervention and State Sovereignty “The Responsibility to Protect” Supplementary Volume to the Report of the International Commission on Intervention and State Sovereignty 6-7.

<sup>231</sup> Article 39 provides that “[t]he Security Council shall determine the existence of any threat to the peace, breach of the peace, ... and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security”.

in Libya to protect civilians whose rights were being violated by the government.<sup>232</sup> The reality is however that at times the UN SC fails to act in instances where gross human rights violations are committed. The genocide in Rwanda which the UN SC failed to prevent through intervention in Rwanda is a case in point.<sup>233</sup>

## 2.5.2 Humanitarian intervention without the approval of the UN SC

The violation of human rights in Rwanda, Darfur, Sudan, East Timor and Kosovo, amongst others, has led to debate among legal scholars as to whether there is a right of humanitarian intervention without the necessary authorisation from the UN SC.<sup>234</sup> One of the concerns is that unilateral humanitarian intervention may be open to abuse as states might hide behind the banner of humanitarian intervention to wage war on other states for ulterior motives.<sup>235</sup> Generally, international law prohibits the use of force against another state,<sup>236</sup> for any reason including to rescue victims of human rights violations, save when the intervening state is acting in self-defence.<sup>237</sup>

The Charter of the United Nations requires the United Nations and its members, when pursuing the purposes of the Organisation – for example the maintenance of international peace and security – to act in accordance with the principle of the sovereign equality of all members.<sup>238</sup>

This could be read as implying that all states are sovereign and equal irrespective of their size or wealth. However, in reality this is not the case as some states are more powerful in terms of resources than other states. It is submitted that as a general rule, and no matter how small or how wealthy states are, their sovereignty should be protected and that there should be no

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<sup>232</sup> S/RES/1973 (2011), adopted by the Security Council at its 6498th meeting on 17 March 2011, available at [http://www.un.org/en/ga/search/view\\_doc.asp?symbol=S/RES/1973\(2011\)](http://www.un.org/en/ga/search/view_doc.asp?symbol=S/RES/1973(2011)) (Date of use: 28 October 2013).

<sup>233</sup> Dowell A “The international community and intervention in cases of genocide” available at <http://www.polis.leeds.ac.uk/assets/files/students/student-journal/amy-dowell-summer-09.pdf> (Date of use: 15 April 2014).

<sup>234</sup> Article 42 of the United Nations Charter; Ferreira-Snyman *The Erosion of State Sovereignty* 256; Greenwood 2002 (10) *Finnish Yearbook of International Law* 141; Goodman 2006 (100) *American Journal of International Law* 107; Arias 1999 (23) *Fordham Law Review* 1005; Kioko 2003 (85) *International Review of the Red Cross* 808.

<sup>235</sup> Goodman 2006 (100) *American Journal of International Law* 111.

<sup>236</sup> Article 2(4) of the Charter of the United Nations.

<sup>237</sup> Article 51 of the Charter of the United Nations. See the *Nicaragua* judgment at para 268 where the ICJ concluded that the use of force by the USA against Nicaragua to foster respect for human rights did not justify the conduct of the USA. See Arias 1999 (23) *Fordham Law Review* 1011-1012.

<sup>238</sup> Article 1 of the Charter of the United Nations.



external interference without the approval of the UN SC. Although not legal,<sup>239</sup> humanitarian intervention may be at least legitimate under certain circumstances to protect civilians such as in the case of Kosovo.<sup>240</sup> Humanitarian intervention can be traced from the writings of Hugo Grotius during the 19<sup>th</sup> Century in which he advocated that foreign state may enter the territory of another because of the former state's failure to protect its citizens.<sup>241</sup> For example, during the 1800s some European states intervened in the Ottoman Empire to end the killings of Christian civilians.<sup>242</sup> It was only after the 1840s that humanitarian intervention appeared in international legal writings and gradually became one of the topical issues in international law.<sup>243</sup> It has become difficult for certain individual states to sit by and watch another state committing gross human rights violations against its people. There is, therefore, an emerging trend, based on a moral justification, to allow states or international organisations to intervene in another state for humanitarian reasons.<sup>244</sup> On an international level, this practice was illustrated by NATO's humanitarian intervention in Kosovo.<sup>245</sup> An example of such intervention specifically in the SADC region, is the 1998 military intervention on humanitarian grounds in Lesotho by South Africa and Botswana in order to prevent a *coup* and possible violation of human rights.<sup>246</sup> Humanitarian intervention has also been undertaken by the Economic Community of West African States in both Liberia and Sierra Leone to stop the violations of human rights.<sup>247</sup> The

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<sup>239</sup> Many governments remain opposed to the principle of humanitarian intervention without the authority of the UNSC. See in this regard Press Release GA/SPD/164 "Humanitarian intervention', slow reimbursement rates assailed as special committee reviews peacekeeping operations" available at <http://www.un.org/news/Press/docs/1999/19991018.gaspd164.doc.html> (Date of use: 23 March 2015). See also para 54 of the Declaration of the South Summit adopted in 2000 where Heads of State and Government of the member countries of the Group of 77 and China said that they "... reject the so-called 'right' of humanitarian intervention, which has no legal basis in the United Nations Charter or in the general principles of international law". The Declaration is available at [http://www.g77.org/summit/Declaration\\_G77Summit.htm](http://www.g77.org/summit/Declaration_G77Summit.htm) (Date of use: 23 March 2015).

<sup>240</sup> Greenwood 1999 (10) *Finnish Yearbook of International Law* 161-162. See also Goodman 2006 (100) *The American Journal of International Law* 108 where he concedes that "...the consensus of opinion among governments and jurists favors requiring Security Council approval for humanitarian intervention".

<sup>241</sup> O' Donnell 2014 (24) *Duke Journal of Comparative and International Law* 559; Quinn *The Responsibility to Protect* 6.

<sup>242</sup> O' Donnell 2014 (24) *Duke Journal of Comparative and International Law* 559.

<sup>243</sup> Quinn *The Responsibility to Protect* 6.

<sup>244</sup> See, *inter alia*, Goodman 2006 (100) *American Journal of International Law* 112; Van der Vyver 2003 (28) *South African Yearbook of International Law* 6-7; Arias 1999 (23) *Fordham Law Review* 1006.

<sup>245</sup> Greenwood 2002 (X) *Finnish Yearbook of International Law* 141.

<sup>246</sup> Likoti FK "The 1998 military intervention in Lesotho: SADC Peace Mission or resources war?" 2007 (14) *International Peace Keeping* 251.

<sup>247</sup> Goodman 2006 (100) *American Journal of International Law* 112.

intervention was carried out under articles 2 and 3 of the Protocol Relating to Mutual Assistance on Defence which sought to prevent political unrest that had the potential to constitute a threat against the entire Economic Community of West African States.<sup>248</sup>

A further example of intervention for humanitarian purposes emerges from *Bishop Rubin Phillip and Another v National Conventional Arms Control Committee and Another*<sup>249</sup> instituted by concerned South African citizens to prevent the transportation of arms via the Indian Ocean from the Durban Harbour to Zimbabwe.<sup>250</sup> The applicant's concerns were that the weapons were destined for use against civilians "for internal repression or suppression of human rights and fundamental freedoms".<sup>251</sup> Even before 1945, on various occasions states took action and intervened in other states in order to prevent gross violations of human rights.<sup>252</sup> It is submitted that humanitarian intervention, depending on the circumstances of each situation (such as that of Kosovo), may be justifiable to prevent a human catastrophe.<sup>253</sup> The international community should not watch a state killing its own citizens when there is a process available allowing intervention to protect human rights.<sup>254</sup> It is submitted that the examples above show that state sovereignty is increasingly being eroded because of the need to restore international peace and to protect human rights. Accordingly, the traditional view of state sovereignty as absolute can no longer stand, as the issue of humanitarian intervention clearly indicates.<sup>255</sup>

The moral justification for humanitarian intervention may be attributed to the belief of the international community that it has a responsibility to protect. In recent years, the doctrine of the "Responsibility to Protect" has emerged in international law in terms of which the international

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<sup>248</sup> The Protocol Relating to Mutual Assistance on Defence of 29 May 1981 available at [http://www.iss.co.za/AF/RegOrg/unity\\_to\\_union/pdfs/ecowas/13ProtMutualDefAss.pdf](http://www.iss.co.za/AF/RegOrg/unity_to_union/pdfs/ecowas/13ProtMutualDefAss.pdf) (Date of use: 17 May 2016).

<sup>249</sup> Case No 4975/08 Durban and Coast Local Division, High Court, Order granted 18 April 2008 (unreported).

<sup>250</sup> For a detailed discussion, see Ferreira-Snyman *The Erosion of State Sovereignty in Public International Law: Towards a World Law?* 258-264. See also Du Plessis 2008 (17) *African Security Review* 23-27.

<sup>251</sup> Ferreira-Snyman *The Erosion of State Sovereignty in Public International Law: Towards a World Law?* 258. See also Du Plessis 2008 (17) *African Security Review* 17-29.

<sup>252</sup> Ferreira-Snyman *The Erosion of State Sovereignty in Public International Law: Towards a World Law?* 257.

<sup>253</sup> Pattison J "Legitimacy and humanitarian intervention: Who should intervene?" available at [http://www.academia.edu/152180/Legitimacy\\_and\\_Humanitarian\\_Intervention\\_Who\\_Should\\_Intervene](http://www.academia.edu/152180/Legitimacy_and_Humanitarian_Intervention_Who_Should_Intervene) (Date of use: 23 March 2015).

<sup>254</sup> Ferreira-Snyman *The Erosion of State Sovereignty in Public International Law: Towards a World Law?* 256-157.

<sup>255</sup> Ferreira-Snyman *The Erosion of State Sovereignty in Public International Law: Towards a World Law?* 255-256.

community has a duty to prevent the massacre of people in any territory without the approval of the UN SC.<sup>256</sup> The responsibility to protect was initially conceptualised by Deng from the framework of the Charter of the United Nations which empowers regional arrangements to strive for the maintenance of international peace and security.<sup>257</sup> Deng's work has been accepted by the international community and it is now widely known that sovereignty is no longer about "the privileges of power but also responsibilities to the citizenry".<sup>258</sup> The failure of the international community to prevent the genocide in Rwanda led the former United Nations Secretary-General Kofi Annan – to ask the global community to attend to humanitarian intervention.<sup>259</sup> In response to the aforesaid request, Canada created the International Commission on Intervention and State Sovereignty which expanded the discussion on sovereignty as a responsibility.<sup>260</sup> The 2001 Report of the International Commission on Intervention and State Sovereignty introduced three elements of the responsibility to protect applicable in cases of conflicts that involve crimes such as genocide.<sup>261</sup> These are: (1) the responsibility to prevent whereby states should identify the causes of a conflict before it escalates into an emergency situation; (2) the responsibility to react which permits states to respond to a conflict that has erupted into a crisis through, *inter alia*, sanctions or military intervention; and (3) the responsibility to rebuild which involves the provision of assistance by other states to a state recovering from crisis.<sup>262</sup> The 2001 Report of the International Commission on Intervention and State Sovereignty has received wide international support.<sup>263</sup> Further, at the 2005 World Summit, states, *inter alia*, agreed and declared that every state has a responsibility to protect its people and prevent genocide.<sup>264</sup> These undertakings were further endorsed by the Security Council in 2006 and by the General

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<sup>256</sup> Deng *Sovereignty as Responsibility* 212-23.

<sup>257</sup> Article 52 of the Charter of the United Nations.

<sup>258</sup> O' Donnell 2014 (24) *Duke Journal of Comparative and International Law* 561.

<sup>259</sup> Press Release, General Assembly, Secretary-General Presents His Annual Report to General Assembly, U.N. Press Release GA/9596 (20 September 1999) available at <http://www.un.org/press/en/1999/19990920.sgsm7136.html> (Date of use: 18 October 2015).

<sup>260</sup> The Responsibility to Protect, Report of the International Commission on Intervention and State Sovereignty 2001 available at <http://responsibilitytoprotect.org/ICISS%20Report.pdf> (Date of use: 25 October 2013).

<sup>261</sup> The Responsibility to Protect, Report of the International Commission on Intervention and State Sovereignty 2001 available at <http://responsibilitytoprotect.org/ICISS%20Report.pdf> (Date of use: 25 October 2013).

<sup>262</sup> The Responsibility to Protect, Report of the International Commission on Intervention and State Sovereignty 2001 available at <http://responsibilitytoprotect.org/ICISS%20Report.pdf> (Date of use: 25 October 2013).

<sup>263</sup> O' Donnell 2014 (24) *Duke Journal of Comparative and International Law* 562.

<sup>264</sup> 2005 World Summit Resolution, GA res UN Doc A/RES/60/1 (24 October 2005). <https://www.ifrc.org/docs/idrl/I520EN.pdf> (Date of use: 18 October 2015).

Assembly in 2009.<sup>265</sup> In light of this discussion, it is evident that humanitarian intervention without the UN SC approval is increasingly justified with reference to the so-called “responsibility to protect”.<sup>266</sup>

It is however currently still accepted that the UN SC authorisation is needed for intervention to be legal.<sup>267</sup> Interventions such as the one in Kosovo may thus be regarded as legitimate at the most.<sup>268</sup>

## 2.6 *African states’ perception of sovereignty*

### 2.6.1 The Organisation of African Unity

When the Organisation of African Unity (OAU) was established in 1961, Africa ascribed to the traditional international law view of sovereignty in the sense that sovereignty was regarded as “basic, sacrosanct and uncompromising”.<sup>269</sup> It can be safely said that the OAU was established during the time where there was no restriction on state sovereignty and that African countries used it to protect their independence from Western countries.<sup>270</sup> Therefore, the principles of absolute state sovereignty and non-interference in the internal affairs<sup>271</sup> of another state, were the key objectives of the OAU Charter.<sup>272</sup> As a result, it has been said that many African states did not take human rights seriously and were unwilling to intervene and/or denounce other states even in the face of clear gross violations of human rights.<sup>273</sup> For example, the massacre of the Hutus by the Tutsi regime in Burundi during 1972 and 1973 drew no comment from the OAU, as the massacre was said to be an “internal affair”.<sup>274</sup> Furthermore, reliance on strict state sovereignty benefitted those African governments and or leaders who mounted coups, rigged

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<sup>265</sup> Bellamy *Global Politics* 81.

<sup>266</sup> International Commission on Intervention and State Sovereignty “The Responsibility to Protect” Supplementary Volume to the Report of the International Commission on Intervention and State Sovereignty 6-7.

<sup>267</sup> Ferreira-Snyman *The Erosion of State Sovereignty* 259.

<sup>268</sup> Ferreira-Snyman *The Erosion of State Sovereignty* 259.

<sup>269</sup> Udombana 2002 (17) *American University International Law Review* 1208.

<sup>270</sup> Udombana 2002 (17) *American University International Law Review* 1208. See also the Preamble to and art II(c) of the Charter of the Organization of African Unity, 479 UNTS 39, entered into force 13 September 1963 (hereafter the OAU Charter).

<sup>271</sup> Article III(2) of the Charter of the Organization of African Unity, 479 UNTS 39, entered into force 13 September 1963.

<sup>272</sup> Nmeihelle 2003 (7) *Singapore Journal of International and Comparative Law* 420; Udombana 2002 (17) *American University International Law Review* 1208-1209.

<sup>273</sup> Nmeihelle 2003 (7) *Singapore Journal of International and Comparative Law* 432; Udombana 2002 (17) *American University International Law Review* 1210.

<sup>274</sup> Umozurike 1979 (78) *African Affairs* 198-200.

elections, and dictated to their people.<sup>275</sup> During the existence of the OAU, more than 71 coups took place in Africa, and the OAU's approach was that these were matters falling solely within the domestic jurisdiction of its member states involved.<sup>276</sup> It is submitted that even though many of the African countries are still very protective of their sovereignty,<sup>277</sup> sovereignty is being redefined as emerges from the provisions of the AU's constitutive document. As indicated by Nagan and Hammer, a "new conception of sovereignty is being formulated" in the sense that African countries are expected to act in accordance with the continent's obligations arising from various instruments.<sup>278</sup> In this way, African sovereignty is being subordinated "to the continent's own constitutional and public order".<sup>279</sup>

## 2.6.2 The African Union

In comparison to the OAU Charter, the Constitutive Act of the African Union<sup>280</sup> places greater emphasis on the protection and promotion of human rights on the African continent.<sup>281</sup> The human rights agenda in the AU can be traced to the Preamble of the Constitutive Act where African leaders indicate their express determination "to promote and protect human and peoples' rights, consolidate democratic institutions and culture, and to ensure good governance and the rule of law". In addition, the objectives of the AU include: the encouragement of international cooperation having due account of the Charter of the United Nations and the UDHR;<sup>282</sup> the promotion of democratic principles and institutions, popular participation and good governance;<sup>283</sup> and the protection of human and peoples' rights in accordance with the African Charter on Human and Peoples' Rights and other relevant human rights instruments.<sup>284</sup> There is

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<sup>275</sup> Gandois [http://www.academia.edu/152155/Sovereignty\\_as\\_responsibility\\_Theory\\_and\\_practice\\_in\\_Africa](http://www.academia.edu/152155/Sovereignty_as_responsibility_Theory_and_practice_in_Africa) (Date of use: 14 October 2013).

<sup>276</sup> Kufuor 2002 (1) *American University International Law Review* 369-370; Odinkulu CA "Concerning Kenya: The current AU position on unconstitutional changes in government" available at [http://www.afrimap.org/english/images/paper/AU&UnconstitutionalChangesinGovt\\_Odinkalu\\_Jan\\_08.pdf](http://www.afrimap.org/english/images/paper/AU&UnconstitutionalChangesinGovt_Odinkalu_Jan_08.pdf) (Date of use: 17 October 2014). Article III (2) of the Charter of OAU provided that member states undertook to, *inter alia*, to adhere to the principle of non-interference in the internal affairs of member states.

<sup>277</sup> Eboobrah 2009 (17) *African Journal of International and Comparative law* 98.

<sup>278</sup> Nagan and Hammer 2004 (43) *Columbia Journal of Transnational Law* 169.

<sup>279</sup> Nagan and Hammer 2004 (43) *Columbia Journal of Transnational Law* 169.

<sup>280</sup> Article 3(h) of the Constitutive Act.

<sup>281</sup> Ferreira-Snyman *The Erosion of State Sovereignty* 247.

<sup>282</sup> Article 3(e) of the Constitutive Act.

<sup>283</sup> Article 3(g) the Constitutive Act.

<sup>284</sup> Article 3(h) of the Constitutive Act.

no doubt that these provisions promote the protection of human rights, something that was lacking under the OAU Charter with its emphasis on state sovereignty.<sup>285</sup> More importantly, where atrocities such as war crimes, genocide and crimes against humanity have been committed,<sup>286</sup> the Constitutive Act empowers the AU to intervene in a member state pursuant to a decision of the Assembly. Further, the Constitutive Act recognises the right of any member state to request intervention from the AU in order to restore peace and security.<sup>287</sup> The provisions in the Constitutive Act which empowers the AU to intervene in the territory of a member state to protect human rights are similar those of the Charter of the United Nations which authorises the UN SC to take measures by *inter alia* entering a sovereign state in order to restore peace. In other words, both under international law and African regional law sovereignty cannot be used in a manner that compromises the protection of human rights.

There are proposals<sup>288</sup> to amend article 4(h) of the Constitutive Act which will allow the AU, upon recommendation by its Peace and Security Council, to intervene further in a member state in cases of a “serious threat to legitimate order to restore peace and stability to the Member State of the Union”. This will afford the AU an opportunity to intervene in countries where atrocities are committed such as the recent conflict in South Sudan. In 2008 the AU intervened militarily in the Comoros Islands to take control from Mohamed Bacar, whose election as president was not recognised by the international community, and assist the Union Government of Comoros to “re-establish control over the Island”.<sup>289</sup> The military intervention by the AU, excluding South Africa, was supported by the international community.<sup>290</sup> It must be noted that the ground for intervention in the Comoros Islands is not one of the grounds listed in article 4(h) of the Constitutive Act, and certainly not those listed in the Protocol on Amendments to the

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<sup>285</sup> Nmehielle 2003 (7) *Singapore Journal of International and Comparative Law* 433.

<sup>286</sup> Article 4(h) of the Constitutive Act.

<sup>287</sup> Article 4(j) of the Constitutive Act.

<sup>288</sup> The Protocol on Amendments to the Constitutive Act of the African Union, adopted in February 2008 (not yet operational). available at [http://au.int/en/sites/default/files/PROTOCOL\\_AMENDMENTS\\_CONSTITUTIVE\\_ACT\\_OF\\_THE\\_AFRICAN\\_UNION.pdf](http://au.int/en/sites/default/files/PROTOCOL_AMENDMENTS_CONSTITUTIVE_ACT_OF_THE_AFRICAN_UNION.pdf) (Date of use: 19 March 2015). See also Ferreira-Snyman 2010 (48) *The Comparative and International Law Journal of Southern Africa* 155; Kioko 2003 (85) *International Review of the Red Cross* 807.

<sup>289</sup> Ferreira-Snyman *The Erosion of State Sovereignty* 250; Ferreira-Snyman 2010 (48) *The Comparative and International Law Journal of Southern Africa* 157.

<sup>290</sup> Ferreira-Snyman *The Erosion of State Sovereignty* 250; Ferreira-Snyman 2010 (48) *The Comparative and International Law Journal of Southern Africa* 157.

Constitutive Act which are not yet in force.<sup>291</sup> In this regard, Ferreira-Snyman has correctly observed that the intervention might have been on the basis of the AU's "condemnation and rejection of unconstitutional changes of government".<sup>292</sup> It can, therefore, be said that article 4(h) of the Constitutive Act has never been used by the AU, despite opportunities to do so where there have been violations of human rights in countries such as the Central African Republic, Zimbabwe and Mali. It is submitted that to the extent that article 4(h) accords the AU a right to intervene, it represents a limitation on the principle of non-interference (which enjoyed superior status under the OAU) and thus limits state sovereignty.<sup>293</sup> Even though the Constitutive Act still contains the principle of non-interference in the domestic affairs of another state, it is clear that there is an exception to this principle, as the AU or any member state (via the AU) may intervene in cases of grave breaches of human rights, including unconstitutional changes of government. In addition, it is submitted that article 4(h) of the Constitutive Act also serves as a deterrent to potential dictators contemplating committing heinous crimes as they are aware that the AU may intervene. Given the fact that member states have to treat their citizens in accordance with the accepted standards of human rights, it is clear that the human rights movement has brought about a significant shift in the traditional principle of state sovereignty and non-interference in the internal affairs of another state. How a state treats its nationals, is no longer a purely internal matter but the concern of the international community as a whole. There has, therefore, been a clear change in the understanding of the concept of sovereignty traditionally espoused by African states.

### 2.6.3 Reciprocity of human rights treaties

Reciprocity is an important principle in international law because states conclude a treaty for mutual benefit. This means that when a treaty becomes operational, all the parties to it need to observe and fulfil their treaty obligations equally.<sup>294</sup> There are different manifestations of reciprocity. It entails the material exchange of goods or benefits between parties to a particular treaty.<sup>295</sup> It also means that even though treaties may not result in reciprocal exchange of

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<sup>291</sup> Ferreira-Snyman 2010 (48) *The Comparative and International Law Journal of Southern Africa* 157; Ferreira-Snyman *The Erosion of State Sovereignty* 248.

<sup>292</sup> Ferreira-Snyman 2010 (48) *The Comparative and International Law Journal of Southern Africa* 157; Ferreira-Snyman *The Erosion of State Sovereignty* 250.

<sup>293</sup> Nmehielle 2003 (7) *Singapore Journal of International and Comparative Law* 434.

<sup>294</sup> Paulus "Reciprocity revisited" 118; *Government of the Republic of Zimbabwe v Fick and Others* (10) BCLR 1103 (CC) at paras 56-57 and 69.

<sup>295</sup> Craven 2000 (11) *European Journal of International Law* 502-503.

goods, the fact that there was consent suggests that there might be some form of reciprocity.<sup>296</sup> Lastly, reciprocity, in its ordinary meaning, represents a framework of an agreement between states and only contains the rights and obligations of the parties to the treaty.<sup>297</sup> In other words, only a party that has a “direct benefit from the performance of an obligation can successfully invoke the duty of another party to perform”.<sup>298</sup> This is evident when one looks at it from the perspective that there is generally a very good culture of compliance with non-human rights treaties,<sup>299</sup> as opposed to those protecting human rights. The reason for this is that there is a motive for reciprocity in non-human rights treaties because one party performs its obligation in anticipation that it will also benefit from the performance of the other party.<sup>300</sup> However, as there is no counter-performance involved in human rights treaties, it may prove difficult to enforce a human rights treaty against a violating state.<sup>301</sup> Some scholars are of the view that there is no justification for reciprocity in human rights treaties because the treaty is between states, but for the benefit of their citizens.<sup>302</sup> It is submitted that states will probably support this view in order to prevent infringement of their sovereignty by other states.<sup>303</sup>

As an important principle of international law, there is no legitimate reason to claim that the principle of reciprocity does not apply (or applies to a limited extent) to human rights treaties. Human rights treaties are part of international law. As noted by Klein, “states would not conclude a treaty if they had no mutual interest in the performance of the accepted commitments”.<sup>304</sup> It is immaterial whether human rights treaties are concluded by states, but for the benefit of their nationals. The fact remains that the states have undertaken to fulfil their treaty obligations.<sup>305</sup> The undertaking is made towards other states. According to Henkin, human rights agreements are directly enforceable between the parties to a particular

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<sup>296</sup> Ferreira-Snyman *The Erosion of State Sovereignty* 187.

<sup>297</sup> Ferreira-Snyman *The Erosion of State Sovereignty* 187-188.

<sup>298</sup> Paulus “Reciprocity revisited” 118.

<sup>299</sup> Ahmad R “Global dispute resolution vis-à-vis ICC, the independent” available at <http://www.highbeam.com/doc/1P1-73826693.html> (Date of use: 19 January 2013).

<sup>300</sup> Ahmad <http://www.highbeam.com/doc/1P1-73826693.html> (Date of use: 19 January 2013).

<sup>301</sup> Ferreira-Snyman *The Erosion of State Sovereignty* 188.

<sup>302</sup> Provost 1994 (65) *British Yearbook of International Law* 385; Klein “Denunciation of human rights treaties and the principle of reciprocity” 477.

<sup>303</sup> Ferreira-Snyman *The Erosion of State Sovereignty in Public International Law* 188.

<sup>304</sup> Klein “Reciprocity revisited” 481-482.

<sup>305</sup> *Government of the Republic of Zimbabwe v Fick and Others* (10) BCLR 1103 (CC) at paras 56-57 and 69 (hereafter the *Fick CC case*).



instrument.<sup>306</sup> It therefore follows that a state party has a reciprocal duty towards other state parties to fulfil its treaty obligations.<sup>307</sup>

There is evidence (such as the creation of the International Criminal Tribunal for Rwanda and the International Criminal Court) supporting the argument that human rights cannot be regarded as a purely domestic matter. It has also been increasingly accepted that states cannot use their sovereignty as a shield behind which to commit human rights violations and contend that such action is a domestic matter. The international community has a legitimate interest to intervene in gross domestic violations of human rights.<sup>308</sup> For example, it was within the powers of the South African Constitutional Court to receive a case and rule against Zimbabwe in the matter between the *Government of the Republic of Zimbabwe v Fick and Others* which arose from the violation of the rights contained in the SADC Treaty.<sup>309</sup> The basis for this is that: “South Africa has essentially bound itself to do whatever is legally permissible to deal with any attempt by any Member State to undermine and subvert the authority of the [SADC] Tribunal and its decisions as well as the obligations” flowing from the Treaty.<sup>310</sup> In this case, the government of Zimbabwe was ordered to pay the legal costs incurred by the respondent in a case that was before the Tribunal concerning human rights violations (ie dispossession of their agricultural land without compensation and eviction from their farms).<sup>311</sup> This judgment acknowledged the importance of states’ obligations flowing from international and regional treaties, and the duty of states to adhere to their commitments. In addition, the decision indicates the commitments of the courts to promoting human rights and the need for states to observe the rule of law in their respective countries, and that non-compliance with a judgment by one state can be remedied in another state.<sup>312</sup>

Another case in point is the ruling of the South African court in *Southern African Litigation Centre and Another v National Director of Public Prosecutions and Others* in which the government of South Africa was ordered to investigate and prosecute Zimbabwean officials responsible for alleged human rights violations committed in Zimbabwe. It is also an indication

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<sup>306</sup> Henkin “Human rights and ‘domestic jurisdiction’” 637.

<sup>307</sup> See also art 26 of the Vienna Convention on the Law of Treaties which provides that “[e]very treaty in force is binding upon the parties to it and must be performed by them in good faith.”

<sup>308</sup> Henkin “Human rights and ‘domestic jurisdiction’” 637-638.

<sup>309</sup> 2013 (10) BCLR 1103 (CC).

<sup>310</sup> *Fick CC* case at para 59.

<sup>311</sup> *Fick CC* case at para 3.

<sup>312</sup> See Foster 2008 (25) *Arizona Journal of International and Comparative Law* 671.

that state sovereignty can no longer be used as a shield to protect those accused of human rights violations.<sup>313</sup> In this case, the applicants had identified certain Zimbabwean officials who had allegedly been responsible for torturing people in Zimbabwe. They then asked the National Director of Public Prosecutions (NDPP) to conduct investigations with the aim of prosecuting these officials on the basis of South Africa's obligations flowing from the Rome Statute of the International Criminal Court. In addition, the applicants argued that the rule of law had collapsed in Zimbabwe and it was unlikely that the responsible officials would be brought to justice in that country. In declining to conduct the necessary investigations, the South African Police Service wrote to the NDPP stating, *inter alia*:

This you will appreciate would imply that these persons are in fact "agents of the service and a very real risk exists that the SAPS can be accused of conduct which is *tantamount to espionage, or at the very least impinging on that countries sovereignty*. (Emphasis added.)<sup>314</sup>

This passage influenced the NDPP not to prosecute those allegedly involved in torture. The Court found that the SAPS and the NDPP were under a duty to investigate the allegations raised, and that it was not their place, at that stage, to consider political or other factors.<sup>315</sup> This judgment effectively opens the way for the perpetrators of torture to be prosecuted in South Africa regardless of the sovereign state in which the acts were committed. In Thakur's words, "[t]he doctrine of national sovereignty in its absolute and unqualified form, which gave rulers protection against attack from without while engaged within in the most brutal assault on their own citizens has gone with the wind".<sup>316</sup> Although these cases were not brought before the courts by a state (South Africa) but by an individual and an NGO, it is submitted that the principle of reciprocity is applicable in that South Africa has an interest in the promotion and protection of human rights.

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<sup>313</sup> *Southern African Litigation Centre and Another v National Director of Public Prosecutions and Others* 2012 (10) BCLR 1089.

<sup>314</sup> *Southern African Litigation Centre and Another v National Director of Public Prosecutions and Others* at para 4.

<sup>315</sup> *Southern African Litigation Centre and Another v National Director of Public Prosecutions and Others* at para 29.

<sup>316</sup> Thakur 2001 (83) *International Review of the Red Cross* 35.

In addition, some of the human rights treaties – for example, the ICCPR – contain inter-state complaint mechanisms for human rights violations.<sup>317</sup> This clearly indicates that states have an interest in how other states adhere to the principles of human rights.

In light of the above exposition, it is submitted that reciprocity is also applicable to human rights treaties and there exists a possibility that SADC member states may litigate against each other to enforce compliance with treaty obligations.<sup>318</sup> Given the fact that access to the SADC Tribunal has been limited to disputes between states, reciprocity may therefore be an avenue to provide individuals with “indirect” access to the envisaged “new” Tribunal. This seldom happens in practice as states are generally reluctant to litigate against each other to enforce compliance with human rights laws. However, it has been said that this does not “necessarily imply that it is a legal impossibility to do so”.<sup>319</sup>

#### 2.6.4 Immunity

Although there is a vast amount of literature on the concept of immunity, there is no uniform definition of what immunity is.<sup>320</sup> The word *immunity* generally refers to protection and/or exemption from prosecution even though someone has committed a crime. The same applies to an international organisation which enjoys immunity in the sense that such an organisation cannot be brought before the courts (and that its property cannot be seized).<sup>321</sup> Terms such as sovereign immunity, foreign state immunity, state immunity, or jurisdictional immunity are often used interchangeably in an attempt to explain what immunity entails.<sup>322</sup> This study does not cover the broad conception of immunity, but focuses only on sovereign immunity, Heads of State immunity, and immunity of international organisations,<sup>323</sup> particularly that of the SADC. These different forms of immunity are discussed separately below.

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<sup>317</sup> Article 41 of the International Covenant on Civil and Political Rights, GA res 2200A (XXI), 21 UN GA OR Supp (No 16) at 52, UN Doc A/6316 (1966), 999 UNTS 171, entered into force 23 March 1976.

<sup>318</sup> Ferreira-Snyman *The Erosion of State Sovereignty* 189.

<sup>319</sup> Ferreira-Snyman *The Erosion of State Sovereignty* 190. The issue of access to the SADC Tribunal is comprehensively dealt with in Chapter 5 of the study.

<sup>320</sup> Murungu “Duty to prosecute” 33; Nkhata 2011 (5) *Malawi Law Journal* 155; Murungu *Immunity of State Officials* 16-17.

<sup>321</sup> Reinisch 2008 (7) *Chinese Journal of International Law* 286.

<sup>322</sup> Murungu “Duty to prosecute” 10, 29, 32.

<sup>323</sup> This aspect is dealt with in Chapter 5.

#### 2.6.4.1 Sovereign (state) immunity

Sovereign immunity refers to immunity which guarantees a foreign sovereign state immunity for all acts committed by states in the execution of their powers.<sup>324</sup> It is said that state immunity and Head of State immunity (discussed below) are closely related and at times confused.<sup>325</sup> The origin of the doctrine of state immunity, however, remains uncertain.<sup>326</sup> Lauterpach has traced the roots of the doctrine to Head of State immunity at a time when the state and the sovereign were seen as one.<sup>327</sup> The basis for this was the old idea that the “King can do no wrong” and that no King (the sovereign) could be called to account by another King.<sup>328</sup> Since the King could do no wrong, this meant that even a wrongful command by him could not be challenged.<sup>329</sup> The theory that King could do no wrong continued until such time as a distinction was made between the state and the King.<sup>330</sup> Its objective was to shield “political activities of the state as a sovereign entity”.<sup>331</sup> The immunity of the state was, at that time, regarded as absolute.<sup>332</sup> However, it was only when the governments and their agencies became frequent players in international trade and finance that the law developed.<sup>333</sup> Judicial activism also contributed to the transformation of the law regarding the principle of state immunity because some domestic courts denied immunity to foreign states if the acts of these states were private or commercial.<sup>334</sup> Immunity of the state is no longer absolute as evidenced by the recent attachment of Zimbabwean property in Cape Town.<sup>335</sup>

In order to assist domestic courts to distinguish between the actions of a foreign state in its private or commercial capacity and its actions classified as “sovereign”, the law of state immunity has been codified in many jurisdictions.<sup>336</sup> As a result, the courts have guidance on

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<sup>324</sup> De Sena and De Vittor 2005 (16) *European Journal of International Law* 105; Tomuschat 2011 (44) *Vanderbilt Journal of Transnational Law* 1118.

<sup>325</sup> Murungu “Duty to prosecute” 33; Bianachi 1999 (10) *European Journal of International Law* 262.

<sup>326</sup> Bianachi 1999 (10) *European Journal of International Law* 262.

<sup>327</sup> Lauterpach 1951 (28) *British Yearbook of International Law* 220.

<sup>328</sup> Davis *Administrative Law Treaties* 6-7.

<sup>329</sup> Pugh 1953 (13) *Louisiana Law Review* 480.

<sup>330</sup> Moagoto 2005 (7) *Notre Dame Law Review* 3.

<sup>331</sup> Lauterpach 1951 (28) *British Yearbook of International Law* 220.

<sup>332</sup> Bianachi 1999 (10) *European Journal of International Law* 263.

<sup>333</sup> Bianachi 1999 (10) *European Journal of International Law* 263.

<sup>334</sup> Bianachi 1999 (10) *European Journal of International Law* 263.

<sup>335</sup> Evans J “Zim govt property in Cape Town sold for R3.7m” available at <http://www.news24.com/SouthAfrica/News/Zim-govt-property-in-Cape-Town-sold-for-R37m-20150921> (Date of use: 23 September 2015).

<sup>336</sup> Bianachi 1999 (10) *European Journal of International Law* 263. See for example, the South African Foreign States Immunities Act 87 of 1981 which provides in section 2 that: “(1) A foreign

what to do when the issue of state immunity comes before them. For example, in the case of *Government of the Republic of Zimbabwe v Fick and Others*<sup>337</sup> the Constitutional Court of South Africa confirmed the decision of the Supreme Court of Appeal which ordered the attachment of Zimbabwean property. This was in line with the provisions of the Foreign States Immunities Act<sup>338</sup> which provides that commercial transactions of the state are not immune. In other words, the property can be seized and sold in execution.<sup>339</sup> Section 3 of the Foreign States Immunities Act recognises that immunity of a foreign state may be forfeited by express waiver. Both the Supreme Court of Appeal and the Constitutional Court of South Africa relied on the provisions of the Foreign States Immunities Act to conclude that Zimbabwe had waived its immunity when it committed itself to the Tribunal Protocol and the Treaty.<sup>340</sup> According to De Wet, the Constitutional Court of South Africa did not deal extensively with the concept of state immunity because the questions relating to immunity were “clear-cut” and therefore only required the application of the law as contained in the Foreign States Immunities Act.<sup>341</sup> It is therefore now settled that the principle of sovereign immunity from any legal claims has to a certain extent lost its once absolute status in order to allow individuals to bring legal action against the state. The recent Zimbabwean property sold in Cape Town is testimony to this.<sup>342</sup> The state can therefore also be challenged and has in this regard lost a portion of its sovereignty.

#### 2.6.4.2 Head of state immunity

There are two forms of immunity involved in Head of state immunity under international law, namely personal immunity and functional immunity.<sup>343</sup> The former refers to immunity that attaches to a person while in office, and the latter to the “official acts or functions of senior state

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state shall be immune from the jurisdiction of the courts of the Republic except as provided in this Act or in any proclamation issued thereunder. (2) A court shall give effect to the immunity conferred by this section even though the foreign state does not appear in the proceedings in question. (3) The provisions of this Act shall not be construed as subjecting any foreign state to the criminal jurisdiction of the courts of the Republic.”

<sup>337</sup> The details of the case are discussed in Chapter 5 and this section deals only with the aspect of state immunity.

<sup>338</sup> 87 of 1981, section 14(3).

<sup>339</sup> De Wet 2014 (1) *Potchefstroom Electronic Law Journal* 557.

<sup>340</sup> *Government of the Republic of Zimbabwe v Fick and Others* (657/11) [2012] ZASCA 122 (20 September 2012) at para 44; *Fick CC* case at para 35.

<sup>341</sup> De Wet 2014 (1) *Potchefstroom Electronic Law Journal* 557.

<sup>342</sup> Evans J “Zim govt property in Cape Town sold for R3.7m” available at <http://www.news24.com/SouthAfrica/News/Zim-govt-property-in-Cape-Town-sold-for-R37m-20150921> (Date of use: 23 September 2015).

<sup>343</sup> Murungu “Duty to prosecute” 37; Nkhata 2011 (5) *Malawi Law Journal* 156.

officials” such as a head of state.<sup>344</sup> Functional immunity can be invoked by, *inter alia*, a serving head of state or former heads of state, for crimes they committed while in office.<sup>345</sup> Generally, one may not invoke functional immunity after committing international crimes because such conduct is not classified as an official act.<sup>346</sup> An example in this regard is the *Pinochet* case.<sup>347</sup> Pinochet became president of Chile through a military coup in 1973.<sup>348</sup> During his term in office, people disappeared, while others were tortured and murdered. He was voted out of office during the 1990 elections but was appointed Senator for life. This granted him immunity. While visiting the United Kingdom in 1998 for medical attention, Pinochet was arrested at the request of the Spanish government in order to have him extradited to Spain to stand trial for the crimes he had committed during his term in office. Pinochet's legal representatives contended that he was immune from the jurisdiction of the British court because he was a head of state at the time the crimes were committed. The issue that was to be decided by the Court was whether Pinochet could claim state immunity from prosecution for the crimes he had allegedly committed and therefore not be extradited to Spain. The Divisional Court ruled in favour of Pinochet in that he had state immunity as the acts of which he was accused were committed while he was head of state.<sup>349</sup> However, the House of Lords ruled that Pinochet did not have immunity because the acts of torture and murder could not be classified as official acts that ought to be performed by a head of state.<sup>350</sup>

Traditionally, heads of state or government officials were immune from prosecution for all crimes committed while in office.<sup>351</sup> However, the emergence of human rights requires everyone to respect human rights.<sup>352</sup> International criminal law also calls for those who commit heinous crimes, regardless of the office they hold, to be held accountable for international crimes.<sup>353</sup> The establishment of the ICTRY and the ICTR in 1993 and 1994 are indicative that no immunity shall be granted to anyone, including heads of state, for gross violations of human rights. These

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<sup>344</sup> Nkhata 2011 (5) *Malawi Law Journal* 156.

<sup>345</sup> Nkhata 2011 (5) *Malawi Law Journal* 156; Murungu “Duty to prosecute” 37.

<sup>346</sup> Nkhata 2011 (5) *Malawi Law Journal* 156.

<sup>347</sup> *R v Bow Street Metropolitan Stipendiary Magistrate, Ex Parte Pinochet Ugarte* 1998 3 WLR 1,456 (HL).

<sup>348</sup> Webber 1999 (26) *Journal of Law and Society* 526.

<sup>349</sup> *R v Evans; R v Bartle, ex parte Pinochet Ugarte* [1998] All ER 629 (D).

<sup>350</sup> Bianchi 1999 (10) *European Journal of International Law* 240. For a detailed discussion of this case in its various stages, see Du Plessis 2000 (16) *South African Journal on Human Rights* 669-689.

<sup>351</sup> Dugard *International Law* 250; Nkhata 2011 (5) *Malawi Law Journal* 156.

<sup>352</sup> Dugard *International Law* 250-251.

<sup>353</sup> Nwosi UN *Head of State Immunity in International Law* 243; Murungu “Duty to prosecute” 38-39.

tribunals were clear in their constitutive documents that the official position of any accused person, including a head of state, “shall not relieve that person of criminal responsibility nor mitigate punishment”.<sup>354</sup> The fact that Slobodan Milosevic, although he died before the conclusion of his case, was indicted when he was still president of the former Federal Republic of Yugoslavia is testimony that heads of state can no longer hide behind state immunity or sovereignty before international tribunals.<sup>355</sup> The indictment of Charles Taylor by the Special Court for Sierra Leone (SCSL) while he was head of state offers further confirmation.<sup>356</sup>

The commitment of the international community to end impunity for heinous crimes by punishing those responsible regardless of the position they hold, did not end with the ICTY, SCSL and ICTR. A permanent International Criminal Court (ICC) to adjudicate gross violations of human rights was also established on 17 July 1998<sup>357</sup> and came into operation on 1 July 2002.<sup>358</sup> The ICC reaffirmed that the international community intends putting an end to impunity by trying anyone, including heads of state, responsible for committing crimes against humanity, amongst others. The Statute of the ICC is clear that official capacity and/or position as head of state will not bar the Court from exercising criminal jurisdiction over those responsible for, *inter alia*, genocide.<sup>359</sup> It is important to highlight that the ICC may only exercise jurisdiction over state parties who have ratified the Statute. However, referrals by the UN SC may also be made in case of non-party states where it appears that crimes such as genocide or crimes against humanity have been committed.<sup>360</sup> A referral by the UN SC to the ICC was made for the

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<sup>354</sup> See art 7(2) of the Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, UN Doc S/25704 at 36, annex (1993) and S/25704/Add.1 (1993), adopted by Security Council on 25 May 1993, UN Doc S/RES/827 (1993); United Nations Security Council resolution S/RES/955 (1994) 8 November 1994 available at <http://www1.umn.edu/humanrts/peace/docs/scres955.html> (Date of use: 18 April 2014).

<sup>355</sup> Dugard *International Law* 253; Nwosi *Head of State Immunity in International Law* 272. It appears that immunity for heads of state still exists before national courts and that heads of state or other officials may successfully plead immunity before the domestic courts. See Bantekas and Nash *International Criminal Law* 111. See also *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v Belgium)* 2002 ICJ Reports 6.

<sup>356</sup> *The Prosecutor v Charles Taylor Case No SCSL -03-01- PT*. For a detailed discussion of the Charles Taylor case, see Mangu 2003 (28) *South African Yearbook of International Law* 238-245.

<sup>357</sup> Phooko 2011 (1) *Notre Dame Journal of International, Comparative and Human Rights Law* 184.

<sup>358</sup> Phooko 2011 (1) *Notre Dame Journal of International, Comparative and Human Rights Law* 184.

<sup>359</sup> See art 27(1) of the Rome Statute of the International Criminal Court UN Doc 2187 UNTS 90, entered into force 1 July 2002 (hereafter the Rome Statute).

<sup>360</sup> See art 13(b) of the Rome Statute which deals with referrals by the Security Council.

investigation of a serving head of state, Al Bashir of Sudan, for genocide and crimes against humanity.<sup>361</sup> The UN SC referral indicated that:

Determining that the situation in Sudan continues to constitute a threat to international peace and security, acting under Chapter VII of the Charter of the United Nations,

1. Decides to refer the situation in Darfur since 1 July 2002 to the Prosecutor of the International Criminal Court;
2. Decides that the Government of Sudan and all other parties to the conflict in Sudan shall co-operate fully with and provide any necessary assistance to the Court and the Prosecutor pursuant to this Resolution, while recognizing that states not party to the Rome Statute have no obligation under the Statute, urges all states and concerned regional and international organizations to co-operate fully.<sup>362</sup>

It must be noted that this referral is silent on the issue of the immunity of a head of state. It is submitted that such silence could be read as implying that the UN SC was aware that the issue of immunity of heads of state before international criminal tribunals is settled.<sup>363</sup> In any event, it is further submitted that the UN SC would not have referred President Al Bashir to the ICC had Head of state immunity still applied to international tribunals. The fact that a warrant of arrest has been issued by the ICC prosecutor (and not by the domestic judicial authority), may indirectly impact on state sovereignty to the extent that President Al-Bashir acts on behalf of the state of Sudan. In a recent case, in the matter between the *Southern Africa Litigation Centre v Minister of Justice and Constitutional Development and Others*,<sup>364</sup> it also became apparent that being a head of state does not provide any form of immunity for international crimes such as genocide. This case concerned the indictment of President Al-Bashir of Sudan by the ICC to stand trial for, *inter alia*, allegations of committing war crimes and genocide.<sup>365</sup> Sometime in June 2015 President Al-Bashir attended the AU Summit in South Africa. His presence resulted

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<sup>361</sup> Press Release, Security Council, “Security Council Refers Situation in Darfur, Sudan, to Prosecutor of International Criminal Court” UN Press Release SC/8551 (31 March 2005) available at <http://www.un.org/News/Press/docs/2005/sc8351.doc.htm> (Date of use: 18 April 2014) (hereafter the Sudan referral).

<sup>362</sup> Sudan referral.

<sup>363</sup> Nwosi has questioned the Sudan referral by the UN SC as it failed to deal with the issues of immunity of a Head of State because according to him, the doctrine of “absolute immunity under customary international law survives Resolution 1953 [Sudan referral]”. He also criticises the ICC Pre Trial Chamber for failure to extensively elaborate on the issue of head of state immunity for President Al-Bashir. See Nwosi *Head of State Immunity in International Law* 297-300.

<sup>364</sup> (27740/2015) [2015] ZAGPPHC 402 (24 June 2015) (hereafter the *Al-Bashir* case).

<sup>365</sup> The first warrant of arrest for Omar Hassan Al-Bashir for crimes against humanity was issued on 4 March 1999: Warrant of Arrest for Omar Hassan Ahmad Al-Bashir, ICC-02/05-01/09 available at <http://www.icc-cpi.int/iccdocs/doc/doc639078.pdf> (Date of use: 17 October 2015). The second warrant of arrest for genocide was issued on 12 July 2010: Second Warrant of Arrest for Omar Hassan Ahmad Al-Bashir, ICC-02/05-01/09 available at <http://www.icc-cpi.int/iccdocs/doc/doc907140.pdf> (Date of use 17 October 2015).



in a court process that sought to have him arrested and handed over to the ICC. The High Court found that the Rome Statute to the International Criminal Court

expressly provides that heads of state do not enjoy immunity under its terms. Similar provisions are expressly included in the *Implementation Act*. It means that the immunity that might otherwise have attached to President Bashir based on customary international law as head of state, is excluded or waived in respect of crimes and obligations under the Rome Statute.<sup>366</sup>

The Court found that South Africa was obliged under international law to arrest President Al-Bashir. It further expressed its dismay at President Al-Bashir being permitted to leave South Africa despite a court order preventing him from doing so.<sup>367</sup>

In light of the above exposition, it is submitted that a head of state can no longer hide behind Head of state immunity and/or state sovereignty to evade justice.<sup>368</sup> International criminal law has, therefore, effectively done away with the doctrine of Head of state immunity and anyone who commits international crimes will be prosecuted before international tribunals.<sup>369</sup>

### 3 CONCLUSION

Our discussion has shown that traditionally there was absolute respect for state sovereignty in that international law was initially involved only with inter-state relations. In addition, the state was the sole possessor of absolute power and could use it in any way it deemed necessary, including violating the rights of its citizens. This form of autonomy was known as Westphalian sovereignty.

However, after the Second World War, international law developed rapidly and state sovereignty began to lose its absolute character. This was caused by factors such as regionalism,

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<sup>366</sup> *Al-Bashir* case at para 28.8.

<sup>367</sup> *Al Bashir* case at para 37.2. For a detailed discussion of the Al-Bashir case before the High Court of South Africa, see Tladi D “The duty on South Africa to arrest and surrender Al-Bashir under South African and international law: Attempting to make a collage from an incoherent framework” available at <http://www.derebus.org.za/wp-content/uploads/2015/07/Dire-Tladi.pdf> (Date of use: 17 October 2015).

<sup>368</sup> *Prosecutor v Milosevic Decision on the Preliminary Motion*, Kosovo (8 November 2001) at paras 26-34. The ICTY through reliance on, *inter alia*, *R v Bow Street Metropolitan Stipendiary Magistrate and others, ex parte Pinochet Ugarte*, (1999) 2 All ER 97 at 588-89 dismissed the accused’s defence of Head of State immunity.

<sup>369</sup> Report of the International Commission of Inquiry on Darfur, Pursuant to Security Council Resolution 1564 of 18 September 2004 to the United Nations Secretary-General available at [http://www.un.org/News/dh/sudan/com\\_inq\\_darfur.pdf](http://www.un.org/News/dh/sudan/com_inq_darfur.pdf) (Date of use: 18 April 2014). The Commission *inter alia* recommended that measures be taken in order “to help break the cycle of impunity”. Such measures included “the exercise of universal jurisdiction by other States”.

globalisation, human rights, humanitarian intervention, and *jus cogens* norms which require cooperation among states. The international community realised that for the maintenance of international peace, amongst others, there was a need to create minimum standards with which states had to comply in order to promote the protection of human rights. States, through signing various (sub)-regional and international treaties, agreed that how they handle various issues (such as human rights) in their own territories would be measured against international standards. The creation of sub-regional communities such as the SADC for, *inter alia*, mutual economic benefit also serves as an indication that states are interdependent and need one another for the achievement of the common good. To this end, Fawcett has said that “no state wishes to remain outside the current trends”.<sup>370</sup>

In addition, the transformation of the OAU which was based on the principle of non-intervention, into the AU, signalled a major development in how African states perceive state sovereignty. Further, humanitarian intervention, regardless of diverse views on its legality, has also shown that states increasingly recognise that they have an obligation to prevent another state from committing heinous crimes.<sup>371</sup> This has, as we have seen, manifested most practically in the responsibility to protect movement.

The doctrine of sovereign immunity – which was regarded as absolute in all its manifestations, such as immunity for international organisations (the SADC), sovereign immunity, and Head of State immunity – has also been greatly affected. Heads of state, SADC as an institution, and any state can be brought before national and international courts to account for their actions – notably those involving human rights violations. No one is considered above the law.

Finally, it is submitted that by becoming party to the Treaty and Tribunal Protocol, SADC countries have surrendered certain elements of their sovereignty and must respect the decisions of the Tribunal. In addition, SADC member states may also enforce the judgments of the Tribunal in their respective territories as they have undertaken obligations under the relevant instruments.

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<sup>370</sup> Fawcett 2004 (80) *International Affairs* 439.

<sup>371</sup> “The Responsibility to Protect” Report of the International Commission on Intervention and State Sovereignty 2001 available at <http://responsibilitytoprotect.org/ICISS%20Report.pdf> (Date of use: 25 October 2013).

In light of the discussion above, it is clear that until 1945 state sovereignty was regarded as superior to other norms such as human rights, as their protection was regarded as a matter of purely domestic concern in which no interference was permitted. Currently, certain matters that were traditionally perceived as domestic, are now issues in which the international community has an interest. The ability of the UN SC to intervene in the territory of a member state for the promotion of international peace and the protection of human rights, has extinguished the power of the once sovereign state used to enjoying immunity from external intervention. It is therefore submitted that these factors have together significantly eroded state sovereignty, and that states can no longer hide behind the veil of sovereignty to avoid the promotion and protection of human rights.

## CHAPTER 4

### THE RELATIONSHIP BETWEEN INTERNATIONAL, REGIONAL (SADC) AND NATIONAL LAW

#### 1 INTERNATIONAL LAW, SADC COMMUNITY LAW AND NATIONAL LAW

One of the perennial problems in the national application of international law is that many states fail to transform their international commitments into their national law in order to give it the force of national law.<sup>1</sup> Even where international law is automatically transformed into national law, states often choose to ignore international law.<sup>2</sup> I deal with three relationships in this chapter:

- the relationship between community law and the domestic laws of member states, that is sometimes defined in the constitutive documents of regional or sub-regional organizations;<sup>3</sup>
- the relationship between international law and domestic law of member states; and
- the relationship between community law and international law.<sup>4</sup>

These relationships are often not determined in constitutions and constitutive documents. Due to globalisation, it is submitted that these relationships should be clarified by states in their constitutions or treaties.

It must be noted that the SADC Treaty<sup>5</sup> makes no provision for the nature of the relationship between international law and the national law of member states or for the relationship between community (SADC) law and the national law of member states, or the relationship between the community itself and international law. The clarification of these relationships is important in

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<sup>1</sup> Cassese *Realizing Utopia* 188.

<sup>2</sup> Cassese *Realizing Utopia* 188.

<sup>3</sup> Oppong RF "Making regional economic community laws enforceable in national legal systems-constitutional and judicial challenges" available at [http://www.kas.de/upload/auslandshomepages/namibia/MRI2008/MRI2008\\_07\\_Oppong.pdf](http://www.kas.de/upload/auslandshomepages/namibia/MRI2008/MRI2008_07_Oppong.pdf) (Date of use: 10 April 2015).

<sup>4</sup> See Ferreira and Ferreirra-Snyman 2014 (4) *Potchefstroom Electronic Law Journal* 1485-1489. The authors provide a useful discussion of the relationship between international law and European Union community law.

<sup>5</sup> Treaty of the Southern African Development Community available at [http://www.sadc.int/files/9113/5292/9434/SADC\\_Treaty.pdf](http://www.sadc.int/files/9113/5292/9434/SADC_Treaty.pdf) (Date of use: 15 April 2015).

order to “make community law effective in national legal system”.<sup>6</sup> Because of this gap in the Treaty, one needs to consider what member states’ national constitutions provide in this regard together with the approach taken by national courts in dealing with this *lacuna*.<sup>7</sup> It is in this regard that the monist-dualist debate is useful, because to a certain extent, it provides answers as to how national legal systems incorporate treaty law.<sup>8</sup>

In order to understand the relationship between SADC Community law and national law, one must look to the status of SADC Community law within a particular country. In cases where the constitution of a certain country provides no answers, there is a need to clarify the relationship between SADC Community law and national law in order to prevent legal uncertainty. Currently, it is not clear which system (SADC Community law or national law) is to be applied when a conflict between these legal systems arises. In order to ensure that the status of SADC Community law in national laws is properly understood and given effect to, it is necessary to address these voids. In addition, there is a need to clarify the relationship between national courts and sub-regional courts – such as the SADC Tribunal – as they operate on different levels.

Because the Treaty and the Tribunal Protocol<sup>9</sup> are silent on these questions, in this chapter I discuss the relationship between SADC Community law and the national law of member states; the relationship between international law and the national law of member states; and the relationship between SADC Community law and international law. Further, I explore the traditional theories on the reception of international law in national law. In addition, I consider the relationship between the Tribunal and the national courts of member states. The answers will be sought in the national constitutions<sup>10</sup> of all SADC member states, the instruments

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<sup>6</sup> Oppong  
[http://www.kas.de/upload/auslandshomepages/namibia/MRI2008/MRI2008\\_07\\_Oppong.pdf](http://www.kas.de/upload/auslandshomepages/namibia/MRI2008/MRI2008_07_Oppong.pdf)  
(Date of use: 10 April 2015).

<sup>7</sup> Oppong  
[http://www.kas.de/upload/auslandshomepages/namibia/MRI2008/MRI2008\\_07\\_Oppong.pdf](http://www.kas.de/upload/auslandshomepages/namibia/MRI2008/MRI2008_07_Oppong.pdf)  
(Date of use: 8 April 2015).

<sup>8</sup> Oppong  
[http://www.kas.de/upload/auslandshomepages/namibia/MRI2008/MRI2008\\_07\\_Oppong.pdf](http://www.kas.de/upload/auslandshomepages/namibia/MRI2008/MRI2008_07_Oppong.pdf)  
(Date of use: 8 April 2015).

<sup>9</sup> SADC Protocol on Tribunal and Rules of Procedure thereof (2000/2001) available at <http://www.sadc.int/index/browse/page/163> (Date of use: 21 March 2014).

<sup>10</sup> The study does not intend to discuss and analyse the constitutions of SADC member states comprehensively, but seeks merely to determine how SADC Community law is given the force of local law.

applicable to the Tribunal, and the approach (if any) taken by national courts. I shall also examine whether the Tribunal's decisions ought to enjoy a status superior to the decisions of national courts and whether these decisions are directly enforceable in the national courts of member states. To the extent relevant, reference is made to the treaties (and decisions) establishing the ECOWAS CCJ and the European Court of Justice.

## **2 THE RELATIONSHIP BETWEEN INTERNATIONAL LAW AND SADC COMMUNITY LAW**

SADC Community law can be described as the legal principles, and undertakings set out in the SADC Treaty and its protocols.<sup>11</sup> Regulations and other treaties of the community are also part and parcel of community law.<sup>12</sup> These provisions are binding on member states. The establishment of the Tribunal was a huge step forward in the development of SADC Community law and jurisprudence.<sup>13</sup> However, this achievement was short lived as the Tribunal was suspended in 2010 before it was able to finalise the cases already before it.

Neither the Treaty nor the Tribunal Protocol contains any provision indicating the relationship between SADC Community law and international law. The provision dealing with international law empowers the Tribunal to develop: "Community jurisprudence having regard to applicable treaties, general principles and rules of public international law".<sup>14</sup> These sources for the development of SADC Community law reproduce the well-known binding sources of public international law. It is therefore logical to conclude that the sources of public international law serve as persuasive legal authority in SADC Community law, and that SADC Community law should be in line with international law. This observation is important as it will form the basis for my argument that the sources of international law are a useful tool in ensuring convergence of SADC Community and international law, and that the national law of SADC member states is aligned with SADC Community law. In this regard, member states may not act in a way that is contrary to SADC Community law.

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<sup>11</sup> Article 21(a) of the 2000 Tribunal Protocol.

<sup>12</sup> Oppong "Regional economic community laws" 2.

<sup>13</sup> Ruppel OC and Bangamwabo FC "The SADC Tribunal: A legal analysis of its mandate and role in regional integration" available at [http://www.kas.de/upload/auslandshomepages/namibia/MRI2008/MRI2008\\_08\\_Ruppel.pdf](http://www.kas.de/upload/auslandshomepages/namibia/MRI2008/MRI2008_08_Ruppel.pdf) (Date of use: 15 April 2015).

<sup>14</sup> Article 21(b) of the 2000 Tribunal Protocol.

### 3 TRADITIONAL THEORIES ON THE RECEPTION OF INTERNATIONAL LAW IN NATIONAL LAW

The legal systems of all SADC countries differ in that some are monist and others dualist. The former British colonies are, by and large, dualist,<sup>15</sup> while some of the former French and German colonies are predominantly monist.<sup>16</sup> These theories are discussed in what follows.

#### 3.1 Dualism

In terms of the dualist theory, international law may only be applied by national courts if it has been transformed into national law through legislation.<sup>17</sup> For example, South Africa follows a dualistic approach and treaties are not directly enforceable in South African law unless parliament gives such law the force of national law in terms of section 231(4) of the Constitution,<sup>18</sup> which reads as follows:

Any international agreement becomes law in the Republic when it is enacted into law by national legislation but a self-executing provision of an agreement that has been approved by Parliament is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament.<sup>19</sup>

In this regard Schlemmer (with reference to the World Trade Organisation [WTO] agreements in South African law) points out that the WTO agreements are binding on South Africa at an international level because they have been ratified.<sup>20</sup> However, since there has been no

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<sup>15</sup> Oppong  
[http://www.kas.de/upload/auslandshomepages/namibia/MRI2008/MRI2008\\_07\\_Oppong.pdf](http://www.kas.de/upload/auslandshomepages/namibia/MRI2008/MRI2008_07_Oppong.pdf)  
(Date of use: 10 April 2015).

<sup>16</sup> Oppong  
[http://www.kas.de/upload/auslandshomepages/namibia/MRI2008/MRI2008\\_07\\_Oppong.pdf](http://www.kas.de/upload/auslandshomepages/namibia/MRI2008/MRI2008_07_Oppong.pdf)  
(Date of use: 10 April 2015). It should be noted that the so-called harmonisation theory emerged to qualify the absolute monist theory. In this regard, Dugard explains it as follows: "... in cases of conflict between international law and municipal law the judge must apply his country's own jurisdictional rules. This means that customary international law is to be applied directly as part of the common law, but that conflicting statutory rules and acts of state may prevail over international law. In this way, 'harmony' is achieved between international law and municipal law". See Dugard *International Law* 43.

<sup>17</sup> Section 231 of the Constitution of the Republic of South Africa, 1996, which deals with domestication of international law into South African domestic law. See also Olivier *Human Rights Procedure, Policy and Practice* 36.

<sup>18</sup> Schlemmer 2004 (29) *South African Yearbook of International Law* 59; Bridge 1971 (20) *International and Comparative Law Quarterly* 747.

<sup>19</sup> Section 231(4) of the Constitution of the Republic of South Africa, 1996.

<sup>20</sup> Schlemmer 2004 (29) *South African Yearbook of International Law* 134; Olivier *Human Rights Procedure, Policy and Practice* 57.

legislation enacted in order to domesticate the WTO, they are not part of South African national law.<sup>21</sup>

Even though the South African Constitution provides a binding procedure for domesticating international law, the section is not entirely clear. In particular, the introduction of the concept of a self-executing treaty which becomes automatically binding in the domestic sphere upon ratification, is problematic.<sup>22</sup> A provision of the treaty is said to be self-executing if it can be applied by the courts without the need for further legislation to give it national effect.<sup>23</sup> In order to ascertain whether certain provisions in a treaty are indeed self-executing or not, is a matter to be clarified by the courts.<sup>24</sup>

The requirement of the statutory enactment of international law in national law is the final step in the procedure triggering the applicability of international law in national law. I therefore support the view expressed by Schlemmer, because South Africa is a dualist state and ratified treaties, by and large, still need to be domesticated in South African law. For dualist states, the assumption of treaty obligations that have the force of national law is not completed by the mere

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<sup>21</sup> Schlemmer 2004 (29) *South African Yearbook of International Law* 134; Olivier *Human Rights Procedure, Policy and Practice* 57.

<sup>22</sup> De Wet 2004 (28) *Fordham International Law Journal* 1532-1533. Some of the scholars view the inclusion of a self-executing treaty in the Constitution of South Africa as serving no real purpose. Others think that the inclusion was “nonsensical” and “farcical”. See, *inter alia*, Botha 2008 (33) *South African Yearbook of International Law* 253-254, 265; Scholtz 2004 (29) *South African Yearbook of International Law* 216. Killander 2010 (6) SA 399 (WCC) 2010 (26) *South African Journal on Human Rights* 389-392. The courts have also given divergent rulings on self-executing treaties. For example, in *Quagliani v President of the Republic of South Africa* case 959/04 (TPD) and *Van Rooyen/Brown v President of the Republic of South Africa* case 28214/06 (TPD), the Court held that the extradition agreements entered into between South Africa and the United States of America was not a self-executing treaty as per the provisions of section 231(4) of the Constitution. However, in *Goodwin v Director-General Department of Justice and Constitutional Development* case 21142/08 (TPD) (unreported) which dealt with the same issue as in the aforesaid case, the Court said that the extradition agreement between South Africa and the United States of America was self-executing. These decisions went on appeal to the Constitutional Court of South Africa in *President of the Republic of South Africa and Others v Quagliani; President of the Republic of South Africa and Others v Van Rooyen and Another; Goodwin v Director-General, Department of Justice and Constitutional Development* 2009 (4) BCLR 345 (CC) at para 37 where the Court said that the Extradition Act 67 of 1962 sets the framework for “giving domestic effect to the content of those [extradition] treaties”. Therefore, it was unnecessary for the Court to determine whether the extradition agreement between South Africa and the United States of America was self-executing or not.

<sup>23</sup> Leary *Labour Conventions and National Law* 39.

<sup>24</sup> Dugard 1997 (1) *European Journal of International Law* 83.



act of ratification.<sup>25</sup> There is a further requirement of domesticating that particular treaty through legislation in the national legal system.<sup>26</sup> The requirement of domestication of international law in South African law has been dealt with in many cases. In the matter between *International Trade Administration Commission v SCAW South Africa*<sup>27</sup> the Court was clear that the General Agreement on Tariffs and Trade of 1994 and WTO Agreements were part and parcel of South African law because they had been enacted into national law. The Court said:

[South Africa's] international obligations on tariffs and trade arise from the WTO Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 ... These obligations are honoured through domestic legislation ... [which] consists of the International Trade Administration Act, 2000 ... The Act [International Trade Administration] is the primary domestic legislation ...<sup>28</sup>

This position reflects the general approach of the courts.<sup>29</sup> However, despite the established jurisprudence on the process of transforming treaty obligations into municipal law, the Constitutional Court appears to be adopting what may be considered a monist approach in its recent decisions. For example, in *Glenister v President of the Republic of South Africa and Others*,<sup>30</sup> the Court was called upon to determine the constitutionality of the National Prosecuting Authority Act 56 of 2008 and the South African Police Service Amendment Act 57 of 2008. The effect of these Acts was to disband the Directorate of Special Operations, which was located within the National Prosecuting Authority, and replace it with the Directorate of Priority Crime Investigation, located within the South African Police Service. The main issues were whether section 7(2) of the Constitution and ratified (but not domesticated) treaties impose a positive obligation on the state to establish an independent anti-corruption unit.<sup>31</sup> The answers to these questions divided the Court. Interestingly, both the majority and minority judgments agreed that South Africa was obliged in terms of international law to create an independent

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<sup>25</sup> Killander and Adjolahoun "International law and domestic human rights" 11.

<sup>26</sup> Ambani "Navigating past" 26.

<sup>27</sup> 2012 (4) SA 618 (CC) (hereafter the *SCAW* case).

<sup>28</sup> *SCAW* case at paras 2 and 31.

<sup>29</sup> See, *inter alia*, *Azanian Peoples Organization (AZAPO) and Others v President of the Republic of South Africa and Others* 1996 (8) BCLR 1015 (CC) at para 26 and *Government of the Republic of South Africa and Others v Grootboom and Others* 2001 (1) SA 46 at para 26.

<sup>30</sup> 2011 (3) SA 347 (CC) (hereafter the *Glenister* case). See also *Government of the Republic of Zimbabwe v Fick and Others* 2013 (5) SA 325 (CC). In this case, the Court also relied on and applied the provisions of the Treaty and the 2000 Tribunal Protocol to recognise and enforce the judgment of the Tribunal, even though these treaties had not been incorporated into South Africa's national law.

<sup>31</sup> *Glenister* case at paras 54, 83 and 86.

body to prevent organised crime.<sup>32</sup> The only disagreement was on the interpretation of the content and extent of the obligation to which South Africa was bound by international law.

The majority decision indicated that section 231(2) of the Constitution imposes a legal obligation on South Africa at an international level.<sup>33</sup> This implies that a treaty that has been approved by Parliament binds South Africa and other states to that agreement on the international plane.<sup>34</sup> However, the majority judgment cautioned that South Africa's international obligations arising from section 231(2) of the Constitution, although binding only on the international plane, should not be seen to mean that these international obligations have no impact at a domestic level.<sup>35</sup> To this end, the majority judgment found that South Africa's obligation to establish an independent unit to deal with crime does not exist on the international level alone, but is also enforceable on the national level in terms of the Constitution.<sup>36</sup> The basis for this was that section 7(2) of the Constitution requires the "state to respect, protect, promote and fulfil the rights in the Bill of Rights".<sup>37</sup> The majority judgment proclaimed that the provisions of section 7(2) of the Constitution, *inter alia*, "impose a positive obligation on the state" to devise structures that will protect everyone.<sup>38</sup> It further held that implicit in this positive obligation, is the duty to take reasonable measures to ensure that the rights in the Bill of Rights are protected.<sup>39</sup> For the majority, to establish whether something is reasonable must be determined by having regard to international law as mandated by section 39(1)(b) of the Constitution which obliges it to consider international law when interpreting the Bill of Rights.<sup>40</sup> The majority then found that the conclusion it had reached as regards South Africa's obligation to create an independent unit under international law, is not intended "to incorporate international agreements into [the] Constitution", but rather represents the Court being "faithful to the Constitution itself, and to give meaning to the ambit of the duties it creates in accordance with its own clear interpretive injunctions".<sup>41</sup>

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<sup>32</sup> *Glenister* case at paras 96, 101, and 115 for the minority decision, and at paras 183 and 189 for the majority decision.

<sup>33</sup> At paras 181-182.

<sup>34</sup> At para 182.

<sup>35</sup> At para 182.

<sup>36</sup> At para 189.

<sup>37</sup> At para 189.

<sup>38</sup> At para 189.

<sup>39</sup> At para 189.

<sup>40</sup> At para 192.

<sup>41</sup> At para 195.

Tuovinen is of the view that the majority judgment takes a “highly ambitious approach about the role of international law in constitutional adjudication” for the reasons indicated below.<sup>42</sup> The difficulty with the majority judgment is that it relies on ratified but unincorporated treaties, such as the United Nations Convention Against Transnational Organised Crime,<sup>43</sup> in reaching its conclusion that the disbanding of the Directorate of Special Operations and its replacement with the Directorate of Priority Crime Investigation was unconstitutional. The question asked by Ferreira and Ferreira-Snyman regarding the approach and the effect of the majority decision on the relationship between international law and national law in South Africa, is relevant to the present discussion.<sup>44</sup> The majority judgment, through the “interpretive injunction in section 39(1)(b) and its concomitant effect on section 7(2) of the Constitution, the latter of which concerns positive obligations of the state”, established a way for unincorporated international law to override local law.<sup>45</sup> This case reflects an unusual procedure in which an unincorporated treaty was applied to influence its role within the domestic law.<sup>46</sup> The observation by Ferreira and Ferreira-Snyman that the practical effects of the route taken by the majority judgment is “to allow the *Constitution* to impose a monist approach” when it comes to human rights obligations flowing from ratified (but unincorporated) treaties, in that they are applied by the courts even

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<sup>42</sup> Tuovinen 2013 (134) *The South African Law Journal* 664. Tuovinen captures the problems of the majority judgment as follows: “The fundamental problem with the majority judgment is the manner in which the majority adopts a questionable distinction between on the one hand adopting international law into the constitutional scheme, and on the other hand incorporating international law into domestic law. The majority highlights the importance of international law to constitutional adjudication and states that the Constitution ‘appropriates the obligation for itself and draws it deeply into its heart, by requiring the state to fulfil it into the domestic sphere’ (para 189). Nevertheless, the majority states that what s 39(1)(b) does ‘is not to incorporate international agreements into our Constitution. It is to be faithful to the Constitution itself, and to give meaning to the ambit of the duties it creates in accordance with its own clear interpretive injunctions’ (para 195). The majority fails to explain the difference between ‘adopting’, ‘appropriating’, ‘drawing in’ and ‘incorporating’ international norms into the constitutional scheme. Thus, the reader is left without a clear idea of how the majority conceives of the role of international law from a broader, doctrinal point of view.” See also Cameron 2013 (23) *Duke Journal of Comparative and International Law* 405. Cameron was one of the judges who delivered the majority judgment in 2011. However, in 2013 he reflected on the same judgment and, *inter alia*, said: “Glenister goes far further than this. It cuts through the debate and draws international law directly into the domestic sphere, using the provisions of the Constitution itself. Yet it does so without adopting a monist approach”.

<sup>43</sup> United Nations Convention against Transnational Organized Crime, GA res 25, annex I, UN GAOR, 55th Sess, Supp No 49, at 44, UN Doc A/45/49 (Vol. I) (2001), entered into force 29 September 2003.

<sup>44</sup> Ferreira and Ferreira-Snyman 2014 (4) *Potchefstroom Electronic Law Journal* 1481.

<sup>45</sup> Stubbs 2011 (4) *Constitutional Court Review* 148.

<sup>46</sup> Stubbs 2011 (4) *Constitutional Court Review* 148.

though they have not been domesticated, has merit.<sup>47</sup> This was a clear departure from the dualist theory which regards international law and municipal law as two distinct and independent legal systems.

The minority judgment disagreed with the majority decision and held that the approval of an international agreement in terms of section 231(2) of the Constitution does not imply that the agreement has been incorporated into South African law. For it to become law, it must be given the force of national law by enabling legislation, as mandated by section 231(4) of the Constitution.<sup>48</sup> The minority further said:

[T]reating international conventions as interpretive aids does not entail giving them the status of domestic law in the Republic. To treat them as creating domestic rights and obligations is tantamount to incorporat[ing] the provisions of the unincorporated convention into our municipal law by the back door.<sup>49</sup>

The minority judgment dealt with the issue before it by taking into account that South Africa follows a dualist legal system and therefore ratified treaties are not binding at the national level until they have been incorporated.<sup>50</sup> I agree with the minority judgment as the procedure for the application of or reliance on international law is provided in the Constitution and the Court's own jurisprudence. The Court ought to have followed the dualist theory that regards international law and municipal law as separate and supreme within their own spheres of operation.<sup>51</sup> It is therefore submitted that applying unincorporated treaties at a national level is contrary to section 231(4) of the Constitution. Ratified treaties must still be enacted into national law through legislation. The Courts' approach has the potential of creating legal uncertainty, something that is undesirable for South Africa's relationship with international law.

Tshosa has rightly observed that the monist and dualist theories must be "approached with caution" as they may not "in practical terms purely determine the relationship between national and international law".<sup>52</sup> The South African case law above supports Tshosa's observation. In

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<sup>47</sup> Ferreira and Ferreira-Snyman 2014 (4) *Potchefstroom Electronic Law Journal* 1481.

<sup>48</sup> *Glenister* case at paras 89-90.

<sup>49</sup> At para 98.

<sup>50</sup> Ferreira and Ferreira-Snyman 2014 (4) *Potchefstroom Electronic Law Journal* 1481.

<sup>51</sup> Eboerah and Nkhata 2010 (43) *The Comparative and International Law Journal of Southern Africa* 85.

<sup>52</sup> Tshosa O "The status of international law in Namibian national law: A critical appraisal of the constitutional strategy" available

addition, the approach taken by South African courts makes the status of SADC Community law in the national legal system of South Africa unclear.

In support of his views, Tshosa submits that the applicability of international law in the national sphere is “always conditioned by a rule of municipal law”. In addition, the application of treaties in many legal systems is mainly “governed by domestic constitutional law”.<sup>53</sup> Further, he points out that the practical approach of the national courts is different as at times even monist countries fail to apply treaties that are applicable in a particular case.<sup>54</sup> Despite these observations, Tshosa agrees that both systems are useful in helping to understand the relationship between international law and municipal law. Indeed, despite the highlighted gaps in the monist and dualist theories, they are nonetheless valuable in identifying how a particular legal system treats international law within its national law. Tshosa’s views have merit and it is submitted that they should also apply to regional law because community law and international law are created through state consent and member states decide the manner in which these two legal systems will be given the force of law in their own territories.<sup>55</sup> Further, as Barent’s correctly points out, “there is no fundamental difference between community law and international law, as various characteristics of the community legal order such as direct effect ... [and] primacy are also recognised in international law”.<sup>56</sup> I also adopt this view because, in reality, international law and community are adopted and operationalised in the same manner. Countries in the SADC region with dualist legal systems include Botswana, Lesotho,<sup>57</sup> Malawi, Swaziland,<sup>58</sup> Tanzania, Zambia, Zimbabwe and South Africa. Of these countries, South Africa,<sup>59</sup>

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53 at:[http://www.kas.de/upload/auslandshomepages/namibia/Namibia\\_Law\\_Journal/2010\\_1/NLJ\\_section\\_1.pdf](http://www.kas.de/upload/auslandshomepages/namibia/Namibia_Law_Journal/2010_1/NLJ_section_1.pdf) (Date of use: 23 April 2014).

Tshosa  
54 [http://www.kas.de/upload/auslandshomepages/namibia/Namibia\\_Law\\_Journal/2010\\_1/NLJ\\_section\\_1.pdf](http://www.kas.de/upload/auslandshomepages/namibia/Namibia_Law_Journal/2010_1/NLJ_section_1.pdf) (Date of use: 23 April 2014).

Tshosa  
55 [http://www.kas.de/upload/auslandshomepages/namibia/Namibia\\_Law\\_Journal/2010\\_1/NLJ\\_section\\_1.pdf](http://www.kas.de/upload/auslandshomepages/namibia/Namibia_Law_Journal/2010_1/NLJ_section_1.pdf) (Date of use: 23 April 2014).

56 Barents *The Autonomy of Community Law* 184.

56 Barents *The Autonomy of Community Law* 184; Wyatt 1982 (7) *European Law Review* 147. It must nonetheless be noted that under the European Union system, community law is regarded as a separate legal order. This is due to the fact that the European Union is a distinct regional organisation where the decisions of the European Court of Justice have direct effect in the territory of member states.

57 Dube BA “The law and legal research in Lesotho” available at <https://www.crin.org/en/library/publications/lesotho-national-laws#one> (Date of use: 8 April 2015). The Constitution of Lesotho which was adopted in 1993, amended in 1996, 1997, 1998, and 1991 does not make any reference to international law.

Malawi,<sup>60</sup> Zimbabwe<sup>61</sup> and Tanzania<sup>62</sup> have clear provisions on the status of international law and the processes for its domestication in national law. This is what Oppong refers to as Africa's "international law-friendly" attitude, as opposed to the initially hostile approach to international law during and immediately after colonialism.<sup>63</sup> Unfortunately, no SADC member state has to date domesticated the SADC Treaty or the Tribunal Protocol. The dualist countries have, however, domesticated other treaties in their municipal laws. For example, in 2008 Tanzania enacted the Anti-Trafficking in Persons Act 6 of 2008 which domesticates the Protocol to Prevent, Suppress and Punish Trafficking in Persons.<sup>64</sup> South Africa has also domesticated, *inter alia*, the Rome Statute of the International Criminal Court<sup>65</sup> by enacting the Implementation of the Rome Statute of the International Criminal Court Act 27 of 2002.<sup>66</sup> Lesotho has also domesticated, *inter alia*, the United Nations Convention on the Rights of the Child<sup>67</sup> through enacting the Children's Protection and Welfare Act 2004. From this, it can be deduced that there has been what may be described as "a wait and see approach", or some lack of political will when it comes to the domestication of the SADC Treaty and Tribunal Protocol.<sup>68</sup>

The constitutions of Botswana,<sup>69</sup> Lesotho<sup>70</sup> and Zambia<sup>71</sup> are silent on the legal status of international law at the domestic level. The status of international law in Zambia is governed by

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<sup>58</sup> Article 236(2) of the Constitution of the Kingdom of Swaziland Act No 001 of 2005 provides that: "Swaziland shall conduct its international affairs directly or through officers of the Government in accordance with the accepted principles of public or customary international law and diplomacy in a manner consistent with the national interest". There is nothing stated regarding the status of international or SADC Community law.

<sup>59</sup> Section 231 of the Constitution of the Republic of South Africa, 1996.

<sup>60</sup> Section 211 of the Constitution of Malawi, 1994; Hansen 2002 (46) *Journal of African Law* 31-42.

<sup>61</sup> Section 111B of the Constitution of Zimbabwe as amended at 14 September, 2005 (up to and including Amendment No 17).

<sup>62</sup> Article 63 of the Constitution of the Republic of Tanzania, 1977. See also the detailed discussion by Murungu "Human rights litigation in Tanzania" 60-61.

<sup>63</sup> Oppong 2006 (30) *Fordham International Law Journal* 296.

<sup>64</sup> Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention Against Transnational Organized Crime, GA res 25, annex II, UN GAOR, 55th Sess, Supp No 49, at 60, UN Doc A/55/49 (Vol I) (2001), entered into force on 25 December 2003; Murungu "Human rights litigation in Tanzania" 60.

<sup>65</sup> Rome Statute of the International Criminal Court 2187 UNTS 90, entered into force on 1 July 2002.

<sup>66</sup> See also Katz 2003 (12) *African Human Security Review* 27.

<sup>67</sup> Convention on the Rights of the Child, GA res 44/25, annex, 44 UN GAOR Supp (No 49) at 167, UN Doc A/44/49 (1989), entered into force 2 September 1990.

<sup>68</sup> Scholtz and Ferreira 2011 (71) *Heidelberg International Law Journal* 352, 357.

<sup>69</sup> Quansah "International law as an interpretative tool" 37. See also the Constitution of Botswana, 1966.

common law and, as a dualist state, a treaty must be transformed into national law through legislation in order to have the force of national law.<sup>72</sup> Although Zambia actively participated in negotiating, adopting and ratifying several international instruments during the 1980s, it has, twenty years later, not yet transformed any of these instruments into national law.<sup>73</sup> As a result, it is argued that there is no apparent willingness to domesticate international law, including the SADC Treaty and the Tribunal Protocol.

With regard to Botswana, the country's legal system is a dualist one<sup>74</sup> and a ratified treaty does not automatically attain the force of national law but must be domesticated before it can be applied at the national level.<sup>75</sup> There is a distinction that needs to be made between treaties in Botswana as there are those that require parliamentary action in order to have a force of national law.<sup>76</sup> These are the treaties that are intended to affect the rights and duties of individual.<sup>77</sup> Those treaties which deal with administrative issues such as "the provision of technical and financial assistance, do not require parliamentary action".<sup>78</sup> Botswana, too, does not have a good record of incorporating ratified treaties into its domestic law.<sup>79</sup>

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<sup>70</sup> The Constitution of Lesotho, 1993.

<sup>71</sup> Hansungule "Domestication of international human rights law in Zambia" 71.

<sup>72</sup> Hansungule "Domestication of international human rights law in Zambia" 71.

<sup>73</sup> Hansungule "Domestication of international human rights law in Zambia" 72. For example, Zambia has ratified the African Charter on Human and Peoples' Rights and the International Covenant on Civil and Political Rights but is yet to give them the force of local law.

<sup>74</sup> Quansah "International law as an interpretative tool" 45.

<sup>75</sup> Quansah "International law as an interpretative tool" 37, 39. See also *Attorney-General v Dow* (2001) AHRLR 99 (BwCA 1992) at para 100 where the appellant *inter alia* argued that the Declaration on the Elimination of Discrimination against Women had not been "incorporated into the domestic law [of Botswana] by legislation ... International treaties became part of the law only when so incorporated". The Court agreed with the appellant but did not further discuss the issue as it was of the view that the Court of first instance did not apply the aforesaid provisions but had merely used them as an interpretative tool.

<sup>76</sup> Fombad C "Botswana: Introductory notes" available at [http://www.icla.up.ac.za/images/country\\_reports/botswana\\_country\\_report.pdf](http://www.icla.up.ac.za/images/country_reports/botswana_country_report.pdf) (Date of use: 15 October 2015).

<sup>77</sup> Fombad C "Botswana: Introductory notes" available at [http://www.icla.up.ac.za/images/country\\_reports/botswana\\_country\\_report.pdf](http://www.icla.up.ac.za/images/country_reports/botswana_country_report.pdf) (Date of use: 15 October 2015).

<sup>78</sup> Fombad C "Botswana: Introductory notes" available at [http://www.icla.up.ac.za/images/country\\_reports/botswana\\_country\\_report.pdf](http://www.icla.up.ac.za/images/country_reports/botswana_country_report.pdf) (Date of use: 15 October 2015).

<sup>79</sup> Quansah "International Law as an interpretative tool" 54.

Seychelles has a hybrid legal system based on both French civil law and English common law.<sup>80</sup> The Constitution of the Seychelles provides guidance on the status or application of international law in the domestic system.<sup>81</sup> The country follows the dualist approach when it comes to the reception of international law into its domestic system. Further, article 48 of the Constitution of Seychelles, 1993, *inter alia* provides that the Bill of Rights shall be interpreted in a manner that is not contrary to Seychelles's international human rights obligations. Seychelles is yet to ratify the SADC Treaty.<sup>82</sup>

### 3.2 Monism

The monist theory views international law and municipal law as a single system of law.<sup>83</sup> Consequently, international law need not be transformed into national law because the act of ratification (followed by publication) of an international treaty immediately transforms the treaty law into national law.<sup>84</sup> Unlike dualism, upon ratification and publication the treaty obtains the force of national law and its status in local law is settled in that international law takes precedence over national law.<sup>85</sup> This is usually the case with former French colonies whose constitutions were influenced by article 55 of the French Constitution of 1958, which gives ratified and domestically-published treaties supremacy over national law.<sup>86</sup>

This is also the case with article 215 the Constitution of the Democratic Republic of Congo, 2005, which provides that “[l]awfully concluded treaties and agreements have, when published,

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<sup>80</sup> Killander and Adjolohoun “International law and domestic human rights” 5.

<sup>81</sup> Article 48 of the Constitution of Seychelles, 1993.

<sup>82</sup> Update on the Status of Member States Signatures and Ratifications of, and Accessions to the SADC Treaty, Protocols and other Legal Instruments as at 12 October 2004. available at [http://www.paulroos.co.za/wpcontent/blogs.dir/12/files/2011/uploads/20060621\\_status\\_SADC\\_protocols.pdf](http://www.paulroos.co.za/wpcontent/blogs.dir/12/files/2011/uploads/20060621_status_SADC_protocols.pdf) (Date of use: 8 April 2015).

<sup>83</sup> Dugard *International Law* 42; Starke 1936 (17) *British Yearbook of International Law* 70; Katz 2003 (12) *African Human Security Review* 27; Marian B “The dualist and monist theories. International law’s comprehension of these theories” available at [http://revcurentjur.ro/arhiva/attachments\\_200712/recjurid071\\_22F.pdf](http://revcurentjur.ro/arhiva/attachments_200712/recjurid071_22F.pdf) (Date of use: 29 July 2012).

<sup>84</sup> Oppong “Regional economic community laws” 11; Tanoh and Adjolohoun “International law and human rights litigation in Côte d’Ivoire and Benin” 114.

<sup>84</sup> Killander and Adjolohoun “International law and domestic human rights” 6.

<sup>85</sup> Oppong “Regional economic community laws” 11.

<sup>86</sup> The French Constitution of October 4, 1958. Article 55 provides that: “Treaties or agreements duly ratified or approved shall, upon publication, prevail over Acts of Parliament, subject, with respect to each agreement or treaty, to its application by the other party”. Text available at [http://www.conseilconstitutionnel.fr/conseilconstitutionnel/root/bank\\_mm/anglais/constiution\\_anglais\\_juillet2008.pdf](http://www.conseilconstitutionnel.fr/conseilconstitutionnel/root/bank_mm/anglais/constiution_anglais_juillet2008.pdf) (Date of use: 10 April 2010). The Constitution of Burundi and Madagascar do not have the supremacy clause even though they were colonised by France.



an authority superior to that of the law, subject for each treaty and agreement to the application by the other party". Ultimately, international law is applicable as law in the national legal system and may be invoked directly in national courts.<sup>87</sup> However, it must be noted that this is not automatically the position in all countries whose legal systems are monist. The precedence of international law over national law largely depends on what the constitution of a particular country determines. Thus, the fact that international law may be directly applied by the courts, does not mean that it automatically takes precedence over domestic law.

In countries with a monist legal system, such as Madagascar<sup>88</sup> and the Democratic Republic of Congo,<sup>89</sup> national courts are obliged to apply the provisions of international law without a further act of incorporation by the legislature.<sup>90</sup> However, in practice this seldom happens. Killander and Adjolahoun have observed that "direct applicability of international law in domestic courts in civil law countries is in practice avoided by the courts, though sometimes invoked by counsel".<sup>91</sup> Instead, courts only refer to international law in certain cases as a means of upholding constitutional provisions.<sup>92</sup> This is often the case with Francophone African countries such as Burundi and the Democratic Republic of Congo, which also follow the monist approach.<sup>93</sup> It is, however, interesting to note that Portuguese-speaking African countries such as Angola,<sup>94</sup> Mozambique<sup>95</sup> and the former German colony, Namibia,<sup>96</sup> which also follow a monist legal

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<sup>87</sup> Tanoh and Adjolahoun "International law and human rights litigation in Côte d'Ivoire and Benin" 114.

<sup>87</sup> Killander and Adjolahoun "International law and domestic human rights" 11.

<sup>88</sup> See art 132 (Title IV) of the Constitution of Madagascar, 2007, which deals with treaties and international agreements. In terms of the Constitution, the ratification of such instruments means that they take precedence over laws.

<sup>89</sup> Articles 153 and 213 of the Constitution of the Democratic Republic of Congo, 2005.

<sup>90</sup> Dugard *International Law* 47; Killander and Adjolahoun "International law and domestic human rights" 6.

<sup>91</sup> Killander and Adjolahoun "International law and domestic human rights" 6.

<sup>92</sup> Killander and Adjolahoun "International law and domestic human rights" 7.

<sup>93</sup> Killander and Adjolahoun "International law and domestic human rights" 6.

<sup>94</sup> Several provisions of the Constitution of the Republic of Angola, 2010, recognises international law. Article 13(2) provides that "[d]uly approved or ratified international treaties and agreements shall come into force in the Angolan legal system after they have been officially published and have entered into force in the international legal system, for as long as they are internationally binding upon the Angolan state".

<sup>95</sup> This is supported by art 18(1) of the Constitution of the Republic of Mozambique, 2004, which provides that "[v]alidly approved and ratified International treaties and agreements shall enter into force in the Mozambican legal order once they have been officially published and while they are internationally binding on the Mozambican State".

<sup>96</sup> Article 144 of the Constitution of the Republic of Namibia, 1990, provides that "[un]less otherwise provided by this Constitution or Act of Parliament, the general rules of public international law and

system, have constitutions that are friendlier in accommodating international law.<sup>97</sup> This observation is supported by article 18(2) of the Constitution of Mozambique in that norms of international law shall have the same force in the Mozambican legal order as have infra-constitutional legislative acts (situated under the constitution). Article 26(1) of the Angolan Constitution states that the fundamental rights provided for in the constitution shall not exclude others contained in international law. There is no doubt that these constitutional provisions expressly recognise and give international law the force of national law in these countries. This notwithstanding, it does not mean that international law is frequently applied by national courts as the “courts still expect the legislator to provide a legal framework for the implementation of treaty principles”.<sup>98</sup> My research has, with the exception of Sychelles and Mauritius, revealed that all the SADC states have ratified the SADC Treaty<sup>99</sup> and the Tribunal Protocol. However, all the states whose legal system is monist have not as yet published these instruments in their national laws in order to give them the force of national law. This is also the situation with the states whose legal system is dualistic and which have not yet promulgated enabling legislation. This thus means that the provisions of the Treaty and Tribunal Protocol have not been given the force of national law in the territories of all SADC states and consequently cannot be applied by national courts.

Mauritius has a hybrid legal system based on both French civil law and English common law.<sup>100</sup> The Constitution of Mauritius<sup>101</sup> is silent on the status of international law in the domestic sphere. There is furthermore no constitutional provision dealing with the process of ratification and implementation of international law in Mauritius. The Constitution of Mauritius provides only that the constitution is the supreme law of the country and that any law inconsistent with it shall

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international agreements binding upon Namibia under this Constitution shall form part of the law of Namibia”.

<sup>97</sup> Killander and Adjolahoun “International law and domestic human rights” 9.

<sup>98</sup> Horn H “International human rights norms and standards: The development of Namibian case and statutory law” available at <http://www.kas.de/upload/auslandshomepages/namibia/HumanRights/horn.pdf> (Date of use: 23 April 2014).

<sup>99</sup> The 2000 Tribunal Protocol has been ratified by all SADC member states. See Update on the Status of Member States Signatures and Ratifications of, and Accessions to the SADC Treaty, Protocols and other Legal Instruments as at 12 October 2004 available at [http://www.paulroos.co.za/wpcontent/blogs.dir/12/files/2011/uploads/20060621\\_status\\_SADC\\_protocols.pdf](http://www.paulroos.co.za/wpcontent/blogs.dir/12/files/2011/uploads/20060621_status_SADC_protocols.pdf) (Date of use: 8 April 2015).

<sup>100</sup> Killander and Adjolahoun “International law and domestic human rights” 5.

<sup>101</sup> The Constitution of Mauritius, 1968.

be void.<sup>102</sup> As I have indicated, Mauritius has not yet ratified the SADC Treaty and Tribunal Protocol. In light of the above, it is necessary for Mauritius to provide a procedure for becoming party to the SADC Treaty and the status of this treaty in its national law.

Although specifically referring to international human rights law, Killander and Adjolahoun have indicated that to ensure greater reliance on international law, ratified treaties should be published so that lawyers and judges may readily access the knowledge they need to ensure quality pleadings and judgments.<sup>103</sup> In addition, they recommend that countries that have not done so, "...should provide a constitutional or legislative mandate for courts to consider international human rights law in addition to implementing legislation consistent with their international obligations".<sup>104</sup> In the absence of these recommended provisions, it will be difficult to implement international obligations at the national level. It is submitted that the continued uncertain status of the Treaty and Tribunal Protocol in the countries with a monist legal system, could be viewed as a lack of political will from member states to give effect to the obligations assumed under these instruments.

Three observations can be made as regards the theories of law discussed above. Monism views international law and national law as a single system. Further, in cases of conflict between the two legal systems, there is no clarity of what should occur unless a specific country has expressly indicated that its national legal system shall have the same status as SADC Community law, or that the latter shall enjoy superior status where a conflict between the two legal systems arises. Dualism sees international law and national law as two distinct and independent legal systems which operate in their own spheres. Consequently, national law can enjoy a status superior to international law – except in the case of *jus cogens* norms. This is so because it was said that the source of national law is the will of the state itself, whereas the source of international law is the common will of states.<sup>105</sup>

International law traditionally dealt with states as subjects of international law.<sup>106</sup> This is no longer the position. It is now beyond doubt that the traditional view which regarded international

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<sup>102</sup> Section 2 of the Constitution of Mauritius, 1968.

<sup>103</sup> Killander and Adjolahoun "International law and domestic human rights" 20.

<sup>104</sup> Killander and Adjolahoun "International law and domestic human rights" 20.

<sup>105</sup> Starke and Shearer *Starke's International Law* 64.

<sup>106</sup> Shaw *International Law* 131.

law as regulating states only no longer applies.<sup>107</sup> Individuals too, have become subjects of international law and holders of rights.<sup>108</sup> Further, national law cannot be used to invalidate or evade international obligations. It is in this regard that it is submitted that international law (and thus regional law) should override national law when a conflict between the two arises. This will apply only if the constitution of a particular country is clear that regional law takes precedence over national law. It is submitted that once a state becomes a party to a treaty, and that treaty is published at a national level, such a treaty should acquire a status superior to national law if the constitution of the state concerned so provides.<sup>109</sup> Where there is no provision indicating the solution in case of conflict between two legal systems, it is submitted that the state concerned should strive as far as possible to accord regional law superior status. Accordingly, it is submitted that when there is a conflict between SADC Community law and national law, the former should be preferred.<sup>110</sup> This is to allow the law-making body on the national level to bring the state's national law in line with its regional obligations. This also brings legal certainty between the two legal systems.<sup>111</sup>

It is submitted that this approach should be borrowed from a well-established principle of international law which obliges states to any international agreement to ensure that they discharge their treaty obligations in good faith.<sup>112</sup> The then Permanent Court of International Justice correctly declared in its Advisory Opinion in the matter between *Exchange of Greek and Turkish Populations*<sup>113</sup> that there is

a 'self-evident' principle in international law, according to which a state which has contracted valid international obligations is bound to make in its legislation such modifications as may be necessary to ensure the fulfilment of the obligations undertaken.

In light of this international law principle, it is submitted that when SADC Community law imposes obligations on a member state, that state should honour its obligations by ensuring that its laws are in conformity with its treaty obligations.<sup>114</sup> Unfortunately, this rarely happens<sup>115</sup>

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<sup>107</sup> Midlerson 1990 (1) *European Journal of International Law* 34.

<sup>108</sup> Midlerson 1990 (1) *European Journal of International Law* 34; Ebobrah and Nkhata 2010 (43) *The Comparative and International Law Journal of Southern Africa* 85.

<sup>109</sup> Capaldo *The Pillars of Global Law* 200.

<sup>110</sup> Capaldo *The Pillars of Global Law* 200.

<sup>111</sup> Capaldo *The Pillars of Global Law* 200.

<sup>112</sup> Capaldo *The Pillars of Global Law* 200.

<sup>113</sup> No 10 (Feb 21, 1925), PCIJ, Series B, No 10, at 10.

<sup>114</sup> Cassese *Realizing Utopia* 188.

despite the fact that that the law of the treaties requires that treaty obligations be discharged in good faith by signatory states.<sup>116</sup>

Under the European Union system in which community law is regarded as a separate legal order which, *inter alia*, takes precedence over conflicting laws of member states,<sup>117</sup> three key arguments are advanced to justify the supremacy of community (regional) law over the national law of member states. These are:

- the international legal obligation to observe treaties;
- ensuring the efficacy and uniform application of community law; and
- the autonomous character of the community legal order (this is not applicable in the current SADC legal system).<sup>118</sup>

These arguments are supported as they justify the supremacy of community law over national law. Another feature of the European Union system is the autonomous character of the European Union community law which makes community law supreme over the laws of member states.<sup>119</sup> It is submitted that these characteristics should also apply in the SADC region because it would be a futile exercise for SADC member states to embark on a lengthy process of negotiating and adopting treaties whose provisions would thereafter be ignored. It is conceded, however, that community law is largely based on state consent. Therefore, states may negotiate and thereafter opt to be part of a treaty or choose not to be. Notwithstanding, when it is clear that SADC Community law takes precedence over national law of member states, there will be legal certainty and this will prevent a situation whereby national law and community law regulate similar issues differently.<sup>120</sup> To ensure the effectiveness of community

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<sup>115</sup> Cassese *Realizing Utopia* 188.

<sup>116</sup> Shaw *International Law* 104. In elaborating on the duty of member states' obligations to discharge their duties under a treaty, the ICJ determined in *New Zealand v France*, Judgment, 1974 ICJ Reports, 457 at para 49, "[o]ne of the basic principles governing the creation and performance of legal obligations, whatever their source, is the principle of good faith. Trust and confidence are inherent in international co-operation, in particular in an age when this co-operation in many fields is becoming increasingly essential. Just as the very rule of *pacta sunt servanda* in the law of treaties is based on good faith, so also is the binding character of an international obligation assumed by unilateral declaration...".

<sup>117</sup> Ferreira-Snyman 2009 (42) *The Comparative and International Law Journal of Southern Africa* 201-202.

<sup>118</sup> Kwiecien 2005 (6) *German Law Journal* 1481.

<sup>119</sup> Czuczai 2012 (31) *Yearbook of European Law* 452.

<sup>120</sup> See for example *Gramara (Private) Limited & Another v Government of the Republic of Zimbabwe* HC 33/09. In this case the applicants sought to register and enforce the judgment of

law, it is submitted that states should cede certain aspects of their legislative authority to the SADC Community legal order for the better functioning of the community legal order.

The jurisprudence of the European Court of Justice (ECJ) has been very useful in clarifying the relationship between community law and the national law of European Union member states.<sup>121</sup> Accordingly, it is necessary to discuss the concept of direct application as developed by the ECJ. Direct application means that community law does not require the legislature to enact legislation in order to make EU law applicable in member states. Immediately on coming into operation, community law is binding and applicable in EU member states.<sup>122</sup> To this end, the ECJ has correctly stated that the operation of community law is "... independent of any measure of reception into national law ..." and that member states are under an obligation to respect the direct applicability of community law.<sup>123</sup> In the event of a conflict between the European Union community law and the national law of member states, community law will prevail.<sup>124</sup> As was stated in *Flaminio Costa v ENEL*:

[B]y creating a Community of unlimited duration, having its own institutions, its own personality, its own legal capacity and capacity of representation on the international plane and, more particularly, real powers stemming from limitation of sovereignty or transfer of powers from the States to the Community, the Member States have limited their sovereign rights, albeit within limited fields, and have created a body of law which binds both their nationals and themselves.<sup>125</sup>

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the SADC Tribunal in Zimbabwe. The Zimbabwean Constitution authorises expropriation of land without compensation. As a result, the applicant's farms were evicted from their farms and their farms were expropriated. They then went to the SADC Tribunal to challenge the constitutionality of the land reform programme. The SADC Tribunal ruled in their favour and *inter alia* ordered that Zimbabwe pays a fair compensation to the applicants. The SADC Tribunal had ruled that Zimbabwe was in breach of its obligations to *inter alia* act in accordance with human rights, democracy and the rule of law and the principle of non-discrimination. The High Court of Zimbabwe declined to honour the judgment of the SADC Tribunal because it was contrary to public policy as it sought to annul a constitutionally mandated land reform programme. On one hand Zimbabwe has its own domestic laws which sanctions expropriation of white farmers without compensation. On the other hand, SADC has its own laws such as human rights (which include a right to be compensated in cases of expropriation) which require Zimbabwe to respect and not to discriminate. The SADC law on the other hand protects the rights of people from being evicted from their homes.

<sup>121</sup> Ferreira and Ferreira-Snyman 2014 (4) *Potchefstroom Electronic Law Journal* 1485.

<sup>122</sup> Winter 1972 (9) *Common Market Law Review* 433; Oppong *Economic Integration in Africa* 42.

<sup>123</sup> C-34/73 - *Fratelli Variola Spa v Amministrazione delle finanze dello Stato* judgment of 10 October 1973 – CASE 34/73 at 10.

<sup>124</sup> *Costa v ENEL* (Case 6/64) [1964] ECR 585.

<sup>125</sup> (Case 6/64) [1964] ECR 585.

The ECJ's decision in this case basically means that the European Union community law, as regards order of precedence, enjoys a status superior to the law of the member states.<sup>126</sup> The doctrine of supremacy has been the main driving force in achieving European integration.<sup>127</sup> As a result, it has been said that the ECJ has gone beyond its interpretative role and entered into the realm of policy-making.<sup>128</sup> The idea of the supremacy of European Union law is not mentioned in any of the European Union Treaties. The ECJ has, however, developed this principle through its jurisprudence. Further, European Union community law prevails over the national law of member states when a conflict arises between the two systems.<sup>129</sup> Direct applicability does not mean the same thing as direct effect. The latter entails a situation whereby an individual may invoke community law in a case before a national court and that court will be bound to follow the community law.<sup>130</sup>

The approach taken by the ECJ is applauded as the community legal order has to be effective and provide protection when community law is threatened or has to be applied. Indeed, the ECJ is tasked with the responsibility of interpreting the community law and is the backbone of the community legal order. Accordingly, the ECJ is one of the integral parts of the European Union order.

Treaties governing other sub-regional communities – for example the Treaty Establishing the East African Community – may provide guidance on the relationship between regional law and the national law of member states. This treaty specifically provides that “[c]ommunity ... laws shall take precedence over similar national ones on matters pertaining to the implementation of this Treaty”.<sup>131</sup> There is no doubt that this provision clearly spells out the nature of the relationship between the East African Community law and the national law of member states. Community law is superior to the national law of member states. The drafters of the Treaty

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<sup>126</sup> Ferreira-Snyman 2009 (42) *The Comparative and International Law Journal of Southern Africa* 204.

<sup>127</sup> Ferreira-Snyman 2009 (42) *The Comparative and International Law Journal of Southern Africa* 204.

<sup>128</sup> Ferreira-Snyman 2009 (42) *The Comparative and International Law Journal of Southern Africa* 204.

<sup>129</sup> Stiernstrom M “The relationship between community law and national law” available at <http://www.as.miami.edu/eucenter/papers/Stiermstromfinal.pdf> (Date of use: 24 April 2013).

<sup>130</sup> *Van Gend en Loos v Nerderlandse Administratie der Belastingen* (Case 26/62) [1963] ECR1; Nwauche 2011 (55) *Journal of African Law* 185. Ferreira-Snyman 2009 (42) *The Comparative and International Law Journal of Southern Africa* 204.

<sup>131</sup> Article 8(4) of the Treaty Establishing the East African Community available at <http://www.eac.int/> (Date of use: 24 April 2014).

Establishing the East African Community presumably foresaw the need for this provision to prevent a situation in which community law would be challenged on the basis of its incompatibility with the national law of member states. In addition, with regard to the relationship between community law and national law, it is clear that the position in the East African Community is similar to that in European Union community law. The only difference is that the relationship between community law and national law in the former, is contained in the Treaty establishing the East African Community, whereas the relationship in the latter community was developed by the ECJ. Unfortunately, the SADC Treaty does not provide clear guidance on this critical issue. The nature of the relationship between SADC Community law and the national law of member states thus remains unclear.

The SADC Treaty only indicates that member states, *inter alia*, undertake to take all the steps necessary to accord the Treaty the force of national law.<sup>132</sup> Despite this *lacuna*, it is submitted that this has to a certain extent been clarified by a South African Constitutional Court in the matter between the *Government of the Republic of Zimbabwe v Fick and Others* where the Court applied the provisions of the Treaty and the Tribunal Protocol despite the fact that they had not been domesticated in South African laws.<sup>133</sup> In reaching its conclusion, the court stated, *inter alia*, that SADC member states have obligations under the Treaty and the Tribunal Protocol to ensure that the judgments of the Tribunal are enforced in the territory of member states.<sup>134</sup> It further found that: “South Africa has essentially bound itself to do whatever is legally permissible” to ensure that the authority of the Tribunal is respected.<sup>135</sup> This decision is progressive from a human rights perspective as it ensures that member states respect their human rights-related treaty obligations. However, the Court’s reasoning that gives unincorporated treaties the force of national law is problematic, as it appears to conflict with section 231(4) of the Constitution of South Africa which deals specifically with treaty law. It is submitted that this means that the Treaty and the Tribunal Protocol enjoy direct application in South Africa without the need for further incorporation in South Africa’s national law. It is common cause that South African court’s decisions do not bind other SADC member states. It will therefore be interesting to see how other SADC states’ national courts handle a similar case should the opportunity arise. Given the continued suspension of the SADC Tribunal, it is

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<sup>132</sup> Article 6(5) of the SADC Treaty.

<sup>133</sup> 2013 (10) BCLR 1103 (CC).

<sup>134</sup> At para 59.

<sup>135</sup> At para 59.



doubtful whether this will happen in the near future. Whether or not these states will draw inspiration from the *Fick* judgment, remains to be seen.

With regard to the ECOWAS CCJ, the principle of direct applicability of community law in member states does not apply as this depends on how each member state incorporates community law into national law.<sup>136</sup> This is evident from the provisions of the Revised Treaty of the Economic Community of West African States (Revised Treaty) which requires member states to give effect to community law in accordance with the procedures set out in the constitutions of member states.<sup>137</sup> It therefore follows that the community law will not have force of national law in states that follow a dualist approach, unless it has been domesticated.<sup>138</sup> As a result, Nwauche has observed that ECOWAS community law is also “less likely to have direct effect in the national courts”.<sup>139</sup> Nwauche is further of the view that even if one were to assume that member states have domesticated the provisions of the Revised Treaty, “it is unlikely that the Revised Treaty [would be] superior to the Constitutions ... of ... countries since their Constitutions declare their supremacy”.<sup>140</sup> In this regard, he refers to the case of the Nigerian Supreme Court in *Abacha v Fawehinmi*<sup>141</sup> where the Court ruled that the Nigerian Constitution was superior to the African Charter on Human and Peoples’ Rights. Contrary to Nwauche’s view, Ebobrah argues that the ECOWAS legal system envisages the principle of supra-nationality, including the direct applicability of ECOWAS community law in the national law of member states.<sup>142</sup> Ebobrah is further of the view that the supra-nationality principle only applies in the field of economic integration and not to human rights.<sup>143</sup> He bases this on the fact that the ECOWAS legal regime is silent on the nature of relationship between itself and national courts.

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<sup>136</sup> Nwauche 2011 (55) *Journal of African Law* 185.

<sup>137</sup> Revised Treaty of the Economic Community of West African States (ECOWAS) available at <http://www.worldtradelaw.net/fta/agreements/ecowasfta.pdf> (Date of use: 24 April 2014).

<sup>138</sup> Nwauche “Enforcing ECOWAS law in West African national courts” 7 (paper on file with author).

<sup>139</sup> Nwauche 2011 (55) *Journal of African Law* 186.

<sup>140</sup> Nwauche 2011 (55) *Journal of African Law* 187.

<sup>141</sup> (2000) 6 NWLR (Pt 660) 228; Nwauche “Enforcing ECOWAS law in West African national courts” 8 (paper on file with author).

<sup>142</sup> Ebobrah *Legitimacy and Feasibility of Human Rights* 142.

<sup>143</sup> Ebobrah *Legitimacy and Feasibility of Human Rights* 142. Under the ECOWAS regime a national court may request the ECOWAS CCJ to make a preliminary ruling about the interpretation and application of the ECOWAS Treaty. It is said that the role of the court in this regard is to give a preliminary decision and that a national court will applying the law. The ECOWAS CCJ role is therefore that of interpreting the law while the national court applies the law. The rationale for this is for the ECOWAS CCJ to interpret the law so that there can be uniformity within the community legal system as to what a particular rule means. Accordingly, some authors are of the view that

It is submitted that Nwauche's views cannot be fully supported. The possibility that the ECOWAS CCJ and/or future SADC Tribunal can decide that community law has direct effect in the national courts of member states cannot be ruled out. Further, it can also not be ruled out that in time, as happened with EU community law, the African regional tribunals could develop a jurisprudence in terms of which community law enjoys precedence over the national law of member states. Additionally, it appears premature to rule out the possibility that the time will come when African heads of state will develop sufficient confidence in the community courts to support them. This is, after all, one of the major factors in the willingness of EU member states to comply with the decisions of the ECJ.<sup>144</sup> It is however conceded that it is most unlikely that African states will not easily accept the direct applicability of SADC law. This is especially the case since the relationship between SADC law and domestic law is not clear. Before states will accept this, instruments will have to be negotiated and agreed upon wherein the relationship between SADC law and domestic law, as well as the jurisdiction of the SADC Tribunal are clearly set out. States will thus have to consent to community law being supreme to domestic law. Ebobrah's view is supported only to the extent that it addresses the supra-national nature of the ECOWAS regime and its direct application. It is submitted that the principle of supra-nationality should apply to the fields of both human rights and economic integration. Applying the principle of supra-nationality only in matters related to economic integration suggests that there is no need for a supreme body to ensure respect for human rights. It is submitted that it will be more challenging to achieve economic integration where human rights are threatened. Accordingly, there is a need to have stable communities to ensure that human rights are protected so that "open markets can flourish".<sup>145</sup>

The basis for dissenting from the views of the above authors lies in the fact that ECOWAS is a regional organisation governed by community law (such as the ECOWAS Treaty).<sup>146</sup> Under international law, it is now a settled principle that states may not ignore their international obligations on the basis of the national law or national constitutions.<sup>147</sup> In addition, under

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the "the relationship between the ECOWAS Court and the national court is not hierarchical but cooperative". See Nwauche 2011 (55) *Journal of African Law* 199.

<sup>144</sup> Bier S "The European Court of Justice and member state relations: A constructivist analysis of the European legal order" available at <http://www.gvpt.umd.edu/irconf/papers/bier.pdf> (Date of use: 15 April 2015).

<sup>145</sup> Musungu 2003 (3) *African Human Rights Law Journal* 94.

<sup>146</sup> Jenks *The Proper Law of International Organisations* 3-4.

<sup>147</sup> *Treatment of Polish Nationals and Other Persons of Polish Origin or Speech in the Danzig Territory*, Advisory Opinion of 4 February, 1932 PCIJ Series A/B No 44 at 24 and 42 (hereafter

international law, the conduct of institutions such as judicial organs are imputed to the state and so become acts of the state.<sup>148</sup> In other words, when a national court rules that a national law which, for example, discriminates against people on basis of race, is not contrary to the community law because the national law is supreme, such conduct is regarded as that of the state. Accordingly, national laws need to be in line with international obligations and the state must modify its law accordingly.<sup>149</sup> Taking good practices from the EU and ECOWAS where community law is superior to the national law of member states, it is submitted that that this should also be followed in the SADC legal order. Although referring to the supremacy of European Union community law over the national law of member states, I support the views of Kwiecien in that the principle of supremacy of SADC Community law (and other sub-regional communities) over the national law of member states is important as it

- prevents national agencies from challenging the validity of community law;
- prohibits states or organs of state from applying national law that is incompatible with the provisions of community law;
- prohibits states or organs of state to enact laws that are contrary to community provisions; and
- imposes obligations on member states to amend their national law which conflicts with contrary provisions in community law.

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the *Treatment of Polish Nationals* case). The issue before the Permanent Court of International Justice was *inter alia* whether the treatment of Polish nationals and other persons of Polish origin or language in the territory of the Free City of Danzig had to be decided only with reference with the provisions of the Treaty of Versailles and the Convention of Paris or also by reference to the Constitution of the Free City? Before answering the question, the Court indicated that a “state cannot rely, as against another State, on the provisions of the latter's Constitution, but only on international law and international obligations duly accepted, on the other hand and conversely, 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”. It therefore ruled that that the question of the treatment of Polish nationals or other persons of Polish origin or language must be dealt with exclusively in terms of international law and the treaty provisions in force between Poland and Danzig. See also art 46(1) of the Vienna Convention on the Law of Treaties.

<sup>148</sup> Draft Articles on Responsibility of States for Internationally Wrongful Acts (reflecting customary international law), in Report of the International Law Commission on the Work of its Fifty-third Session, UN GAOR 56th Sess, Supp No 10, at 43, UN Doc A/56/10 (2001). Article 4(1) provides “[t]he conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organization of the State, and whatever its character as an organ of the central Government or of a territorial unit of the State”.

<sup>149</sup> Bartels “Review of the Role, Responsibilities and Terms of Reference of the SADC Tribunal” (final report) 6 March 2011 (on file with author).

The principles above are important as they will ensure for SADC Community law a uniform meaning and effect in the national legal systems of member states.<sup>150</sup> It is submitted that leaving the reception of SADC Community law in national law to the discretion of member states would negatively affect the functioning of the future SADC Tribunal and the SADC Community as whole, as the community law would be subject to the national law of member states.<sup>151</sup> Upon ratification, community law should have an impact in the local legal system of member states. The basis for this submission is to prevent a situation where community law would be applied where it suites member states.<sup>152</sup> As observed by Ferreira-Snyman, European community law favours a monist approach since dualism would cause “divergences in member states’ relations vis-à-vis Community law”.<sup>153</sup>

Our discussion has revealed that SADC countries with dualist legal systems have not taken measures to give effect to the provisions of the Treaty or the Tribunal Protocol in their national law. The countries whose legal systems are monist have also not published the relevant instruments so as to give them the force of national law.<sup>154</sup> Oppong aptly captures the negative attitude of non-incorporation (or non-publication) of ratified treaties as follows:

[T]he fact of unincorporation may be a manifestation of parliamentary resistance to the treaty. By giving effect to it absent a national implementing measure, the judiciary may be indirectly setting itself up against the will of an elected branch of government or upsetting the balance of power between the various organs of government.<sup>155</sup>

As if responding to Oppong’s view, in *Gramara (Pvt) Ltd v Government of the Republic of Zimbabwe*<sup>156</sup> the Zimbabwe court observed that it was common cause between the parties that the Treaty and Tribunal Protocol had not been domesticated in Zimbabwe. Without further explanation of the effect of this observation, the Court then went on to state that “...a State cannot invoke its own domestic deficiencies in order to avoid or evade its international obligations or as a defence to its failure to comply with those obligations”.<sup>157</sup> This did not have

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<sup>150</sup> Kwiecien 2005 (6) *German Law Journal* 1481.

<sup>151</sup> Tillotson *et al Texts, Cases and Materials* 79.

<sup>152</sup> *Gramara (Private) Limited & Another v Government of the Republic of Zimbabwe* HC 33/09 (hereafter the *Gramara* case).

<sup>153</sup> Ferreira-Snyman 2009 (42) *The Comparative and International Law Journal of Southern Africa* 204.

<sup>154</sup> Killander and Adjolohoun “International law and domestic human rights” 6.

<sup>155</sup> Oppong 2007 (30) *Fordham International Law Journal* 315.

<sup>156</sup> *Gramara* case at 4-5.

<sup>157</sup> *Gramara* case at 5.

any influence on the outcome of the case as the judge applied Zimbabwean national law. Zimbabwe declined to recognise and register the decision of the Tribunal on the basis that it was contrary to public policy. Zimbabwe has not been friendly towards the reception of international law in its domestic laws. It still relies on state sovereignty and/or supremacy of its own laws as justification for “non-compliance with certain or all rules of international law”.<sup>158</sup> It is submitted that the argument raised by Zimbabwe was misguided because it is established under international law that a state may not invoke its national law to evade its international obligations. The international law principle which indicates that a state may not invoke its national law to evade its international obligations has been confirmed in various judgments of the International Court of Justice.<sup>159</sup> Therefore, the proposed autonomy and supremacy of SADC Community law will address issues such as those that were confronted by a Zimbabwean court in the *Gramara* case. In contradistinction, as we saw above, the South African Constitutional Court recognised and registered the Tribunal’s decision even though the Treaty and Tribunal Protocol had not been domesticated in South Africa.<sup>160</sup> The difference in approach taken by the courts necessitates a further discussion regarding the relationship between the national courts and international tribunals.

#### **4 SHOULD DECISIONS OF THE (SUSPENDED) SADC TRIBUNAL BE TREATED AS FOREIGN JUDGMENTS OR INTERNATIONAL JUDGMENTS?**

With regard to whether judgments of the Tribunal should be treated as foreign judgments or judgments of an international court, it is settled that judgments of international tribunals are not automatically directly enforceable in national courts as this is a question governed by how states incorporate treaty law into their domestic legal systems.

The Tribunal Protocol provides that decisions of the Tribunal shall be enforced in the territory of member state in whose judgment has to be executed via the use of “law and rules of civil

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<sup>158</sup> Mude 2014 (2) *Journal of Power, Politics & Governance* 80.

<sup>159</sup> See, *inter alia*, *Treatment of Polish Nationals* case at 24. The Court said that “[a] State cannot rely, as against another State, on the provisions of the latter's Constitution, but only on international law and international obligations duly accepted, on the other hand and conversely, 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...”.

<sup>160</sup> *The Government of the Republic of Zimbabwe v Fick and Others* 2013 (10) BCLR 1103 (CC) (hereafter the *Fick CC* case).

procedure for the registration and enforcement of foreign judgments”.<sup>161</sup> In other words, judgments of the Tribunal are treated as foreign judgments for the purposes of enforcement in national courts. The procedure envisaged for the recognition and enforcement of foreign judgments in the Tribunal Protocol is not suitable for all forms of international judgment. It must be noted that the Oponong has correctly asked whether the rules of civil procedure (which differ in the various SADC countries) for the enforcement of the Tribunal’s decisions provide adequate protection for judgment creditors.<sup>162</sup> Indeed, having different procedures in SADC countries to achieve a single result – such as the enforcement of the Tribunal’s judgments – may deny successful litigants a remedy, especially where the rules of procedure in a particular country are cumbersome. In addition, the use of national procedures to enforce international judgments has the potential to deny justice to successful litigants as certain states’ national law does not provide for the enforcement of non-monetary judgments.<sup>163</sup> In this regard, a successful litigant with a judgment from the Tribunal requiring a particular government to take the steps necessary to protect the rights of those affected, may be unable to enforce the judgment. An example of this is where the government of Zimbabwe was required to take all the necessary steps to protect the farmers from being evicted from their land.<sup>164</sup> This order (to take necessary steps to protect the rights of the farmers) is not accommodated in the current Zimbabwean system for enforcing foreign judgments.<sup>165</sup>

The 2014 Protocol has fortunately abandoned the requirement in the 2000 Tribunal Protocol that the law and rules of civil procedure should be applied for the registration and enforcement of foreign judgments.<sup>166</sup> This is something positive in the 2014 Protocol.

Despite these shortcomings in the enforcement of international judgments as foreign judgments, a South African court has registered and enforced a decision of the Tribunal.<sup>167</sup> In the *Fick* case,

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<sup>161</sup> Article 31(1) of the Tribunal Protocol.

<sup>162</sup> Oponong [http://www.kas.de/upload/auslandshomepages/namibia/MRI2010/MRI2010\\_chapter7.pdf](http://www.kas.de/upload/auslandshomepages/namibia/MRI2010/MRI2010_chapter7.pdf) (Date of use: 27 August 2013).

<sup>163</sup> Oponong [http://www.kas.de/upload/auslandshomepages/namibia/MRI2010/MRI2010\\_chapter7.pdf](http://www.kas.de/upload/auslandshomepages/namibia/MRI2010/MRI2010_chapter7.pdf) (Date of use: 27 August 2013). South Africa is currently considering proposals to enforce non-monetary judgments. See Report of the South African Law Reform Commission 2006 at 38, available at [http://www.justice.gov.za/salrc/reports/r\\_prj121\\_2006dec.pdf](http://www.justice.gov.za/salrc/reports/r_prj121_2006dec.pdf) (Date of use: 04 September 2013).

<sup>164</sup> *Campbell* main case.

<sup>165</sup> The Zimbabwe Civil Matters (Mutual Assistance) Act of 1996 deals with monetary judgments only.

<sup>166</sup> Article 44 of the 2014 Protocol.

the applicant sought to enforce a costs order granted by the Tribunal against the government of Zimbabwe, in South Africa. It is important to note that the applicants first successfully registered and enforced the Tribunal's costs order before the South African Supreme Court of Appeal through the common-law procedure for the enforcement of foreign judgments.<sup>168</sup> The government of Zimbabwe lodged an appeal against the decision of the Supreme Court of Appeal in the Constitutional Court. The Constitutional Court recognised and enforced the judgment of the Tribunal by determining that the common-law procedure only applied to the judgments of foreign courts made by foreign courts.<sup>169</sup> In other words, the common-law procedure did not cater for the enforcement of the judgments of international tribunals such as the SADC Tribunal. The Court then, correctly in terms of sections 8(3) and 39(2) of the Constitution of South Africa, deemed it necessary to develop the common-law procedure so as to include judgments delivered by international tribunals such as the Tribunal.<sup>170</sup> Furthermore, there was a need to modify the common-law position, as failure to do so could allow people to evade the "jurisdictional nets of the courts and thereby escape legal accountability for their wrongful actions".<sup>171</sup> In addition, the Court was of the view that the principle of reciprocity *inter alia* entails that the courts of one country "should enforce judgments of foreign courts in the expectation that foreign courts would reciprocate".<sup>172</sup> The Court further indicated that the Constitution of South Africa, 1996, enables the modification of national law to ensure its concordance with South Africa's international law obligations.<sup>173</sup> The Court again reiterated that "[t]his promotes comity, [and] reciprocity ..., which is central to the enforcement of decisions of foreign courts".<sup>174</sup>

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<sup>167</sup> *Fick CC case*. The *Fick* case is discussed in Chapter 3 of the study and only the aspect relating to the enforcement of judgments as foreign judgments is explored here.

<sup>168</sup> *Government of the Republic of Zimbabwe v Fick and Others* (657/11) [2012] ZASCA 122 (20 September 2012) (hereafter the *Fick SCA case*). The Supreme Court of Appeal found that the common-law requirements had been complied with. These requirements were laid down in *Jones v Krok* 1995 (1) SA 677 (A) namely: that the foreign court which issued the judgment must have had international competence in terms of South African law; that the judgment must be final and conclusive in that it must not be subject to appeal; that the enforcement of the judgment must not be contrary to public policy; that the judgment must not have been obtained through fraudulent means; that the judgment must not involve the enforcement of a penal or revenue law of the foreign state; and that the enforcement must not be contrary to the provisions of the Protection of Businesses Act 99 of 1978.

<sup>169</sup> *Fick CC case* paras 52-53.

<sup>170</sup> At para 53.

<sup>171</sup> At para 55.

<sup>172</sup> At para 56.

<sup>173</sup> At para 57.

<sup>174</sup> At para 57.

The Court then relied on article 32(2) of the 2000 Tribunal Protocol which binds South Africa and other SADC member states to take “all measures necessary to ensure execution of decisions of the Tribunal”.<sup>175</sup> This had to be done through the “law and rules of civil procedure” which regulate the registration and enforcement of foreign judgments in the territory of a state in which it is sought to be enforced.<sup>176</sup> This implies that even though the judgment was issued against Zimbabwe, all SADC member states have a role to play in ensuring its enforcement.<sup>177</sup> The Court then correctly observed that the above procedure did not apply, but only the common-law procedure.<sup>178</sup> In other words, it was not envisaged that the law and rules of civil procedure were at some future stage going to cater for the registration and enforcement of the judgments of the Tribunal. Accordingly, the Tribunal’s decisions could not be enforced via the law and rules of civil procedure. It is in this regard that the Constitutional Court of South Africa held that the “common law must be developed in a way that would empower South Africa’s domestic courts to register and facilitate the enforcement of the Tribunal’s decisions”.<sup>179</sup> The Court indicated that the

development of the common law extends to the enforcement of judgments and orders of international courts or tribunals, based on international agreements that are binding on South Africa.<sup>180</sup>

It then ruled that the concept of a “foreign court” includes the Tribunal and, therefore, South Africa is bound to abide by obligations flowing from the Treaty and the Tribunal Protocol.<sup>181</sup> As this was the first opportunity for a South African court to address the status of a binding decision from an international tribunal, the development of the common-law position so as to include and enforce a judgment of the Tribunal is welcomed.<sup>182</sup> De Wet has, however, cautioned against the Court’s approach in equating judgments of international tribunals with foreign judgments for

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<sup>175</sup> At para 58. It is important to highlight that article 32(2) of the 2000 Tribunal Protocol has been retained almost as is in article 44(1) of the 2014 Protocol in its peremptory form. Article 44(1) of the 2014 Protocol mandates member states and institutions of SADC “to take forthwith all measures necessary to ensure execution of the decisions of the Tribunal.” This is welcomed as this provision played a significant role in ensuring that the Tribunal’s decision was enforced in South Africa even though it was issued against Zimbabwe.

<sup>176</sup> At para 58.

<sup>177</sup> De Wet 2014 (17) *Potchefstroom Electronic Law Journal* 555.

<sup>178</sup> *Fick CC* case at para 8.

<sup>179</sup> At para 58.

<sup>180</sup> At para 59.

<sup>181</sup> At paras 59, 62 and 63.

<sup>182</sup> De Wet 2014 (17) *Potchefstroom Electronic Law Journal* 554. This is something (the development of common law) that the Supreme Court of Appeal failed to address in the *Fick SCA* case.



enforcement in the national courts of member states.<sup>183</sup> According to her, “it is unusual for treaties regulating the competencies of international tribunals to determine that their decisions shall be treated as ‘foreign judgments’ on the domestic level”.<sup>184</sup> Rather, decisions of international tribunals are usually “treated as domestic judgments”.<sup>185</sup> De Wet’s views are supported as the civil procedure for the enforcement of foreign judgments was initially intended to accommodate monetary orders only, thereby excluding a decision such as one compelling the offending state to take the necessary measures to prevent the continued violation. It is, therefore, submitted that the decisions of the Tribunal should be regarded as domestic judgments, as the Tribunal Protocol covers the enforcement of both monetary and non-monetary judgments.<sup>186</sup>

The courts’ reliance on the Treaty and Tribunal Protocol to enforce an international judgment even though these instruments had not been domesticated as required by a dualist legal system, is not clear. This is something that the courts failed to address in their deliberations when they opted to apply the provisions of the Treaty and the Tribunal Protocol directly regardless of the fact that they had yet to be transformed into South Africa’s national law through legislation.<sup>187</sup>

Even though the Constitutional Court is to be commended in developing the common law so as to include the Tribunal’s decisions, the relationship between decisions of national courts and international tribunals remains unclear as the constitutions of SADC countries and SADC community law are silent on this issue.<sup>188</sup> In this regard the Treaty of the East African Community may be instructive. It provides that the “[d]ecisions of the Court [EACJ] on the

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<sup>183</sup> De Wet 2014 (17) *Potchefstroom Electronic Law Journal* 560.

<sup>184</sup> De Wet 2014 (17) *Potchefstroom Electronic Law Journal* 560.

<sup>185</sup> De Wet 2014 (17) *Potchefstroom Electronic Law Journal* 560.

<sup>186</sup> Article 32(1) of the SADC Tribunal refers to judgments and this could be read as implying both monetary and non-monetary judgments. See Oppong RF “Enforcing judgments of the SADC Tribunal in the domestic courts of member states: available at [http://www.kas.de/upload/auslandshomepages/namibia/MRI2010/MRI2010\\_chapter7.pdf](http://www.kas.de/upload/auslandshomepages/namibia/MRI2010/MRI2010_chapter7.pdf) (Date of use: 10 April 2015).

<sup>187</sup> Wallis has noted with concern the direct application of unincorporated treaties. In his words “[w]hilst the outcome is to be welcomed, and the general thrust of the Court’s reasoning is sound, the decision will require some reading between the lines to discern the exact legal principles that underpin why and when the SADC Treaty (or any international treaty for that matter) can be directly invoked in South Africa’s courts ...”. See Wallis A “SA ruling victory for international law” available at <http://www.osisa.org/law/blog/sa-ruling-victory-international-law> (Date of use: 25 April 2014).

<sup>188</sup> De Wet 2014 (17) *Potchefstroom Electronic Law Journal* 554.

interpretation and application of this Treaty shall have precedence over decisions of national courts on a similar matter”.<sup>189</sup> This provision clearly sets out the nature of the relationship between the EACJ and national courts. As was pointed out earlier, the decisions of the European Court of Justice also take precedence over the decisions of national courts regarding the application and interpretation of European Union community law.<sup>190</sup>

The decisions of the ECOWAS CCJ are final and binding on member states.<sup>191</sup> Nwauche is of the view that however, that this does not clearly indicate the relationship between the ECOWAS CCJ and national courts in that the hierarchy of the courts is determined by a country’s national constitution.<sup>192</sup> Accordingly, to ensure the ECOWAS CCJ precedence over national courts would require states to surrender their “judicial sovereignty” in clear terms.<sup>193</sup> In French-speaking countries, it appears that upon ratification of the treaty the ECOWAS CCJ becomes “superior to the appellate courts of these countries and its judgment is of precedential value”.<sup>194</sup> According to Nwauche, in English-speaking countries, the Revised Treaty of ECOWAS is not directly applicable in member states and, therefore, it is not clear whether its judgments are “superior to judgments of highest national courts”.<sup>195</sup> It is submitted that when ECOWAS member states created the ECOWAS CCJ, their intention was to create a supranational court that would be superior to their national courts. This can be deduced from the preamble to the Revised Treaty of ECOWAS which provides that “... the integration of Member States into a viable regional community may demand the partial and gradual pooling of national sovereignties to the Community within the context of a collective political will”. Consequently, it is submitted that a decision of the ECOWAS CCJ should take precedence over the judgments of national courts. It is further submitted that this should also be the position within the SADC Community regime as regards the relationship between national courts and the “new” SADC Tribunal.

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<sup>189</sup> Article 33(2).

<sup>190</sup> *Costa v ENEL* (Case 6/64) [1964] ECR 585.

<sup>191</sup> Article 15 of the Revised Treaty of ECOWAS.

<sup>192</sup> Nwauche 2011 (55) *Journal of African Law* 187.

<sup>193</sup> Nwauche 2011 (55) *Journal of African Law* 194.

<sup>194</sup> Nwauche 2011 (55) *Journal of African Law* 194.

<sup>195</sup> Nwauche ES “Enforcing ECOWAS law in West African national courts” 16 (paper pre-revision and publication on file with author).

## 5 CONCLUSION

It is clear that an individual state's political will determines whether or not the state will be party to a specific treaty. Further, the reception of SADC Community law differs from country to country. The discussion has revealed that no SADC country has moved to accord the Treaty and the Tribunal Protocol the status of national law. For the purposes of, *inter alia*, uniformity in SADC law, state parties must accept that the SADC Community order is superior to national law, and that where conflict between SADC Community law and national law arises, the former should prevail. This can be achieved through the revision of the relevant treaties.

Lastly, the creation of the SADC regional order presupposes that states intended to create an authority superior to those of national law. If such an authority is not respected, the relevance of SADC Community law falls away. There is therefore a need – as under the European Union community order – for SADC law to have a direct effect and be directly applicable in SADC member states. Although technically problematic, it is submitted that SADC member states following a dualist approach, should continue to do so in respect of their “other” international obligations, but adopt a monist approach when dealing with SADC law. It is therefore submitted that SADC member states should consider amending the 2014 Protocol in order to pave the way for the autonomy and supremacy of community law.

## CHAPTER 5

### COMPLIANCE WITH AND ENFORCEMENT OF JUDGMENTS OF THE SADC TRIBUNAL

#### 1 BACKGROUND

The Tribunal became operational in 2005 and received its first human rights case in 2007 in the matter of *Mike Campbell (Pvt) Ltd and Others v Republic of Zimbabwe*.<sup>196</sup> In the *Campbell* interim judgment, the Tribunal ruled in favour of the applicants and ordered the Republic of Zimbabwe, *inter alia*, not to take any steps that would directly or indirectly result in the eviction of the applicants from their farms.<sup>197</sup> The decision was welcomed as a significant achievement for the protection of human rights and the upholding of the rule of law in the SADC region.<sup>198</sup> Unfortunately, the judgment of the Tribunal in the *Campbell* interim case, and other cases unrelated to human rights, remain unenforced.<sup>199</sup>

The SADC Summit of Heads of State (the Summit) is responsible for overseeing the functions of the SADC and its decisions are binding on SADC member states.<sup>200</sup> The Summit's powers include taking appropriate action against a member state which refuses to comply with the decisions of the Tribunal.<sup>201</sup> The Summit may only take such action once the matter has been referred to it by the Tribunal. The referral to the Summit is necessary because the enforcement of international judgments is a long-standing problem which depends on the willingness of the member state concerned to abide by the judgment.<sup>202</sup>

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<sup>196</sup> *Mike Campbell (PVT) Limited and Another v Republic of Zimbabwe (2/07)* [2007] SADCT 1 (13 December 2007) (hereafter the *Campbell* interim case).

<sup>197</sup> *Campbell* interim case at 7.

<sup>198</sup> Ebobrah 2010 (4) *Malawi Law Journal* 199-200; Bell A "Southern Africa: Top lawyers say SADC turning its back on human rights" available at <http://allafrica.com/stories/201106040073.html> (Date of use: 3 June 2011).

<sup>199</sup> See *inter alia Gramara (Private) Limited & Another v Government of the Republic of Zimbabwe* HC 33/09 (hereinafter referred to as the *Gramara* case); *Fick and Another v Republic of Zimbabwe* (SADC (T) 01/2010) [2010] SADCT 8 (16 July 2010) (hereinafter referred to as the *Fick* SADC judgment).

<sup>200</sup> Article 10(2) and 10(8) of the SADC Treaty.

<sup>201</sup> Article 32(5) of the Protocol on the Tribunal and Rules thereof 2000 (hereafter referred to as the 2000 Tribunal Protocol). The document is available at [http://www.sadc.int/documents-publications/show/Protocol%20on%20the%20Tribunal%20and%20Rules%20thereof%20\(2000\)](http://www.sadc.int/documents-publications/show/Protocol%20on%20the%20Tribunal%20and%20Rules%20thereof%20(2000)) (Date of use: 04 October 2013).

<sup>202</sup> Moyo 2009 (9) *African Human Rights Law Journal* 610.

The first referral testing the Summit's ability to use its powers to take appropriate action under article 32(5) of the 2000 Tribunal Protocol, was in July 2008 and arose from Zimbabwe's refusal to comply with the Tribunal's ruling in the *Campbell* interim case. A second referral, again involving Zimbabwe, was in July 2012 and arose from Zimbabwe's refusal to comply with or implement the Tribunal's final judgment in *Campbell*.<sup>203</sup> It appears that most of the challenges facing the Tribunal concerning failure to comply with its rulings, have involved Zimbabwe. In the *Fick* SADC judgment, the Tribunal consequently stated

...it is evident that the Respondent [Zimbabwe] has not complied with the decision of the Tribunal. We, therefore, hold that the existence of further acts of non-compliance with the decision of the Tribunal has been established, after the Tribunal's decision of June 5, 2009 under which the earlier acts of non-compliance have already been reported to the Summit. Accordingly, the Tribunal will again report this finding to the Summit for its appropriate action.<sup>204</sup>

The Tribunal has on several occasions reported Zimbabwe's non-compliance with its decisions to the Summit.<sup>205</sup> The Summit, a body made up of SADC Heads of State or Government, has, however, opted not to take action against Zimbabwe.<sup>206</sup> In short, the Summit has done nothing to ensure that Zimbabwe complies with the decisions of the Tribunal.

Zimbabwe had also mounted a challenge to the existence of the Tribunal. Because of the difficulties surrounding the implementation of certain of the Tribunal's judgments and Zimbabwe's concerns about the legitimacy of the Tribunal, the Summit, in apparent support of Zimbabwe, announced on 17 August 2010 that it would review the "role, functions and terms of reference of the SADC Tribunal."<sup>207</sup> During the review process, the Summit placed a moratorium on the Tribunal and barred it from adjudicating any new cases. The review process was undertaken and concluded by an independent consultant in 2011. The final and official report

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<sup>203</sup> Ebobrah 2010 (4) *Malawi Law Journal* 199.

<sup>204</sup> *Fick* SADC judgment at 4.

<sup>205</sup> See, *inter alia*, *Campbell and Another v Republic of Zimbabwe* (SADC (T) 03/2009) [2009] SADCT 1 (5 June 2009); *Fick* SADC judgment; Ebobrah 2010 (4) *Malawi Law Journal* 199.

<sup>206</sup> Ebobrah 2009 (17) *African Journal of International and Comparative Law* 201.

<sup>207</sup> Ngandwe 2012 (1) *The Pan African Yearbook of Law* 53; Ebobrah 2009 *African Journal of International and Comparative Law* 201-202; SADC: Communiqué by the Southern African Development Community Heads of State, on the 30th Jubilee SADC summit (19/08/2010) available at <http://www.zimeye.org/?p=20977> (Date of use: 24 May 2012); Request for Proposals for Provisions of Consultancy Services to the SADC Secretariat available at: <http://www.sadc.int/index/browse/page/790> (Date of Use: 21 May 2012).

dated 6 March 2011, found that the Tribunal had been properly constituted<sup>208</sup> and therefore recommended that the Tribunal be allowed to continue to perform its functions.<sup>209</sup> This has not happened. Surprisingly, the Preamble to the 2014 Protocol begins by “[n]oting that a review of the role, responsibilities and terms of reference of the Southern African Development Community (SADC) Tribunal led to recommendations that require a new Protocol on [the] Tribunal in the SADC”. This statement in the Preamble is not strictly correct, because the final and official report of the review process was adopted by the Attorneys General and Ministers of Justice, but ignored by the Summit. In fact, the final and official report explicitly supports the retention of the jurisdiction over disputes between natural and legal persons and SADC member states in its recommendations.<sup>210</sup> Nowhere in the recommendations is it stated that the Tribunal should be dissolved and a new protocol be adopted that limits the jurisdiction of the Tribunal to inter-state disputes only.

Despite the positive official report, on 20 May 2011 the Summit, *inter alia*, mandated the Ministers of Justice/Attorneys General of member states to initiate a process aimed at amending the relevant SADC legal instruments relating to the Tribunal.<sup>211</sup> In addition, the Summit decided not to reappoint Tribunal judges whose terms of office expired on 31 August 2010 and to not replace members of the Tribunal whose terms of office were due to expire in October 2011.<sup>212</sup> The Summit also extended the moratorium on the Tribunal receiving new cases or adjudicating pending cases until the 2000 Tribunal Protocol had been reviewed and approved.<sup>213</sup> The final

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<sup>208</sup> Bartels L “Review of the role, responsibilities and terms of reference of the SADC Tribunal” 6 March 2011 available at <http://www.scribd.com/doc/115660010/WTIA-Review-of-the-Role-Responsibilities-and-Terms-of-Reference-of-the-SADC-Tribunal-Final-Report> (Date of use: 6 February 2013).

<sup>209</sup> Bartels L “Review of the role, responsibilities and terms of reference of the SADC Tribunal” 6 March 2011 available at: <http://www.scribd.com/doc/115660010/WTIA-Review-of-the-Role-Responsibilities-and-Terms-of-Reference-of-the-SADC-Tribunal-Final-Report> (Date of use: 6 February 2013).

<sup>210</sup> Bartels L “Review of the role, responsibilities and terms of reference of the SADC Tribunal” 6 March 2011 available at <http://www.scribd.com/doc/115660010/WTIA-Review-of-the-Role-Responsibilities-and-Terms-of-Reference-of-the-SADC-Tribunal-Final-Report> (Date of use: 6 February 2013).

<sup>211</sup> Communiqué Extraordinary Summit Heads of State and Government of the Southern Africa Development Community Windhoek, Republic of Namibia 20 May 2011 available at <http://www.swradioafrica.com/Documents/SADCSummit240511.pdf> (Date of use: 24 May 2012); Scholtz 2011 (1) *SADC Law Journal* 10.

<sup>212</sup> Scholtz 2011 (1) *SADC Law Journal* 13.

<sup>213</sup> Communiqué Extraordinary Summit Heads of State and Government of the Southern Africa Development Community Windhoek, Republic of Namibia 20 May 2011 available at <http://www.swradioafrica.com/Documents/SADCSummit240511.pdf> (Date of use: 24 May 2012); Scholtz 2011 (1) *SADC Law Journal* 10.

report to the Summit regarding the progress of the review of the role, functions and terms of reference of the Tribunal was due in August 2012. The SADC Committee of Ministers of Justice/Attorneys General gave feedback on progress with the review.<sup>214</sup> In a move that elicited wide-spread criticism,<sup>215</sup> the Summit decided to limit the jurisdiction of the SADC Tribunal to disputes between member states.<sup>216</sup>

In this chapter I discuss the factors that contributed to the suspension of the Tribunal. This includes the challenge by Zimbabwe that the Treaty and the 2000 Tribunal Protocol, together with their subsequent amendments, did not formally enter into force and were thus not binding on member states. My examination also addresses whether the Treaty and the 2000 Tribunal Protocol contain any provisions authorising the suspension of the Tribunal in any given situation.

I also analyse compliance with the Tribunal's decision in the *Campbell* interim case and subsequent human rights decisions related to *Campbell*. This will assist in determining the extent of compliance with decisions of the Tribunal and the status of those that have not been implemented. The study also considers whether any alternate remedies are available to those litigants whose judgments have not been complied with and those whose cases are still pending. I also evaluate whether the newly envisaged jurisdictional provisions limiting recourse to the Tribunal to inter-state disputes does not violate the right of the individual to enjoy access to courts. This leads to an examination of whether we should, in the future, regard the Tribunal's decisions as foreign judgments – in accordance with article 32(1) of the 2000 Tribunal Protocol – or as national judgments. Finally, I consider how the Tribunal's judgments should be enforced in the context of international law. To the extent relevant, I examine compliance with the judgments of the European Court of Justice (ECJ) and the ECOWAS CCJ to establish how compliance with their decisions has been achieved.

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<sup>214</sup> Communiqué Extraordinary Summit Heads of State and Government of the Southern Africa Development Community Windhoek, Republic of Namibia 20 May 2011 available at <http://www.swradioafrica.com/Documents/SADCSummit240511.pdf> (Date of use: 24 May 2012).

<sup>215</sup> All Africa, Southern Africa: "SADC leaders deal fatal blow to SADC Tribunal - Shock decision denies citizens access to the Court" available at <http://allafrica.com/stories/201208200629.html> (Date of use: 20 August 2012); Ndlovu R SADC Tribunal disbandment victory for ZANU-PF available at <http://www.financialgazette.co.zw/national-report/13885-sadc-tribunal-disbandment-victory-for-zanu-pf.html> (Date of use: 23 August 2012).

<sup>216</sup> Final Communique of the 32<sup>nd</sup> Summit of SADC Heads of State and Government available at: [http://www.sadc.int/files/3413/4531/9049/Final\\_32nd\\_Summit\\_Communique\\_as\\_at\\_August\\_18\\_2\\_012.pdf](http://www.sadc.int/files/3413/4531/9049/Final_32nd_Summit_Communique_as_at_August_18_2_012.pdf) (Date of use: 23 August 2012).

## 2 ZIMBABWE'S CHALLENGE TO THE LEGITIMACY OF THE SADC TRIBUNAL

On 7 August 2009, after Zimbabwe had on a number of occasions been brought before the Tribunal for refusing to comply with the Tribunal's decisions, Zimbabwe rejected the authority of the Tribunal in a letter addressed to the Tribunal's Registrar.<sup>217</sup> In his letter, Justice Minister Chinamasa gave notice of Zimbabwe's withdrawal from the Tribunal on the basis that it lacked jurisdiction over Zimbabwe as the amendment to the 2000 Tribunal Protocol had not yet been ratified by two-thirds of the total number of SADC member states as required by the Treaty.<sup>218</sup> Minister Chinamasa further claimed that the amendment to the Treaty was also not operational as it had not yet been ratified by the required two-thirds of the total membership of the SADC as required by treaty provisions and as read with article 41 of the original SADC Treaty.<sup>219</sup> Consequently, Minister Chinamasa stated that Zimbabwe would not appear before the Tribunal, and would not respond to any action instituted or pending against Zimbabwe before the Tribunal.<sup>220</sup> According to Minister Chinamasa, for these reasons any decision made by the Tribunal against Zimbabwe would be "null and void".<sup>221</sup>

Similar statements of defiance were repeated by Zimbabwe's Deputy Chief Justice when he, *inter alia*, said that the Tribunal lacked jurisdiction to hear and determine the main case in *Campbell and Another v Republic of Zimbabwe*.<sup>222</sup> Zimbabwe's President Robert Mugabe referred to one of the Tribunal's decision as "nonsense" and "of no consequence".<sup>223</sup> To add to the controversy, the Tanzanian President, Jakaya Kikwete, is reported to have said that by

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<sup>217</sup> *Government of the Republic of Zimbabwe v Fick and Others* (657/11) [2012] ZASCA 122 (20 September 2012) (hereafter the *Fick SCA* case) at para 10.

<sup>218</sup> Ngandwe 2012 (1) *The Pan African Yearbook of Law* 54. In the *Gramara* case, *Fick SCA* case, *Fick SADC* judgment and *The Government of the Republic of Zimbabwe v Fick and Others* (CCT 101/12) [2013] ZACC 22 (27 June 2013). Zimbabwe consistently claimed that the SADC Treaty and the 2000 Tribunal Protocol still required ratification by member states in order to give rise to obligations. Because Zimbabwe had not ratified the 2000 Tribunal Protocol, it could not be subjected to the jurisdiction of the Tribunal and the Tribunal's judgments could not be registered and enforced in Zimbabwe. In all the cases above the courts found that the 2000 Tribunal Protocol and the SADC Treaty are binding on Zimbabwe.

<sup>219</sup> *Fick SCA* case at para 10. Article 41 of the SADC Treaty provides that the: "Treaty shall enter into force thirty (30) days after the deposit of the instruments of ratification by two-thirds of the States listed in the Preamble".

<sup>220</sup> At para 10.

<sup>221</sup> At para 10.

<sup>222</sup> *Mike Campbell (Pvt) Limited and Others v Zimbabwe* (2008) AHRLR 199 (SADC 2008) (hereafter the *Campbell* main case). See also *Campbell and Another v Republic of Zimbabwe* (SADC (T) 03/2009) [2009] SADCT 1 (5 June 2009) at para 2 (hereafter the *Campbell* ruling).

<sup>223</sup> *Campbell* ruling at para 3.



creating the Tribunal, SADC leaders had created a monster that would destroy them.<sup>224</sup> The Summit did not condemn the acts of defiance from Zimbabwe's officials and certain of the SADC member states. These statements show a lack of support for the Tribunal in that the very people who created it question its credibility and discredit it. Furthermore, it can be deduced from the discussion above that the Summit was unwilling to confront Zimbabwe and demand that it comply with the decisions of the Tribunal.<sup>225</sup>

### 3 SADC MEMBER STATES' CONSENT TO BE BOUND BY A TREATY

A state can express its intention to be bound by the provisions of a treaty on the international plane, *inter alia*, by ratifying the treaty concerned or by any other means agreed upon by the parties.<sup>226</sup> The important factor is that there must be consent to be bound by the provisions of a treaty. As a result, a member state that has agreed to be party to a treaty which requires a two-thirds majority to come into operation, cannot later claim that it is not bound by a provision in that agreement. This is so because once the requirement of the two-thirds majority has complied with and the treaty enters into force, the principle of *pacta sunt servanda* comes into play thereby imposing obligations on member states to discharge their treaty obligations in good faith.<sup>227</sup> This matter is addressed below by indicating the process that SADC member states chose to trigger the operation of subsequent amendments to the Treaty and Tribunal Protocol on the Tribunal without the need for ratification.

#### 3.1 *Did Zimbabwe participate in the enactment and ratification of the SADC Treaty and the adoption of the Agreement Amending the Treaty?*

The SADC Treaty was adopted on 17 August 1992 by the Heads of State or Government of the SADC in Windhoek, Namibia.<sup>228</sup> It became operational in 2003 in terms of article 41 of the Treaty which provides that: "This Treaty shall enter into force thirty (30) days after the deposit of the instruments of ratification by two thirds of the States listed in the Preamble". This

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<sup>224</sup> Christie S "Killed off by 'kings and potentates'" available at <http://mg.co.za/article/2011-08-19-killed-off-by-kings-and-potentates> (Date of use: 7 February 2013).

<sup>225</sup> Ngandwe 2012 (1) *The Pan African Yearbook of Law* 53.

<sup>226</sup> See art 11 of the Vienna Convention on the Law of Treaties 1969, 1155 UNTS 331; 8 *ILM* 679 (entered into force 27 Jan 1980) (hereafter referred to as the Vienna Convention).

<sup>227</sup> Kunz 1945 (39) *American Journal of International Law* 180.

<sup>228</sup> The full text of the SADC Treaty is available at [http://www.iss.co.za/Af/RegOrg/unity\\_to\\_union/pdfs/sadc/8SADC\\_Treaty.pdf](http://www.iss.co.za/Af/RegOrg/unity_to_union/pdfs/sadc/8SADC_Treaty.pdf) (Date of use: 08 February 2013).

requirement was complied with on 17 August 1992 and the Treaty became binding on member states thirty days later.

Article 36(1) of the Treaty regulates the process of enacting and triggering the operation of future amendments to the Treaty. In particular, article 36(1) provides that “[a]n amendment of this Treaty shall be adopted by a decision of three-quarters of all the Members of the Summit”. The Treaty was amended in 2001 by the Agreement Amending the Treaty of the Southern African Development Community (Agreement Amending the Treaty).<sup>229</sup> The Agreement Amending the Treaty was signed in Blantyre, Malawi, on 14 August 2001 by fourteen SADC member states, including Zimbabwe. This complied with the requirement set for the adoption of an amendment to the Treaty by three-quarters of Summit members. The entry into force of the Agreement Amending the Treaty is regulated by article 32 of the Agreement Amending the Treaty which provides that: “This Agreement shall enter into force on the date of its adoption by three-quarters of all members of the Summit”. In light of the above, it is clear that the Agreement Amending the Treaty required no further ratification by member states in that its adoption also triggered its coming into operation. It is therefore binding on all SADC member states, including Zimbabwe.<sup>230</sup>

Assuming that the Treaty required signature and ratification by member states in order for it to enter into force, this does not mean that pending ratification a state party may violate the treaty provisions. Under international law, a party who has signed but not yet ratified a treaty, is under an obligation not to defeat the purposes and objects of that treaty<sup>231</sup> Therefore, even if Zimbabwe had, for example, signed the Treaty but not ratified it, it would still be obliged not to act contrary to the provisions of the Treaty.

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<sup>229</sup> The full text of the Agreement Amending the Treaty of the Southern African Development Community is available at <http://www.sokwanele.com/node/1047> (Date of use: 08 February 2013).

<sup>230</sup> *Government of the Republic of Zimbabwe v Fick and Others* 2013 (10) BCLR 1103 (CC) at para 11.

<sup>231</sup> Rogoff 1980 (32) *Maine Law Review* 271; art 18 of the Vienna Convention.

### 3.2 *Did Zimbabwe participate in the enactment and ratification of the 2000 Tribunal Protocol and the Amended Protocol on the Tribunal?*

The Summit of Heads of State or Government of SADC, which includes Zimbabwe,<sup>232</sup> acting under article 4(4) of the 2000 Tribunal Protocol, appointed the judges of the SADC Tribunal in Gaborone, Botswana, on 18 August 2005.<sup>233</sup> The 2000 Tribunal Protocol was signed by the SADC Heads of State or Government on 7 August 2000.<sup>234</sup> Article 35 of the 2000 Tribunal Protocol provides that “[t]his Protocol shall be ratified by Signatory States in accordance with their constitutional procedures”.<sup>235</sup> In addition, article 38 states that “[t]his Protocol shall enter into force thirty (30) days after deposit in terms of Article 43 of the Treaty, of instruments of ratification by two thirds of the States”. It is, however, unclear whether the 2000 Tribunal Protocol was ratified as required by the provisions of article 35 as there is no record of ratification.<sup>236</sup> In 2002, the 2000 Tribunal Protocol was amended by the Agreement Amending the Protocol on the Tribunal (Amended Tribunal Protocol) of 3 October 2002.<sup>237</sup> The Amended Tribunal Protocol, which was signed by Heads of State including Zimbabwe, effectively removed articles 35 and 38 from the 2000 Tribunal Protocol by inserting article 21 of the Amended Tribunal Protocol. As a result, article 21 of the Amended Tribunal Protocol regulates its entry into force as it provides that “[t]his Agreement shall enter into force on the date of its adoption by three-quarters of all Members of the Summit”. Therefore, it is immaterial whether the 2000 Tribunal Protocol had entered into force under articles 35 and 38, because the new provision – article 21 of the Amended Tribunal Protocol – dealing with adoption and operation governs this process. Consequently, the adoption of the Amended Tribunal Protocol by three-quarters of the members of the Summit in 2002 rendered it binding on all SADC member states, Zimbabwe included.<sup>238</sup>

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<sup>232</sup> *Fick SCA* case at para 31.

<sup>233</sup> Ruppel *et al* “Regional Integration” 296.

<sup>234</sup> The full text of the SADC Protocol Tribunal is available at [http://www.iss.co.za/AF/RegOrg/unity\\_to\\_union/pdfs/sadc/6Protocol\\_on\\_Tribunal.pdf](http://www.iss.co.za/AF/RegOrg/unity_to_union/pdfs/sadc/6Protocol_on_Tribunal.pdf) (Date of use: 7 February 2012).

<sup>235</sup> *Fick SCA* case at para 35. See also the SADC Protocol on the Tribunal available at [http://www.iss.co.za/AF/RegOrg/unity\\_to\\_union/pdfs/sadc/6Protocol\\_on\\_Tribunal.pdf](http://www.iss.co.za/AF/RegOrg/unity_to_union/pdfs/sadc/6Protocol_on_Tribunal.pdf) (Date of use: 7 February 2012).

<sup>236</sup> *Fick SCA* case at para 36.

<sup>237</sup> The full text of the Amended Protocol on the Tribunal is available at [http://www.tralac.org/wp-content/blogs.dir/12/files/2011/uploads/20071107\\_AGREEMENT\\_AMENDING\\_THE\\_PROTOCOL\\_ON\\_TRIBUNAL-ENGLISH.pdf](http://www.tralac.org/wp-content/blogs.dir/12/files/2011/uploads/20071107_AGREEMENT_AMENDING_THE_PROTOCOL_ON_TRIBUNAL-ENGLISH.pdf) (Date of use: 7 February 2013).

<sup>238</sup> See also *Fick SCA* case at para 36.

#### 4 TREATY PROVISIONS EMPOWERING THE SUMMIT TO SUSPEND THE SADC TRIBUNAL

As alluded to earlier, the Tribunal was suspended in 2010 and it has not functioned since. A review of the SADC Treaty, the Agreement Amending the Treaty, the 2000 Tribunal Protocol, and the Amended Tribunal Protocol reveals that there are no provisions authorising the Summit to suspend the operation of the Tribunal. The suspension of the Tribunal is only possible if the Summit, acting under the provisions which allow for future amendments, adopts a new protocol containing provisions relating to the suspension of the Tribunal. This can be done, for example, under article 37(1) of the 2000 Tribunal Protocol which provides that “[a]ny State which is a Party to this Protocol may propose an amendment thereto”. This procedure was also not followed during the process of enacting the 2014 Protocol.<sup>239</sup> Because there has to date been no such amendment, it follows that there is no legal basis or source of authority allowing for the suspension of the Tribunal by the SADC Heads of State or Government.<sup>240</sup> Further, it is not clear what the legal impact or enforceability of the 2014 Protocol is, as it was initiated outside the permissible procedures.

The Summit has failed to take steps against one of the SADC member states, and eventually came to view the Tribunal as a threat to member states’ sovereignty.<sup>241</sup> In Ebobrah’s words, Zimbabwe brought a “politico-legal challenge” against the Tribunal.<sup>242</sup> Ngandwe with reference to Trollip,<sup>243</sup> and Sasman,<sup>244</sup> has also noted that the Tribunal was “suspended for strategic and political reasons”.<sup>245</sup> Trollip’s view is that the Tribunal was suspended, *inter alia*, to pre-empt it

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<sup>239</sup> Erasmus <http://www.tralac.org/images/docs/6900/us15wp012015-erasmus-new-protocol-sadc-tribunal-20150123-fin.pdf> (Date of use: 18 February 2016).

<sup>240</sup> Bartles <http://www.scribd.com/doc/115660010/WTIA-Review-of-the-Role-Responsibilities-and-Terms-of-Reference-of-the-SADC-Tribunal-Final-Report> (Date of use: 6 February 2014).

<sup>241</sup> Ngandwe 2012 (1) *The Pan African Yearbook of Law* 53; Ebobrah 2009 (17) *African Journal of International and Comparative Law* 87; Hulse M “Silencing a supranational court: The rise and fall of the SADC Tribunal” available at <http://www.e-ir.info/2012/10/25/silencing-a-supranational-court-the-rise-and-fall-of-the-sadc-tribunal/> (Date of use: 22 August 2013); Nevin T “SADC Tribunal paid the price for threatening states’ authority” available at <http://www.bdlive.co.za/world/africa/2013/01/28/sadc-tribunal-paid-the-price-for-threatening-states-authority> (Date of use: 22 August 2013).

<sup>242</sup> Ebobrah 2009 (17) *African Journal of International and Comparative Law* 80.

<sup>243</sup> Ngandwe 2012 (1) *The Pan African Yearbook of Law* 48 refers to an interview with Trollip, (the then Democratic Alliance Parliamentary leader) in the *Pretoria News* of 10 August 2013 at 11.

<sup>244</sup> Sasman C “Lesotho: SADC Split On Tribunal” available at <http://allafrica.com/stories/201104210364.html> (Date of use: 20 August 2013).

<sup>245</sup> Ngandwe 2012 (1) *The Pan African Yearbook of Law* 48.

from adjudicating on sensitive land-grab issues in Zimbabwe.<sup>246</sup> Sasman also says that “the South African-based Swissbourgh Group claims that the governments of Lesotho, South Africa and Zimbabwe were key movers behind the Southern African Development Community (SADC) decision to, for all intents and purposes, suspend the SADC Tribunal”.<sup>247</sup> The root cause of this was a court action in Lesotho in which the Swissbourgh Group sued the Kingdom of Lesotho for compensation and damages resulting from the “expropriation of its mineral rights in the execution of the Lesotho Highlands Water Project”.<sup>248</sup> This suite had huge potential financial implications for Lesotho. The views above should not be taken lightly as no reasons were given for the suspension of the Tribunal. Accordingly, the inference that can be drawn is that the suspension of the Tribunal was politically motivated. Indeed, “it is rare that any sovereign [state] will simply conform to the decision of an international court that renders an adverse decision”.<sup>249</sup> As noted by Ngandwe, Zimbabwe would not have questioned the legitimacy of the Tribunal had the latter ruled in its favour.<sup>250</sup> However, it was only once it was realised that Zimbabwe had lost its case that the decision was taken to come up with any excuse to ensure that whatever the outcome, Zimbabwe would remain unaffected by the Tribunal’s decisions.<sup>251</sup> The binding force of the Treaty and 2000 Tribunal Protocol provisions in a national legal system, is entirely dependent on the political will of SADC member states.<sup>252</sup>

## 5 DISCUSSION OF THE JUDGMENTS OF THE SADC TRIBUNAL

Having established that the Tribunal had been properly constituted and that the challenges to its existence were unfounded, I turn now to compliance with the human rights decisions by member states. This will be useful in establishing whether or not such judgments have been complied with. Where there has been no compliance, I will consider possible means by which

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<sup>246</sup> Ngandwe 2012 (1) *The Pan African Yearbook of Law* 48 refers to an interview with Trollip that was covered in the *Pretoria News* 10 August 2013 at 11.

<sup>247</sup> Sasman <http://allafrica.com/stories/201104210364.html> (Date of use: 20 August 2013).

<sup>248</sup> Ngandwe 2012 (1) *The Pan African Yearbook of Law* 48.

<sup>249</sup> Beukes 2008 (33) *South African Yearbook of International Law* 242-243; Johnson J “Enforcing judgments in international law: An analysis of the Southern African Development Community (“SADC”) Tribunal’s Decision in the Case, Mike Campbell, Ltd, & Others v The Republic of Zimbabwe and Robert Gabriel Mugabe, NO, in his capacity as President of Zimbabwe” available at <http://www.jdsupra.com/legalnews/enforcing-judgments-in-international-law-69044/> (Date of use: 08 February 2013).

<sup>250</sup> Ngandwe 2012 (1) *The Pan African Yearbook of Law* 53.

<sup>251</sup> Ngandwe 2012 (1) *The Pan African Yearbook of Law* 54.

<sup>252</sup> Cowell 2013 *Human Rights Law Review* 4.

such decisions can be enforced in future. This will be highly relevant to the functioning of the “new” Tribunal.

The Tribunal delivered its first judgment in 2007<sup>253</sup> and its last in 2010,<sup>254</sup> just before its suspension.<sup>255</sup> To date, most of the judgments have not been complied with,<sup>256</sup> and these are discussed in what follows.

### 5.1 *Mike Campbell (PVT) Limited and Another v Republic of Zimbabwe (1)*

The Campbell interim case was filed simultaneously with the application in the *Campbell* main case. The applicants sought interim measures preventing the government of Zimbabwe from, *inter alia*, removing them from their farm and taking all steps necessary to protect their stay on the farm until the main case had been finalised.<sup>257</sup> The Tribunal ruled in the applicants’ favour and ordered the Republic of Zimbabwe not to take any direct or indirect steps to evict the applicants from their farm.<sup>258</sup>

#### 5.1.1 Comments on the case and compliance with the judgment

Although the decision in the *Campbell* interim case was an application within an application, the Tribunal’s decision demonstrated its ability to use the principles in the Treaty to prevent the violation of human rights and promote the rule of law in the region. Unfortunately, the decision has not been complied with and can be seen as the reason for the challenges to the legality of the Tribunal.<sup>259</sup>

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<sup>253</sup> *Mtingwi v SADC Secretariat* (1/2007) [2008] SADCT 3 (27 May 2008) (hereafter the *Mtingwi* case).

<sup>254</sup> *Fick* SADC judgment.

<sup>255</sup> SADC: Communiqué by the Southern African Development Community Heads of State, on the 30th Jubilee SADC summit (19/08/2010) available at <http://www.zimeye.org/?p=20977> (Date of use: 24 August 2013).

<sup>256</sup> Of thirteen decisions, including non-human rights-related cases, only two judgments (unrelated to human rights issues) have been complied with. See *Mondlane v SADC Secretariat* (SADC (T) 07/2009) [2010] SADCT 3 (5 February 2010); *Kanyama v SADC Secretariat* (SADC (T) 05/2009) [2010] SADCT 1 (29 January 2010). An appendix of all the decisions of the SADC Tribunal is attached at the end of the discussion indicating all the decisions that were delivered and showing whether or not they have been complied with. Those which did not require compliance, such as dismissed applications and objections, are also indicated with a brief explanatory note. Pending decisions are also listed with reasons.

<sup>257</sup> *Campbell* interim case at 1.

<sup>258</sup> At 7.

<sup>259</sup> Hansungule 2013 (35) *Strategic Review for Southern Africa* 140.

## 5.2 *Mike Campbell (PVT) Limited and Another v Republic of Zimbabwe (2)*

In the main application, the applicants challenged section 16B of the Constitution of Zimbabwe (Amendment 17, 2005) which sanctioned the expropriation of land without compensation and ousted the jurisdiction of local courts from adjudicating land disputes.<sup>260</sup> In addition, they argued that they had been discriminated against on the ground of race. The Tribunal noted that even though the Constitutional Amendment 17 was silent on race, its effect would be felt only by white farmers who own the majority of agricultural land.<sup>261</sup> The Tribunal ruled in the applicants' favour and found, *inter alia*, that the applicants had been discriminated against. It ordered the Republic of Zimbabwe to pay compensation for the land forcefully taken from the applicants.<sup>262</sup>

### 5.2.1 Comments on the case and compliance with the judgment

The decision in the *Campbell* main case has generated considerable discussion from various angles but has been welcomed in the human rights arena.<sup>263</sup> The violence perpetrated by the agents of the government of Zimbabwe in carrying out land reform should be condemned in the strongest possible terms, as states have the primary obligation to protect their citizens.<sup>264</sup> The Tribunal unanimously found that Amendment 17, 2005, of the Zimbabwean Constitution, contravened the Treaty which prohibits racial and other forms of discrimination, as the policy targeted white farmers.<sup>265</sup> However, Justice Tshosa disagreed that Amendment 17, 2005, constituted a form of racial discrimination as found by the majority. In this regard, the dissenting judgment points out that:

In oral arguments, and this is on record, the respondents were specifically asked by the Tribunal whether there were other people [black farmers] apart from the applicants whose agricultural land was compulsorily acquired on the basis of Amendment 17. *The answer was in the affirmative and this was not challenged by the applicants.*<sup>266</sup> (Emphasis added.)

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<sup>260</sup> The contributions that will be made here are comments on the decision which found that Zimbabwe's land reform policy was discriminatory as it targeted only white farmers. Other issues such as the human rights jurisdiction of the Tribunal, have been dealt with in Chapter 2.

<sup>261</sup> *Campbell* main case at 12.

<sup>262</sup> At 59.

<sup>263</sup> See, amongst others, Moyo 2009 (9) *African Human Rights Law Journal* 590; Ndlovu 2011 (1) *SADC Law Journal* 63; Nkhata 2012 (20) *African Journal of International and Comparative Law* 93.

<sup>264</sup> Reichborn-Kjennerud 2012 *Conflict Trends* 21.

<sup>265</sup> *Campbell* main case at 54.

<sup>266</sup> At 65.

According to this statement, Amendment 17, 2005, of the Zimbabwean Constitution, thus applied to all agricultural land – irrespective of who (black or white farmer) owned the land.<sup>267</sup> The majority of the Tribunal however found that the land reform law, through its application, constituted indirect racial discrimination as it targeted predominantly white farmers:

Since the effects of the implementation of Amendment 17 will be felt by the Zimbabwean white farmers only, we consider it, although Amendment 17 does not explicitly refer to white farmers, as we have indicated above, its implementation affects white farmers only and consequently constitutes indirect discrimination or *de facto* or substantive inequality.<sup>268</sup>

It is submitted that the Tribunal's approach appears to have overlooked the history of land acquisition in Zimbabwe, as it merely said that "we note that the acquisition of land in Zimbabwe has had a long history" but did not elaborate on this aspect.<sup>269</sup> The issue of how the applicants acquired the land should have enjoyed greater attention and been addressed in detail. It is submitted that any regional judgment which ignores an unjust history is more likely to be disregarded in the territory in which enforcement is sought. The basis for this is that during the period 1894 -1895, the colonial rulers forcibly removed black people from their ancestral land.<sup>270</sup> Although black people attempted to resist their removal they lost the battle. During this period, various laws were adopted giving the control of the land to white settlers.<sup>271</sup> Furthermore, huge hectares of land were taken from black people without compensation and transferred to white settlers.<sup>272</sup> This position was later confirmed in *In Re Rhodesia* where the Privy Council said that the land belonged to the British Crown and that it had been taken from the black people because they did not have recognisable property rights to own the land.<sup>273</sup> It is submitted that Amendment 17, 2005, sought to redress an injustice of land ownership acquired through unjust laws. Therefore, the issue of discrimination should not have been judged in a vacuum, but with due regard to the historical context of land acquisition and what Amendment 17, 2005, sought to achieve.<sup>274</sup>

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<sup>267</sup>

At 94.

<sup>268</sup>

At 53.

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At 11.

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Ndlovu 2011 (15) *Law Democracy and Development* 3-4.

<sup>271</sup>

Ndlovu 2011 (15) *Law Democracy and Development* 4.

<sup>272</sup>

Ndlovu 2011 (15) *Law Democracy and Development* 4.

<sup>273</sup>

4 (1919) AC 210.

<sup>274</sup>

See for example, *City Council of Pretoria v Walker* 1998 (2) SA 363 para 26 where the Constitutional Court of South Africa said "[t]hat assessment cannot be undertaken in a vacuum



In light of the above, it cannot be said that the land reform law targeted a specific group only. Instead, a more substantial discussion from the Tribunal would have clarified its conclusion on the issues of race and unfair discrimination.

### 5.3 *Gondo and Others v Republic of Zimbabwe*<sup>275</sup>

The applicants had successfully sued the respondent in the national courts of Zimbabwe on the basis of the violence they had suffered at the hands of the respondent's security agents. According to the Tribunal, the respondent failed to comply with the judgments of the Zimbabwean courts which had found the Zimbabwean government liable to compensate the applicants for the injuries they had suffered.<sup>276</sup> As a result, the applicants approached the Tribunal claiming that the respondent was in breach of the Treaty because of its failure to ensure that effective remedies were available to them.<sup>277</sup> This, according to the applicants, was a failure to act in accordance with the principles of human rights and democracy as set out in the Treaty.<sup>278</sup> The applicants also challenged section 5(2) of the Zimbabwean State Liability Act<sup>279</sup> on the ground that it was in breach of the Treaty as it prevented the execution of the respondent's property to satisfy a judgment. The respondent did not oppose the application.

The legal issues were whether the respondent was in breach of the Treaty which, *inter alia*, requires member states to act in accordance with the principles of human rights, democracy and the rule of law.<sup>280</sup> In addition, the Tribunal had to determine whether the respondent's law (the State Liability Act) was in line with the Treaty, as it prevented the respondent's property from attachment or execution to fulfil a judgment debt. The Tribunal answered both questions in the affirmative and found the respondent to have breached the Treaty. In coming to these conclusions, the Tribunal relied on several regional and international instruments under which

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but should be based both on the wording of the section and in the constitutional and historical context of the developments in South Africa".

<sup>275</sup> SADC (T) Case No 05/2008. Some of the issues of this case have been dealt with in Chapter 2 of the study and will therefore not be repeated.

<sup>276</sup> At 2.

<sup>277</sup> At 2.

<sup>278</sup> At 2-3.

<sup>279</sup> The relevant part of section 5(2) provides: "Subject to this section, no execution, or attachment, or process in the nature thereof shall be issued against the defendant or respondent in any action or proceedings ... against any property of the State, but the nominal defendant or respondent may cause to be paid out of the Consolidated Revenue Fund such sum of money as may, by a judgment or order of the court, be awarded to the plaintiff, the applicant or petitioner, as the case may be".

<sup>280</sup> Article 4(c) of the SADC Treaty.

SADC member states have undertaken obligations to ensure that human rights are respected and promoted in their territories.<sup>281</sup> In addition, the Tribunal emphasised that the right to an effective remedy and the right to protection of the law are well-known principles of human rights law.<sup>282</sup> It also found the State Liability Act to be unfairly discriminatory against the applicants as it prevented state property from being attached, while the state could attach the peoples' property to satisfy a judgment.<sup>283</sup>

### 5.3.1 Comments on the case and compliance with the judgment

The ruling has to date not been implemented and the applicant is yet to benefit from the judgment. Zimbabwe has refused to comply with the decisions of its own courts and with that of the Tribunal. In *Etheredge v Minister of National Security*<sup>284</sup> the Zimbabwean High Court held, *inter alia*, that the 2000 Tribunal Protocol did not intend to create a sub-regional forum superior to the courts in member states. The Court also ruled that its jurisdiction is superior to that of the Tribunal.<sup>285</sup> Zimbabwe's statements of defiance mean that individuals who have obtained judgments in their favour from the Tribunal cannot enforce them against the state of Zimbabwe. Additionally, it could be argued that Zimbabwe has an unfriendly reception of international law. Instead, it prefers its own national laws regardless of whether they are contrary to the well-established principles of international law such as the protection of human rights.

### 5.4 *Fick v The Republic of Zimbabwe*<sup>286</sup>

The applicants brought this matter before the Tribunal to report the continued failure by the respondent to comply with the earlier Tribunal judgments in the *Campbell* interim case and the *Campbell* main case. The aim of the application was for the Summit to take appropriate action against Zimbabwe. The Tribunal found that there was compelling evidence that the respondent had failed to comply with its decisions and, therefore, that there were continued "acts of non-compliance".<sup>287</sup> The Tribunal indicated that it would again report the finding of non-compliance

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<sup>281</sup> *Gondo and Others v Republic of Zimbabwe* SADC (T) Case No 05/2008 at 4-5.

<sup>282</sup> At 3-9.

<sup>283</sup> At 12.

<sup>284</sup> HC 3295/08 [2009] ZWHCC 1 (4 February 2009).

<sup>285</sup> At 9.

<sup>286</sup> *Fick* SADC judgment.

<sup>287</sup> At 4.

to the Summit to take appropriate action. It also awarded a costs order against the respondent.<sup>288</sup>

#### 5.4.1 Comments on the case and compliance with the judgment

This decision has not been complied with. The applicants' attempts to have the decision enforced in the national courts of Zimbabwe have also failed.

#### 5.5 *Gramara (Private) Limited and Another v Government of the Republic of Zimbabwe*<sup>289</sup>

In the *Gramara* case, the applicants sought to register and enforce the judgment of the SADC Tribunal in the *Campbell* main case. The issues for determination before the High Court of Zimbabwe were whether the Tribunal had jurisdiction and competence to hear the case before it and whether the recognition and enforcement of the Tribunal's decision would be contrary to public policy in Zimbabwe.<sup>290</sup> With regard to the first issues, the Court found that the jurisdiction of the Tribunal "encompasses all disputes between States and between natural and legal persons and States relating to the interpretation and application of the [SADC] Treaty" and that the Tribunal had been properly constituted.<sup>291</sup> The Court went on to state that:

Despite this broad formulation, I am not entirely persuaded that the general stricture [*sic*] enunciated in Article 4(c) of the Treaty, which requires SADC and the Member States to act in accordance with the principles, *inter alia*, of "human rights, democracy and the rule of law", suffices to invest the Tribunal with the requisite capacity to entertain and adjudicate alleged violations of human rights which might be committed by Member States against their own nationals.<sup>292</sup>

#### 5.5.1 Comment on the case and compliance with the judgment

This view was addressed in Chapter 2 above where I disagreed with the Court's view and concluded that the Tribunal has jurisdiction over human rights cases. This is so because SADC member states undertook, *inter alia*, to defend and maintain democracy. Therefore, one cannot talk of democracy and exclude human rights.

Regarding the registration of the Tribunal's judgment, the Court held that registering the judgments in Zimbabwe would challenge the decision of the Supreme Court and so undermine

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<sup>288</sup>

At 4.

<sup>289</sup>

HC 33/09 (hereafter the *Gramara* case).

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*Gramara* case at 8.

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*Gramara* case at 8.

<sup>292</sup>

*Gramara* case at 13.

its authority in Zimbabwe.<sup>293</sup> In addition, the Court mentioned several reasons for declining the registration of the Tribunal's decision, including that such registration would require the government of Zimbabwe to disregard the land reform policy enacted by the Parliament and question the supremacy of the Constitution.<sup>294</sup> As a result, the application for registration was dismissed.

#### 5.6 *Fick v Government of the Republic of Zimbabwe and Others*<sup>295</sup>

In view of the ruling in the *Gramara* case by the Zimbabwean High Court, Campbell and other aggrieved farmers sought relief from the South African High Court in *Fick* SA High Court case. In this case the applicants argued that their application complied with the common-law requirements for registration and enforcement of foreign judgments.<sup>296</sup> Further, they argued that the High Court of Zimbabwe recognised the validity of the Tribunal. The respondent did not oppose the application. The Court, without deliberation, ruled in favour of the applicants and registered the decision of the Tribunal.<sup>297</sup> Consequently, a writ of execution was issued in Cape Town to attach and sell Zimbabwe's property situated in Cape Town to fulfil the Tribunal's costs order.

The government of Zimbabwe appealed the High Court decision in the Supreme Court of Appeal on the ground that the Treaty and the 2000 Tribunal Protocol had not been domesticated in South Africa and therefore could not be automatically enforced.<sup>298</sup> In response to these challenges, the Supreme Court of Appeal first indicated that the SADC was constituted under the SADC Treaty signed and ratified by Heads of State or Government of the Southern African region, including Zimbabwe. As a result, Zimbabwe had been part of the process and

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<sup>293</sup> *Gramara* case at 17. In *Campbell (Pvt) Ltd & Another v Minister of National Security Responsible for Land, Land Reform and Resettlement & Another* SC 49/07 [2008] ZWSC 1 (22 January 2008) the Supreme Court of Zimbabwe found the land reform program constitutionally permissible and dismissed the applicant's challenge that his land had been unlawfully taken from him.

<sup>294</sup> *Gramara* case at 17-19.

<sup>295</sup> *Fick v Government of the Republic of Zimbabwe and Others* 2009 Case NO: 77881/2009 North Gauteng High Court, Pretoria (6 June 2011) (hereafter the *Fick* SA High Court case).

<sup>296</sup> Hemel and Schalkwyk 2010 (35) *The Yale Journal of International Law* 521.

<sup>297</sup> *Fick* SA High Court case at para 1.

<sup>298</sup> *Government of the Republic of Zimbabwe v Fick and Others* (657/11) [2012] ZASCA 122 (20 September 2012) (hereafter the *Fick* SA SCA case).

The arguments discussed here are only those relating to the SADC Treaty and the SADC Protocol on the Tribunal, as other issues such as the SADC Tribunal's jurisdiction have been dealt with in Chapter 2.

that the 2000 Tribunal Protocol was binding on it.<sup>299</sup> The Court then held that Zimbabwe's contention that the Treaty and the 2000 Tribunal Protocol had not been domesticated in South Africa was misplaced because these were not the instruments being enforced but "...only that by its act Zimbabwe has submitted to the jurisdiction and enforcement".<sup>300</sup>

#### 5.6.1 Comments on the case and compliance with the judgment

The Court found that there were no valid reasons why Zimbabwe should not be held accountable for not complying with its treaty obligations. It therefore held that Zimbabwe had advanced no defence against the recognition and enforcement of the Tribunal's costs order. The appeal failed. However, Zimbabwe did not comply with the decision but made a further appeal.

#### 5.7 *Government of the Republic of Zimbabwe v Fick and Others*<sup>301</sup>

Unsatisfied with the decision of the Supreme Court of Appeal in *Fick SA SCA* case, Zimbabwe appealed to the Constitutional Court of South Africa in *Government of the Republic of Zimbabwe v Fick and Others*. The main issue before the Constitutional Court was whether South African courts had jurisdiction to register and enforce the decision of the Tribunal against Zimbabwe. The government of Zimbabwe argued that the South African Parliament had not transformed the SADC Treaty into its municipal law as required by section 231 of the Constitution of South Africa, 1996.<sup>302</sup> Therefore, the judgments of the Tribunal could not be registered and enforced by South African courts. The Court dismissed this argument on the basis that South Africa "approved" the SADC Treaty in 1995, and that it was therefore "binding on South Africa, at least on the international plane".<sup>303</sup> It also indicated that SADC member states are required to take all necessary measures to ensure the execution of the judgments of the Tribunal. This means that "both Zimbabwe and South Africa effectively agreed that their domestic courts would have jurisdiction to recognize and enforce orders of the Tribunal made against them".<sup>304</sup> The appeal was dismissed.

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<sup>299</sup> *Fick SA SCA* case at para 36.

<sup>300</sup> At para 45.

<sup>301</sup> 2013 (10) BCLR 1103 (CC) (hereafter the *Fick CC* case).

<sup>302</sup> *Fick CC* case at para 29.

<sup>303</sup> At para 30. (Emphasis added.)

<sup>304</sup> At para 48.

### 5.7.1 Comments on the case and compliance with the judgment

The decision of the Constitutional Court, although not entirely convincing as regards the relationship between SADC Community law and national law,<sup>305</sup> basically confirms the SCA's decision in the *Fick SA SCA* case that by being party to the Treaty and the 2000 Tribunal Protocol, Zimbabwe and South Africa undertook to implement the decisions of the Tribunal in their respective countries. However, the difficulty with this ruling is that the Court was silent on the issues of monism and dualism which was required to substantiate its ruling on how ratified, but undomesticated, treaties become enforceable against South Africa and Zimbabwe. Despite this shortcoming, the judgment has paved the way for victims of human rights abuse in Zimbabwe to approach South African courts for the "enforcement of international, regional and sub-regional human rights norms".<sup>306</sup> The judgment was eventually complied with when the Zimbabwean Government property was auctioned in Cape Town.<sup>307</sup>

## 6 EVALUATION OF THE CASES

The cases discussed above indicate how instrumental the suspended SADC Tribunal has been in promoting and advancing a human rights protection mandate in the SADC region. In addition, they show the ability of the Tribunal to exercise its powers to protect those who had approached it for relief. The Tribunal, through its judgments, "tried to ensure regional integration and common regional standards through the development of community jurisprudence".<sup>308</sup> The unenforced judgments remain a major obstacle to ensuring that justice is done. Enforcement of the Tribunal's decisions is something that lies with the Summit and depends largely on the political will of member states.<sup>309</sup>

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<sup>305</sup> *Fick CC* case.

<sup>306</sup> Hemel and Schalkwyk 2010 (35) *The Yale Journal of International Law* 523. The issues of monism and dualism are discussed in Chapter 4 of the study.

<sup>307</sup> Evans J "Zim govt property in Cape Town sold for R3.7m" available at <http://www.news24.com/SouthAfrica/News/Zim-govt-property-in-Cape-Town-sold-for-R37m-20150921> (Date of use: 23 September 2015).

<sup>308</sup> Pillay AG "Reflection on the SADC Tribunal: A missed opportunity" available at <http://web.up.ac.za/sitefiles/file/46/1322/Pillay%20%20Reflecting%20on%20the%20SADC%20Tribunal.pdf> (Date of use: 8 September 2013).

<sup>309</sup> Hemel and Schalkwyk 2010 (35) *The Yale Journal of International Law* 521.

## 7 ENFORCEMENT OF THE SADC TRIBUNAL'S JUDGMENTS IN INTERNATIONAL LAW

International tribunals do not have the capacity to enforce their own decisions.<sup>310</sup> They also do not have personnel such as sheriffs or other institutions that may help pressure the state concerned to execute the judgment delivered by the relevant tribunal.<sup>311</sup> Their mandate is to adjudicate disputes referred to them in accordance with their constitutive documents. Once a tribunal delivers a judgment, it becomes *functus officio* — meaning that the tribunal has fulfilled its function regarding the particular issue.<sup>312</sup> Enforcement of judgments, therefore, does not lie within the work of the tribunals.<sup>313</sup> Instead, the body which created the tribunal, or the institution entrusted with the power to oversee that the tribunal's decisions are enforced, is responsible for their execution.<sup>314</sup>

For justice to be done, it is important that the judgments the SADC Tribunal are fully complied with. Without this it would be futile for individuals to approach the Tribunal as they would end up with meaningless orders. As observed by Mkandawire, “[j]udicial proceedings are practical and if a litigant cannot have a judgment enforced, then there is no point of having judicial proceedings in the first place”.<sup>315</sup> What is important for any litigant at the conclusion of his or her case, either at national or international level, is the resulting judgment.<sup>316</sup> The aggrieved individual at an international level is generally not overly concerned about the rules or principles applied in deciding his or her case, or the significance of the judgment for future similar cases. What is of significance to the litigant is the “...judgment as a remedy and the material consequence of being granted such remedy”.<sup>317</sup> The same frustration applies to tribunals as they are regarded as custodians of human rights (albeit subject to the unclear human rights jurisdiction such as that of the SADC Tribunal which had to be concretised via the doctrine of

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<sup>310</sup> Henkin 1995-1996 (25) *Georgia Journal of International and Comparative Law* 41.

<sup>311</sup> Ebobrah 2009 (17) *African Journal of International and Comparative Law* 96; Hudson *International Tribunals, Past and Future* 127.

<sup>312</sup> Noortman *Enforcing International Law* 123; Hudson *International Tribunals, Past and Future* 128.

<sup>313</sup> Ndlovu 2011 (1) *SADC Law Journal* 78.

<sup>314</sup> Noortman *Enforcing International Law* 121.

<sup>315</sup> Mkandawire 2010 (36) *Commonwealth Law Bulletin* 567.

<sup>316</sup> Oppong RF “Enforcing judgments of the SADC Tribunal in the domestic courts of member states” available at [http://www.kas.de/upload/auslandshomepages/namibia/MRI2010/MRI2010\\_chapter7.pdf](http://www.kas.de/upload/auslandshomepages/namibia/MRI2010/MRI2010_chapter7.pdf) (Date of use: 27 August 2013).

<sup>317</sup> Oppong [http://www.kas.de/upload/auslandshomepages/namibia/MRI2010/MRI2010\\_chapter7.pdf](http://www.kas.de/upload/auslandshomepages/namibia/MRI2010/MRI2010_chapter7.pdf) (Date of use: 27 August 2013).

implied powers).<sup>318</sup> As a result, there is “[n]o court or quasi-judicial body [that] would like to render decisions that are tantamount to empty orders”.<sup>319</sup>

The difficulties associated with the enforcement of judgments of international tribunals are not something new.<sup>320</sup> As pointed out above, the suspended Tribunal’s decisions regarding human rights have not yet been implemented. This problem continues to be a subject of debate throughout Africa and beyond.<sup>321</sup> As we saw earlier, most African countries are “very protective of their state sovereignty”.<sup>322</sup> This is one of the reasons why compliance is partially or totally rejected by a state for policy or practical<sup>323</sup> reasons, even if there is a treaty or other obligation requiring compliance with the decision.<sup>324</sup> It is in this regard that Llamzon has correctly observed that “international institutions [and courts such as the SADC Tribunal] are plagued by too many expectations [of protecting human rights] and too little power”.<sup>325</sup> This observation has merit because in the case of the Tribunal, the victims of human rights violations approached the Tribunal in the hope of receiving the necessary protection. The Tribunal ruled in their favour but could not enforce its decisions as this fell outside of its powers. The Summit is the body with the power to ensure that the decisions of the Tribunal are implemented by member states, but it has failed to do so.<sup>326</sup>

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<sup>318</sup> The doctrine of implied powers has been comprehensively dealt with in Chapter 2 of the study.  
<sup>319</sup> Mutangi T “Executing judgments of the SADC Tribunal rendered under its human rights-related jurisdiction by utilizing the foreign judgments (registration and enforcement) procedure: Prospects and challenges” available at <http://www.ssrn.com/abstract=1907891> (Date of use: 28 August 2013).  
<sup>320</sup> Phooko 2011 (1) *Notre Dame Journal of International Comparative and Human Rights Law* 195; Llamzon 2008 (5) *The European Journal of International Law* 815; Johnson JS “Enforcing judgments in international law: An analysis of the Southern African Development Community (“SADC”) Tribunal’s decision in the case, Mike Campbell, Ltd, & Others v The Republic of Zimbabwe and Robert Gabriel Mugabe, NO, in his capacity as President of Zimbabwe” available at <http://www.jdsupra.com/legalnews/enforcig-judgments-in-international-law-69044/> (Date of use: 20 June 2013).  
<sup>321</sup> Mkandawire 2010 (36) *Commonwealth Law Bulletin* 567; Brickhill J “Judgment relates to jurisdiction when enforcing foreign judgments in SA” *The Sunday Independent* 14 July 2013 at 7; Tleane C “Ruling does nothing for SA’s reputation of acting like a sub-imperial African power” *The Sunday Independent* 14 July 2013 at 7.  
<sup>322</sup> Ebobrah 2009 (17) *African Journal of International and Comparative Law* 98.  
<sup>323</sup> As was discussed earlier, in the *Gramara* case the Zimbabwean High Court declined to register and recognise the judgment of the SADC Tribunal on, *inter alia*, practical reasons that would require the government to reverse a programme that had been implemented for many years.  
<sup>324</sup> Noortman *Enforcing International Law* 82.  
<sup>325</sup> Llamzon 2008 (5) *The European Journal of International Law* 815.  
<sup>326</sup> See art 32(5) of the SADC Protocol on the Tribunal.



It is unfortunate that a country voluntarily accedes to a treaty but thereafter fails to discharge its treaty obligations. This necessitates a brief discussion of why states enter into treaties. According to Chayes and Chayes, when states conclude international agreements they will to a certain degree fulfil their obligations under that treaty.<sup>327</sup> In this regard, these authors indicate that even though treaty compliance cannot be empirically verified, the tendency of countries to comply with their treaty obligations is more tenable and useful than the realist assumption that states violate international agreements whenever it is in their interest to do so.<sup>328</sup> In support of this, they argue, *inter alia*, that treaties are closely related to states' "interests" and for this reason states need to enter into agreements which are in their own interests. In this regard a treaty will be discussed and concluded based on the interests of states.<sup>329</sup> However, if states are not entirely honest during the negotiation process, the result would be that countries enter into a treaty that does not reflect their interests. Further, they submit that it is a well-known rule of international law that treaties are binding on member states, and that state parties have to discharge their treaty obligations – *pacta sunt servanda*.<sup>330</sup> Indeed, the motive for international agreements is for the common good of the international community as parties negotiate and ratify treaties for mutual benefit. In addition, according to Chayes and Chayes, non-compliance is a result of states entering into a treaty for the sake of appeasing the international community with no intention of carrying out their treaty obligations.<sup>331</sup> This is common in many countries that ratify treaties but fail to bring their national law into line with their treaty obligations. For example, Zambia ratified several human rights treaties in the 1980s but has to date not given them the force of national law.<sup>332</sup> The government of Zambia has also said that if the treaties have not been incorporated, individuals will not be able to approach Zambian national courts (since the treaty is then not part of national law).<sup>333</sup> However, the individual could approach a regional or international court (should he/she have *locus standi*). The fact that a state has not domesticated a treaty does not mean that it is not bound on the international level to comply

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<sup>327</sup> Chayes and Chayes 1993 (47) *International Organization* 176.

<sup>328</sup> Chayes and Chayes 1993 (47) *International Organization* 176.

<sup>329</sup> Chayes and Chayes 1993 (47) *International Organization* 179-185.

<sup>330</sup> Chayes and Chayes 1993 (47) *International Organization* 185-187; Nidovu 2011 (1) *SADC Law Journal* 79.

<sup>331</sup> Chayes and Chayes 1993 (47) *International Organization* 187-188.

<sup>332</sup> Hansungule "Domestication of international human rights law in Zambia" 72-73.

<sup>333</sup> Hansungule "Domestication of international human rights law in Zambia" 73.

with its treaty obligations. It is liable to other states on the international plane and that state must respect such an agreement.<sup>334</sup>

### 7.1 *Factors contributing to non-compliance with the judgments of international tribunals*

Compliance with the decisions of the domestic courts is generally high because of the organised system involving a police force and sheriffs. For example, if a court issues a judgment in a civil case for the award of money, the sheriff will proceed to recover the money even through the attachment of the debtor's assets.<sup>335</sup> Also, in criminal cases, where the court issues a judgment ordering the arrest of a suspect, police officers will implement that order. However, international, regional, or sub-regional courts, such as the SADC Tribunal, do not have the power to compel compliance with their decisions because there is "no world order similar to national government".<sup>336</sup> In fact, these tribunals are considered to be more political than judicial bodies.<sup>337</sup> This argument is not without merit as these institutions are created by treaties and their operation and proper functioning are dependent on the political will of member states. Even if there are problems involving compliance with international decisions, these institutions play an indispensable role in the development of international law and the protection of human rights.<sup>338</sup> The various forms of compliance and the causes of non-compliance are discussed below.<sup>339</sup>

*Full compliance* refers to a situation where a state party has fully complied with the decision of the international court and/or where the state party has indicated a clear political will to comply with a judgment.<sup>340</sup> As far as the latter is concerned, the process of complying with the decision must have already commenced.<sup>341</sup> *Non-compliance* refers to a situation where a state party has

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<sup>334</sup> *Glenister v President of the Republic of South Africa and Others* 2011 (3) SA 347 (CC) at para 91.

<sup>335</sup> *Nyathi v Member of the Executive Council for the Department of Health Gauteng and Another* 2008 (9) BCLR 865 (CC); *Minister for Justice and Constitutional Development v Nyathi and Others* 2010 (4) SA 567 (CC).

<sup>336</sup> Warioba 2001 (5) *Max Planck Yearbook of United Nations Law* 49.

<sup>337</sup> Warioba 2001 (5) *Max Planck Yearbook of United Nations Law* 45.

<sup>338</sup> Warioba 2001 (5) *Max Planck Yearbook of United Nations Law* 46.

<sup>339</sup> For the purposes of this discussion, partial compliance and situational compliance will not be addressed as they did not apply in the cases decided by the SADC Tribunal. Partial compliance refers to a situation where a state has complied with some aspects of the ruling and/or recommendations. Situational compliance occurs, for example, when a state moves from a regime that disregarded court orders to a regime that respects the rule of law and complies with court decisions. See Viljoen *International Human Rights Law in Africa* 340.

<sup>340</sup> Viljoen and Louw 2007 (101) *The American Journal of International Law* 5.

<sup>341</sup> Viljoen *International Human Rights Law in Africa* 340.

indicated its intention, as Zimbabwe has done, that it will not comply with the decisions of the court that issued the judgment.<sup>342</sup>

Chayes and Chayes are of the view that non-compliance with the decisions of international courts can be attributed to the ambiguous nature of a treaty, incapacity of the parties to fulfil their treaty obligations, and the temporary dimension of social or economic change.<sup>343</sup> The SADC Treaty may be regarded as ambiguous in the sense that it is silent on the relationship between the Treaty itself and the national constitutions of member states. In addition, as pointed out in Chapter 2, the Treaty and 2000 Tribunal Protocol do not expressly empower the Tribunal to adjudicate human rights cases. This has resulted in Zimbabwe's domestic courts declining to register and recognise an order of the Tribunal on the basis that it was contrary to the Zimbabwean Constitution.<sup>344</sup> Further, the government of Zimbabwe has consistently maintained that the Tribunal does not have a human rights mandate in that the Treaty does "not set out the standards against which actions of Member States can be assessed" but "only sets out the principles and objectives of SADC".<sup>345</sup>

With regard to the incapacity of some states to comply with their treaty obligations: States may enter into treaties but fail to honour their obligations in terms of the treaty due to lack of resources and infrastructure. Although such countries may have demonstrated a political will to fulfil treaty obligations, the availability of resources may be a barrier to compliance.

The social-change factor – such as the transition from an era of gross human rights violations to the democratic dispensation in South Africa, and the subsequent ratification of various human rights treaties by the democratic government – does not necessarily mean that all its treaty obligations could be fulfilled immediately. Some of these obligations (for example, in the area of socio-economic rights) can only be achieved progressively because of the need, *inter alia*, to put an implementation framework in place to achieve the obligations imposed by the treaty.<sup>346</sup>

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<sup>342</sup> Viljoen *International Human Rights Law in Africa* 340.

<sup>343</sup> Chayes and Chayes 1993 (47) *International Organization* 188-197.

<sup>344</sup> *Gramara* case at 18.

<sup>345</sup> *Mike Campbell* main case at 23.

<sup>346</sup> See, for example, s 26 of the Constitution of the Republic of South Africa, 1996; *Soobramoney v Minister of Health, KwaZulu-Natal* 1997 (12) BCLR 1696 (CC). In this case, the Court indicated that the right to access to health care services was limited by the lack of resources and that the obligation imposed on the state was not an immediate one, but required the state progressively to achieve the realisation of everyone's' right to access to health care services.

Chayes and Chayes are of the view that there should not be a requirement of *strict compliance* with a treaty regime but rather certain acceptable levels of overall compliance must be required to protect the interests of the treaty.<sup>347</sup> They support this by indicating that there can be deviations within acceptable levels.<sup>348</sup> I can go along with this view only to the extent that deviations from treaty obligations should only be allowed in line with the doctrine of margin of appreciation to allow member states to a treaty "to derogate from the obligations laid down" for them in certain situation.<sup>349</sup> However, in order for treaty law to be respected in the same way as national law, it is submitted that full compliance with treaty obligations should always be encouraged. This is no straightforward matter given the diverse global community. Further, states are deemed to be better placed to understand and regulate certain things such as freedom of expression and public morals in their own territories.<sup>350</sup>

Chayes and Chayes are further of the view that higher compliance can be compelled by treaty bodies or non-governmental organisations where a treaty does not have a body responsible for monitoring compliance with its obligations.<sup>351</sup> Whilst this is true, in practice even established treaty bodies – such as the Committee against Torture – do not have notable power in that they are limited to making recommendations to member states.<sup>352</sup> Even an investigation of allegations of human rights violations by treaty bodies in the territory of the delinquent state depends largely on the willingness of the country concerned.

It is submitted that non-compliance can be intentional or unintentional.<sup>353</sup> An example of intentional non-compliance would be where a state has entered into a treaty for the sole reason of appeasing the international community with no intention whatsoever of fulfilling its treaty

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<sup>347</sup> Chayes and Chayes 1993 (47) *International Organization* 197-201.

<sup>348</sup> Chayes and Chayes 1993 (47) *International Organization* 197-198.

<sup>349</sup> *Application No 176/56 (Greece v United Kingdom, "Cyprus")* 1958-1959 (2) *Yearbook of the European Convention* 174-199 at 136. In this case, the European Court of justice said the following with regard to margin of appreciation, "[t]he Commission of Human Rights is authorised by the Convention to express a critical opinion on derogations under Article 15, but the Government concerned retains, with certain limits, its discretion in appreciating the threat to the life of the nation. In the present case the Government of Cyprus has not gone beyond these limits." For a detailed discussion on this doctrine, see Howard *The Margin of Appreciation Doctrine* 10.

<sup>350</sup> Church *et al Human Rights* 199-201.

<sup>351</sup> The absence of a body monitoring compliance with the decisions of the SADC Tribunal and the attendant disadvantages are dealt with below.

<sup>352</sup> The Committee against Torture monitors the implementation of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment (1984).

<sup>353</sup> The *Gramara* case represents a case of intentional non-compliance with the judgment of the SADC Tribunal.

obligations. Unintentional non-compliance occurs, for example, where the provisions of a treaty are ambiguous, or where a state has insufficient resources to discharge its treaty obligations such as the provision of access to adequate housing.

In a study assessing state compliance with the recommendations of the African Commission of Human and Peoples' Rights between 1993 and 2004, Viljoen and Louw reaches the conclusion that in Africa non-compliance with decisions of regional tribunals is, *inter alia*, caused by the AU's lack of appreciation of the culture of human rights.<sup>354</sup> It is submitted that this is also the case on the SADC level as SADC member states have not been notably involved in taking appropriate action against Zimbabwe for non-compliance with the decisions of the Tribunal.

A change in government may also result in non-compliance with a decision of the court.<sup>355</sup> This could happen, for example, where the previous government was involved in gross violations of human rights. When the new government assumes power, it may have to compensate victims of human rights abuses committed by the former government. The country may not have sufficient resources to compensate the victims as the focus may be mainly on building the country and the institutions supporting democracy. This is so because gross violations of human rights "require large-scale remedies".<sup>356</sup>

Unlike the ECJ, the lack of an effective body to monitor compliance with the Tribunal's decisions is also a concern. A successful litigant has, therefore, the additional burden of reporting non-compliance with the decisions of the Tribunal to the Summit for the latter to take appropriate action.

Nathan has also expressed the view that one of the factors which especially affects the implementation of human rights decisions of regional and/or sub-regional courts is the political character of the state.<sup>357</sup> On the one hand, this means that states that have a record of human rights abuse, also have a poor record of compliance with human rights judgments issued by international courts.<sup>358</sup> Zimbabwe, amongst other states, is an example in the SADC region of a

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<sup>354</sup> Viljoen and Louw 2007 (101) *The American Journal of International Law* 12.

<sup>355</sup> Viljoen and Louw 2007 (101) *The American Journal of International Law* 12.

<sup>356</sup> Viljoen and Louw 2007 (101) *The American Journal of International Law* 12.

<sup>357</sup> Nathan 2013 (35) *Human Rights Quarterly* 887.

<sup>358</sup> Report of the Open Society Justice Initiative (OSJI) "From Judgment to Justice: Implementing International and Regional Human Rights Decisions (2010)" available at

state that has violated the human rights of its citizens for decades past and has defied judgments of the SADC Tribunal.<sup>359</sup> On the other hand, countries that respect human rights are more likely to comply with the judgments of international and regional courts.<sup>360</sup> In addition, the more the decision of an international, regional or sub-regional court deals with a sensitive area and is contrary to a local policy of the state concerned, the greater the probability that it will not be implemented.<sup>361</sup> An example of this is where the government of Zimbabwe and its local courts defied the decisions of the SADC Tribunal<sup>362</sup> on the basis that they sought to reverse the land policy that had been adopted by Parliament.

It is submitted that states party to any treaty should at all times voluntarily discharge their treaty obligations, freely assumed, without the need for third parties to intervene.<sup>363</sup> Unfortunately, this does not always happen in the real world. Therefore, as is further discussed below, it is submitted that compliance with the judgments of the Tribunal delivered while it was operational, should be achieved through diplomatic means. This may, for example, take place where the Summit compels the non-complying party to take measures to ensure that the judgment is fulfilled. The decisions of the envisaged SADC Tribunal should be enforced by a judicial procedure and/or sanctions (as a matter of last resort) in cases where the parties to the dispute deliberately ignore the decision.

## 7.2 Powers of the Summit to enforce the decisions of the SADC Tribunal through sanctions

The powers of the Summit to take appropriate action against a member state that refuses to comply with the decisions of the Tribunal are also supported by the provisions of the SADC Treaty. For example, article 33 of the Treaty authorises the imposition of sanctions against any member state who “persistently fails” to discharge the obligations flowing from the Treaty. Further, the Treaty requires sanctions to be determined on a case by case basis.<sup>364</sup> The provision regarding sanctions in the Treaty relates to the oldest and most traditional method

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<http://www.opensocietyfoundations.org/sites/default/files/from-judgment-to-justice-20101122.pdf>

(Date of use: 19 March 2014) (hereafter the OSJI Report).

<sup>359</sup> Nathan 2013 (35) *Human Rights Quarterly* 887.

<sup>360</sup> OSJI Report at 28.

<sup>361</sup> OSJI Report at 16, 19-20, 24.

<sup>362</sup> *Gramara case*; *Etheredge case*.

<sup>363</sup> Nathan 2013 (35) *Human Rights Quarterly* 874.

<sup>364</sup> Article 33(2) of the SADC Treaty.

used to enforce international law.<sup>365</sup> The implementation of sanctions is an example of a self-help measure taken by sovereign states against a particular state and is aimed at, *inter alia*, coercing the state into complying with a judgment issued against it or to protect certain interests.<sup>366</sup> International pressure as a form of fostering compliance with judgments cannot be ignored regardless of its controversial nature.<sup>367</sup> These measures may be remedial and punitive in nature.<sup>368</sup> Further, “appropriate action” is broad enough to include political pressure and/or coercion from member states to compel a defaulting state to comply with the decisions of the Tribunal.<sup>369</sup> As noted by Adjolohoun, the political influence of an organisation such as the SADC and pressure mounted by member states, play a major role in promoting compliance with judgments of sub-regional courts.<sup>370</sup> There must therefore be coercion or persuasion exerted on member states in the form of political pressure regarding the imposition of sanctions to ensure that compliance is achieved. It is submitted that had the Summit mounted political pressure on Zimbabwe, there could have been some sort of compliance with the Tribunal’s decisions. However, the Summit and/or individual SADC member states adopted a silent approach to Zimbabwe’s non-compliance with the judgments of the Tribunal.

Apart from the above treaty enforcement mechanisms, international pressure by non-governmental organisations may also help secure compliance with judgments. This was helpful with the recommendations of the African Commission on Human and Peoples’ Rights (African Commission) where full compliance with its recommendations increased when non-governmental organisations mounted international pressure against non-compliant states.<sup>371</sup> The effort of national and international non-governmental organisations is therefore also “developing to be a potent force in the monitoring of compliance with agreements” especially in

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<sup>365</sup> Noortman *Enforcing International Law* 3; Oppong [http://www.kas.de/upload/auslandshomepages/namibia/MRI2010/MRI2010\\_chapter7.pdf](http://www.kas.de/upload/auslandshomepages/namibia/MRI2010/MRI2010_chapter7.pdf) (Date of use: 27 August 2013).

<sup>366</sup> Noortman *Enforcing International Law* 3.

<sup>367</sup> Viljoen and Louw 2007 (101) *The American Journal of International Law* 31. Viljoen and Louw indicate that the lack of international pressure appears to have contributed to non-compliance with many decisions of the African Commission on Human and Peoples’ Rights.

<sup>368</sup> Noortman *Enforcing International Law* 3.

<sup>369</sup> Adjolohoun *Giving Effect to the Human Rights Jurisprudence of the Court of Justice of the Economic Community of West African States: Compliance and Influence* 252.

<sup>370</sup> Adjolohoun *Giving Effect to the Human Rights Jurisprudence of the Court of Justice of the Economic Community of West African States: Compliance and Influence* 252.

<sup>371</sup> Adjolohoun *Giving Effect to the Human Rights Jurisprudence of the Court of Justice of the Economic Community of West African States: Compliance and Influence* 260, 324.

the area of human rights.<sup>372</sup> It is conceded, however, that international pressure, whether from non-governmental organisations or other human rights bodies, will have no effect if the state concerned has no commitment to honouring a decision against it.

Articles 10(8) and 19 of the Treaty require that the decisions of the Summit, unless otherwise stated, be taken by consensus. Sanctions can, therefore, by consensus, be imposed on any member state. It is however important to highlight that both the Treaty and the 2000 Tribunal Protocol are silent as to the types of sanctions that may be imposed against a recalcitrant state. It is further submitted that the probability of sanctions being imposed is slim. This is so because the Summit's decisions are reached by consensus. Therefore, even the member state "against whom sanctions are contemplated" must be part of the deliberations and agree to any form of punishment that may be imposed on it.<sup>373</sup> Furthermore, political and diplomatic considerations come into play as member states do not wish to cause tensions in their international relations. It is also submitted that solidarity among African states forged to address issues of colonialism makes it difficult for member states to take drastic measures against one of their own. It is, therefore, unlikely that a member state would willingly submit to such "self-imposed" sanctions. From this it can be deduced that this was the main obstacle preventing the Summit from taking appropriate action or imposing sanctions against Zimbabwe for failure to comply with the Tribunal's judgments.<sup>374</sup>

It is submitted that self-help measures, such as political isolation should only be resorted to as a matter of last resort to enforce compliance because such measures do not affect the wrongdoer only, but also certain segments of the population.<sup>375</sup> For example, Zimbabwe has experienced severe poverty in the last decade because of sanctions resulting from alleged human rights abuses by President Mugabe's regime.

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<sup>372</sup> Viljoen and Louw 2007 (101) *The American Journal of International Law* 30-31; Warioba 2001 (5) *Max Planck Yearbook of United Nations Law* 50-51. According to Warioba, some of the decisions of the International Court of Justice were implemented after diplomatic channels were pursued. This supports the proposition that diplomatic means may be the most appropriate to enforce decisions of the SADC Tribunal.

<sup>373</sup> Ndlovu 2011 (1) *SADC Law Journal* 77.

<sup>374</sup> *Fick* SADC judgment.

<sup>375</sup> Malloy 2013 (31) *Boston University International Law Journal* 129. Although Malloy's study revealed that some sanctions are relatively successful, there is also an acknowledgement that some are "relatively ineffective". This happens, for example, where the wrongdoer decides to ignore the sanctions imposed and continue with human rights abuses, such as in Myanmar where the military junta had long suppressed democracy even though the United States of America had denied aid to that country and opposed other forms of assistance to Myanmar.



### 7.3 Implementing the decisions of the SADC Tribunal through non-judicial measures?

Self-help and non-judicial measures were created when standing before international tribunals was limited to states.<sup>376</sup> The reason for this was said to be that the enforcement of an international judgment fell within the sphere of the executive.<sup>377</sup> Once the tribunal has issued a judgment, parties would enter into negotiations on how it was to be implemented.<sup>378</sup> Accordingly, enforcement was something reserved for the executive and became an entirely political, as opposed to judicial matter.<sup>379</sup>

Other mechanisms for enforcing the judgments of international courts include non-judicial institutions, consensual dispute settlement and diplomatic negotiations.<sup>380</sup> Arbitration too, falls within the ambit of non-judicial measures.<sup>381</sup> The parties to the dispute agree to refer the matter to arbitration, select the arbitrator, and agree to be bound by the arbitrator's decision.<sup>382</sup>

Formal enforcement mechanisms discussed earlier, presumably expose the state accused of violations to other states when in fact there are diplomatic means that can be explored to establish the causes of non-compliance. The causes of non-compliance, such as an ambiguity in the Treaty and the 2000 Tribunal Protocol regarding the Tribunal's human rights mandate, can be discussed and resolved by diplomatic means where the vagueness of the treaty is discussed and an amicable solution is reached.<sup>383</sup> It is submitted that through such diplomatic means national policies and decisions could, over time, be aligned with agreed international standards.<sup>384</sup> In this way, the non-compliant state is given an opportunity, through dialogue, to advance its reasons for its failure to discharge its international obligations. Sudan is an example where peace was achieved through diplomatic processes. Although diplomatic channels are

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<sup>376</sup> Oppong [http://www.kas.de/upload/auslandshomepages/namibia/MRI2010/MRI2010\\_chapter7.pdf](http://www.kas.de/upload/auslandshomepages/namibia/MRI2010/MRI2010_chapter7.pdf) (Date of use: 27 August 2013).

<sup>377</sup> Oppong [http://www.kas.de/upload/auslandshomepages/namibia/MRI2010/MRI2010\\_chapter7.pdf](http://www.kas.de/upload/auslandshomepages/namibia/MRI2010/MRI2010_chapter7.pdf) (Date of use: 27 August 2013).

<sup>378</sup> Oppong [http://www.kas.de/upload/auslandshomepages/namibia/MRI2010/MRI2010\\_chapter7.pdf](http://www.kas.de/upload/auslandshomepages/namibia/MRI2010/MRI2010_chapter7.pdf) (Date of use: 27 August 2013).

<sup>379</sup> Hudson *International Tribunals, Past and Future* 128.

<sup>380</sup> Noortman *Enforcing International Law* 3; Chayes and Chayes 1993 (47) *International Organization* 176; Oppong [http://www.kas.de/upload/auslandshomepages/namibia/MRI2010/MRI2010\\_chapter7.pdf](http://www.kas.de/upload/auslandshomepages/namibia/MRI2010/MRI2010_chapter7.pdf) (Date of use: 27 August 2013).

<sup>381</sup> Zenda *SADC Tribunal and the Judicial Settlement* 31.

<sup>382</sup> Zenda *SADC Tribunal and the Judicial Settlement* 31.

<sup>383</sup> Chayes and Chayes 1993 (47) *International Organization* 176.

<sup>384</sup> Chayes and Chayes 1993 (47) *International Organization* 176.

slow in resolving an issue and gross human rights violations may persist during the negotiation period, they are inexpensive, less confrontational, and “less dramatic” compared to self-help measures. In any event, there is political instability in most of the African countries, including Zimbabwe, due to various factors.<sup>385</sup> Compliance with international judgments is highly unlikely in such a climate. It is in this regard that Viljoen and Louw, although referring to compliance with the decisions of the African Commission, have observed that good governance and political stability within the states influence compliance with the decisions and/or recommendations of a judicial body.<sup>386</sup> This sentiment has also been correctly expressed by Fagbayibo who has observed that “[s]upranational organisations [such as the SADC Tribunal] can effectively assert their control and influence only in a stable climate”.<sup>387</sup> It is therefore necessary for SADC countries to bring peace to their own countries in order to ensure that the rule of law and democracy are achieved. In this way, international judgments could be enforced more successfully.

It is submitted that the enforcement of and compliance with judgments pending before the Tribunal should be achieved through diplomatic means as they are “less intrusive and less imposing”.<sup>388</sup> Diplomatic means are also flexible and confidential.<sup>389</sup> This means that the parties themselves control of the process and the outcome.<sup>390</sup> Accordingly, a settlement reached through negotiation is likely to present fewer problems of compliance and implementation as both parties have contributed to the outcome.<sup>391</sup> As Chayes and Chayes argue, there should be “de-emphasis of formal enforcement measures and even, to a degree, of coercive informal sanctions, except in egregious cases”.<sup>392</sup> It is submitted that member states should voluntarily comply with the judgments of the new SADC Tribunal once they have been delivered as a matter of first priority, and that they should be enforced through diplomatic channels when there is unwillingness from parties concerned to comply with them. It must also be noted that under international law fostering compliance through sanctions is no simple matter, as some states may agree, others not, and yet others abstain during the voting process.<sup>393</sup>

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<sup>385</sup> Fagbayibo 2013 (1) *Potchefstroom Electronic Law Journal* 56.

<sup>386</sup> Viljoen and Louw 2007 (101) *The American Journal of International Law* 25.

<sup>387</sup> Fagbayibo 2013 (1) *Potchefstroom Electronic Law Journal* 56.

<sup>388</sup> Warioba 2001 (5) *Max Planck Yearbook of United Nations Law* 47.

<sup>389</sup> Warioba 2001 (5) *Max Planck Yearbook of United Nations Law* 47.

<sup>390</sup> Warioba 2001 (5) *Max Planck Yearbook of United Nations Law* 47.

<sup>391</sup> Warioba 2001 (5) *Max Planck Yearbook of United Nations Law* 47.

<sup>392</sup> Chayes and Chayes 1993 (47) *International Organization* 205.

<sup>393</sup> Viljoen and Louw 2007 (101) *The American Journal of International Law* 13.

From the foregoing, it can be deduced that there has been continuing difficulty in enforcing the judgments of international and regional tribunals within international law. It is in this regard that Oppong is of the view that “international law did not contemplate direct enforcement of the decisions of international courts by national courts”, but enforcement through diplomatic or political means.<sup>394</sup> As discussed earlier, this position appears to be changing as certain national courts do now enforce the judgments of regional tribunals.<sup>395</sup> The question of how these judgments should be enforced is addressed below.

The proper functioning of the Tribunal and compliance with its judgments is largely dependent on the greater commitment, political will, political leadership, and good faith at Summit level.<sup>396</sup> The support for the Tribunal from member states is indispensable to the Tribunal being in a position to discharge its duties. Applying the views of Chayes and Chayes – that treaties are closely related to states’ interests and that member states are likely to comply with their obligations – it is submitted that SADC countries voluntarily accepted the obligations flowing from the Treaty. In addition, the Treaty, as is shown below, seeks to promote the interests of SADC countries such as democracy and the rule of law within their territories. This was done for the common good of SADC citizens and in pursuit of the objectives set out in the Treaty, including the protection of human rights. These obligations are found in the Preamble to the Treaty which provides:

DETERMINED to ensure, through common action, the progress and well-being of the people of Southern Africa;  
CONSCIOUS of our duty to promote the interdependence and integration of our national economies for harmonious, balanced and equitable development of the region;  
...  
MINDFUL of the need to involve the people of the Region centrally in the process of development and integration, particularly through the guarantee of democratic rights, observance of human rights and the rule of law;  
RECOGNIZING that, in an increasingly interdependent world, *mutual understanding*, good neighbourliness, and meaningful co-operation among the countries of the Region are indispensable to the realization of these ideals ...

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<sup>394</sup> Oppong [http://www.kas.de/upload/auslandshomepages/namibia/MRI2010/MRI2010\\_chapter7.pdf](http://www.kas.de/upload/auslandshomepages/namibia/MRI2010/MRI2010_chapter7.pdf) (Date of use: 27 August 2013).

<sup>395</sup> *Fick* SCA case; *Fick* SADC judgment and *Fick* CC case.

<sup>396</sup> Mkandawire 2010 (36) *Commonwealth Law Bulletin* 572; Ndlovu 2011 (1) *SADC Law Journal* 78; Ruppel “Regional economic communities” 296.

In addition, SADC member states have undertaken to adopt measures to ensure that the objectives of the SADC are fulfilled.<sup>397</sup> Member states have further agreed not to take any measures that would compromise, *inter alia*, the implementation of the principles and objectives set out in the Treaty. They have also undertaken to take all the necessary steps to accord the Treaty the force of national law and have committed themselves to cooperate with and assist institutions of the SADC, such as the Tribunal, in the performance of their functions.<sup>398</sup>

Article 32(2) of the 2000 Tribunal Protocol also requires member states to take all measures necessary to ensure execution of the decisions of the Tribunal. What can be deduced here is that compliance with the obligations of the Treaty is dependent on the cooperation of member states. Without their support, the Tribunal has no power to enforce its judgments. A successful litigant before the Tribunal will not be able to enforce a judgment in the territory of the state concerned if the member state has no political will to comply with that judgment.

As indicated earlier, there is no major difference between the provisions of the 2000 Tribunal's Protocol and the 2014 Protocol when it comes to the enforcement and execution of the decisions of the SADC Tribunal. Article 32 of the 2000 Tribunal Protocol provides that

1. The law and rules of civil procedure for the registration and enforcement of foreign judgements in force in the territory of the State in which the judgement is to be enforced shall govern enforcement.
2. States and institutions of the Community shall take forthwith all measures necessary to ensure execution of decisions of the Tribunal.
3. 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.
4. Any failure by a State to comply with a decision of the Tribunal may be referred to the Tribunal by any party concerned.
5. If the Tribunal establishes the existence of such failure, it shall report its finding to the Summit for the latter to take appropriate action.

Article 44 of 2014 Protocol provides that

1. Member States and institutions of SADC shall take forthwith all measures necessary to ensure execution of decisions of the Tribunal.
2. A decision of the Tribunal shall be binding upon the parties to the dispute in respect of that particular case and must be complied with.
3. Any failure by a Member State to comply with a decision of the Tribunal may be referred to the Tribunal by any Member State affected by the decision.

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<sup>397</sup> See art 6(1) of the SADC Treaty.

<sup>398</sup> Article 6(5) of the SADC Treaty.

4. If the Tribunal establishes the existence of such failure, it shall report its findings to the Summit for the latter to take appropriate action.

The main problem with the enforcement mechanisms and execution of judgments as provided for in the 2014 Protocol is that it is similar with those contained in the 2000 Tribunal Protocol. It does not offer any new methods of ensuring that the decisions of the Tribunal are enforced. For example, a failure by a member state to comply with a decision of the new Tribunal may be referred to the Tribunal by any member state affected by the decision. If the Tribunal establishes a failure, it shall report the act of non-compliance to the Summit for the latter to take appropriate action. The Summit still consist of the same states that failed to take effective action in order to ensure that the former Tribunal's decisions were enforced. All in all, these enforcement mechanisms did not yield any positive results, because several acts of non-compliance by Zimbabwe were referred to the Summit by the Tribunal. However, these decisions remain unenforced.

The notable difference in the 2014 Protocol is the omission of the requirement that “the law and rules of civil procedure for the registration and enforcement of foreign judgments” are to be applied in enforcing the Tribunal's decisions in the territory of member states involved in the dispute. As discussed earlier, this procedure was not desirable for the enforcement of non-monetary judgments.<sup>399</sup> In addition, in terms of article 34 of the 2014 Protocol, the Tribunal “shall give advisory opinions on such matters as the Summit or Council may refer to it”. This provision is welcomed and must be retained. Advisory opinions are important as they provide guidance on, *inter alia*, the constitutionality on “pending legislation or on contemplated action by the executive”.<sup>400</sup>

Furthermore, as is discussed below, the 2014 Protocol does not include any transitional provisions to resolve the issue of pending cases and unenforced judgments.<sup>401</sup> The power of the Summit to take appropriate action under article 32(5) of the 2000 Tribunal Protocol has been retained as is in article 44(4) of the 2014 Protocol. It would have been useful for the Summit to elaborate and/or provide guidance as to what “appropriate action” may entail in a given case, because this broad power contributed to the demise of the former Tribunal.

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<sup>399</sup> This item is fully dealt with in Chapter 4 of the study.

<sup>400</sup> Field 1949 (24) *Indiana Law Journal* 204.

<sup>401</sup> Erasmus available at <http://www.tralac.org/images/docs/6900/us15wp012015-erasmus-new-protocol-sadc-tribunal-20150123-fin.pdf> (Date of use: 18 February 2016).

Although referring to the International Criminal Tribunal for Rwanda and the International Criminal Tribunal for the former Yugoslavia, Stroh has correctly indicated that the cooperation of states remains an “indispensable requirement for efficient proceedings [and enforcement of the decisions]”.<sup>402</sup> Countries that have ratified a treaty promoting human rights should ensure that their treaty obligations are carried out in good faith. Even in cases of the breach of treaty obligations, there is a need for constructive dialogue through diplomatic means to ensure that non-compliance with a treaty is addressed and victims are afforded redress. However, where member states decide to protect one of their allies accused of human rights violations, the objectives of the SADC region will be compromised.

In light of the above exposition, it is clear that compliance with treaty obligations and/or the judgments of regional and international tribunals is significantly dependent on the political will of member states.

## **8 STATUS OF DECISIONS DELIVERED BY THE SUSPENDED SADC TRIBUNAL AND PENDING CASES**

There is no doubt that the decisions that have already been delivered by the Tribunal are final and binding upon member states involved in the dispute, even though the Tribunal has been suspended.<sup>403</sup> These judgments lack only enforcement. South African courts – although, in my view without adequately articulating how undomesticated SADC Community law is enforceable in Zimbabwe and South Africa – have taken steps to ensure that the Tribunal’s decisions are enforced.<sup>404</sup> Interestingly, a property that belongs to the Zimbabwean government was recently sold on auction to give effect to the court order in the *Fick* (CC) case.<sup>405</sup> The enforcement of a Tribunal’s decision through the sale of property at a national level, has never before happened in Africa. Zimbabwe has vowed to challenge this.

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<sup>402</sup> Stroh D “State cooperation with the International Criminal Tribunals for the Former Yugoslavia and for Rwanda” available at [http://www.mpil.de/files/pdf1/stroh\\_5.pdf](http://www.mpil.de/files/pdf1/stroh_5.pdf) (Date of use: 29 August 2013).

<sup>403</sup> Article 16(5) of the SADC Treaty and art 24(3) of the 2000 Tribunal Protocol.

<sup>404</sup> *Fick* SA SCA judgment; *Fick* CC case.

<sup>405</sup> Evans E “Zim govt property in Cape Town sold for R3.7m” available at <http://www.news24.com/SouthAfrica/News/Zim-govt-property-in-Cape-Town-sold-for-R37m-20150921> (Date of use: 23 September 2015).

Litigants approach the courts in anticipation that their cases will be heard and a ruling made. Since the 2014 Protocol does not provide any solution in dealing with decisions which were pending when the Tribunal was suspended,<sup>406</sup> there are two ways of addressing this difficulty. Firstly, this unique challenge can be addressed through non-judicial means as discussed above. Fortunately, one of the SADC institutions has taken this approach and the case is currently in arbitration at the SADC Investor-State Arbitration.<sup>407</sup> Arbitration, as discussed, is an alternative dispute-resolution process not involving the courts, which can be used to resolve disputes.<sup>408</sup>

The SADC as an international organisation, its institutions, its officials, property and assets enjoy immunity from any legal process brought against it.<sup>409</sup> The immunity of the SADC and its institutions is further provided for in article 1 of the Protocol to the Treaty establishing SADC on Immunities and Privileges (“Immunities Protocol”).<sup>410</sup> This form of immunity is regarded as important to ensure that the organisation can fully perform its functions.<sup>411</sup> As the SADC enjoys immunity in disputes brought against it by, *inter alia*, its staff or officials, it has to provide some means of alternative dispute resolution.<sup>412</sup> Indeed, article 32 of the Treaty provide for disputes to be settled peacefully before they are referred to the Tribunal. Given the continuing suspension of the Tribunal, De Wet is of the view that employees of the SADC have no access to judicial protection against any form of unfair labour practice.<sup>413</sup> De Wet points out that a practice has developed in other international organisations in terms of which immunity has been waived, especially in relation to employment contracts where the organisation has failed to provide alternative measures to ensure that its staff can claim their rights.<sup>414</sup> Referring to the decision of

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<sup>406</sup> For example, in the matter *Bach's Transport (Pty) Ltd v Democratic Republic of Congo* (SADC (T) 14/2008) [2010] SADCT 6 (11 June 2010), an assessment of damages by the Registrar of the SADC Tribunal is pending, while, *Swissbourgh Diamond Mines (Pty) Ltd and Others v Kingdom of Lesotho* (SADC (T) 04/2009) [2010] SADCT 4 (11 June 2010) is under arbitration.

<sup>407</sup> *Swissbourgh Diamond Mines (Pty) Ltd and Others v Kingdom of Lesotho* (SADC (T) 04/2009) [2010] SADCT 4 (11 June 2010). See details of the case under arbitration at <http://www.italaw.com/cases/2256> (Date of use: 15 April 2015).

<sup>408</sup> Assheton-Smith 2013 (40) *Pharmaceutical and Cosmetic Review* 18.

<sup>409</sup> Article 31 of the SADC Treaty; De Wet 2013 *ICSID Review* 16; Reinisch 2008 (7) *Chinese Journal of International Law* 286.

<sup>410</sup> The Protocol to the Treaty establishing SADC on Immunities and Privileges was signed on 17 August 1992 and entered into force on 30 September 1993 in Windhoek, Namibia available at [http://www.sadc.int/files/6413/5292/8365/Protocol\\_to\\_the\\_Treaty\\_establishing\\_SADC\\_on\\_Immunities\\_and\\_Privileges1992.pdf](http://www.sadc.int/files/6413/5292/8365/Protocol_to_the_Treaty_establishing_SADC_on_Immunities_and_Privileges1992.pdf) (Date of use: 27 March 2015).

<sup>411</sup> Reinisch and Webber 2004 (1) *International Organizations Review* 59.

<sup>412</sup> Reinisch 2008 (7) *Chinese Journal of International Law* 286.

<sup>413</sup> De Wet 2013 *ICSID Review* 16.

<sup>414</sup> De Wet 2013 *ICSID Review* 16.

the European Court of Human Rights in *Waite and Kennedy v Germany*,<sup>415</sup> she notes that some national courts waived the immunity of international organisations because they (international organisations) failed to provide a judicial mechanism for their staff to protect their rights.<sup>416</sup> Ultimately, she cautions that this should be a “signal warning” to the SADC leaders of the speedy need to revive the Tribunal.<sup>417</sup> According to De Wet, the jurisprudence developed by the European Court of Human Rights and spread over Europe regarding the waiver of immunity by national courts, can serve as persuasive authority for national courts in the SADC regions.<sup>418</sup> The revival of the Tribunal will be useful as it will be able to draw on the experience of other jurisdictions on how the issue of immunity of international organisations has been dealt with where regional tribunals have failed to provide mechanisms for redress.

De Wet’s observations certainly have merit. In fact, in 2011 in *Swart v Southern African Development Community*, the High Court of Botswana had an opportunity to decide whether it had jurisdiction to adjudicate a case arising from a contract of employment between SADC (an international organisation) and its employee.<sup>419</sup> The applicant, a former interpreter in the employ of the respondent, had sought a review of the respondent’s decision not to renew his contract of employment. Cases such as this were generally heard by SADC Tribunal before its

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<sup>415</sup> *Waite and Kennedy v Germany* App No 26083/94, ECtHR (18 February 1999). This dispute concerned an employment dispute between the applicants who were in the employ of a British company, and the European Space Agency (ESA), an international organisation. The applicants were placed at ESA to work at its centre in Germany. The German courts ruled that the ESA enjoyed immunity before the German courts. The applicants thereafter approached the European Court of Human Rights and argued that Germany had violated its obligations under art 6(1) of the European Convention on Human Rights when it denied them access to the courts to present their case. Article 6(1) provides “[i]n the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.” The Court found that there had been no violation of art 6(1) of the European Convention on Human Rights by recognising and granting immunity to an international organisation. The basis for this was that there was an alternative means of legal protection available to the applicants within the ESA’S administrative body. They could have approached the ESA Appeals Board which was independent from the agency itself. This decision ensured that member states respect the rights of its citizens to have access to legal avenues in order to vindicate their rights even if such legal recourse has been transferred to certain international organisations.

<sup>416</sup> De Wet 2013 *ICSID Review* 17.

<sup>417</sup> De Wet 2013 *ICSID Review* 17.

<sup>418</sup> De Wet 2013 *ICSID Review* 17.

<sup>419</sup> 2011 1 BLR 410 HC.



suspension.<sup>420</sup> Counsel on behalf of the respondent raised a point *in limine* arguing that the High Court of Botswana had no jurisdiction as the SADC was an international organisation<sup>421</sup> and so enjoyed sole jurisdiction over disputes between itself and its employees.<sup>422</sup> This argument was then abandoned because the Tribunal was no longer functional. Counsel further conceded that if the applicant was denied access to the courts of Botswana, she would be deprived of an opportunity to claim her rights.<sup>423</sup> The judge agreed with counsel's submission and indicated that the "[SADC] treaty of the respondent provides no alternative mechanism apart from that tribunal".<sup>424</sup> The Court assumed jurisdiction but dismissed the application on the basis that the respondent had not made any promise and/or created a legitimate expectation to renew her contract of employment. It is submitted that the effect of this judgment is that it has done away with sovereign immunity of SADC as an international organisation in the domestic courts of Botswana. Further, the decision sets a precedent that all the SADC officials may approach the High Court of Botswana to resolve employment disputes emanating from the SADC and its employees.<sup>425</sup> The decision may also serve a persuasive authority in other SADC countries such as South Africa.<sup>426</sup>

Under international and regional law, protection of human rights can only be secured through the availability of effective judicial remedies.<sup>427</sup> Those whose human rights are violated should, as a matter of fundamental importance, have access to justice.<sup>428</sup> In this context, access to justice means "the possibility for the individual to bring a claim before a court and have a court adjudicate it ... in accordance with substantive standards of fairness and justice".<sup>429</sup> The continued suspension of the SADC Tribunal and the adoption of the Protocol on the Tribunal in the SADC which limit access to the Tribunal to inter-state disputes, violate the right of access to

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<sup>420</sup> Article 15(1) of the 2000 Tribunal Protocol. See also 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> (Date of use: 30 March 2015).

<sup>421</sup> *Swart v Southern African Development Community* at para 9.

<sup>422</sup> *Swart v Southern African Development Community* at para 9

<sup>423</sup> *Swart v Southern African Development Community* at para 9.

<sup>424</sup> *Swart v Southern African Development Community* at para 9.

<sup>425</sup> Erasmus <http://www.tralac.org/images/docs/5553/s14tb032014-erasmus-high-court-of-botswana-steps-into-void-sadc-tribunal-20140305-fin.pdf> (Date of use: 30 March 2015).

<sup>426</sup> Section 39(1)(c) of the Constitution of South Africa, 1996 provides that "[w]hen interpreting the Bill of Rights, a court, tribunal or forum may consider foreign law".

<sup>427</sup> Francioni *Access to Justice as a Human Right* 1.

<sup>428</sup> Francioni *Access to Justice as a Human Right* 1.

<sup>429</sup> Francioni *Access to Justice as a Human Right* 1.

courts. The right of access to courts is a fundamental human right which entitles one to have access to justice and have his/her case heard. It is therefore submitted that the current jurisdiction of the SADC Tribunal and continued non-operation infringes the right of access to courts/justice and, by implication the protection of human rights.

Where no remedy is available as a result of the continuing suspension of the Tribunal and the Zimbabwean national courts do not provide recourse, the final possibility is for litigants to approach other tribunals – such as the African Court on Human and Peoples’ Rights or the African Commission.<sup>430</sup> However, it is not easy to follow this route in that individuals face a number of hurdles – including the exhaustion of local remedies and, in the case of the African Commission, the acceptance of their complaint by a simple majority of the members of the Commission.<sup>431</sup> Although the recommendations of the African Commission are not binding on the parties in dispute and may not in effect be of great assistance to the complainant, the condemnation of the conduct complained of bears a moral force that may yield positive results such as compliance.<sup>432</sup> Approaching the African Court on Human and Peoples’ Rights is also dependent on member states making a declaration accepting the jurisdiction of the court to receive individual complaints.<sup>433</sup> The admission of an individual case is in the discretion of the court.<sup>434</sup> A further difficulty is that certain of the member states – Tanzania, for example – belong to more than one sub-regional court,<sup>435</sup> which means that the individual will have to choose the appropriate forum for his or her case. It is therefore clear that approaching alternate fora is not a simple solution. But this does not mean that it is impossible to do so. For example,

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<sup>430</sup> *Dawda Jawara v The Gambia* Comm Nos 147/95 and 149/96 (2000). In this case, it was decided that remedies should not only be available but accessible and effective in that they are capable of providing redress.

<sup>431</sup> The procedure for individual complaints is too slow and cumbersome. It is regulated by arts 55-58 of the African Charter on Human and Peoples’ Rights, adopted June 27, 1981, OAU Doc CAB/LEG/67/3 rev. 5, 1982 (21) *ILM* 58, entered into force 21 October 1986.

<sup>432</sup> Viljoen and Louw 2007 (101) *The American Journal of International Law* 13.

<sup>433</sup> Article 5(3) and 34(6) of the Protocol to the African Charter on Human and Peoples’ Rights on the Establishment of an African Court on Human and Peoples’ Rights, adopted June 1998, entered into force Jan. 2004, OAU Doc OAU/LEG/EXP/AFCHPR/PROT (III). See also Juma 2007 (4) *Essex Human Rights Review* 1. It must be noted that individuals and NGOs still have the possibility to indirectly access the Court where states have accepted the Protocol to the African Charter on Human and Peoples’ Rights but have not made a declaration under article 34(6). In situations such as this, a recommendation issued by the African Commission may be referred before the Court with the possibility of being converted into as binding decisions as opposed to the initial recommendation.

<sup>434</sup> Juma 2007 (4) *Essex Human Rights Review* 3.

<sup>435</sup> Tanzania is a member of the SADC (and the SADC Tribunal) and the East African Community (and the East African Court of Justice).

Luke Thembanani and Ben Freeth approached the African Commission on behalf of Zimbabwean farmers requesting an order compelling SADC Heads of State to allow the suspended SADC Tribunal to continue with its work.<sup>436</sup> Their application was unsuccessful. Some of the SADC states sought to oppose the application based on “preliminary procedural objections” but the African Commission ruled the case admissible.<sup>437</sup> This means that it is possible to take pending cases before other existing fora chosen by aggrieved parties who received no relief from the SADC Tribunal or whose judgments remains unenforced. The basis for this is that the Tribunal remains dysfunctional despite the 2014 Protocol, which has only been signed by nine SADC member states so far. It has also not been ratified by any state to date.<sup>438</sup> The question of a remedy is very important in any litigation because “without an effective remedy a right is largely worthless”.<sup>439</sup> In *Dawda Jawara v The Gambia*, the African Commission said:

A remedy is considered available if the petitioner can pursue it without impediment, it is deemed effective if it offers a prospect of success, and it is found sufficient if it is capable of redressing the complaint.<sup>440</sup>

Even though the African Commission and Enonghong were referring to local remedies, it is submitted that on a sub-regional or any other level, the remedy must be available. Failing this it would make no sense to approach a supranational court whose orders would be worthless and/or unenforceable.

Another factor that deserves attention is that, as things stands, the “new” SADC Tribunal will deal with inter-state disputes only. This will be a serious defect in the SADC legal system. An example of a better approach is that of the ECOWAS system which provides direct access for individuals to the ECOWAS CCJ.<sup>441</sup> It has been said that the ECOWAS CCJ is unique among

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<sup>436</sup> Chikuhwa *Zimbabwe: The End of the First Republic* 104.

<sup>437</sup> Chikuhwa *Zimbabwe: The End of the First Republic* 104. Luke Thembanani was one of persons whose farm was expropriated and who successfully approached the SADC Tribunal in the matter between *Thembanani v Republic of Zimbabwe* (SADC (T) 07/2008) [2009] SADCT 3 (14 August 2009).

<sup>438</sup> Article 52 of the 2014 Protocol provides that “[t]his Protocol shall be ratified by Member States who have signed the Protocol in accordance with their constitutional procedures”. This has not yet been done by all SADC states.

<sup>439</sup> Enonghong 2012 (46) *Journal of African Law* 203.

<sup>440</sup> Comm Nos 147/95 and 149/96 (2000) at para 32.

<sup>441</sup> See art 4(c) of the Supplementary Protocol A/SP 1/01/05 Amending the Preamble and arts 1, 2, 9 and 30 of Protocol A/P 1/7/91 relating to the Community Court of Justice and art 4 para 1 of the English version of the Protocol available at [http://www.courtecawas.org/site2012/pdf\\_files/supplementary\\_protocol.pdf](http://www.courtecawas.org/site2012/pdf_files/supplementary_protocol.pdf) (Date of use: 29 April 2014).

human rights courts in that it grants direct access to individuals without requiring them first to submit their complaints to a quasi-judicial institution for screening or recommendations (if the complaints are found to be admissible).<sup>442</sup> However, the East African Court of Justice also allows individuals access to the court without requiring them to first exhaust local remedies.<sup>443</sup> It is indeed unusual for a sub-regional court to grant direct access to individuals without requiring the parties first to exhaust local remedies. It is nonetheless submitted that individuals should always exhaust local remedies<sup>444</sup> and only approach sub-regional courts as a matter of last resort where local remedies do not provide redress. In fact, it would appear that the SADC Tribunal is the only sub-regional court in Africa which does not provide for direct access for individuals. This prevents individuals within the SADC region from approaching a court where local remedies are incapable of providing redress. It is therefore submitted that the SADC member states should consider extending access to the future Tribunal to matters involving disputes between member states, individuals, and non-governmental organisations.

In the event that SADC member states decide that individuals will not have access to the new SADC Tribunal, the issue of reciprocity may play an important role. One could possibly argue that State A could then (on behalf of an injured citizen of State B) take State B (who violated the individual's right) to the SADC Tribunal. This is only possible where State A and State B are both parties to a human rights treaty and where the right that was violated has the status of *jus cogens* – for example, torture.<sup>445</sup>

## 9 LESSONS FROM THE EUROPEAN COURT OF JUSTICE AND ECOWAS CCJ

The ECOWAS CCJ and the European Court of Justice have been chosen from other sub-regional and regional tribunals to provide guidance on the future SADC Tribunal. The basis for

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<sup>442</sup> Alter *et al* 2013 (107) *The American Journal of International Law* 755.

<sup>443</sup> *Peter Anyang' Nyong'o and 10 Others v The Attorney General of Kenya and 5 Others*, Reference No 1 of 2006 EACJ.

<sup>444</sup> Discussed in Chapter 1.

<sup>445</sup> *National Commissioner of The South African Police Service v Southern African Human Rights Litigation Centre and Another* 2015 (1) SA 315 (CC); 2015 (1) at para 5 where the Court considered and confirmed the decision of the Supreme Court of Appeal in which the latter court had said “the SAPS [South Africa] are empowered to investigate the alleged offences [of torture] ... under the Implementation of the Rome Statute of the International Criminal Court Act 27 of 2002”. By virtue of their membership of the Rome Statute, South Africa and Zimbabwe have a reciprocal duty to ensure that the provisions of the Rome Statute are given effect to.

this choice lies in their unique mechanisms for the enforcement of their decisions. Additionally, compliance with their judgments has been high compared to other tribunals.

The ECJ has been successful in enforcing European Union law against “recalcitrant governments”.<sup>446</sup> Governments regularly comply with ECJ decisions because of, *inter alia*, the willingness of member states to accept the authority of the court and the fear of being sanctioned.<sup>447</sup> It is because of this level of compliance that the ECJ is regarded as the most successful of the sub-regional courts which has met with little resistance from member states.<sup>448</sup> This high level of compliance does not suggest that the ECJ did not experience problems of non-compliance in its early years of operation.<sup>449</sup> How the ECJ deals with issues of compliance may, however, be instructive in the SADC context.

Instances of non-compliance with the judgments of the ECJ may be categorised as “pre-litigation non-compliance” and “post-litigation non-compliance”.<sup>450</sup> The former entails a situation where there has been an alleged breach of the European community law, but the existence of the violation is yet to be determined by the ECJ.<sup>451</sup> The latter refers to a situation where the ECJ has heard a case and issued a judgment<sup>452</sup> but a member state fails to comply with the judgment.<sup>453</sup> If there is non-compliance, a member state, after reporting the matter to the European Commission for non-compliance, may take the case to the ECJ if the act of non-compliance continues.<sup>454</sup> The ECJ has the discretion to impose a lump-sum penalty on the party

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<sup>446</sup> Panke D “Why the ECJ restores compliance faster in some cases than others: Comparing Germany and the UK available at [http://www.polsoz.fu-berlin.de/polwiss/forschung/international/europa/arbeitspapiere/2007-4\\_Panke.pdf](http://www.polsoz.fu-berlin.de/polwiss/forschung/international/europa/arbeitspapiere/2007-4_Panke.pdf) (Date of use: 27 August 2013).

<sup>447</sup> Bier S “The European Court of Justice and member state relations: A constructivist analysis of the European legal order available at <http://www.gvpt.umd.edu/irconf/papers/bier.pdf> (Date of use: 27 August 2013).

<sup>448</sup> Gibson and Caldeira 1995 (39) *American Journal of Political Science* 462.

<sup>449</sup> See for example, *Commission v Italy* Case 7/68 [1968] ECR 423 and *Commission v France* Case 232/78 [1979] ECR 2729 where Italy and France refused to comply with judgments of the ECJ. See also Hartley *The Foundations of the European Union Law* 340 and Bonnie 2005 (1) *Journal of Contemporary European Research* 39, 41.

<sup>450</sup> Bonnie 2005 (1) *Journal of Contemporary European Research* 40.

<sup>451</sup> Bonnie 2005 (1) *Journal of Contemporary European Research* 40.

<sup>452</sup> Bonnie 2005 (1) *Journal of Contemporary European Research* 40.

<sup>453</sup> Bonnie 2005 (1) *Journal of Contemporary European Research* 41.

<sup>454</sup> Article 259 of the European Union, Consolidated Version of the Treaty on the Functioning of the European Union, 13 December 2007, 2008/C 115/01, available at <http://www.refworld.org/docid/4b17a07e2.html> (Date of use: 30 August 2013).

concerned.<sup>455</sup> The focus of enforcement relevant to this discussion is that envisaged in the EU Treaty where the oversight and enforcement mechanisms have proved successful.

Article 260 of the EU Treaty is specifically designed to address the issue of post-litigation non-compliance, and gives the ECJ the power to require member states to take necessary measures to implement the court's decisions.<sup>456</sup> In addition, articles 258 and 259 of the EU Treaty empower the European Commission to take measures, *inter alia*, to monitor compliance with the judgments of the ECJ and report member states who fail to comply to the court. The European Commission has the power to recommend a penalty to the ECJ to be imposed on a member state that has failed to implement a decision of the court.<sup>457</sup> The European Commission first gives the member state concerned an opportunity to make its observations about the judgment, before a decision to report it to the ECJ is taken.<sup>458</sup> These unique provisions, which are absent from the SADC Treaty, essentially empower the European Commission to promote compliance with the EU Treaty by investigating, *inter alia*, acts of non-compliance with the judgments of the ECJ and reporting these to the court with a specified penalty that must be paid by the member state concerned.

In addition, the European Commission enjoys support from member states to enable it to discharge its mandate.<sup>459</sup> The ECJ even enjoys political support. This emerges from the fact that member states have extended the ECJ's powers to include the imposition of financial sanctions in order to compel member states to comply with its judgments.<sup>460</sup>

There are three observations that can be made from the practice of the ECJ.

- The powers of the ECJ include financial sanctions. We also find this in the SADC Tribunal processes in that the Summit is empowered to take appropriate action. The

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<sup>455</sup> Article 260 of the European Union, Consolidated Version of the Treaty on the Functioning of the European Union.

<sup>456</sup> See Hartley *The Foundations of the European Union Law* 341; Zenda *SADC Tribunal and Judicial Settlement* 520. Hartley and Zenda have pointed out that prior to an amendment of art 260 of the EU Treaty, there was no provision in the Treaty Establishing the European Economic Community of 1957 empowering the ECJ to impose sanctions against a member state who defied a judgment of the court.

<sup>457</sup> Article 256(2) and (3) of the EU Treaty.

<sup>458</sup> Article 256(3) of the EU Treaty.

<sup>459</sup> Bonnie 2005 (1) *Journal of Contemporary European Research* 41.

<sup>460</sup> Zenda *SADC Tribunal and Judicial Settlement* 532-533.

phrase “appropriate action” is broad and can be read to mean any form of sanction, including those of a financial nature.

- The European Commission assists the ECJ by reporting (and investigating) acts of non-compliance to the ECJ. The SADC Tribunal lacks this mechanism. Instead, acts of non-compliance are reported by successful litigants to the Tribunal and the Tribunal must report to the Summit for the latter to take appropriate action.
- Lastly, and importantly, the ECJ and the European Commission enjoy political support from member states. The suspension of the SADC Tribunal is a clear indication that this is not the case in the SADC region.

The ECOWAS CCJ has also experienced non-compliance with its human rights decisions against member states.<sup>461</sup> Some sixty per cent of its decisions have not been complied with.<sup>462</sup> Although this may appear high, if it is compared to other sub-regions, compliance with the decisions of the ECOWAS CCJ may be regarded as above average.<sup>463</sup> Unlike the suspended SADC Tribunal, under the ECOWAS regime individuals do not have standing to bring cases before the court to report acts of non-compliance. Instead, acts of non-compliance are brought to the attention of the Authority of Heads of State or Government via the court’s officers, such as judges, who publicly pressure governments to comply with the court’s decisions.<sup>464</sup> The Authority of Heads of State or Government have the power to impose sanctions – such as the withdrawal of voting rights, economic sanctions, and suspension from the community – against a state that fails to comply with the decisions of the court. These measures have, however, not yet been taken. Under the 2005 Supplementary Protocol on the court, member states are required to appoint national authorities who will primarily be responsible for enforcing the judgments of the court. This feature is also absent from the SADC regime. To this end, the

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<sup>461</sup> Alter *et al* 2013 (107) *The American Journal of International Law* 739. According to Taima Munganyiki who works at the East African Law Society (Class deliberation at the UN Regional Course on International Law 7 April-2 May 2014 held in Addis Ababa Ethiopia), the East African Court of Justice is also experiencing difficulties with the enforcement of its judgments.

<sup>462</sup> Premium Times “ECOWAS court frowns at non-enforcement of decisions by member states” available at [http://www.premiumtimesng.com/news/159166-ecowas-court-frowns-non-enforcement-decisions-member-states.html?utm\\_source=rss&utm\\_medium=rss&utm\\_campaign=ecowas-court-frowns-non-enforcement-decisions-member-states](http://www.premiumtimesng.com/news/159166-ecowas-court-frowns-non-enforcement-decisions-member-states.html?utm_source=rss&utm_medium=rss&utm_campaign=ecowas-court-frowns-non-enforcement-decisions-member-states) (Date of use: 01 May 2014).

<sup>463</sup> Adjolohoun *Giving Effect to the Human Rights Jurisprudence of the Court of Justice of the Economic Community of West African States: Compliance and Influence* 190, 321.

<sup>464</sup> Alter *et al* 2013 (107) *The American Journal of International Law* 767.

governments of Nigeria, Guinea, and Niger have appointed such authorities.<sup>465</sup> This is a significant step as sub-regional courts do not have officials to execute judgments of the courts.

Another notable feature of the ECOWAS system is the Commission of the Economic Community of West Africa States (ECOWAS Commission) which was established in 2007.<sup>466</sup> In terms of article 14 of the Supplementary Act, a member state or the President of the ECOWAS Commission may institute a procedure for sanctions against a member state that fails to fulfil its treaty obligations. The ECOWAS Commission then prepares reports of non-compliance and submits these to the political organs of the Community for consideration and further action. The President of the ECOWAS Commission has on several occasions called upon member states to comply with the decisions of the ECOWAS CCJ.<sup>467</sup> To this end, it has been suggested that the President of the ECOWAS Commission is better placed “to give life to follow-up mechanisms”.<sup>468</sup>

The Supplementary Act was enacted primarily to reinforce states’ obligations to comply with the decisions of the ECOWAS CCJ.<sup>469</sup> The Supplementary Act was also promulgated to give effect to article 77 of the Revised Treaty of the Economic Community of West African States which deals with sanctions against member states who fail to honour their treaty obligations.<sup>470</sup> The Preamble to the Supplementary Act provides, *inter alia*, that member states recall that ECOWAS has created “supra-national institutions whose decisions are binding and enforceable in full and directly both in its institutions and in member states”.<sup>471</sup> The Supplementary Act further defines obligations owed to the community as, *inter alia*, the decisions of the ECOWAS CCJ.<sup>472</sup> Importantly, the Supplementary Act expressly provides that the protection and respect

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<sup>465</sup> Alter *et al* 2013 (107) *The American Journal of International Law* 767.

<sup>466</sup> ECOWAS Commission is available at <http://comm.careers.ecowas.int/> (Date of use: 16 April 2015). The Commission of the Economic Community of West Africa States replaced the former Secretariat of the Economic Community of West African States.

<sup>467</sup> Adjohoun *Giving Effect to the Human Rights Jurisprudence* 225.

<sup>468</sup> Adjohoun *Giving Effect to the Human Rights Jurisprudence* 227.

<sup>469</sup> Supplementary Act A/SP.13/02/12.

<sup>470</sup> Article 77 of the Revised Treaty of ECOWAS provides:

1. Where a Member State fails to fulfil its obligations to the Community, the Authority may decide to impose sanctions on that Member State. 2. These sanctions may include: (i) suspension of new Community loans or assistance, (ii) suspension of disbursement on on-going Community projects or assistance programmes; (iii) exclusion from presenting candidates for statutory and professional posts; (iv) suspension of voting rights; and (v) suspension from participating in the activities of the Community.

<sup>471</sup> Preamble to the Supplementary Act.

<sup>472</sup> Article 1 of the Supplementary Act.



for human rights, democracy and the rule of law are obligations owed by member states under ECOWAS community law.<sup>473</sup> These provisions show a remarkable development as the Revised Treaty of the Economic Community of West African States, 1993, was not clear as to what constitutes obligations owed to the Community by member states.<sup>474</sup> In fact, the Revised ECOWAS Treaty lists the recognition, promotion and protection of human and peoples' rights and the "promotion and consolidation of a democratic system of governance" as principles (as opposed to obligations, which are now clear in the Supplementary Act) that member states have undertaken to observe.<sup>475</sup> The adoption of the Supplementary Act is therefore useful in that it also clarifies important provisions relating to human rights and the nature of the obligations of member states. The SADC Treaty may, therefore, draw inspiration from the ECOWAS CCJ in order to clarify some of the contested provisions relating to human rights obligations.

The ECJ and ECOWAS CCJ mechanisms above are commendable and offer guidance for the new SADC Tribunal. It is essential for SADC member states to support the institutions they have created in order to achieve the objectives set out in the Treaty. The support that the ECOWAS CCJ and the ECJ receive from their member states is something that the SADC region should emulate in order to strengthen institutions that ought to protect democracy and uphold the rule of law.

## 10 CONCLUSION

In light of the above exposition, it is submitted that the challenges regarding the operation of the SADC Treaty, the Tribunal Protocol, the Agreement Amending the Treaty, the Amended Tribunal Protocol, and the establishment of the Tribunal appear unfounded. In addition, it is also clear that the main cause of all challenges facing the Tribunal have emanated from the Tribunal's decision to rule against Zimbabwe for its violation of human rights. Furthermore, these challenges have been politically motivated arguments were aimed at paralysing the Tribunal.

There are various reasons for non-compliance with the judgments of international courts including the political approach of the country and the political will of the state to adhere to its

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<sup>473</sup> Article 2(2) iv of the Supplementary Act.

<sup>474</sup> Adjolahoun *Giving Effect to the Human Rights Jurisprudence* 56.

<sup>475</sup> See art 4(g) and (j) of the Revised Treaty of the Economic Community of West African States.

international obligations.<sup>476</sup> Countries with systems of good governance are likely to implement decisions of international courts; those with an unstable political climate are not.

It is submitted that compliance with human rights decisions of international courts should first be achieved through diplomatic means as they are, *inter alia*, less confrontational and the parties to the dispute contribute to the outcome. However, where these do not produce positive results, there must be international pressure, including sanctions, in order to coerce the recalcitrant state to honour its treaty obligations.

Compliance with the pending judgments of the Tribunal should be finalised through non-judicial means such as negotiated settlements. SADC member states should willingly respect and comply with the decisions of the new Tribunal. As a supplementary measure in order to ensure full compliance, the Tribunal should learn from the ECOWAS CCJ and the ECJ by establishing a body that will monitor compliance with its decision. Such a body should also be given powers to recommend and/or impose sanctions.

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<sup>476</sup> Adjolahoun *Giving Effect to the Human Rights Jurisprudence* 321.

## **CHAPTER 6**

### **FINDINGS AND RECOMMENDATIONS**

#### **1 INTRODUCTION**

This main purpose of this study, as indicated in Chapter 1, has been to establish whether the suspended SADC Tribunal enjoyed jurisdiction to adjudicate human rights issues and, if so, how its judgments should be enforced and what impact the enforcement of these judgments will have on state sovereignty. This Chapter deals with the main findings of the study.

In order to answer the research question, I considered the relevant jurisprudence of the SADC Tribunal itself, the International Court of Justice, the ECOWAS Community Court of Justice, and the East African Court of Justice. Reference to these institutions was important for the study because these courts have dealt with the doctrine of implied powers. Importantly, the East African Court of Justice and the ECOWAS Community Court of Justice operate at a sub-regional level and within the African context. It was, therefore, imperative to ascertain how they have been empowered to deal with human rights cases (including how they have broadened their mandates to deal with human rights where their constitutive documents are silent). The study of the concept of state sovereignty and its path since the Second World War, was also essential in establishing how the judgments of other international, sub-regional, and regional tribunals, such as the European Court of Justice, have been enforced in the context of international law. The relationship between international law and the national law of member states; the relationship between international law and SADC Community law; and the relationship between the national law of member states and SADC Community law was also essential in order to explore which legal order should prevail in cases of conflict.

#### **2 JURISDICTION OF THE SADC TRIBUNAL**

Jurisdiction of sub-regional tribunals such as the SADC Tribunal refers to the power or competence of an organisation to adjudicate over a legal matter. The constitutive document of the organisation plays a significant role, as it gives adjudicatory power to such an organisation and determines the extent to which that power can be exercised. Where such powers are broad and/or vague, the tribunal concerned may resort to the doctrine of implied powers. There are

two schools of thought in this regard: the proponents of the doctrine of implied powers; and those supporting the doctrine of express powers.

### 2.1 *Express and implied powers*

Express powers denote those powers which are contained in the treaty establishing the tribunal. According to the proponents of express powers, only powers that are contained in the founding document can be exercised by a particular tribunal.

Implied powers, on the other hand, are those powers not provided for in the founding document of the body involved, but which may be assumed provided that they are necessary for the organisation to fulfil its mandate. It is important at this point to highlight that the source of the suspended SADC Tribunal's jurisdiction is the Protocol on the Tribunal and Rules Thereof (SADC Protocol on the Tribunal). The Treaty of the Southern African Development Community (SADC Treaty) is a key document regarding member states' obligations in the SADC region. The SADC Tribunal Protocol does not expressly provide that the Tribunal can adjudicate human rights cases. In addition, the SADC Treaty is not clear as to member states' obligations concerning human rights issues. These factors were the source of the challenge to the Tribunal's competence to decide cases involving allegations of human rights violations. In *Mike Campbell (Pvt) Ltd and Others v Republic of Zimbabwe*<sup>477</sup> the Tribunal found that, based on SADC member states' undertaking to act in accordance with the principles of human rights, the rule of law, and democracy, it enjoyed jurisdiction over matters involving human rights. It is submitted that the Tribunal acted within its mandate when it resorted to the doctrine of implied powers as this was necessary to ensure that member states respect their treaty obligations, including the protection of human rights. The Tribunal correctly invoked implied powers through its interpretative powers when it interpreted the SADC Treaty in order to resolve the uncertainty as to whether it had the competence to deal with cases involving human rights violations. It further correctly relied on the principles – in the SADC Treaty – of democracy, human rights and the rule of law to establish its human rights powers. It is a well-settled principle in international law that where the constitutive document – such as the SADC Treaty and the SADC Protocol on the Tribunal – is silent or unclear on certain aspects such as the obligations of member states, and the jurisdiction of the Tribunal to adjudicate allegations of violation of human rights, the Tribunal may resort to implied powers. Implied powers are not merely invoked under

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<sup>477</sup> (2/2007) [2008] SADCT 2 (28 November 2008) at 58.

international law. Before an organisation can resort to implied powers, it must settle the critical question of whether the exercise of implied powers is necessary for the fulfilment of the organisation's object and purpose as embodied in the Treaty. If the answer is in the affirmative, implied powers can be claimed. This was the case with the SADC Tribunal because the rule of law, human rights and democracy would be compromised where individuals' rights within SADC are not protected. The jurisprudence of the International Court of Justice endorsed this position in 1949 and has continued to do so in subsequent advisory opinions as discussed in Chapter 2 of the study.

The jurisprudence of the East African Community of Justice explored in Chapter 2, also reflects the exercise of the doctrine of implied powers to assert jurisdiction in a case involving violations of human rights. The Court, in my view, correctly indicated that it would not shy away from exercising jurisdiction through the interpretation of the constitutive document (the Treaty Establishing the East African Community). Again, this approach falls within the ambit of implied powers as confirmed by the International Court of Justice.

Finally, the law of the treaties is also clear in that a treaty must be interpreted in light of its object and purpose. In addition, a treaty must be read in its entirety, including its preamble, when a certain aspect is unclear in order to try to establish its true meaning. The principle of good faith in treaty interpretation also applies. These qualifications are important in order to ensure that judicial organs address, as far as possible, issues within the confines of treaty objectives. The reliance of the SADC Tribunal on the Preamble to the SADC Treaty together with the provisions of the SADC Treaty was therefore essential in order to establish the obligations of the member states when it comes to the protection of human rights.

The above findings are important and instructive for the new SADC Tribunal if it is to avoid the problems that led to the suspension of the Tribunal. It is submitted that the obligations of member states and the jurisdiction over human rights in the new SADC Tribunal should be clearly stated. The proposal for the enactment of new provisions addressing these issues is offered in the recommendations below, as the 2014 Protocol is largely similar to the 2000 Protocol and does not offer solutions for many of the problems illuminated in this study. These recommendations take the form of new provisions in the proposed Supplementary Protocol to

the Treaty of the Southern African Development Community and a Revised Protocol on the Tribunal and Rules Thereof.

### **3 STATE SOVEREIGNTY**

Sovereignty is one of the fundamental principles of international law. The principle of state sovereignty formed one of the important pillars of traditional international law in terms of which the state was regarded as enjoying absolute and uncontrolled power as embodied in the Treaty of Westphalia of 1648, which saw the end of the Thirty Years War in Europe. A state could, therefore, do anything it wished free from external interference. International law dealt only with inter-state relations as states were the sole subjects of international law. This meant that even when a particular state committed gross violations of human rights against its citizens, this was regarded as a purely domestic matter in which no one could intervene. In addition, senior government officials, such as heads of state, were accountable to no one for crimes they committed against their people.

The end of the Second World War ushered in an era of development in the international legal system. The emergence of human rights norms and movements affected the meaning and context in which state sovereignty is today understood. Individuals are also regarded as subjects who possess rights under international law. The emergence of regional and sub-regional organisations have also played a major role in contemporary international law. These developments, which limit state sovereignty, are briefly addressed below.

#### *3.1 International level*

The adoption of the Charter of the United Nations marked a new global order as the international community committed itself to the protection of human rights and maintenance of universal peace and security. To this end, the United Nations tasked its Security Council with this enormous global responsibility. The Security Council has the power to intervene in any state to realise the aims contained in the Charter of the United Nations such as the maintenance of international peace and security. Indeed, this has been done in countries such as Libya and elsewhere. In addition, the Security Council has established international tribunals such as the International Tribunal for the former Yugoslavia, the Special Tribunal for Lebanon, and the

Special Tribunal for the Sierra Leone to prosecute individuals, including heads of state, who have committed heinous crimes.

In addition, numerous human rights instruments such as the Universal Declaration of Human Rights (UDHR) have been adopted. Certain of the provisions of the UDHR – such as the prohibition of torture – have attained the status of *jus cogens* and prohibit the torture any person wherever perpetrated. Further, certain states have ratified the International Covenant on Civil and Political Rights and Covenant on Economic, Social and Cultural Rights which require states to protect and promote human rights. There are also mechanisms under various treaties which monitor compliance with treaty obligations. As a result, it can be said that human rights agreements are directly enforceable between the parties to a particular instrument, and that a state party has a reciprocal duty towards other state parties to fulfil its obligations under the agreements. It is therefore submitted that the principle of reciprocity should apply to these treaties.

The prohibition of certain crimes such as genocide has the status of *jus cogens* and there is an *erga omnes* obligation not to commit such crime. These obligations automatically bind states. They are regarded as peremptory norms from which no state may derogate. These norms also allow any state to request a particular state to refrain from violating these norms. There is no doubt, therefore, that these norms limit state sovereignty in that one state may call upon another state to respect human rights or refrain from committing heinous human rights violations, such as genocide.

Humanitarian intervention undertaken by states in another state's jurisdiction in order to save civilians has also eroded the once absolute doctrine of sovereignty. As a result, it has received attention from scholars of international law, because such intervention is often undertaken without the approval of the Security Council. There have been humanitarian interventions in countries such as Liberia by the Economic Community of West African States in the 1990s. Further, there was also an intervention in Kosovo by NATO forces and intervention in Chad by Pan-African Peacekeeping Force of the then Organisation of African Union (OAU) (now AU). This is an indication that a state can no longer treat its inhabitants as objects, as the entire international community has an interest in the protection of human rights. It is therefore clear that intervention on humanitarian grounds limits state sovereignty. Further, the responsibility to

protect imposes a duty on a state to prevent the massacre of its citizens and also empowers other states to act where a state fails to protect its own people.

It is also submitted that as the UN SC has been tasked with the responsibility to maintain international peace and security, state sovereignty has been eroded and may not be invoked to justify conduct that compromises international peace.

### 3.2 *Regional level*

Groups of states have come together on a regional level and created communities in order to pursue and achieve certain common interests, such as the maintenance of peace and security. This process is known as regionalism and is recognised by the Charter of the United Nations. Regionalism is closely-related to the process of globalisation, in that there is an increasing interconnection and interdependence among states. Indeed, states need each other for the achievement of the common good such as the protection of human rights and economic relations. Therefore, in order for regionalism to operate effectively, there must be cooperation among states. The AU is an example of a regional body created to, *inter alia*, promote and protect human rights. As discussed in Chapter 3, the clear emphasis on the protection and promotion of human rights in the constitutive documents of the AU, marks a shift from its predecessor, the OAU, which placed greater emphasis on non-interference in the domestic affairs of another member state. In addition, the OAU made no reference to human rights. The AU has the authority to intervene in other states to prevent crimes and promote peace. Article 4(h) of the Constitutive Act of the AU 2000 provides for “the right of the Union to intervene in a Member State pursuant to a decision of the Assembly in respect of grave circumstances, namely: war crimes, genocide and crimes against humanity”. The AU has, for example, intervened in the Comoros Islands to assist a government that was unconstitutionally removed from office to re-establish control over the territory. This form of intervention is not provided for in the Constitutive Act of the AU. However, this intervention indicates that factors that have the potential to create instability within the region are the concern for everyone, and that a state cannot not rely on state sovereignty to prevent intervention.

### 3.3 *Sub-regional level*

At this level, a primary focus of this study, SADC member states created the SADC, *inter alia*, to observe the principles of human rights, democracy, and the rule of law. Through becoming state



parties to the SADC Treaty and the Tribunal Protocol, it is submitted that SADC member states relinquished a certain portion of their sovereignty. The transfer of power to regional and international organisations is a clear indication that sovereignty can no longer be viewed from the perspective of the earlier theorists such as Jeann Bodin and Hugo Grotious, as indivisible. Without member states relinquishing a certain part of their sovereignty, it is submitted that the SADC would be unable to achieve its objectives, as any member state may act contrary to the provisions of the Treaty and the Tribunal Protocol without fear of the consequences.

In light of the above exposition, it is submitted that SADC countries have relinquished some aspects of their sovereignty and must abide by the obligations flowing from these instruments. In addition, it is submitted that none of the SADC member states may invoke state sovereignty in order to evade its treaty obligations (such as enforcement of the decisions of the Tribunal).

The denial of access for individuals to the “new” SADC Tribunal is unfortunate and a defect when compared to the ECOWAS CCJ and the East African Court of Justice. The SADC Tribunal was the custodian of human rights for SADC citizens, in particular where domestic mechanisms were unavailable, or available but ineffective in that they did not provide redress. In addition, the study has revealed that there are no provisions in the Treaty or the Tribunal Protocol which allow the Summit to suspend the Tribunal. Accordingly, it is submitted that the Summit’s decision was unlawful. It is further submitted that the Summit should learn from other sub-regional courts that allow individuals to bring cases before them and reconsider its decision to suspend the operation of the Tribunal. It will be for the benefit of SADC citizens to have access to the envisaged SADC Tribunal.

#### **4. RELATIONSHIP BETWEEN INTERNATIONAL LAW, REGIONAL LAW (SADC COMMUNITY LAW) AND NATIONAL LAW**

##### *4.1 Monism and dualism*

This study has revealed that the reception of international law into municipal law depends on how a particular country’s constitution provides for the incorporation of treaty law into national law. Even though the monist and dualist theories assist in ascertaining how treaty law is transformed into national laws, they do not help in determining the hierarchy between international law, SADC law, and national law. In this regard the European Union legal system provides useful guidance on the nature of the relationship between community law and national

law of the member states. It is submitted that the principle of direct applicability and direct effect should be applied in the SADC legal order in order to allow citizens of SADC member states to invoke the provisions of the SADC community law before national courts. In addition, the SADC legal order should be superior to the legal systems of member states.

It is conceded that this will have an impact on state sovereignty and may be met with resistance. However, for the reasons stated in Chapter 4, this will prevent a situation in which SADC Community law is unjustly challenged and/or applied at the whim of the member states. It is submitted that SADC member states must respect the autonomous character of the SADC legal order. Additionally, the supremacy of the SADC Community law will ensure its uniform application. As was alluded to earlier, it is submitted that by becoming members of the SADC, member states have relinquished aspects of their sovereignty and should therefore be willing to abide by the SADC legal order.

## **5 COMPLIANCE WITH AND ENFORCEMENT OF (SUB)-REGIONAL JUDGMENTS**

There has been general non-compliance with the human rights decisions of the SADC Tribunal. This is not a problem exclusive to the Tribunal but also faces, for example, the ECOWAS CCJ. An example of a tribunal that has a good record of compliance with its judgments is the European Court of Justice. Even though the ECOWAS CCJ has a non-compliance rate of some sixty per cent, its record remains better than that in other sub-regions.<sup>478</sup> The good practice that can be drawn from ECOWAS is that member states fully support the functioning of the Court. This is something that appears to be lacking among SADC leaders. In addition, the European Court of Justice has a body (European Commission) to monitor compliance with the judgments of the Court. The European Commission reports acts of non-compliance to the Court and also has the power to impose financial fines to foster compliance.

Similarly, in ECOWAS member states are required to appoint a national authority that will be responsible for monitoring compliance with the Court's decisions. Although this has not yet happened in all ECOWAS states, it is submitted that this is a sound initiative as it relieves a successful litigant of the need to institute other legal proceedings for reporting non-compliance with a court decision. This is the case within the SADC system. A successful litigant must institute a further legal action to report non-compliance with a Tribunal decision. Unfortunately,

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<sup>478</sup> See discussion in Chapter 5 of the study.

none of these mechanisms exists within the SADC legal order in order to support the SADC Tribunal, especially with the enforcement of its decisions. It is submitted that the good practice from the European Court of Justice and the ECOWAS CCJ are something that should be emulated by the envisaged “new” Tribunal.

The SADC Tribunal has no police force or sheriff to execute its judgments. It can only receive and hear a case – and this is where its involvement ends. It can only deal with matters of non-compliance by reporting them to the Summit. If the Summit does nothing, the Tribunal’s hands are tied. The Summit is a body tasked with the enforcement of the Tribunal’s decisions and it has the power to take all the necessary measures to ensure that the decisions of the Tribunal are complied with. Given the current hostility towards the Tribunal regarding human rights jurisdiction and access by individuals, it is submitted that compliance with the unenforced decisions of the Tribunal should be achieved through diplomatic means in which both parties to the dispute contribute to the outcome. This will, it is hoped, assist in arriving at a point at which member states will support the SADC Tribunal and willingly implement its decisions. This will, however, ultimately depend on the political will of member states.

## **6 RECOMMENDATIONS**

To prevent further legal uncertainty between the SADC legal system and the national legal systems of its member states, it is submitted that clear provisions governing the proper functioning of the new SADC Tribunal be adopted. The basis for this is that the 2014 Protocol does not provide solutions to the current problems. Instead, it curtails the powers of the Tribunal to inter-states disputes only. The recommended provisions (below) attempt to address and prevent the problems encountered by the suspended SADC Tribunal. Therefore, for the effective functioning of the SADC Community legal order, it is submitted that a Supplementary Protocol to the Treaty of the Southern African Development Community and a Revised Protocol on the Tribunal in the Southern African Development Community should be adopted which will include the following provisions:

## 6.1 *Supplementary Protocol to the Treaty of the Southern African Development Community*

### 6.1.1 Article 1: Obligations of Member States

- (1) Each Member State to this Supplementary Protocol has the *obligation* to respect, protect and promote the principles of democracy, human rights and the rule of law in their territories.

### 6.1.2 Article 2: Incorporation of Community law into national law

- (1) Each member state undertakes to incorporate the provisions of this treaty and the Revised Protocol on the SADC Tribunal into its national laws within six months of ratification of the Treaty.

### 6.1.3 Article 3: Autonomous legal order and supranationality

- (1) The SADC Community legal system is an autonomous legal order.
- (2) The SADC Community legal system is superior to the legal systems of member states and in case of irreconcilable differences, SADC Community law shall take precedence over conflicting provisions in the national systems of member states.

### 6.1.4 Article 4: Applicability of SADC law in member states

- (1) Member states, individuals and NGOs shall have access to the Tribunal and may invoke the provisions of SADC Community law directly before the domestic courts of their national states, and domestic courts are obliged to consider and apply community law.

## 6.2 *Revised Protocol on the Tribunal in the Southern African Development Community*

### 6.2.1 Article 1: Access to the Tribunal

- (1) Individuals and NGOs shall have access to the Tribunal provided that local remedies where accessible, available and effective have been exhausted.

#### 6.2.2 Article 2: Jurisdiction

- (1) The Southern African Development Community Tribunal shall have jurisdiction over disputes between natural or legal persons and Member States arising from the Treaty, its Protocols, and other instruments of the Community or international law.
- (2) The Tribunal's jurisdiction under/in terms of article 2(1) includes the power and competence to determine complaints of the violation of human rights that occur in the territory of any Member State.

#### 6.2.3 Article 3: Immunity

- (1) There shall be no civil or criminal immunity accorded to any person, including heads of state, for gross violations of human rights.

#### 6.2.4 Article 4: Judgments of the SADC Tribunal in Member States

- (1) The judgments of the SADC Tribunal shall take precedence over and be enforceable by the judgments of national courts.

#### 6.2.5 Article 5: Advisory Opinions

- (1) The Tribunal shall give advisory opinions on such matters as the Summit or Council may refer to it.

#### 6.2.6 Article 6: Establishment of body to monitor compliance with the rulings of the SADC Tribunal

- (1) Parties to this agreement agree to establish a SADC Committee to be termed the SADC Monitoring Committee, to monitor compliance with the rulings of the SADC Tribunal within 90 days of the entry into force of this agreement;

- (2) The SADC Monitoring Committee shall have the power to recommend sanctions to the Summit against any Member State of the SADC Treaty and the SADC Tribunal who refuses to comply with a decision of the SADC Tribunal;
- (3) The SADC Monitoring Committee shall be represented in the deliberations of the Summit and shall present its report on compliance with the decisions of the SADC Tribunal.

#### 6.2.7 Article 7: Establishment of Registrar for enforcement of the Tribunal's decisions

- (1) Parties to this Agreement agree to establish a Registrar in their respect countries who shall be responsible for monitoring compliance with the decisions of the SADC Tribunal; and
- (2) The Registrar shall report acts of compliance and/or non-compliance to the SADC Monitoring Committee.

## **7 CONCLUSION**

It is clear that certain of the proposed provisions will impact on the state sovereignty of member states, which has been a politically-sensitive issue for many African states due to their colonial history. Although I acknowledge the political impediments in realising the above recommendations, it is submitted that for the sake of regionalism, economic integration, the rule of law, democracy and human rights, SADC Heads of State or Government should seriously consider these proposals. Ultimately, the success and proper functioning of the (newly established) SADC Tribunal will be dependent on the political will of all SADC members.

## ANNEXURE A

### DECISIONS COMPLIED AND NOT-COMPLIED WITH

√ = complied with.

X = not complied with.

*Fick and Another v Republic of Zimbabwe* (SADC (T) 01/2010); [2010] SADCT 8 (16 July 2010)



*Mondlane v SADC Secretariat* (SADC (T) 07/2009); [2010] SADCT 3 (5 February 2010)



*Kanyama v SADC Secretariat* (SADC (T) 05/2009); [2010] SADCT 1 (29 January 2010)



*Swissbourgh Diamond Mines (Pty) Ltd and Others v Kingdom of Lesotho* (SADC (T) 04/2009); [2010] SADCT 4 (11 June 2010) (Currently under arbitration.)



*Campbell v Republic of Zimbabwe* SADC (T) 03/2009); [2009] SADCT 1 (5 June 2009) (Contempt of court ruling.)



*Kethusegile-Juru v Southern African Development Community Parliamentary Forum* (SADC (T) 02/2009); [2010] SADCT 7 (11 June 2010)



*Mike Campbell (Pvt) Ltd and Others v Republic of Zimbabwe* (2/2007); [2008] SADCT 2 (28 November 2008) (Main decision.)



*Mike Campbell (Pvt) Limited and Another v Republic of Zimbabwe* (2/07); [2007] SADCT 1 (13 December 2007) (Interim ruling.)



## **CASES DISMISSED, DECLARATORY ORDERS, REFERRALS TO THE AFRICAN COMMISSION AND CASES UNDER ARBITRATION**

*Tem bani v Republic of Zimbabwe* (SADC (T) 07/2008); [2009] SADCT 3 (1 August 2009) (Application to intervene dismissed.)

*Campbell v Zimbabwe* (Contempt of court) (SADC (T) 11/2008) (Non-compliance with declaratory order.)

*United Peoples' Party of Zimbabwe v SADC and Others* (SADC (T) 12/2008); [2009] SADCT 4 (14 August 2009) (Application dismissed.)

*Bach's Transport (Pty) Ltd v Democratic Republic of Congo* (SADC (T) 14/2008); [2010] SADCT 6 (11 June 2010) (Assessment of damages by the Registrar is pending.)

*Albert Fungai Mutize and Others v Campbell and Others* (SADC (T) 08/2008) (Application dismissed for late filing and as it was a dispute between individuals over which the SADC Tribunal lacks jurisdiction.)

*Luke Tembani v Republic of Zimbabwe* Case no 7 of 2008 (The case was also lodged with the African Commission for reference to the African Court on Human and Peoples Rights but was dismissed.)

*Kethusegile-Juru v Southern African Development Community Parliamentary Forum* (SADC (T) 02/2009); [2010] SADCT 2 (5 February 2010) (Preliminary objections dismissed.)

*Gondo and Others v Republic of Zimbabwe* Case no 5 of 2008 (Preliminary objection abandoned by Zimbabwe, set aside/legal costs order.)

*Gideon Stephanus Theron and 7 Others v Zimbabwe* Case no 2 of 2008 (Application to intervene in *Campbell* case; relief granted.)

*Zimbabwe Human Rights NGO Forum v Republic of Zimbabwe* (SADC (T) 05/2008); [2009] SADCT 2 (1 January 2009) (Application brought by incorrect party on behalf of people claiming to have been victims of violence. The Court ordered that the application be amended as it was in the interests of justice.)

*United Republic of Tanzania v Cimexpan (Mauritius) Ltd and Others* (SADC (T) 01/2009) [2010] SADCT 5 (11 June 2010) (Case dismissed since the applicant did not exhaust local remedies and failed to prove that he was tortured)



*Nixon Chirinda and Others v Mike Campbell (Pvt) Limited and Others* (09/08); [2008] SADCT 1  
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