

# Much Ado About Nothing? The SADC Tribunal's Quest for the Rule of Law Pursuant to Regional Integration

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## Abstract

Art. 9 of the Southern African Development Community Treaty (SADC Treaty) established the Southern African Development Community Tribunal in 1992. The Tribunal became operational in 2005 in Windhoek. The decision of the Tribunal in the matter between *Mike Campbell and Others v. The Republic of Zimbabwe* received a great deal of attention since it dealt with the so-called “land reform” process in Zimbabwe. This case compelled the Tribunal to rule on a dispute concerning human rights, the rule of law and democracy in order to ensure adherence to Art. 4 of the SADC Treaty. The authors utilise the decision as a point of departure in order to illustrate how the Tribunal, as a member of a loose community of courts, oversees member states in order to strengthen the rule of law and democracy pursuant to the promotion of human rights in the context of regional integration. The authors also deal with the persistent refusal of Zimbabwe to adhere to

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the decisions of the Tribunal and indicate that this disdain for the rule of law is not beneficial to the scheme of regional integration in Southern Africa.

## I. Introduction

Art. 9 of the SADC Treaty<sup>1</sup> established the SADC Tribunal<sup>2</sup> in 1992. The Tribunal became operational in 2005 in Windhoek, Namibia.<sup>3</sup> It is the main objective of the Tribunal “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”.<sup>4</sup> The Tribunal “shall give advisory opinions on such matters as the Summit or the Council may refer to it”.<sup>5</sup> Furthermore, the decisions of the Tribunal have a final and binding character.<sup>6</sup> The Tribunal has jurisdiction over all disputes and applications referred to it in accordance with the provisions of the Treaty and the Protocol, and which relate to the interpretation and application of the Treaty.<sup>7</sup> The members of the Tribunal must also be committed to the “international character of SADC”, and shall not seek or receive instructions from any external entities.<sup>8</sup> Thus, the members of the Tribunal must act independent pursuant to the objectives of SADC. The Treaty does not regulate the Tribunal in detail since it stipulates that a protocol must provide for the “composition, powers, functions, procedures and other related matters” of the Tribunal.<sup>9</sup> Thus, the SADC Protocol on Tribunal and the Rules of Procedure Thereof was authorised by the Heads of State or Government of SADC Member States during 2000.<sup>10</sup>

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<sup>1</sup> Southern African Development Community Treaty, hereafter “Treaty”, <http://www.sadc.int>.

<sup>2</sup> Southern African Development Community Tribunal, hereafter “Tribunal”.

<sup>3</sup> <http://www.sadc-tribunal.org>.

<sup>4</sup> Art. 16 para. 1 Treaty.

<sup>5</sup> Art. 16 para. 4 Treaty.

<sup>6</sup> Art. 16 para. 5 Treaty.

<sup>7</sup> Art. 14 lit. (a) SADC Protocol on Tribunal and Rules of Procedure Thereof, hereafter “Protocol”.

<sup>8</sup> Art. 17 para. 2 Treaty. It must be borne in mind that SADC is an international organisation. See Art. 3 of the Treaty.

<sup>9</sup> Art. 16 para. 2 Treaty.

<sup>10</sup> Art. 3 of the Protocol regulates the constitution and composition of the Tribunal.

The Tribunal has not had much opportunity to exercise its jurisdiction. However, the decision of the Tribunal in the second case<sup>11</sup> it adjudicated received a great deal of attention since it dealt with the so-called "land reform" process in Zimbabwe. This case compelled the Tribunal to rule on a dispute concerning human rights, the rule of law and democracy in order to ensure adherence to Art. 4 lit. (c) of the Treaty.

It is therefore the primary aim of this article to use the decision as a point of departure in order to illustrate how the Tribunal, as a member of a loose community of courts, oversees member states in order to strengthen the rule of law and democracy pursuant to the promotion of human rights in the context of regional integration.<sup>12</sup>

Thus, we shall provide a brief exposition of the decision of the Tribunal in *Mike Campbell and Others v. The Republic of Zimbabwe*.<sup>13</sup> Subsequently, a more in depth discussion of certain implications of the decision will follow. The decision draws from national and international case law in order to interpret human rights law. This exercise in transjudicial communication will therefore be a focal point of the authors. The authors furthermore reflect on human rights, the rule of law and democracy in the context of the role of the tribunal pursuant to regional integration and the rule of law. The refusal of the Zimbabwean government to adhere to the decision and the inaction of the Summit in this regard, however, leads the authors to question the impact that the Tribunal may have in the scheme of regional integration. On a more positive note, the authors indicate that one of the member states came to the rescue to uphold the decision of the Tribunal and the rule of law in Southern Africa. The authors conclude the article with some critical views.

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<sup>11</sup> The first case involved a labour dispute between a national of Malawi and the SADC secretariat. See *Ernest Francis Mtingwi v. the SADC Secretariat SADC (T)* Case No. 1/2007.

<sup>12</sup> It is not our intent to deliver a mere case note or discussion since other authors have done this. See *M. Beukes, Zimbabwe in the Dock: The Southern Africa Development Community (SADC) Tribunal's First Decision*, SAYIL 33 (2008), 228 et seq. This case note presents a brief summary of the decision, rather than a critical discussion. For some analysis of the decision *A. Moyo, Defending Human Rights and the Rule of Law by the SADC Tribunal: Campbell and Beyond*, *African Human Rights Law Journal* 9 (2009), 590 et seq.

<sup>13</sup> *Mike Campbell and Others v. The Republic of Zimbabwe SADC (T)* Case No. 2/2007.

## II. Exposition of the Case

### 1. Facts

In the matter between *Mike Campbell and Others v. The Republic of Zimbabwe* the SADC Tribunal had to deal with the validity of the government of Zimbabwe's land reform programme. On 11.10.2007, the first and second applicants filed an application with the Tribunal in which they challenged the respondent's acquisition of agricultural land owned by the applicants. In an additional application in terms of Art. 28 of the Protocol on Tribunal and the Rules of Procedure Thereof, they simultaneously requested that they be granted an order restraining the respondent from removing or allowing the removal of the applicants from their land, pending the determination of the matter.<sup>14</sup>

Section 16B of Amendment 17 (2005)<sup>15</sup> to the Constitution of Zimbabwe provides *inter alia* that agricultural land may be acquired by the government for the purposes of resettlement in order to give effect to the government's land reform policy. Amendment 17 further determines that land so acquired vests in the state and no compensation shall be payable to the owners except for any improvements effected on such land before it was acquired. In addition, Amendment 17 ousted the jurisdiction of the Zimbabwean courts to entertain any challenge concerning such acquisitions. Implementing Amendment 17, the Zimbabwean government confiscated the land of most white commercial farmers in Zimbabwe; including some of the 79 applicants in this matter. The said applicants consequently approached the SADC Tribunal and submitted the following:<sup>16</sup>

- The Zimbabwean government acted in breach of its obligations under the Treaty of the Southern African Development Community by enacting and implementing Amendment 17;
- The responsible Minister failed to employ reasonable and objective criteria in order to establish whether the confiscated farms were reasonably necessary for resettlement purposes in conformity with the land reform programme;
- The applicants were denied access to the Zimbabwean courts to challenge the legality of the compulsory acquisition of their lands;
- The applicants had suffered racial discrimination insofar as they were the only ones whose lands have been acquired under Amendment 17; and

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<sup>14</sup> Tribunal, 4.

<sup>15</sup> Tribunal, 8 et seq. Section 16B of Amendment 17 (2005), hereinafter referred to as Amendment 17.

<sup>16</sup> Tribunal, 12 et seq.

- The applicants were denied compensation in respect of the lands acquired from them.

The respondent in turn argued *inter alia* as follows:<sup>17</sup>

- The Tribunal has no jurisdiction to entertain the application under the Treaty of the Southern African Development Community;
- Land is acquired from mainly white farmers who own large tracts of land suitable for agricultural resettlement, and this policy cannot be described as racist because it is brought about by colonial history;
- The respondent also acquired land from a few black Zimbabweans who possessed large tracts of land;
- The applicants will receive compensation in terms of Amendment 17;
- The compulsory acquisition of land is aimed at correcting inequities pertaining to colonially inherited land ownership; and
- The applicants have not been denied access to the Zimbabwean courts as they could seek judicial review if they wish to.

Against this background, the Tribunal formulated the issues to be determined as follows:<sup>18</sup>

- Whether or not the Tribunal has jurisdiction to entertain the application;
- Whether or not the applicants have been denied access to the courts in Zimbabwe;
- Whether or not the applicants have been discriminated against on the basis of race; and
- Whether or not compensation is payable for the land compulsorily acquired from the applicants by the respondent.

The first and second applicants (*William Campbell (Pvt) Ltd* and *William Michael Campbell*) initially started proceedings in the Supreme Court of Zimbabwe against the acquisition of their agricultural lands by the respondent.<sup>19</sup> They argued before the Supreme Court that Amendment 17 violated their right to equal treatment before the law, to a fair hearing before an independent and impartial court of law or tribunal, and their right not to be discriminated against regarding their ownership of land based on race or place of origin. However, before the Supreme Court of Zimbabwe could have delivered its judgment, the first and second applicants as mentioned earlier, filed an application before the Tribunal for an interim order restraining the respondent from removing or allowing the removal of the applicants

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<sup>17</sup> Tribunal, 4 et seq.

<sup>18</sup> Tribunal, 6 et seq.

<sup>19</sup> *Mike Campbell (Pty) Ltd v. Minister of National Security Responsible for Land, Land Reform and Resettlement* (SC 49/07).

from their land, pending the determination of the matter. On 13.12.2007 the Tribunal granted the interim measure sought by the applicants and ordered that “pending the determination of the main case ... the Republic of Zimbabwe shall take no steps, or permit no steps to be taken, directly or indirectly, whether by its agents, or by orders, to evict from or interfere with the peaceful residence on, and beneficial use of, the farm ... held ... by *Mike Campbell (Pvt) Ltd* and *William Michael Campbell*, their employees and the families of such employees and of *William Michael Campbell*”.<sup>20</sup> The Supreme Court of Zimbabwe rendered its judgment only on 22.2.2008 and found that the legislature in clear and unambiguous language and in the proper exercise of its powers had constitutionally ousted the jurisdiction of the Court in a lawful manner in those cases where the acquisition of agricultural land by the state may be questioned before a court of law.<sup>21</sup>

In the meantime, 77 other persons applied to intervene in the proceedings pursuant to Art. 30 of the Protocol. In addition, the intervening applicants also applied for an interim order prohibiting the respondent from removing them from their farms, pending the determination of the matter. The Tribunal granted the application to intervene as well as the interim measure sought. The application of *Mike Campbell (Pvt) Ltd* and *William Michael Campbell*, as well as the applications of the 77 other intervening applicants were therefore consolidated into a single case.<sup>22</sup>

Because the respondent failed to adhere to the interim relief ordered by the Tribunal, the applicants again approached the Tribunal and reported the said failure on the part of the respondent. The Tribunal in turn, having determined the failure, reported its finding in terms of Art. 32 para. 5 of the Protocol to the Summit consisting of the Heads of State or Government of all member states.<sup>23</sup>

Against this background, the applicants before the Tribunal are essentially challenging the compulsory acquisition of their agricultural lands, carried out by the respondent in terms of its land reform programme.<sup>24</sup>

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<sup>20</sup> Tribunal, 5; Tribunal, 18 et seq.

<sup>21</sup> Tribunal, 18; Tribunal, 21 et seq.

<sup>22</sup> Tribunal, 5 et seq.

<sup>23</sup> Tribunal, 7.

<sup>24</sup> Tribunal, 7.

## 2. Jurisdiction

At the start of the proceedings before the Tribunal, the Supreme Court of Zimbabwe had not yet delivered its judgment in the application lodged before it by the first two applicants. The respondent therefore immediately raised the question as to the Tribunal's jurisdiction to hear the matter. It was argued by the respondent that because the Supreme Court had not yet delivered its judgment, it could not be said that the applicants had "exhausted all available remedies or were unable to proceed under the domestic jurisdiction" as required by Art. 15 para. 2 of the Protocol. The Tribunal reacted by pointing out that the Protocol is not the only regional instrument containing a rule pertaining to the exhaustion of local remedies. Art. 26 of the European Convention on Human Rights as well as Art. 50 of the African Charter on Human and Peoples' Rights contain similar provisions. The rationale behind the rule is to grant local courts the opportunity to first deal with the matter because they are best equipped to judge issues concerning national law. In addition, the rule ensures that regional and international tribunals are not burdened with cases that could efficiently have been disposed of by national courts.<sup>25</sup> However, the rule regarding the exhaustion of local remedies is qualified insofar as it is not applicable where municipal law does not offer a remedy, or where the remedy that is offered is ineffective, or where the circumstances are such that the procedure of achieving the remedy is unduly prolonged.<sup>26</sup>

The Tribunal referred to Amendment 17 in terms of which the jurisdiction of the Zimbabwean courts were ousted with regard to cases that concerned the acquisition of agricultural land by the respondent. The applicants were thus unable to institute proceedings before the Zimbabwean Courts<sup>27</sup> as was indeed confirmed by the Supreme Court of Zimbabwe on 22.2.2008 in the application of the first and second respondents questioning the acquisition of their agricultural land by the respondent.<sup>28</sup>

The respondent also submitted that the Treaty does not contain the standards against which member states must be evaluated, but only sets out the principles and objectives of the SADC. The respondent further contended that in the absence of the necessary standards, the Tribunal cannot borrow these from any other international documents as such a practice would

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<sup>25</sup> Tribunal, 19 et seq.

<sup>26</sup> Tribunal, 21.

<sup>27</sup> Tribunal, 21.

<sup>28</sup> *Mike Campbell (Pty) Ltd v. Minister of National Security Responsible for Land* (note 19).

amount to legislating on behalf of the member states of the SADC. In addition, the respondent argued that none of the Protocols under the Treaty deals with human rights and agrarian reform and that such a protocol should first be enacted to give effect to the principles contained in the Treaty. As a result, the respondent suggested that “the Tribunal appears to have no jurisdiction to rule on the validity or otherwise of the land reform programme carried out in Zimbabwe”.<sup>29</sup> The Tribunal, however, rejected the respondent’s arguments and referred to Art. 21 lit. (b) of the Protocol which not only enjoins the Tribunal to develop its own jurisprudence, but also instructs the Tribunal to do so by taking into account applicable treaties, and general principles and rules of public international law. The Tribunal, therefore in fact must consult other international documents in order to establish the legal position concerning matters on which the Treaty is silent. The Tribunal further found it unnecessary that a Protocol on human rights and agrarian reform should first be enacted to give effect to the principles contained in the Treaty in view of Art. 4 lit. (c) of the Treaty which requires from the SADC and member states to act in accordance with the principles of human rights, democracy and the rule of law. From this provision, the Tribunal deduced that it is endowed with the necessary jurisdiction to rule on any dispute concerning human rights, democracy and the rule of law, the very issues that have to be decided on in the present application before the Tribunal.<sup>30</sup>

Regarding the issue of its jurisdiction, the Tribunal in the final instance pointed out with reference to Art. 27 of the Vienna Convention on the Law of Treaties, that the respondent may not invoke provisions of its national law (in this case Amendment 17) as a justification for the failure to carry out an international agreement.<sup>31</sup>

### 3. Access to Courts

The second issue before the Tribunal was whether the Applicants have been denied access to the courts and whether they have been deprived of a

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<sup>29</sup> Tribunal, 23 et seq.

<sup>30</sup> Tribunal, 24 et seq.

<sup>31</sup> Tribunal, 25 et seq. The Tribunal also quoted professor *M. Shaw*, International Law, 2008, 104 et seq. who formulated the rationale behind this rule as follows: “The reason for this inability to put forward internal rules as an excuse to evade international obligation (sic) are obvious. Any other situation would permit international law to be evaded by the simple method of domestic legislation.”



fair hearing due to Amendment 17.<sup>32</sup> Member states are under a legal obligation to “respect, promote and protect” these two fundamental rights.<sup>33</sup> The Tribunal bases its reasoning on the viewpoint that the rule of law embraces these rights and Art. 4 lit. (c) of the Treaty obliges Members to respect principles of “human rights, democracy and the rule of law”. Art. 6 para. 1 contains the undertaking to “refrain from taking any measures likely to jeopardize the sustenance of its principle”. The Tribunal accordingly discusses the right to access to the courts *via* extensive reference to decisions of regional and national courts as well as *quasi*-judicial bodies.<sup>34</sup>

In relation to the right to a fair hearing before an individual is deprived of a right, interest or legitimate expectation, the Tribunal held that it is a principle “well recognized and entrenched in law”.<sup>35</sup> The Tribunal considered the relevant provisions of Amendment 17 and held that the provisions of section 18(1) and (9) concerning the constitutional right to the protection of law and a fair hearing have been taken away in relation to land acquired under section 16B (2) (a).<sup>36</sup> The Tribunal cited the Supreme Court’s explicit acknowledgement of this in its judgement.<sup>37</sup>

The Tribunal accordingly finds that the Applicants have established that they have been deprived of their lands without having had the right of access to the courts and a fair hearing. The Respondents were therefore found to have acted in breach of Art. 4 lit. (c) of the Treaty.<sup>38</sup>

#### 4. Racial Discrimination

The applicants contended that the land reform programme of the respondent as embodied in Amendment 17 is solely or primarily based on considerations of racial discrimination and country of origin, as it is directed only at white Zimbabwean farmers of European origin. The respondent, in the execution of the land reform programme, did not take into account whether the land so targeted were acquired during the colonial period or not. The applicants submitted that the policy was designed to redress the imbalances of land ownership created during the colonial period. However, as a result the respondent directed that no person of white colour or European origin

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<sup>32</sup> Tribunal, 26.

<sup>33</sup> Tribunal, 27.

<sup>34</sup> Tribunal, 28 et seq.

<sup>35</sup> Tribunal, 35.

<sup>36</sup> Tribunal, 37.

<sup>37</sup> Tribunal, 38.

<sup>38</sup> Tribunal, 41.

was to be allowed to retain ownership of a farm. The enactment of Amendment 17 provided the instrument through which this was to be achieved, although it did not explicitly refer to the race and colour of the owners whose farms were to be confiscated. The applicants were at pains to point out that although no explicit mention was made in Amendment 17 of the colour or race of the owners of the land acquired under the land reform programme, the intent of the legislature clearly was to target only white land owners. In addition, as the applicants further contended, the confiscated farms were not handed over to landless people, but to a group of politically connected beneficiaries that included senior political and judicial officials and senior members of the armed forces. Against this background, the applicants submitted that the respondent, by enacting and implementing Amendment 17, was in violation of Art. 6 para. 2 of the Treaty prohibiting racial discrimination.<sup>39</sup>

The respondent refuted the allegations by the applicants that not only white farmers were targeted by Amendment 17. They argued that the land reform programme was simply aimed at people who were disadvantaged under colonialism and because of Zimbabwe's colonial history (which resulted in most agricultural land being owned by white farmers), it was inevitable that the farms targeted for acquisition largely belonged to white farmers. In this regard, the respondent claimed that not only white farmers were targeted for expropriation, but also a few black Zimbabweans who owned large tracts of land. In addition, some white farmers had been offered 99-year leases in respect of expropriated agricultural lands. The respondent, therefore, denied that it had discriminated against white farmers and that it had thus acted in breach of Art. 6 para. 2 of the Treaty.<sup>40</sup>

In its consideration of the question whether Amendment 17 discriminated against the applicants and as such violated the obligation that the respondent took upon itself in terms of Art. 6 para. 2 of the Treaty to prohibit discrimination, the Tribunal noted that discrimination of whatever nature is prohibited in various international and regional instruments. In this respect, the Tribunal referred to Art. 1 para. 3 of the Charter of the United Nations, Art. 2 of the Universal Declaration of Human Rights, Art. 2 para. 1 of the International Covenant on Civil and Political Rights, Art. 2 para. 2 of the International Covenant on Economic Social and Cultural Rights, Art. 2 of the African Charter on Human and Peoples' Rights, Art. 14 of the European Convention on Human Rights, and the Convention on the Elimination of All Forms of Racial Discrimination. Having established that a num-

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<sup>39</sup> Tribunal, 41 et seq.

<sup>40</sup> Tribunal, 44 et seq.

ber of international and regional documents prohibit racial discrimination, the Tribunal subsequently defined the concept of racial discrimination with reference to Art. 1 of the Convention on the Elimination of All Forms of Racial Discrimination. Art. 1 determines that “any distinction, exclusion, restriction, or preference based on race, ... which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise on an equal footing, of human rights ...” constitutes racial discrimination. The Tribunal, also cited para. 7 of General Comment no. 18 of the Human Rights Committee that defines racial discrimination in similar terms.<sup>41</sup>

The Tribunal then referred to para. 13 of General Comment no. 16 of the Committee on Economic, Social and Cultural Rights in which a distinction is made between formal and substantive equality. The former assumes that “equality is achieved if a law or policy treats everyone equal in a neutral manner”, whilst substantive equality is mainly concerned “with the effects of laws, policies and practices in order to ensure that they do not discriminate against any individual or group of individuals”. The Tribunal also emphasised the distinction between direct and indirect discrimination as set out in paras 12 and 13 of General Comment 16 of the said Committee. Direct discrimination (in the context of sexual discrimination but similarly in the context of racial discrimination) relates to a difference in treatment that is “directly and explicitly ... based ... on characteristics of men or women, which cannot be justified objectively”. Indirect discrimination, on the other hand, “does not appear to be discriminatory but has a discriminatory effect when implemented”.<sup>42</sup>

In view of the foregoing exposition, the Tribunal came to the following conclusion:<sup>43</sup>

“Since the effects of the implementation of Amendment 17 will be felt by the Zimbabwean white farmers only, we consider [that] although Amendment 17 does not explicitly refer to white farmers, ... its implementation affects white farmers only and consequently constitutes indirect discrimination or de facto or substantive inequality.

In examining the effects of Amendment 17 on the applicants, it is clear to us that those effects have had an unjustifiable and disproportionate impact upon a group of individuals distinguished by race such as the Applicants. We consider that the differentiation of treatment meted out to the Applicants also constitutes discrimination as the criteria for such differentiation are not reasonable and objective but arbitrary and are based primarily on considerations of race. The aim

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<sup>41</sup> Tribunal, 45 et seq.

<sup>42</sup> Tribunal, 50 et seq.

<sup>43</sup> Tribunal, 53 et seq.

of the Respondent in adopting and implementing a land reform programme might be legitimate if and when all lands under the programme were indeed distributed to poor, landless and other disadvantaged and marginalized individuals or groups.

We, therefore, hold that, implementing Amendment 17, the Respondent has discriminated against the Applicants on the basis of race and thereby violated its obligation under Art. 6 para. 2 of the Treaty.”

The Tribunal finally emphasised the need for a land reform programme under the rule of law by observing that if the criteria adopted by the respondent pertaining to the land reform programme had not been arbitrary but reasonable and objective, if fair compensation had been paid in respect of the appropriated lands, if the lands so expropriated had indeed been distributed to the poor, landless and other disadvantaged and marginalized individuals or groups, thus rendering the purpose of the programme legitimate, the differential treatment afforded to the applicants would not have constituted discrimination.<sup>44</sup>

## 5. Compensation

The Applicants argued that the Respondent breached its obligations under international law due to the failure to compensate for the expropriated land. The Respondent did not dispute the entitlement of the Applicants to compensation, but argued that the former colonial power, Britain, is responsible for the payment of compensation based on the independence agreement reached in 1978 in London. Section 16B (2) (b), however, excludes payment of compensation for agricultural land that has been acquired for resettlement purposes. In this regard, the Tribunal finds that the Applicants have a right under international law to compensation and the Respondent the duty to pay fair compensation.<sup>45</sup> The Tribunal held that the Respondent could not rely on its national law, in this instance the Constitution, to avoid its international law obligation to pay compensation.<sup>46</sup>

The Tribunal therefore directed the Respondent “to take all necessary measures, through its agents, to protect the possession, occupation and ownership of the lands of the Applicants and to ensure that no action is taken, pursuant to Amendment 17 ... to evict from, or interfere with, the peaceful residence ... of those farms by, the Applicants”, except for the Ap-

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<sup>44</sup> Tribunal, 54 et seq.

<sup>45</sup> Tribunal, 56.

<sup>46</sup> Tribunal, 57.

plicants that have already been evicted; and to pay fair compensation on or before 30.6.2009 to three Applicants that have already been evicted.”<sup>47</sup> It is interesting to note that the Tribunal does not make a specific determination of damages, but rather directs the Zimbabwean government to comply with international law.

Compensation for expropriated property is the source of controversy between developed and developing states. Agreement seems to exist that arbitrary expropriation without compensation violates international law. The criterion to determine compensation, however, is not settled. The traditional requirement that compensation should be “prompt, adequate and effective” assessed on the basis of the fair market value of the expropriated asset is not trite under international law. *Dugard* opines that “appropriate compensation”, which is less than “prompt, adequate and effective” enjoy greatest support.<sup>48</sup> “Appropriate” is much more flexible and all the circumstances of a case will be considered in determining the amount of compensation payable.

Certain Tribunals have taken into account whether the expropriation itself was lawful or unlawful.<sup>49</sup> This may have an impact on the determination of the damages. Unlawful expropriations trigger the customary international law regime. This means that in the case of unlawful expropriations the remedy would be restitution and not mere compensation. Further, an increase in the expropriated property since the expropriation may be awarded. Lastly, compensation may include incidental expenses or other consequential damages. The SADC Tribunal did not reflect on this issue.

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<sup>47</sup> Tribunal, 58 et seq.

<sup>48</sup> *J. Dugard*, *International Law: A South African Perspective*, 2005, 299 et seq.

<sup>49</sup> See *Siemens v. Argentina Award of 6 February 2007*, para. 352, in: *Amoco International Finance Corporation v. The Islamic Republic of Iran* (15 Iran-US CTR, 189, 246 et seq.; 83 ILR, 500) it was held that the difference between the two instances was that compensation for lost profits was only available in the instance of wrongful expropriation. This approach has, however, not been followed in subsequent decisions and further received a great deal of critique. See for an extensive discussion *S. Ripinsky/K. Williams*, *Damages in International Investment Law*, 2008, 64 et seq.

### III. Evaluation

#### 1. Transjudicial Communication

The tribunal also took into account international and foreign law.<sup>50</sup> The Protocol makes explicit provision for such references as it states that the Tribunal shall “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>51</sup>

The tribunal has also made extensive reference to the decisions of regional tribunals,<sup>52</sup> national courts,<sup>53</sup> quasi-judicial bodies<sup>54</sup> and expert bodies<sup>55</sup> established by UN organs.<sup>56</sup> It seems that the reference to foreign ad-

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<sup>50</sup> In reaching a decision on the issue of jurisdiction, it refers to Art. 26 European Convention on Human Rights (ECHR), Art. 50 African Charter on Human and People’s Rights (ACHPR) as well as the Vienna Convention on the Law of Treaties (Vienna Convention). It also relies on Art. 7 para. 1 lit. (a) ACHPR in order to address the access of the courts. The Tribunal cites international law (United Nations Charter, Universal Declaration of Human Rights, International Covenant on Civil and Political Rights and International Covenant on Economic, Social and Cultural Rights and the Convention on the Elimination of All Forms of Racial Discrimination) as well as Art. 2 ACHPR in support of its viewpoint that discrimination is prohibited.

<sup>51</sup> Art. 21 lit. (b) Protocol.

<sup>52</sup> Citations include European Court of Human Rights (*Golder v. United Kingdom*, 21.2.1975 Series A No. 18 and *Philis v. Greece*, 17.8.1991 Series A No. 209 as well as the Inter-American Court of Human Rights (Advisory Opinion OC-9/97 of 6.10.1987).

<sup>53</sup> The Tribunal referred to the House of Lords (*Attorney-General of the Commonwealth of the Bahamas v. Ryan* (1980) A.C. 718 and *Jackson v. Attorney-General* UKHL 56 (2006) 1 A.C.262); the Constitutional Court of South Africa (*Zondi v. MEC for Traditional and Local Government Affairs and Others* 2005 (3) SA 589 (CC) as well as the Supreme Court of Zimbabwe (*Commercial Farmers Union v. Minister of Lands* 2001 (2) SA 925 (ZSC) and *Mike Campbell (Pty) Ltd v Minister of National Security Responsible for Land* (note 19)).

<sup>54</sup> Cf. African Commission on Human and People’s Rights (*Constitutional Rights Project, Civil Liberties Organisation and Media Rights Agenda v. Nigeria*, Comm. No. 140/94, 141/94 145/95 (1999); Zimbabwe Human Rights NGO Forum/Zimbabwe, Comm. No. 245 (2002), Human Rights Committee (General Comment No. 18), The African Commission on Human and People’s Rights is seen as a quasi-judicial body. For a discussion *R. Murray*, *The African Commission on Human and People’s Rights and International Law*, 2000, 143 et seq. Controversy exists concerning the question whether the Human Rights Committee has quasi-judicial powers. See *F. Forrest Martin/S. J. Schnably*, *International Human Rights and Humanitarian Law: Treaties, Cases and Analysis*, 2006, 7. See, however, *J. Crawford*, in: P. Alston/J. Crawford (eds.), *The Future of UN Human Rights Monitoring*, 2000, 2 et seq.

<sup>55</sup> The Committee on Economic, Social and Cultural Rights (General Comment No. 16). *S. Leckie* in: P. Alston/J. Crawford (note 54), 129 et seq.

<sup>56</sup> The Tribunal has also referred to the decisions of other authoritative entities.

judicative bodies take place outside any formal treaty context.<sup>57</sup> This seems to form part of the phenomenon of what Professor *Slaughter* has dubbed “transjudicial communication: communication among courts – whether national or supranational – across borders”.<sup>58</sup> This dialogue is more likely to flow from “a common substantive mission, such as the protection of human rights, at a ... regional level”.<sup>59</sup>

This form of communication may strengthen human rights regimes as well as the tribunals that enforce them.<sup>60</sup> Furthermore, transjudicial communication may foster a process of “collective judicial deliberation on a set of common problems”.<sup>61</sup> This suggests “recognition of a global set of human rights issues to be resolved by courts around the world in colloquy with one another”.<sup>62</sup> This recognition stems from the universal human rights embodied in the UN Universal Declaration of Human Rights, which results in a universal judicial process. This manner of communication establishes a community of courts,<sup>63</sup> which operates on a modicum of common ground. In the context of liberal democracies, the rule of law provides such a common ground.<sup>64</sup> Thus, the community of courts act pursuant to the preservation and promotion of the rule of law. An important consequence of transjudicial communication is the enhanced protection of universal human rights on a national, regional and international level.<sup>65</sup>

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<sup>57</sup> Strictly speaking, the references to the decisions of the South African Constitutional Court and Supreme Court of Zimbabwe do not fall under this category. The latter courts follow the system of legal precedent or *stare decisis* and Art. 21 lit. (b) SADC Protocol makes specific provision for the acknowledgement of the law of States. In terms of Art. 1 Treaty “State” refers to a “Member State”. Zimbabwe and South Africa are both Member States of SADC. See *D. A. Bronstein*, *Demystifying the Law: An Introduction for Professionals*, 2000, 17 et seq. See, however, *A. S. Gaibie*, *The Stare Decisis Doctrine: The Beginning of the End for Zimbabwe?*, *Codicillus* 47 (2006), 66 et seq.

<sup>58</sup> *A.-M. Slaughter*, *A Typology of Transjudicial Communication*, *U. Rich. L. Rev.* 29 (1994-1995), 99 et seq. The citations of the SADC Tribunal may in general be classified as horizontal communication. The decision of the Tribunal also constitutes a form of vertical communication, which is directed at the Members of the Community.

<sup>59</sup> Tribunal, 102.

<sup>60</sup> Tribunal, 117.

<sup>61</sup> Tribunal, 119.

<sup>62</sup> Tribunal, 122.

<sup>63</sup> *A.-M. Slaughter*, *A Global Community of Courts*, *Harv. Int'l L. J.* 44 (2003), 191 et seq. This community includes both domestic and international courts.

<sup>64</sup> Tribunal, 125.

<sup>65</sup> Tribunal, 134.

## 2. Rule of Law

The SADC tribunal is indeed supposed to oversee liberal democracies of the Community on the basis of the rule of law pursuant to the strengthening of human rights among Members.<sup>66</sup> It does this as an independent actor, which operates as a member of a loose community of courts.

In the context of the case under discussion, a clear distinction must be drawn between the application of the rule of law on the municipal law level and the application of the rule of law on the (regional) international law level. Since *Dicey's* formulation of the rule of law in English law, clarity has largely been achieved as to the content of this notion and its necessity on the national level in order to place some restriction on the exercise of state authority.<sup>67</sup> Unfortunately, the same cannot be said of the application of the rule of law on the international and regional levels. In this instance, a lot of uncertainty exists with regard to, for example, the exact purpose and aim of the rule of law on the international level as well as the values underpinning this notion.<sup>68</sup> Yet, there is a growing acceptance of the fact that there are certain advantages to the recognition of an international rule of law, which according to *Kumm*<sup>69</sup> simply means that states, in their mutual relationships, are to be ruled by law. In this regard, he argues that national courts have a particular role to play in the enforcement of an international rule of law insofar as it is likely to further greater state compliance with international law.<sup>70</sup> More specifically, the application of an international rule of law would curtail the abuse of political power, thereby mitigating asymmetries in power and contributing to a more predictable and stable international environment; contribute to the promotion and realisation of international human rights and as a consequence stabilising liberal constitutional democracy on the domestic level; provide a valuable institutional resource to the international community insofar as it can assist in building trust between international actors and thus facilitate mutually beneficial co-operative en-

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<sup>66</sup> Art. 4 lit. (c) and (e) Treaty states that SADC and its Members shall act in accordance with the principles of human rights, democracy and the rule of law; and the peaceful settlement of disputes.

<sup>67</sup> See e.g. *J. Jowell*, in: J. Jowell/D. Oliver, *The Changing Constitution*, 2007, 5 et seq.

<sup>68</sup> See in this regard e.g. *G. M. Ferreira/M. P. Ferreira-Snyman*, *The Constitutionalisation of Public International Law and the Creation of an International Rule of Law: Taking Stock*, *South African Yearbook of International Law* 13 (2008), 147 et seq.

<sup>69</sup> *M. Kumm*, *International Law in National Courts: The International Rule of Law and the Limits of the Internationalist Model*, *Va. J. of Int'l L.* 44 (2003), 22.

<sup>70</sup> Tribunal, 20; Tribunal, 22 et seq.



deavours; and stabilise social relationships by creating a predictable environment in which individual actors can make meaningful choices.<sup>71</sup>

It should be apparent that the role of domestic courts in the development and enforcement of an international rule of law is dependent on the condition that the decisions of these courts be accepted and enforced by the government of the particular state. Unfortunately, the Zimbabwean government has on several occasions been at odds with the judiciary, which in turn has led the President to unconstitutionally attempt to get rid of certain judges.<sup>72</sup> For example, in 2001 the President unconstitutionally ordered the then Chief Justice, *Sir Anthony Gubbay*, together with four other High Court judges, to step down because they allegedly stood in the way of the land reform process. As will become clear from this discussion, the reluctance of Zimbabwe to accept and adhere to the decisions of its own judiciary, also extends to sub-regional courts such as the SADC Tribunal.

In fact, should one analyse the current political, economical and social situation in Zimbabwe, one cannot avoid coming to the conclusion that there indeed exists a tendency to disregard international law and especially international human rights law, to misuse political power, to ignore some of the basic rules of democracy, and to distrust the intentions of parts of the international community of states. The recognition and application of an international rule of law by the domestic courts in Zimbabwe will certainly have a positive influence on the situation in Zimbabwe. In fact, all the member states of the SADC as well as the African Union (AU) will reap substantial benefits from following such an approach in the sense that they at least will have an objective yardstick to measure their performance against. The condition of course, is that a state employing a dualist system (like Zimbabwe)<sup>73</sup> does not refuse to implement the relevant parts of a treaty merely in order to escape its international responsibilities.<sup>74</sup>

Thus, the judgment of the SADC Tribunal, brings to the fore the question on the nature of the relationship between international/regional law and municipal law. For example, with regard to the former, conflict may arise between international/regional law and municipal law insofar as the municipal constitutional arrangements may not conform to the provisions of international and regional human rights instruments. From the case under discussion, it is clear that the SADC Tribunal had to evaluate the mu-

<sup>71</sup> Tribunal, 24 et seq.

<sup>72</sup> <http://www.afrol.com>.

<sup>73</sup> In terms of section 111 lit. (B) of the Constitution of Zimbabwe, the courts can only apply international treaty law provisions once a particular treaty has been transformed into municipal law by an act of parliament.

<sup>74</sup> See *S. v Makwanyane* 1995 (3) SA 391 (CC) paras. 36 et seq.

municipal law of Zimbabwe (more specifically constitutional Amendment 17) in order to establish whether it is in conformity with certain international and regional human rights instruments binding on Zimbabwe. This in turn undoubtedly constitutes a limitation on the sovereignty of Zimbabwe with regard to the functioning of its municipal courts insofar as a regional judicial organ (the Tribunal) may override the decisions of its national courts.<sup>75</sup>

It should be evident from the exposition above that the application of the rule of law, on both a national level and an international level, may be seriously compromised by the uncertainty surrounding the mutual relationships between international law, regional law, and municipal law. Accepting that the concept of the rule of law in its most basic form simply means adherence to the applicable law, the uncertainty as to which “system” of law are applicable in a given situation, results in this most important concept being rendered ineffective. In this regard, it must be kept in mind that a distinction is usually made between monist and dualist systems in order to describe the relationship between international law and municipal law.<sup>76</sup> Monism suggests that international law and municipal law constitute a single system of law and that, therefore, international law as part of municipal law may be applied directly by a municipal court of law. Dualism, on the other hand, views international law and municipal law as two separate systems of law and therefore requires that international law first be transformed into municipal law by way of parliamentary legislation before a municipal court may apply it in a given situation. Some states, such as South Africa, do not follow an exclusive monist or an exclusive dualist approach.<sup>77</sup> For example, with regard to customary international law, section 232 of the Constitution of the Republic of South Africa, 1996 provides that it forms part of South African law insofar as it is not in conflict with the Constitution or an Act of parliament. Pertaining to treaty law, section 231 determines that a treaty has to be transformed by way of an act of parliament in order to bring it within the ambit of South African law. The South African approach towards the relationship between international law and South African law can consequently be described as hybrid<sup>78</sup> insofar as a monist approach is followed with regard to customary international law and a dualist approach pertaining to treaty law. The realisation of the aim to promote the integration of

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<sup>75</sup> This is in line with the dynamic nature of sovereignty that is evolving. See *F. Deng*, *Sovereignty as Responsibility: Conflict Management in Africa*, 1996, xvii.

<sup>76</sup> *J. Dugard* (note 48), 47 et seq.

<sup>77</sup> See for a discussion *W. Scholtz*, *A Few Thoughts on Section 231 of the South African Constitution*, 108 of 1996, *South African Yearbook of International Law* 29 (2004), 202 et seq.

<sup>78</sup> See *J. Dugard*, in: *D. Sloss* (ed.), *The Role of Domestic Courts in Treaty Enforcement*, 2009, 448 et seq.

Africa,<sup>79</sup> coupled with the aim to harmonise the laws in the member states of the African Union,<sup>80</sup> can be greatly enhanced if member states were to adopt a similar approach pertaining to the relationship between international/regional law and municipal law. It is suggested that a monist approach in terms of which international law and municipal law are viewed as a single system of law that must be applied and enforced also by municipal courts, would be in line with the stated aims of SADC and the AU, which is concerned with the well-being and human rights of people.<sup>81</sup>

The disregard in a state of the human rights of individuals, have a direct bearing on the democratic nature of such a state. Although democracy is a concept that is probably impossible to define to the satisfaction of the majority of commentators, one of its characteristics most people seem to agree on is that it embodies the notion of the protection of human rights. *Benhabib*,<sup>82</sup> for example, remarks that “ideally, democratic rule means that all members of a sovereign body are to be respected as bearers of human rights ...”, and furthermore, that “the democratic sovereign draws its legitimacy not merely from its act of constitution but, equally significantly, from the conformity of this act to universal principles of human rights that are in some sense said to precede and antedate the will of the sovereign and in accordance with which the sovereign undertakes to bind itself”. *Ramcharan*<sup>83</sup> describes the contents of democracy in even broader terms with reference to the Universal Declaration on Democracy adopted by the Council of the Inter-Parliamentary Union on 16.9.1997:

“As an ideal, democracy aims to preserve and promote the dignity and fundamental rights of the individual, achieve social justice, foster a community’s economic and social development, strengthen the cohesion of the society and enhance national tranquility, and create a climate that is favorable for international peace.”

It is therefore understandable that in this regard some scholars argue that international law in recent years has come to recognise a right or entitlement to democratic governance.<sup>84</sup> *Franck*,<sup>85</sup> for example, holds the view that

<sup>79</sup> See para. 3 of this article.

<sup>80</sup> *M. P. Ferreira-Snyman/G. M. Ferreira*, The Harmonization of Laws within the African Union and the Viability of Legal Pluralism as an Alternative, THRHR 73 (2010), 608 et seq.

<sup>81</sup> This is in line with the strand represented in *Lauterpacht*'s work. See in this regard *M. N. Shaw* (note 31), 2008, 131.

<sup>82</sup> *S. Benhabib*, Another Cosmopolitanism, 2005, 32.

<sup>83</sup> *B. G. Ramcharan*, Contemporary Human Rights Ideas, 2008, 79.

<sup>84</sup> According to *Ndulo* an international norm is emerging in terms of which only democracy validates governance. *M. Ndulo*, The Democratization Process and Structural Adjust-

the entitlement to democracy in international law has developed on both a normative and a customary level. Not only has it evolved as a system of rules but also it is evident in the practice of states and organisations. He submits that this development in international law has gone through three phases, namely the normative entitlement to self-determination, the normative entitlement to free expression as a human right and the normative entitlement to a participatory electoral process. Although he suggests that the entitlement to democracy already enjoys a high degree of legitimacy, he also concedes that the entitlement is not yet entirely coherent.

If the current situation in Zimbabwe as it is reflected by the judgment of the SADC Tribunal is measured against these arguments, it would seem fully justifiable to describe Zimbabwe as being undemocratic since the majority opposition party have been denied victory through elections that have been manipulated and rigged by the ruling party.<sup>86</sup> Fortunately, the current situation can be reversed insofar as Zimbabwe still retains some elements of democratic rule, for, as *Ramcharan*<sup>87</sup> points out, democracy is “the only political system that has the capacity for self-correction”. It is hoped that the constitutional review currently underway in Zimbabwe will achieve exactly that.<sup>88</sup>

Lastly, the democratic entitlement of the people of SADC, as incorporated in the Treaty, may also (in theory) provide the basis for pro-democratic intervention (PDI).<sup>89</sup> The Organ on Politics, Defence and Security (OPDS) also has as one of its key principles the observance of human

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ment in Africa, *Ind. J. Global Legal Stud.* 10 (2003), 336 On 338 he points out that many international institutions as well as individual states have formulated good governance standards as requirements for their development assistance activities. This has brought about the following consequences: “Democracy is ... well on the way to becoming a global entitlement, one that will be increasingly promoted and protected by international collective processes. We are witnessing a change in international law, and as a result, the legitimacy of each government will someday be measured by international rules and processes. We may not be quite there, and this norm is still challenged, but we can see the outlines of this new world in which citizens of each state will look increasingly to international law and organizations to guarantee their democratic entitlement.”

<sup>85</sup> *T. M. Franck*, *The Emerging Right to Democratic Governance*, *AJIL* 86 (1992), 90 et seq. See also *J. Crawford*, *Democracy and International Law*, *BYIL* 64 (1993), 113 et seq.

<sup>86</sup> *R. K. Edozie*, *Reconstructing the Third Wave of Democracy: Comparative African Democratic Politics*, 2009, 135.

<sup>87</sup> *B. G. Ramcharan* (note 83), 79.

<sup>88</sup> In June 2010, Zimbabwe has launched a programme to rewrite the country’s constitution before the general elections planned for 2011. See <http://www.presstv.ir>.

<sup>89</sup> See for a discussion *J. I. Levitt*, in: *J. I. Levitt* (ed.), *Africa Mapping New Boundaries in International Law*, 2009, 103 et seq. The dire situation in Zimbabwe may also invoke the discourse concerning “humanitarian intervention”. See, however, *J. I. Levitt* (note 89), 109 et seq. for a discussion of the distinction between the concepts.

rights, democracy and the rule of law. Objective (g) states that where diplomatic efforts fail, the OPDS is responsible for recommending punitive measures to the Summit.

### 3. Regional Integration

The rule of law is also an important basis for regional integration. It must be borne in mind that it is the objective of SADC to “achieve development and economic growth, alleviate poverty, enhance the standard and quality of life of the people of Southern Africa and support the socially disadvantaged through regional integration”.<sup>90</sup> Regional Economic Communities (RECs), such as SADC, have an important role to play in the “gradual attainment of the objectives of the Union”,<sup>91</sup> which includes the acceleration of the “political and socio-economic integration of the continent”<sup>92</sup> on the basis of *inter alia* the respect for democratic principles, human rights, the rule of law and good governance.<sup>93</sup> Thus, the Tribunal has an important role to play pursuant to sub-regional, and ultimately continental integration<sup>94</sup> based on,

<sup>90</sup> Art. 5 para. 1 lit. (a) Treaty. Art. 6 para. 1 reads that Member states shall 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”. African leaders view regional integration as a response to the challenges of globalisation and the marginalisation of the African continent. See *M. Spicer*, in: J. B. Macedo/O. Kabbaj, *Regional Integration in Africa*, (2002), 163 et seq.; *T. Murithi*, *The African Union Pan Africanism Peacebuilding and Development*, (2005) 5; *M. Ndulo*, *The Need for Harmonization of Trade Laws in SADC*, *African Yearbook of International Law* 4 (1996), 222 and *R. J. Langhammer/U. Hiemenz*, *Regional Integration among Developing States Opportunities, Obstacles and Options*, (1990). Regarding regional integration and SADC *R. Davies*, in: P. H. Baker/A. Boraime (eds.), *South Africa and the World Economy in the 1990s*, 1993, 217 et seq. See also *M. Lundahl/L. Petersson*, in: M. Lundahl (ed.), *Globalization and the Southern African Economies*, (2004), 92 et seq. See, however, *A. Smith*, in: V. Cable/D. Henderson (eds.), *Trade Blocs? The Future of Regional Integration*, 1994, 17 et seq.

<sup>91</sup> See Art. 3 lit. (l) Constitutive Act of the African Union.

<sup>92</sup> Art. 3 lit. (c) Constitutive Act.

<sup>93</sup> Art. 3 lit. (m) Constitutive Act.

<sup>94</sup> SADC serves as one of the building blocks of the African Economic Community (AEC). See Art. 88 Treaty Establishing the African Economic Community of 1991 read with Art. 3 Constitutive Act of the African Union. See also the Protocol on Relations between the African Economic Community and the Regional Economic Communities of 1998. The Protocol on the Relations between the African Union and the Regional Economic Communities will replace the latter Protocol when it enters into force. See on the complex relationship between the AU, AEC and RECs *R. Frimpong Oppong*, *The African Union, the African Economic Community and Africa's Regional Economic Communities: Untangling a Complex Web*, *AJICL* 18 (2010), 92 et seq.

amongst others, the principles of the rule of law, democracy and human rights. It is therefore that the SADC Treaty provides for an independent tribunal, which should promote the objectives and interests of the community and not merely certain Member states.<sup>95</sup> Member States have given the Tribunal real competence and in this manner “have already taken a step towards granting certain autonomy to the process of integration”.<sup>96</sup>

In this regard, *Metcalf* and *Papageorgiou*, as a result of a comparative study on courts of regional integration, opine that:

“There are many positive aspects to the role and need for regional courts. In systems of integration there is a genuine need for an independent court with its own jurisdiction. Regional courts with wide jurisdiction strengthen the federal or common system. The court will have an interest in safeguarding the interests and integrity of the common system. Furthermore, ... a court underlines that the common system is a system based on law and order and respect for the rule of law.”<sup>97</sup>

The rejection of Zimbabwe of the Tribunal and its decision may, however, point to a rejection of the pooling of sovereignty in this regard. It seems that SADC Members often do not have the political will to commit themselves to the process of regional integration.<sup>98</sup> SADC Members frequently cling to their own sovereignty and guard vigilantly against any possible erosion thereof.<sup>99</sup> Member states may therefore be reluctant to allow the SADC Tribunal to interfere with their state sovereignty and this may restrict the role of the Tribunal. The lack of political will make it difficult for the Tribunal to function effectively. Thus, the rulings of the Tribunal may have no or little impact on the national law of Member states. Sanctions may have an influence on the impact of rulings of regional courts.<sup>100</sup> The SADC Protocol provides that the decisions of the Tribunal are “final and binding”.<sup>101</sup> However, enforcement of the decisions of the Tribunal is

<sup>95</sup> In terms of Article 17 para. 1 Treaty “Member States shall respect the international character and responsibilities of SADC, the Executive Secretary and other staff of SADC, and shall not seek to influence them in the discharge of their functions”. Art. 17 para. 2 Treaty further reads that “the members of the Tribunal ... shall not seek or receive instructions from any Member States”.

<sup>96</sup> *K. Nyman Metcalf/I. Papageorgiou*, Regional Integration and Courts of Justice, 2005, 109.

<sup>97</sup> Tribunal, 107.

<sup>98</sup> African Economic Outlook (2002), 35.

<sup>99</sup> *M. Schoeman*, in: M. E. Muller/B. de Gaay Fortman (eds.), *From Warfare to Welfare: Human Security in a Southern African Context*, 2004 66 et seq. See also Opening Remarks for the ICM by Mr *Trevor Manuel* <http://www.sadc.int>.

<sup>100</sup> See *K. Nyman Metcalf/I. Papageorgiou* (note 96), 117.

<sup>101</sup> Art. 24 para. 3 Protocol.

dependent on the Member States. Art. 32 of the Protocol makes provision for the enforcement of decisions of the Tribunal through domestic civil law procedure governing the registration and enforcement of foreign judgements in the territory of the State in which the judgement is to be enforced.<sup>102</sup> Thus, States have an obligation to take all measures to execute the decisions of the Tribunal.<sup>103</sup> Any party may refer non-compliance of a State with a decision to the Tribunal.<sup>104</sup> Accordingly, the Tribunal may report a finding of failure to comply with a decision of the Tribunal to the Summit “for the latter to take appropriate action”.<sup>105</sup> Appropriate action may be in the form of the imposition of sanctions against a Member State who are in non-compliance.<sup>106</sup> The sanctions are not specified since it is the responsibility of the Summit to determine this on a case-by-case basis.<sup>107</sup> The Summit is the supreme policy-making body of SADC and consists of the Heads of State or Government of all Member States, which meets on an annual basis.<sup>108</sup> The decisions of the Summit are taken on the basis of consensus and have a binding nature.<sup>109</sup> The problem in this regard is that the Summit is extremely reluctant to take punitive measures against a Member State.<sup>110</sup> The Zimbabwean example suffices as a good example in this regard. Furthermore, it may prove to be difficult to reach consensus even when the Summit is of the intent to impose sanctions against a Member State. A further problem is non-specification of the measures that the Summit may impose. Thus, in practice the Tribunal is a tiger without teeth. Member States will decide whether they want to adhere to the decisions or not since the chances of the imposition of real sanctions against a rogue state are very

<sup>102</sup> Art. 32 para. 3 Protocol states 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.”

<sup>103</sup> Art. 32 para. 2 Protocol.

<sup>104</sup> Art. 32 para. 4 Protocol.

<sup>105</sup> Art. 32 para. 5 Protocol.

<sup>106</sup> Art. 33 para. 1 Protocol provides for the imposition of sanctions against Member states who “(a) persistently fails, without good reason, to fulfil obligations assumed under this Treaty.” and “(b) implements policies which undermine the principles and objectives of SADC”.

<sup>107</sup> Article 33 para. 2 Protocol.

<sup>108</sup> Article 10 paras. 1 and 5 Treaty.

<sup>109</sup> Article 10 para. 8 Protocol.

<sup>110</sup> SADC is sometimes criticized for being an “old boys club” where political leaders show loyalty to one another. *F. Söderbaum*, in: M. Telò (ed.), *European Union and New Regionalism Regional Actors and Global Governance in a Post-Hegemonic Era*, 2007, 195.

slim.<sup>111</sup> It is in this regard that the viewpoint of *Metcalf* and *Papageorgiou* seem to be especially relevant for the SADC Tribunal since they opine that a

“system of the rule of law with basic respect for its rulings is in any event necessary. This is one reason it is difficult to consider how a court would deliver in the African Union, a system consisting of several members that seriously lack democracy and respect for the rule of law.”<sup>112</sup>

The response of the Zimbabwean government to the decision is illustrative of a lack for the respect of the rule of law. The SADC Tribunal has on two occasions found that the Government of Zimbabwe is in breach and contempt of the previous orders of the court.<sup>113</sup> In reaction to the decisions of the Tribunal, the Zimbabwean government has formally withdrawn from any legal proceedings involving the SADC Tribunal until the Protocol on Tribunal and the Rules of Procedure Thereof of the court is ratified by at least two-thirds of the bloc’s membership. In a letter dated 7.8.2009, and delivered to the registrar of the Tribunal, Legal Affairs Minister *Patrick Chinamasa* stated that the court did not exist by law and any decisions against Zimbabwe are therefore considered null and void.<sup>114</sup> The withdrawal of the Zimbabwean government is in defiance of its obligations in terms of the Treaty. The establishment and validity of the Tribunal is not subject to the ratification of the Protocol since Art. 9 para. 1 lit. (f) of the Treaty states that the Tribunal is “hereby established”. Art. 16 para. 2 accordingly states that the “composition, powers, functions, procedures and other related matters governing the Tribunal shall be prescribed in a Protocol adopted by the Summit”. Thus, the Tribunal has already been established in terms of the Treaty and its decisions are final and binding.<sup>115</sup> The Protocol merely regulates the matters as provided for in Art. 16 para. 2 of the Treaty. The actions of the Zimbabwean government also defeat the objects and purpose of the Protocol prior to its entry into force in contravention of Art. 18 of the Vienna Convention on the Law of Treaties of 1969. The government’s breach of the SADC Treaty is also in contravention of the

<sup>111</sup> See in relation to SADC interventions *A. van der Vleuten*, in: A. Ribeiro Hoffmann/J. M. van der Vleuten, *Closing or Widening the Gap? Legitimacy and Democracy in Regional Integration Organizations*, 2007, 158 et seq.

<sup>112</sup> See *K. Nyman Metcalf/I. Papageorgiou* (note 96), 118. This situation is, however, not only applicable to Africa. See *J. Allain*, *A Century of International Adjudication The Rule of Law and Its Limits*, 2000, 183.

<sup>113</sup> *Mike Campbell (Pty) Limited and Others and the Republic of Zimbabwe* Case No. SADC (T) 11/08 and *William Michael Campbell, Richard Thomas Etheredge and the Republic of Zimbabwe* Case No. SADC (T) 03/2009.

<sup>114</sup> <http://english.peopledaily.com.cn>.

<sup>115</sup> Art. 16 para. 5 Treaty.



*pacta sunt servanda* provision of Art. 26 of the Vienna Convention. Thus, it is impossible for the Zimbabwean government to withdraw from the Tribunal. The only available option for Zimbabwe would be to withdraw from SADC in accordance with Art. 34 of the Treaty.

The Zimbabwean High Court also refused to register the decision of the SADC tribunal.<sup>116</sup> It is interesting to note that the Court did not base its decision on the validity of the Tribunal. The Court confirmed that the general rule is that public policy dictated that the tribunal's decisions, made within the confines of its international jurisdictional competence, be recognised and enforced in Zimbabwe.<sup>117</sup> The Court, however, stated that the application of the general rule must be subjected to the consideration of the facts of each case as well as the legal and practical consequences of the recognition and the enforcement of the decision.<sup>118</sup> The Court then decided that:

“If the tribunal's judgment were to be registered ... the Government would be required to contravene and disregard what Parliament has specifically enacted in Section 16B ... This ... cannot be countenanced as a matter of law, let alone as an incident of public policy.<sup>119</sup> In effect, enforcement of the decision ... would ultimately necessitate the Government having to reverse all the land acquisitions that have taken place since 2000. This programme ... is quintessentially a matter of public policy.”<sup>120</sup>

The Court accordingly acknowledges the legitimate expectation of the applicants that Zimbabwe complies with the SADC treaty and the decision of the Tribunal.<sup>121</sup> The Court, however, states that a greater number of Zimbabweans have a legitimate expectation that the Government will implement the land reform programme.<sup>122</sup> Thus, the Court finds that “Given these countervailing expectations, public policy as informed by basic utilitarian precept would dictate that the greater public good must prevail and therefore the registration and consequent enforcement of the judgement would be contrary to the public policy of the country”.<sup>123</sup>

It is clear that the decision of the Court is incorrect since the judge did not address the relationship between international law (SADC Treaty law)

<sup>116</sup> *Gramara (Private) Limited and Colin Bailie Cloete v Government of the Republic of Zimbabwe and Attorney-General of Zimbabwe and Norman Kapanga* HH-169 2009.

<sup>117</sup> Tribunal, 16.

<sup>118</sup> Tribunal, 16.

<sup>119</sup> Tribunal, 18.

<sup>120</sup> Tribunal, 19.

<sup>121</sup> Tribunal, 19.

<sup>122</sup> Tribunal, 19.

<sup>123</sup> Tribunal, 19.

and Zimbabwean municipal law. The decision results in non-compliance with international obligations and municipal law is invoked as a justification for the failure to carry out an international agreement.<sup>124</sup> The court in effect departs from the common ground, which the rule of law creates amongst courts of democracies pursuant to the promotion of human rights.

In reaction to the flawed decision of the Supreme Court of Zimbabwe commercial farmers *Louis Fick*, *William Michael Campbell* and *Richard Etheredge*, the Commercial Farmers' Union of Zimbabwe and the Southern African Commercial Farmers' Alliance – Zimbabwe again lodged an application at the SADC Tribunal to hold the Government of Zimbabwe in contempt and refer the matter to the Summit.<sup>125</sup>

It is clear that the Zimbabwean government is unwilling to give effect to the rulings of the SADC Tribunal, which means that the applicants are left without relief in the matter. It is in this regard interesting to note that the applicants decided to make use of the courts of one of the Member States of SADC to implement the decisions of the Tribunal. The North Gauteng High Court of South Africa was approached and the Court registered the decisions of the SADC Tribunal of 28.11.2008 and 5.6.2009.<sup>126</sup> The Court also confirmed a cost order of the Tribunal. This implies that non-diplomatic assets of the Zimbabwean government may be seized for the execution of the cost order.

It is interesting to note that in effect a national court of a Member State of SADC is used to enforce the decision of the Tribunal; thus giving effect to Arts 6(1), (4)<sup>127</sup>, (5)<sup>128</sup> and 16(5) of the Treaty. In this manner, the North Gauteng High Court played an important role in the enforcement of the SADC Treaty.<sup>129</sup> The latter example may be a positive development, which could address the deficiencies concerning the enforcement of SADC decisions. Courts of Member States, in particular of South Africa, could play a complementary role in the adjudication of regional disputes. This model of

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<sup>124</sup> See Art. 27 Vienna Convention. The decision of the Court warrants extensive analysis. However, it is not the intent of the authors to dissect the decision. This decision deserves reference in this article since it is indicative of the lack of the rule of law in Zimbabwe and the approach of the Zimbabwean government towards international law.

<sup>125</sup> <http://www.thezimbabwean.co.uk>

<sup>126</sup> *Louis Karel Fick and Others v Government of the Republic of Zimbabwe* unreported Case No. 7781/2009 (NGHC), decided on 25.2.2010.

<sup>127</sup> "Member States shall take all steps necessary to ensure the uniform application of this Treaty."

<sup>128</sup> "Member States shall take all necessary steps to accord this Treaty the force of national law."

<sup>129</sup> See on the role of domestic courts in treaty enforcement *D. Sloss* (ed.), *The Role of Domestic Courts in Treaty Enforcement*, 2009.

governance supposes that domestic courts where the rule of law is entrenched may act as guardians of the regional (and therefore) international rule of law.

#### IV. Conclusion

The adjudication of the *Mike Campbell* saga by the SADC tribunal serves as an example of an adjudicative body, which participates in a loose network of courts and tribunals that operate on the basis of the rule of law in order to strengthen human rights. The judgment of the SADC Tribunal superseded the judgments of Zimbabwean municipal courts in order to give effect to the regional (and international) adherence to human rights among (supposedly) democratic Member States of SADC. This phenomenon should be understood against the regional integration project in Southern Africa and the whole of Africa. Adherence to the rule of law at a regional level is vital for sub-regional and regional integration since it is important that Member States operate in a predictable environment that builds trust between democratic Members, which may provide the basis for beneficial cooperation aimed at the sustainable development of the people.

The blatant disregard of Zimbabwe for the rule of law and consequently human rights unfortunately has a negative effect on the regional integration initiative of the Members of SADC since it erodes the important bedrock for this project. It also seems that leaders of states still lack political will to give true effect to the meaning and intent of the Treaty. However, all is not lost as a South African court acted as a member of the community of courts to enforce the sub-regional rule of law in order to ensure that another member of the community's decision, the Tribunal, was given effect. It is, however, imperative that the Summit acts and sanctions Zimbabwe in order to save the rule of law and the reputation of SADC from the actions of a Member state that blatantly contravenes the founding principles thereof. In this regard, it must be noted that the most recent development concerning the SADC Tribunal has been a decision by the regional heads of state and government to have the role and functions of the Tribunal reviewed by professionals and experts. In the meantime, the Tribunal may not entertain any new cases, but may deal with those at hand.<sup>130</sup> However, the Zimbabwean President insists that the SADC Tribunal's functioning has been suspended for at least six months pending the review of its mandate and operations.<sup>131</sup>

<sup>130</sup> <http://www.zimeye.org>.

<sup>131</sup> <http://nehandaradio.com>.

This attitude of the Zimbabwean President is yet another nail in the coffin of the rule of law in Africa.