The role of the Southern African Development Community (SADC) Tribunal in promoting human rights and strengthening regional social, economic and political integration in SADC

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Table of Contents

1. Introduction

The Southern African Development Community (SADC) Tribunal was established through a Protocol adopted in 2000. It decided its first case in 2007. Following the backlash orchestrated by Zimbabwe in response to the *Campbell* litigation, the SADC Tribunal has not been functional since 2010. In August 2014, the SADC Summit decided to adopt a new Protocol which, if and when it enters into force, will transform the functioning and role of the Tribunal. There are two main differences with the Tribunal established under the 2000 Protocol. First, the new Tribunal would abolish access for individuals or other non-state actors to the Tribunal, leaving it with jurisdiction to hear only inter-state disputes. Second, it would no longer have jurisdiction to hear human rights or rights-related cases. In its short active life, spanning from 2007 to 2010, the SADC Tribunal produced a limited but diverse jurisprudence on various issues related to regional integration and human rights in the SADC region. It is very unlikely that the proposed new SADC Tribunal operating under the 2014 Protocol would be able to sustain this trend.

This report first analyses the case law of the SADC Tribunal. It thereafter considers the establishment and suspension of the Tribunal and the adoption of the 2014 Protocol, with a particular focus on civil society participation in those processes. The 2000 and 2014 Protocols are then compared with regard to key provisions. The final section deals with the institutional framework and practice of other African international courts and analyses the changes made to the SADC institutional framework in light of these framework and practices. The report then concludes with some recommendations.

2. Analysis of the case law of the SADC Tribunal

2.1 Human rights and rule of law related cases

A total of five decisions emerged from the *Campbell* case before the SADC Tribunal. For ease of reading, all the applications and rulings/judgments arising from the *Campbell* case will be discussed together.

***Mike Campbell (Pvt) Limited & William Michael Campbell v The Republic of Zimbabwe*, Case no SADC T: 2/07 (*Campbell 1* case)**

The case of *Campbell & Another v Zimbabwe* (*Campbell 1* case) was the second case filed before the SADC Tribunal, but it resulted in the first ruling by the Tribunal, owing to the application for interim measures requested by the applicants. Filed on 11 October 2007, this case was a challenge to Zimbabwe's compulsory acquisition of the applicants' agricultural land. Alleging that they faced an imminent threat of seizure of their land in spite of on-going domestic legal action before the Supreme Court of Zimbabwe, the applicants relied on article 28 of the Protocol of the SADC Tribunal and rule 61 of the Tribunal's Rules of Procedure to request the Tribunal to issue interim measures to restrain Zimbabwe from removing the applicants from the land. While it did not oppose the granting of the interim measures *per se*,[1] Zimbabwe challenged the competence of the application on the grounds that, contrary to article 15(2) of the Tribunal's Protocol, the applicants did not first exhaust local remedies in Zimbabwe before the action was brought to the SADC Tribunal.

In its ruling granting the application for interim measures, the Tribunal took the opportunity of its first decision to declare its understanding of its mandate and the nature of its jurisdiction. The Tribunal first established that under its 2000 Protocol, it could receive cases from natural and legal persons against Member States of the SADC.[2] In so doing, the Tribunal affirmed the elaborate non-state actor access that SADC Member States allowed under the 2000 Protocol of the Tribunal. Also, the Tribunal established that access was guaranteed under the article 14 (2000 Protocol) competence to interpret and apply the SADC Treaty.[3] Significantly, the Tribunal asserted that the case and the application for interim measures involved the interpretation and application of article 4 of the SADC Treaty relating to Member States' commitment to act in

[1] It could be speculated that Zimbabwe did not zealously oppose the granting of interim measures because it was confident that the application would be dismissed on grounds of non-exhaustion of local remedies.
[2] See p 3 of the *Campbell 1* ruling, dealing with art 15(1) of the 2000 SADC T Protocol.
[3] As the Tribunal pointed out, the competence to interpret and apply the Treaty is only one of the bases of its jurisdiction. Others include the interpretation, application and validity of SADC Protocols and other subsidiary legal instruments and acts of SADC institutions as well as other agreements by which states agree to confer jurisdiction on the Tribunal. See art 14 of the 2000 Protocol of the Tribunal.

accordance with the principles of human rights, democracy and the rule of law.[4] The Tribunal equally used the ruling to give meaning to article 4(c) of the SADC Treaty by asserting that it imposed a legal obligation on SADC Member States (jointly as SADC, and in their individual capacities) to 'ensure that there is democracy and the rule of law within the region'. Consequently, the Tribunal ruled that the applicants' allegation of infringement of their 'property rights over that piece of land' is a matter that fell squarely within its mandate to interpret and apply the SADC Treaty.[5]

A number of implications for human rights arise from the Tribunal's elaboration of articles 4, 14 and 15 of the SADC Treaty in the *Campbell* 1 ruling. On a general note, some would argue that SADC is not a human rights organisation considering that neither the rule of law nor the promotion and protection of human rights feature explicitly as an objective of the Community under article 5 of the Treaty.[6] By this ruling, the SADC Tribunal boldly gave meaning to article 4 which may otherwise have passed as mere rhetoric without much meaning. Hence, by the pronouncements in this ruling, the Tribunal, like the East African Court of Justice (EACJ), provided judicial leadership by assisting SADC Member States to mainstream democracy, rule of law and human rights as central features of the SADC Community agenda.[7] The Tribunal's ruling conclusively and authoritatively gave determinacy to article 4, affirming both individual and collective obligations for Member States in relation to democracy, the rule of law and human rights. Thus, in addition to giving concrete meaning to the provision, the Tribunal's ruling clearly established SADC and its Member States as duty bearers in relation to the obligation to mainstream human rights, while also confirming non-state actors as right holders with entitlement to expectations of state compliance with that obligation. Significantly, the

[4] See p 3 of the *Campbell 1* ruling.
[5] As above.
[6] It should be noted that however that article 5 (1) (b) sets out the objective of the promotion of common political values, systems and other shared values which are transmitted through institutions which are democratic, legitimate and effective and art 5(c) makes it an objective of SADC to 'consolidate, defend and maintain democracy'.
[7] The EACJ has consistently provided judicial protection to the governing principles provided under article 6(d) and 7(2) of the EAC Treaty and has thus arguably assisted in the protection and promotion of these principles in the EAC region.

ruling also affirmed that the duty imposed by article 4 was operative both as the domestic level (within the Member States) and at the Community level.

In its response to the objection raised by the respondent state, the Tribunal further demonstrated its preference for protecting access by affirming that the requirement for prior exhaustion of local remedies under article 15(2) of the 2000 Protocol was inapplicable to request for interim measures.[8] By distinguishing between main cases, on the one hand, and urgent applications for interim measures, on the other, the Tribunal equally positioned itself as an ally of non-state actors in situations where national courts are unwilling or unable to protect rights in imminent risk of abuse. Having ruled that the requirement to exhaust local remedies did not apply to this case, the Tribunal issued an interim order against Zimbabwe in respect of the applicant's land.

***Mike Campbell (Pvt) Ltd & 78 Others v The Republic of Zimbabwe* (*Campbell 2* case) SADC (T) Case no. 2/2007 (judgment)**

Following the dismissal of Zimbabwe's preliminary objection and the grant of the applicant's request for interim measures in *Campbell 1*, the SADC Tribunal admitted 77 other natural and legal persons who had applied as interveners to join as applicants in the case against Zimbabwe.[9] Thus, the cases of the 77 interveners and the original case filed by Campbell were consolidated into one case, increasing the stakes and interest in the matter. Before it dealt with the substantive issues in the consolidated case, the Tribunal reiterated that it had reported a finding of non-compliance against Zimbabwe following the applicants' 20 June 2008 referral of the State's refusal and failure to comply with the Tribunal's order of interim measure. In effect, at this early stage of the proceeding, Zimbabwe had begun to establish a pattern of resistance and disrespect for the Tribunal and this fact had also been brought to the attention of the SADC Summit – SADC's highest decision-making body. It is against this background that the substantive issues in this case were addressed by the Tribunal.

[8] See p 6 of the *Campbell 1* ruling.

[9] P 5 of the judgment in *Campbell 2*. Other applications to intervene as respondents did not succeed on the grounds that the Tribunal as an international court could not entertain disputes between individuals.

The 79 applicants in *Campbell 2* challenged the compulsory acquisition of their respective farmland by the Zimbabwean authorities acting under section 16B of the Constitution of Zimbabwe as introduced by Amendment No. 17 of 2005.[10] The applicants contended that section 16B of the Constitution of Zimbabwe and the act of acquisition were unlawful and in violation of Zimbabwe's obligation under articles 4(c) and 6(1) of the SADC Treaty. The applicants argued that apart from the fact that the minister who authorised the acquisition 'failed to establish that he applied reasonable and objective criteria' in relation to the decision, section 16B of Zimbabwe's Constitution was racially discriminatory, denied them access to the courts and did not provide for payment of compensation in respect of the acquisition. Zimbabwe challenged the jurisdiction of the Tribunal to entertain the case, contending that in the absence of a SADC human rights catalogue, the Tribunal could not 'borrow standards from other Treaties as this would amount to legislating on behalf of SADC Member States'.[11] Alternatively, Zimbabwe argued that its land policy under the challenged constitutional provision was justified by virtue of the country's colonial history, was not discriminatory and was aimed at correcting historical inequalities.[12]

A number of reasons make the judgment in *Campbell 2* significant for human rights and the rule of law in Southern Africa. First, in establishing its competence to receive and determine the *Campbell* case, the Tribunal outlined the scope of its jurisdiction, linked it to human rights, set out the conditions for invoking that jurisdiction and staked its authority to draw inspiration from, and apply international law within the SADC framework. Second, the Tribunal used this judgment to develop an understanding of certain rights and their link to the rule of law. Third, and most importantly, this judgment marked the start of the Tribunal's attempt to 'constitutionalise' the SADC Treaty by using its provisions as a point of reference to review national constitutions, legislation, policies and actions for compliance with human rights standards. Affirming article 16 of the SADC Treaty as the fountain of its *de jure* authority, the

[10] See *Campbell 2*, at p 8.
[11] P 23, *Campbell 2*.
[12] See pp 14 – 16 of *Campbell 2*.

Tribunal reiterated that its functions were to ensure adherence to, and the proper interpretation of the Treaty and other legal instruments of SADC.[13]

Conscious of Zimbabwe's challenge to its competence over human rights cases, the Tribunal established that its function to interpret and apply the Treaty covered article 4(c) relating to the Member States' commitment to act in accordance with the principles of human rights, democracy and the rule of law. Relying on article 21(b) of its 2000 Protocol, the Tribunal claimed authority to fill the gap created by the absence of a human rights catalogue within the SADC framework. The Tribunal also affirmed its conferred mandate to have regard to 'applicable treaties, general principles and rules of international law' thus effectively asserting these as sources of law in the development of its jurisprudence.[14] Thus, the Tribunal took the view that it did not 'consider that there should first be a Protocol on human rights in order to give effect to the principles set out in the Treaty'.[15] Hence, the Tribunal came to the conclusion that it had 'jurisdiction in respect of any dispute concerning human rights, democracy and the rule of law',[16] thereby establishing itself as an international forum for human rights protection within the Southern Africa region.

Prior to asserting its competence to receive and determine human rights cases, the SADC Tribunal confirmed that the exhaustion of local remedies, as required under article 15 of the 2000 Protocol, was a condition for invoking its jurisdiction over human rights and rule of law cases under the SADC Community framework. Building on its ruling in *Campbell 1*, the Tribunal reiterated that the requirement to exhaust local remedies is a feature of human rights treaties and a recognised principle in international law. However, drawing inspiration from the African Commission on Human and Peoples Rights' (African Commission) interpretation of the African Charter on Human and Peoples' Rights (African Charter), the Tribunal stressed that the requirement was subject to exceptions in situations where remedies were either unavailable or

[13] See p 17 of *Campbell 2*.
[14] Even if a broader array of international law instruments, SADC law trumps these as far as the hierarchy of norms is concerned.
[15] p 24, *Campbell 2*.
[16] See p 25 of *Campbell 2*.

unduly prolonged.[17] Thus, even though the SADC Treaty and the Tribunal Protocol did not expressly mention the African Charter, the Tribunal made the Charter part of the SADC framework. Applying the facts before it, the Tribunal concluded that the ouster of the jurisdiction of national courts in Zimbabwe made the requirement to exhaust local remedies redundant.

In relation to its development of substantive human rights, the Tribunal took the view that access to justice formed an important component of the rule of law. In the words of the Tribunal, 'it is settled that the concept of the rule of law embraces at least two fundamental rights, namely the right of access to the courts and the right to a fair hearing'.[18] In the Tribunal's view, the combined effect of articles 4(c) and 6(1) of the SADC Treaty was to legally obligate SADC Member States to respect, protect and promote these two rights.[19] In order to substantiate its position, the Tribunal invoked the human rights jurisprudence of the European Court of Human Rights (ECtHR), the Inter-American Court of Human Rights (IACtHR) and the African Commission. Significantly, the Tribunal carefully picked international human rights supervisory mechanisms. Hence, for instance, drawing inspiration from the IACtHR's jurisprudence, the Tribunal had no qualms finding that the right of access to justice imposed a duty on the States to 'provide effective judicial remedies to those alleging human rights violation' or that 'the rule of law, representative democracy and personal liberty are essential for the protection of human rights'.[20] The Tribunal equally used the jurisprudence of national courts from its Member States for the purpose of building its jurisprudence. Accordingly, the Tribunal drew inspiration from the judgments of the Constitutional Court of South Africa. Perhaps more controversial, but in line with the approach common to Commonwealth countries, the Tribunal also relied on the decisions of English courts to strengthen its position that the right to fair hearing is a component of the rule of law.

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[17] P 21 of *Campbell 2*. In borrowing from the African Commission jurisprudence in relation to exhaustion of local remedies, the Tribunal subtly used the African Charter to define (and possibly expand the scope of) the exceptions to the rule under the SADC framework. Art 15(2) of the 2000 Protocol of the Tribunal requires exhaustion of local remedies unless the applicant 'is unable to proceed under the domestic jurisdiction' but does not indicate what should qualify as being unable to proceed.

[18] P 26 of *Campbell 2*.

[19] As above.

[20] See pp 29 & 30 of *Campbell 2*.

Ultimately, the Tribunal ruled that in the face of the ouster of the jurisdiction of the Zimbabwean courts regarding the acquisition decision of the minister, any action by the minister had to be invalid for failure to respect the rules of natural justice.[21] Thus, the Tribunal concluded that notwithstanding the claim that the right of access to court for the purpose of demanding compensation for acquisition remained under the national laws, there was a violation of the right of access to justice since the Supreme Court of Zimbabwe itself was unable to protect the jurisdiction of the courts to entertain challenges to the legality of acquisition.[22] Thus, the Tribunal affirmed that the right of access to justice was claimable under article 4(c) of the SADC Treaty and could be a basis for reviewing state action.

Concerning the applicants' claim of violation of their Treaty guaranteed protection from racial discrimination, the Tribunal first invoked a variety of United Nations (UN) and regional human rights instruments to assert that 'discrimination of whatever nature is outlawed or prohibited in international law'.[23] In invoking these instruments, the Tribunal first established that Zimbabwe had ratified the instruments so that they became relevant in the determination of the state's obligation even under the SADC framework. In effect, the Tribunal created regional consequences for the global human rights instruments ratified by Southern African states. After affirming that the totality of global and regional instruments obligated Zimbabwe to prohibit and outlaw discrimination, the Tribunal reinforced the obligation on SADC Member States under article 6(2) of the SADC Treaty to prohibit discrimination on the stated grounds including on grounds of race. However, pointing out the SADC Treaty does not define racial discrimination, the Tribunal had resort to UN Convention on the Elimination of All Forms of Racial Discrimination (CERD) as well as the General Comments of the UN Human Rights Committee and the Committee on Economic Social and Cultural rights in order to extract meaning for the prohibition of discrimination in article 6(2) of the SADC Treaty. This has the effect of linking the reference to human rights, democracy and the rule of law in article 4(c) of

[21]Pp 37 -38 of the judgment in *Campbell 2*.
[22] See pp 38 to 39 of *Campbell 2*.
[23] See pp 45 - 47 of *Campbell 2*. For this purpose, the Tribunal applied the Universal Declaration of Human Rights (UDHR), the International Covenant on Civil and Political Rights (ICCPR), the International Covenant on Economic, Social and Cultural Rights (ICESCR), the Convention on the Elimination of All Forms of Racial Discrimination (CERD) and the European Convention on Human Rights (ECHR) and the African Charter.

the SADC Treaty to global instruments, thereby affirming the universality of human rights. Critically, the Tribunal's approach allowed it to establish the difference between formal and substantive equality as well as direct and indirect discrimination, leading it to reach the conclusion that the nature of differentiation and the skewed impact of the challenged national laws and actions amounted to indirect discrimination against white farmers in Zimbabwe.[24] Hence, the Tribunal was able to find that Zimbabwe's constitutional Amendment 17 and its implementation violated Zimbabwe's obligation under article 6(2) of the SADC Treaty.

In relation to the claim for fair and adequate compensation in the event of lawful compulsory acquisition, the Tribunal first asserted that the applicants had a right to compensation under international law.[25] The Tribunal then reaffirmed the position of the Vienna Convention on the Law of Treaties that states cannot rely on national law, including national constitutions, to avoid obligations voluntarily accepted under international law. Thus, the Tribunal found that the applicants had been denied, and Zimbabwe was in violation of, their right to access justice, protection from racial discrimination and their right to fair compensation for compulsory acquisition of their land. In important ways, therefore, this case allowed the Tribunal to give content and meaning to the principles of respect for human rights, democracy and rule of law under the SADC Treaty, signifying that these were critical principles in the regional integration of Southern Africa under the SADC framework.

***Nixon Chirinda & Others v Mike Campbell (Pvt) Ltd & Others* (*Chirinda* case)[26]; *William Michael Campbell & Another v The Republic of Zimbabwe* (*Campbell 3* case)[27]; *Louis Karel Fick & Four Others v The Republic of Zimbabwe* (*Fick* case)[28]**

Three other relatively minor rulings were delivered by the SADC Tribunal in relation to the *Campbell* case, and are briefly considered here. In the *Chirinda* case, the Tribunal ruled on an application by certain non-state actors to intervene in the *Campbell* case against Zimbabwe. Citing the similarity of the *Chirinda* application with an earlier application in the case of *Albert*

[24] Generally see pp 51 – 53 of *Campbell 2*.
[25] P 56 of *Campbell 2*.
[26] SADC (T) Case No 09/08.
[27] Case No SADC (T) 03/2009.
[28] Case No SADC (T) 01/2010.

Fungai Mutize & Others v Campbell & Others,[29] the Tribunal ruled that article 15(1) of its 2000 Protocol, on which the application hinges, does not empower the Tribunal to adjudicate disputes between individuals. Concluding that the dispute of the *Chirinda* applicants was against the applicants in the *Campbell* case, the Tribunal declined to entertain the *Chirinda* case.[30] Apart from the fact that it set out the conditions for applying as interveners in a case before Tribunal, this ruling allowed the Tribunal to reaffirm that it is an international court before which at least one party has to be a state. The Tribunal equally showed that it will not allow interventions aimed solely at delaying proceedings in other cases.

In *Campbell 3*, the original two applicants in *Campbell 1* approached the Tribunal to ask for a declaration that Zimbabwe was in contempt of the ruling in which interim measures were ordered. In the build-up to the Tribunal's finding that Zimbabwe was in breach and contempt, the SADC Tribunal listed pieces of evidence that indicated a pattern of Zimbabwe's disregard for the Tribunal. First, the Tribunal noted that 'the Respondent has not taken part in the proceedings'.[31] The Tribunal further cited a letter from the Deputy Attorney General of Zimbabwe to a firm of legal practitioners in which the policy to ignore the Tribunal's ruling was conveyed. Next was a speech by the Deputy Chief Justice of Zimbabwe in which the Tribunal's jurisdiction and competence over the *Campbell* case was called into question. Last, the Tribunal cited President Mugabe's statements of disdain for the Tribunal and its decisions. Against the background of such weighty evidence, the Tribunal invoked article 32(5) of the 2000 Protocol which required the Tribunal to report its finding of violation to the SADC Summit.

In relation to human rights and the rule of law, the ruling in *Campbell 3* produced evidence that ought to raise the concern of SADC Member States in relation to Zimbabwe's disregard for the Tribunal. The conduct of Zimbabwe's national legal institutions such as the office of the Attorney General and especially the office of the Chief Justice (Deputy Chief Justice) in denigrating the Tribunal, setting the Zimbabwean national legal system and its institutions on a collision course with the Tribunal was particularly troubling in view of treaty provisions that

[29]SADC Case No 8/08.
[30] See p 4 of the *Chirinda* case.
[31] See p 2 of *Campbell 3*.

required the involvement of those institutions in the implementation of the Tribunal's decisions within Zimbabwe. Considering that article 5 of the SADC Treaty speaks to the idea of 'common political values, systems and other shared values' and the 'consolidation, defence and maintenance of democracy, peace, security and stability' as objectives of the Community; and that the general undertaking in article 6(1) of the Treaty provides that Member States are under an obligation to '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 (the) Treaty', Zimbabwe's conduct ought to attract the vigilant attention of SADC Member States as it implicates other Member States. Further, the state of affairs called into question the effectiveness of the SADC compliance and sanctions regime as well as the commitments of Southern African states to the SADC agenda.

The *Fick* case came after Zimbabwe's failure to comply with or implement any of the Tribunal's decisions in the previous *Campbell* cases.[32] Again invoking article 32 of its 2000 Protocol relating to enforcement and execution of its decisions, the Tribunal referred to 'abundant evidence … that the lives, liberty and property of all whom the decision meant to protect have been endangered'.[33] The Tribunal further indicated that it received a letter from the Zimbabwean Minister of Justice and Legal Affairs conveying Zimbabwe's resolution not to appear before the Tribunal, participate in any proceedings of the Tribunal or in any way react to processes of the Tribunal.[34] In furtherance of this resolution, the Tribunal observed that in the Zimbabwean domestic case of *Gramara (Pvt) Ltd & Another v The Government of the Republic of Zimbabwe*, the High Court of Zimbabwe has refused to play a role in enforcing the decisions of the Tribunal as envisaged in article 32 of the Tribunal's 2000 Protocol.[35] In other words, Zimbabwe had *de facto* withdrawn from the jurisdiction of the SADC Tribunal without any consequence whatsoever. An indication of the Tribunal's helplessness in the face of Zimbabwe's defiance was that the Tribunal could only resolve that it 'will again report this

[32] After its failure to comply with the interim orders of the Tribunal, Zimbabwe equally ignored the decision and orders in the substantive judgment even though it took part in the proceedings.
[33] See p 2 of the ruling in the *Fick* case.
[34] See p 3 of the ruling in the *Fick* case.
[35] As above.

finding to the Summit for its appropriate action'. Arguably, the *Fick* case confirmed that whereas the SADC Tribunal considered democracy, human rights and the rule of law as critical ingredients for effective regional integration, other organs and institutions of the SADC Community were not as convinced. Thus, at the very least, there was no consensus within the SADC Community on the centrality of human rights and the rule of law in the community agenda.

***Zimbabwe Human Rights NGO Forum v The Republic of Zimbabwe* (*NGO Forum* case) Case No SADC (T) 05/2008**

The *NGO Forum* case was a simple ruling in an application regarding the *locus standi* of the Zimbabwe NGO Forum as a party before the Tribunal. Ruling on the arguments by counsel, the Tribunal arguably introduced a victim's requirement as a condition for triggering its jurisdiction by finding that whereas the alleged victims of state violence could properly bring an action, the NGO Forum could at best only be an agent of the parties.[36] While this may appear as if the Tribunal had narrowed access, in reality it did nothing more than require that applications are made in the name of the actual victims and not in the name of organisations or individuals representing the victims or acting on their behalf.

***Luke Munyandu Tembani v The Republic of Zimbabwe* (*Tembani* case) Case No SADC (T) 07/2008**

The *Tembani* case, the second substantive case heard by the SADC Tribunal, also arose out of the agricultural land laws and policies of Zimbabwe. Having unsuccessfully challenged, at the domestic level, the constitutionality of section 38 of Zimbabwe's Agricultural Finance Corporation Act authorising the possession of land by certain loan-granting authorities, without prior recourse to the courts, the applicant challenged the conformity of that provision with the SADC Treaty.[37] Before the Tribunal, the applicant contended that the possession and auction by the Agricultural Bank of Zimbabwe (ABZ) of his farm in the Nyazura District of Zimbabwe without recourse to the courts violated Zimbabwe's obligation under articles 4(c) and 6(1) of

[36] See p 2 of the ruling in the *NGO Forum* case.
[37] See p 2 of the judgment in the *Tembani* case.

the SADC Treaty on grounds of denial of his right of access to justice requiring the application of the rules of natural justice. In essence, as in the *Campbell* case, Tembani invited the Tribunal to subject domestic legal provisions of a Member State to 'constitutional review' at the regional level. Although it failed to file its defence within both the stipulated and extended time, Zimbabwe filed supplementary affidavit to adduce evidence and challenge the Tribunal's jurisdiction to hear the case.[38]

Agreeing with the applicant's argument that Zimbabwe's habit of ignoring the rules was disrespectful, the Tribunal rejected Zimbabwe's supplementary affidavit but *suo moto* proceeded to determine whether the applicant had met the preconditions for submission of cases. In relation to the requirement to exhaust local remedies, the Tribunal recalled its finding in the *Campbell* case regarding the ouster of the jurisdiction of Zimbabwean courts in cases involving the acquisition of agricultural land.[39] Based on the facts available to it, the Tribunal concluded on this point that 'it would be meaningless … to insist that the applicant should have first exhausted his domestic remedies'.[40] Thus, the Tribunal demonstrated that it had a flexible approach to the exhaustion of local remedies rule.

With regards to the substantive right of access to the courts, the Tribunal considered three judgments of the Supreme Court of Zimbabwe upholding the constitutionality of the impugned section of the national law and came to the conclusion that the seizure and sale of the applicant's land by the ABZ under the authority of Zimbabwean law contravened the SADC Treaty.[41] The Tribunal emphasised the importance of allowing access to a court of law even in situations where an individual appears to have agreed to loan terms. To justify its decision, the Tribunal again referred to the jurisprudence of the South African Constitutional Court, thereby demonstrating its determination to build jurisprudence that is partly founded on accepted judicial principles of SADC Member States. Concerning the alleged breach of the rules of natural justice, the Tribunal ruled that the denial of a right to be heard by an independent and impartial court before the seizure and sale of the farm by ABZ meant that the Bank acted as a judge in its

[38] See p 8 of the judgment in the *Tembani i*case.
[39] See p 10 of the *Tembani* case.
[40] P 12 of the judgment in the *Tembani* case.
[41] See p 15 of the judgment in the *Tembani* case.

own cause. Hence, the Tribunal found the actions of ABZ and the relevant Zimbabwean constitutional and legislative provisions to be in violation of articles 4(c) and 6(1) of the SADC Treaty.[42] While it is not much different from the *Campbell* case in the sense that it saw the Tribunal evaluating national constitutional and legislative provisions against the yardstick of the SADC Treaty provisions, this case is significant in the sense that the offending actions were those of a state agency rather than state officials.

***United Peoples Party of Zimbabwe v SADC & Five Others* (*UPP* case), Case no. SADC (T) 12/2008**

The *UPP* case arose out of SADC's decision to intervene in the political crisis that rocked Zimbabwe in the aftermath of disputed elections. The applicant, a political party in Zimbabwe, contended that it was excluded by the SADC appointed mediator in the power sharing agreement reached in the aftermath of the crisis. The applicant argued that its exclusion was contrary to the SADC mandate. Although five of the respondents were non-state actors, the Tribunal claimed competence over the dispute on the grounds that Zimbabwe[43] had been joined as a party, in spite of Zimbabwe's protestations that it had no interest in the matter. Ignoring SADC's objection that the applicant had failed to exhaust local remedies, the Tribunal considered the main claim and concluded that in the circumstances of the facts, the exclusion of the applicant was not unlawful since the applicant had not won any seats in the national elections.[44] Although this case did not invoke any legal instrument of the SADC Community, its relevance lies in the Tribunal's recognition of the link between national political stability and the advancement of regional integration. However, in terms of jurisprudential value, the case does not add anything significant to the body of the Tribunal's jurisprudence.

***Gondo v Zimbabwe* (*Gondo* case), Case no. SADCT 05/2008**

In the *Gondo* case, nine applicants who had secured favourable judgments from various national courts in Zimbabwe on grounds that they (applicants) were victims of violence inflicted

[42] See pp 19 – 20 of the judgment in the *Tembani* case.
[43] See pp 5 – 6 of the *UPP* case. Apart from SADC and Zimbabwe, the other four respondents are non-state actors and they declined to participate in the proceedings as they were not even represented.
[44] See p 10 of the *UPP* case.

by Zimbabwean security forces approached the SADC Tribunal to challenge Zimbabwe's refusal to implement the various judgments of the national courts. Before the SADC Tribunal, the applicants argued that Zimbabwe's failure to pay monetary awards and associated costs ordered by the various Zimbabwean courts amounted to a violation of articles 4(c) and 6(1) of the SADC Treaty to the extent that it was a failure to ensure effective remedies, to act in accordance with the principles of human rights and to refrain from jeopardizing Treaty based human rights principles. In specific terms, the applicants sought declarations that Zimbabwe's failure to comply with its own courts was a breach of the SADC Treaty and that section 5(2) of Zimbabwe's State Liability Act was incompatible with its Treaty obligations.[45]

Reiterating that articles 4(c) and 6(1) of the SADC Treaty imposed an obligation on all SADC Member States to respect, promote and protect human rights, democracy and good governance, the SADC Tribunal underscored four fundamental components of the rule of law. It stressed that the right to an effective remedy, the right of access to an independent and impartial court, the right to a fair hearing before deprivation of a right, interest or legitmate expectation and the right to equality before the law and equal protection of law are all embraced within the rule of law. To flesh out its position on the right to an effective remedy and associated rights, the SADC Tribunal referred to the International Covenant on Civil and Political Rights, the Vienna Declaration and Programme of Action, the European Convention on Human Rights, the American Convention on Human Rights and the African Charter. Consequently, the SADC Tribunal also relied on the jurisprudence of the three main regional human rights systems to elaborate the nature of state obligation envisaged in articles 4(c) and 6(1) of the SADC Treaty. Significantly, the SADC Tribunal concluded that Zimbabwe's refusal to implement the orders of its own domestic courts was a violation of the SADC Treaty. Partly relying on the jurisprudence of the South African Constitutional Court, the SADC Tribunal held further that section 5(2) of Zimbabwe's State Liability Act was a breach of the rights to effective remedy, access to an independent court and to fair hearing as well as the rights to equaility and

[45] Sec 5(2) of the State Liability Act, Cap 8:14 immunises Zimbabwe and its properties from enforcement of judgment debts.

equal protection of law. Taking into account the reality of Zimbabwe's inflation, the Tribunal also ordered for a revalorization of the original debt ordered in favour of the applicants.

The *Gondo* case is particularly significant as it remained one of the most detailed substantive judgments of the SADC Tribunal on the scope of human rights obligations under the SADC Treaty. The case also provided a clear example of the Tribunal's willingness to look beyond the narrow confines of the SADC legal framework for the elaboration of rights.

***Swissbourgh Diamond Mines (Pvt) Ltd & Eight Others v The Kingdom of Lesotho (Swissbourgh* case) Case no. SADC (T) 04/2009**

The *Swissbourgh* case was not concluded before the Tribunal was effectively suspended. In its ruling on Lesotho's application for extension of time to file its defence to the claim, the Tribunal established that time allowed by the rules for action by parties could only be extended for good cause. Accordingly, the Tribunal laid down the conditions on which it would allow an application for extension.[46] Although it demonstrated its determination to ensure equality between parties, including state parties in cases before it, the Tribunal also indicated its willingness to prioritise the interest of justice in its decision-making. According to the Tribunal, 'we have had to consider the manner in which the respondent has approached the whole matter: it has shown the desire to be heard and the wish to comply with the prescribed time limits, it has promptly taken steps whenever it appeared that it would not be possible to do so'.[47] In essence, this case was an indication that there were SADC Member States that had some respect for the Tribunal.

2.2 Regional integration and trade related cases

Apart from the cases that raised human rights and rule of law cases, the Tribunal heard other cases that touched directly or indirectly on regional integration in the sense that they raised questions of an economic nature. The cases in this category are *Bach's Transport (Pty) Ltd v The Democratic Republic of Congo* and *The United Republic of Tanzania v Cimexpan (Mauritius) Ltd & Another*. These cases relate to commitment in the SADC Treaty to 'encourage the peoples of

[46] See pp 3 – 4 of the *Swissbourgh* case.
[47] See p 6 of the *Swissbourgh* case.

the Region and their institutions to take initiatives to develop economic, social and cultural ties across the Region and to participate fully in the implementation of the programmes and projects of SADC'.[48]

***Bach's Transport (Pty) Ltd v The Democratic Republic of Congo* (*Bach* case), Case n SADC (T) 14/2008**

In the *Bach* case, the applicant brought an action against the Democratic Republic of Congo (DRC) complaining that officials of the DRC had unlawfully impounded his trailer and truck. Accordingly, the applicant sought damages, cost of the action and interest against the DRC. Upon the failure of the DRC to file a defence despite evidence of service of processes on it, the applicant applied for default judgment in accordance with the rules.[49] At the hearing of the case, the DRC through its agent challenged the jurisdiction of the court on the grounds that the applicant is not a legal person and had not exhausted local remedies in the DRC. The DRC agent equally challenged the amount claimed by the applicant as the value of the seized items.

After disposing of the challenge to the legal standing of the applicant based on the fact that legal persons could access the Tribunal against a Member State, the Tribunal considered the facts adduced by the applicant and ruled that an attempt had been made to exhaust local remedies. In its words, 'there is evidence supported by documents that the Applicant tried to utilise the legal system of the Respondent to have its truck and trailer released but was unsuccessful' hence 'it was clearly unable to proceed under the domestic legal system of the Respondent'. In this way, the Tribunal again reaffirmed its flexible approach to the requirement to exhaust local remedies. Having overruled the respondent's preliminary objections, in the absence of a defence from the DRC, the Tribunal gave judgment in favour of the applicant. It being a default judgment, the Tribunal had no opportunity to make any significant pronouncements regarding the scope SADC integration agenda.

[48] See art 5(2)(b) of the SADC Treaty (as amended).
[49] P 2 of the judgment in the *Bach* case.

***The United Republic of Tanzania v Cimexpan (Mauritius) Ltd & Others* (*Cimexpan* case), Case no SADC (T) 01/2009**

Following the filing of a case against it by Cimexpan against the deportation of the third respondent, Tanzania (as applicant) raised preliminary objections to the action, which led to the Tribunal's ruling in the matter. Cimexpan had opened shop in Zanzibar in furtherance of a memorandum of understanding between the governments of Mauritius and Zanzibar. An official of Cimexpan alleged that he was detained and subjected to ill treatment before he was finally deported from Zanzibar. He alleged that after the cancellation of the contract by the government of Zanzibar, he was deported while his family and the assets of his company remained in Zanzibar. For its part, Tanzania contended that the Tribunal lacked jurisdiction since the respondents had not exhausted local remedies.[50] Tanzania argued further that the facts did not disclose any 'international delinquency' to warrant intervention by the Tribunal.[51]

First, establishing that the case fell within its personal jurisdiction, the Tribunal reiterated that exhaustion of local remedies was a prerequisite for access against a Member State.[52] Holding that the respondents had not adduced evidence to support their claim that local remedies had been exhausted, the Tribunal concluded that the matter was inadmissible. Significantly, the Tribunal ruled that the absence of the third respondent from Tanzanian territory by reason of his deportation was insufficient excuse for not attempting to use the legal institutions in that state.[53] Regarding Tanzania's argument that the Tribunal lacked jurisdiction to rescind the deportation order on the grounds that international law recognised the right of states to dictate the admission of aliens on their territories, the Tribunal made references to texts and UN instruments in order to determine applicable principles. Finding that evidence had not been adduced to show that the third respondent was subjected to torture prior to his deportation, the Tribunal ruled that 'the right to admit or expel an alien remains squarely within the

[50] See p 3 of the *Cimexpan* ruling.
[51] As above.
[52] P 5 of the *Cimexpan* ruling.
[53] See p 6 of the *Cimexpan* ruling.

preserve of the sovereignty of the applicant subject to the observance of minimum human rights standards'.[54]

This case raises a number of important human rights issues. However, it equally raises question regarding the scope of regional integration in Southern Africa. While other regional economic communities have tried to advance integration by addressing free movement of persons, goods and services, the decision in this case demonstrates that those are currently not major concerns within the SADC region.

2.3 Labour disputes involving SADC staff

A third set of cases addressed by the SADC Tribunal are labour cases arising from disputes between prospective and actual members of staff of SADC institutions. The cases in this category are *Ernest Francis Mtingwi v SADC Secretariat*, *Clement Kanyama v SADC Secretariat*, *Angelo Mondlane v SADC Secretariat* and *Bookie Monica Kethusegile-Juru v The SADC Parliamentary Forum*. Although they generally touch on issues of fair hearing, these cases are strictly speaking labour matters which are relevant for the functioning of the respective community institutions but have few or no wider consequences for integration or for democracy, human rights and the rule of law in Southern Africa.

The demise of the SADC Tribunal has meant that labour disputes involving SADC staff have been heard by the Botswana High Court. A SADC Administrative Tribunal to deal with these cases is in the process of being established.[55]

[54] See p 8 of the *Cimexpan* ruling.

[55]The SADC Summit adopted a resolution on the SADC Administrative Tribunal in August 2015. Attempts by the consultant to obtain the resolution from the SADC Secretariat have been unsuccessful.

3. The establishment, suspension and re-establishment of the SADC Tribunal

This section briefly sets out the background to the establishment of the SADC Tribunal. It then analyses the legality of the suspension of the Tribunal and its re-establishment under the 2014 protocol. In the last part, an assessment of the prospects and challenges that lie ahead is made.

3.1 The establishment of the SADC Tribunal

The SADC Tribunal was included as one of the main institutions of SADC in the 1992 Treaty. The other institutions are the Summit of Heads of State or Government (the Summit); the Council of Ministers (the Council); the Integrated Committee of Ministers (now Sectoral and Cluster Ministerial Committees (SCMCs)); the Standing Committee of Officials (SCO); and the Secretariat. With the exception of the SADC Tribunal, all institutions were envisaged to come into effect immediately after the adoption of the 1992 Treaty. As for the Tribunal, article 16(2) of the Treaty provides that '[t]he composition, powers, functions, procedures and other related matters governing the Tribunal shall be prescribed in a protocol adopted by the Summit'.

SADC functioned without a tribunal for more than a decade. A draft protocol on the Tribunal was presented to the Council in 1998 but referred back for national consultations. The Summit finally adopted the Protocol on Tribunal and the Rules of Procedure Thereof (the Tribunal Protocol or 2000 Protocol) on 7 August 2000. Article 38 of the Protocol provided that it would enter into force after ratification by two-thirds of Member States.

There apparently was no enthusiasm for the ratification of the 2000 Protocol by the Member States since, by the time of the 2001 Treaty amendment, discussed below, only one country – Botswana, had ratified the Protocol.[56] With the coming into effect of the 2001 Treaty amendment, the need for ratification fell away. This is so because an amended article 16(2) now made the Tribunal an 'integral part' of the Treaty, 'notwithstanding the provisions of article 22' of the Treaty (which makes all treaties subject to signature and ratification by Member States).[57] The Summit subsequently amended the Tribunal Protocol on 3 October 2002

[56] Botswana signed and ratified the Tribunal Protocol on 14 March 2001. See http://www.tralac.org/wp-content/blogs.dir/12/files/2011/uploads/20060621_status_SADC_protocols.pdf (accessed 9 September 2015)..

[57] Article 16(2) of the SADC Treaty reads as follows:

to align it with the Treaty, providing an amendment procedure for the Protocol that, as will be discussed further below, was not used in adopting the 2014 Protocol.[58]

The inauguration of the Tribunal and the swearing in of the first members (judges) took place in 2005. The registry was set up in 2006 and the operations effectively began in 2007.[59] Practically speaking, therefore, the Tribunal started operating only some 15 years after it was first provided for in the SADC Treaty.

3.2 Jurisdictional powers under the 2000 Protocol and applicable law

The 2000 Tribunal Protocol covers institutional and administrative matters,[60] jurisdiction, and procedural matters. The Tribunal's jurisdiction has a wide substantive and personal jurisdiction. These are dealt with in articles 14 and 15, which set out, respectively, the 'basis' and 'scope' of the Tribunal's jurisdiction.

Article 14 provides that the Tribunal has jurisdiction over all disputes referred to it in terms of the Treaty and the Tribunal Protocol relating to the interpretation and application of the Treaty; the interpretation, application and validity of the protocols, all subsidiary instruments adopted within the framework of the Community;[61] acts of the institutions of the Community; and all

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The composition, powers, functions, procedures and other related matters governing the Tribunal shall be prescribed in a Protocol which shall, notwithstanding the provisions of article 22 of this Treaty, form an integral part of this Treaty.

[58]Article 37 of the 2000 Protocol as amended in 2002 to read as follows:

> Amendment
>
> 1 Any Member State may propose an amendment to this Protocol.
>
> 2 Proposals for amendment of this Protocol may be made to the Executive Secretary who shall duly notify all Member States of the proposed amendments at least thirty (30) days in advance of consideration of the amendment by Member States but such period of notice may be waived by Member States.
>
> 3 Amendments to this Protocol shall be adopted by a decision of three quarters of all the Members of the Summit and shall become effective within thirty (30 days) after such adoption.

See Protocol on the Tribunal and Rules of Procedure thereof, http://www.kas.de/upload/auslandshomepages/namibia/SADCLJ/11-1/SADCLJ-2011_appendix.pdf (accessed 2 October 2015.

[59] See ST Ebobrah 'Litigating human rights before sub-regional courts in Africa: Prospects and challenges (2009) 17 *African Journal of International and Comparative Law* 83; L Nathan *Community of insecurity: SADC's struggle for peace and security in Southern Africa* (2012) 124, 134.

[60] These include, among other things, constitution and composition, nomination, selection and appointment of members of the Tribunal, resignation and termination of office of the members and their terms and conditions of service.

[61] It should be noted that in terms of the Agreement Amending the Protocol of the Tribunal adopted at Lusaka, Zambia on 17 August 2007, the Tribunal's jurisdiction was 'extended' to include determination of appeals arising from the decisions of panels constituted in terms of the Protocol on Trade.

matters specifically provided for in any other agreements that Member States may conclude among themselves or within the Community and which confer jurisdiction on the Tribunal.

The personal jurisdiction of the Tribunal includes disputes between Member States, and between natural or legal persons and Member States. The Tribunal's jurisdiction is compulsory in that where a dispute is referred to the Tribunal by any party, the consent of other party to the dispute is not required.[62] It should be noted that the SADC Treaty itself, through article 16(4), gives two of the SADC institutions – the Summit and the Council -- the right to approach the Tribunal for advisory opinions.

Additional matters regarding the Tribunal's jurisdictional competence and some of the administrative matters are dealt with in articles 16 to 22. These include such matters as preliminary rulings; disputes between the Community and Member States; disputes between natural or legal persons and the Community; and disputes between the Community and its members of staff related to the latter's conditions of employment; advisory opinions; applicable law; and the Tribunal working languages.

With regard to applicable law, the Tribunal is enjoined to apply the SADC Treaty; the SADC Tribunal Protocol and other 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.[63] Over and above these specifically spelt out sources of SADC law, the Tribunal has the power 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 laws of Member States.'[64] Indeed, this power gives the Tribunal enough discretion to craft a far-reaching jurisprudence in a wide range of areas of law.

[62] Article 15(3) of the SADC Tribunal Protocol.
[63] Article 21(a) of the SADC Tribunal Protocol.
[64] Article 21(b) of the SADC Tribunal Protocol.

3.3 The suspension of the Tribunal

3.3.1 The non-election of members of the Tribunal, the review and the draft 2012 Protocol

We have already set out in section 2, above, the limited but diverse jurisprudence of the Tribunal including the *Campbell* decisions. No action was taken against Zimbabwe by the Summit when the Tribunal referred its non-compliance to it. At that point the government of Zimbabwe had already started challenging the legality of the Tribunal. Its main line of reasoning was that the Tribunal was not lawfully brought into existence owing to the non-ratification of the Tribunal Protocol by the requisite number of Member States. This argument by Zimbabwe has roundly been dismissed by scholars and even the High Court of Zimbabwe, the consensus being that the procedure followed in turning the Tribunal into an integral part of the SADC Treaty was in accordance with international law.[65] Over and above this, it has also been argued that Zimbabwe was part of the processes that gave rise to the Tribunal's legal status and that it even actively participated in the actual operationalisation of the Tribunal.[66]

The other argument that was raised by Zimbabwe was that the Tribunal did not have jurisdiction to entertain human rights matters. Again, this argument has also been demonstrated to be unsound especially in light of the fact that the SADC Treaty does not proscribe human rights jurisdiction and also since the jurisdictional powers of the Tribunal and the power given to it to develop its jurisprudence are broad enough to support human rights jurisdiction.[67] Zimbabwe mounted a considerable diplomatic onslaught in the region, with a view to getting other SADC leaders to reign in the Tribunal.[68] Probably as a direct result of this diplomatic lobbying, Zimbabwe was not sanctioned by the Summit for its failure to abide by the

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[65] L Bartels 'Review of the role, responsibilities and terms of reference of the SADC Tribunal', 6 March 2011; *Gramara (Private) Limited and Another v the Republic of Zimbabwe* HC 5483/2009.

[66] E de Wet 'The rise and fall of the Tribunal of the Southern African Development Community: Implications for dispute settlement in Southern Africa' (2013) 28 # 1*ICSID* Review 54-56; L Nathan 'Solidarity triumphs over democracy –The dissolution of the SADC Tribunal' (2011) 57 *Development Dialogue* 127-128.

[67] The position is very much different from the one obtaining in the EAC. In the EAC,article 27(2) of the EAC Treaty mentions human rights as one of the areas over which the EACJ would have jurisdiction in the future, if and when a Protocol to expand the mandate of the Court is be adopted.

[68] F Cowell 'The death of the Southern African Development Community's human rights jurisdiction' (2013) *Human Rights Law Review* 9.

decision of the Tribunal, but was instead rewarded for its intransigence as the Summit suspended the Tribunal in August 2010.

The only mention of the Tribunal in the August 2010 Summit communiqué is that 'Summit decided that a review of the role functions and terms of reference of the SADC Tribunal should be undertaken and concluded within six months'.[69] However, the Summit went beyond requesting the Secretariat to commission such a study by deciding not to reappoint the judges whose term of office would expire in August 2010 for another five years pending the review report but that the Members of the Tribunal would remain in office pending the review. The Summit further decided that the Tribunal should not entertain new cases until such time that an extra-ordinary meeting of the Summit would have decided on the legal status and roles and responsibilities of the Tribunal.[70] The decision not to renew the terms of the Tribunal members whose terms came to an end in August 2010 or elect new members was not included in the communiqué. This decision is only clear from the Summit Record which remains unpublished to date.

A report of the Ministers of Justice/Attorneys-General submitted to the 2010 Summit noted 'with regard to the legal issues on Zimbabwe' that the 'matter would … benefit from a comprehensive review that would take into account both its legal and political dimensions'.[71] In its decision to undertake such a study the Summit noted that the members of the Tribunal should be consulted.

Following the decision of the August 2010 Summit, the SADC Secretariat in September 2010 invited bids to undertake the expert review of the role, responsibilities and terms of reference of the SADC Tribunal. The World Trade Institute (WTI) was contracted to complete the study which was undertaken by Dr Lorand Bartels of the University of Cambridge. The initial report was presented to the Standing Committee of Officials and a revised version to the Committee of Ministers of Justice/Attorneys–General in March 2011. The report concluded that the human

[69] Communique by the Southern African Development Community Heads of State, on the 30th Jubilee SADC Summit, 19 August 2010, para 32.

[70] See paragraphs 9.3-9.5 of the minutes of Summit meeting of 16-17 August 2010, Windhoek, Namibia. The minutes are available in the SADC library, Gaborone, Botswana (accessed 10 March 2014, copy on file with authors).

[71] Summit Record p 32.

rights jurisdiction of the Tribunal had a clear legal basis in the SADC Treaty and that the suspension of the SADC Tribunal was a violation by the SADC Member States of their obligations under international law. The report made recommendations for the strengthening of the SADC Tribunal including the creation of an appeals chamber.

In May 2011, the Summit directed Ministers of Justice/Attorneys General to 'initiate the process aimed at amending the relevant SADC legal instruments and submit a progress report to the Summit in August 2011 and a final report to Summit in August 2012.'[72] The Summit further decided not to appoint any members of the Tribunal and 'reiterated the moratorium on receiving any new cases or hearings'.[73] By the time of the extra-ordinary Summit in 2011, the Tribunal was effectively dead. The four members of the Tribunal whose terms were not renewed reacted angrily to the news which was communicated to them through the communiqué of the Summit.[74]

The Committee of Ministers of Justice/Attorneys-General which was set up to review the role, responsibilities and terms of reference of the Tribunal, did its work as mandated and produced a draft protocol for consideration by the 2012 Summit.[75] The draft protocol sought to restrict individual access to the Tribunal by limiting it to matters pertaining to 'Protocols concluded by Member States'. It also sought to deprive the Tribunal of an inherent human rights jurisdiction, with jurisdiction over human rights to be provided in a separate protocol.[76] Another noteworthy proposal was that the Tribunal should have an appeals chamber.[77] The draft protocol provided that it would enter into force 'on the date of its adoption by a decision of

[72] Communique extraordinary summit heads of state and government of the Southern Africa Development Community, Windhoek, Republic of Namibia, 20 May 2011, para 7, http://www.swradioafrica.com/Documents/SADCSummit240511.pdf

[73] Para 8.

[74] 'Three illegal and ultra vires decisions', http://www.politicsweb.co.za/documents/three-illegal-and-ultra-vires-decisions

[75] Draft Protocol on Tribunal in the Southern African Development Community 2000 as amended, SADC/MJ/2/2012/4, 19 June 2012.

[76] Article 37.

[77] Article 34.

three-quarters of all the Members of the Summit'.[78] This was in line with the revisions of the amendment procedure of the 2000 Protocol adopted in 2002.

On transitional matters and status of jurisprudence developed by the 'old' Tribunal, article 58 of the draft protocol provided that pending cases should be heard in terms of the 2000 Tribunal Protocol and that '[a]ll actions, decisions, judgments and other administrative acts undertaken pursuant to the 2000 Protocol … shall remain valid and in force.' Notwithstanding these far-reaching proposals that sought to curtail access to and limit the jurisdiction of the Tribunal, the draft Protocol did not impress the Summit which instead directed, in August 2012, that a Protocol covering only disputes between Member States should be negotiated.[79]

3.3.2 Article 23 of the SADC Treaty and the lack of consultation

The review process has been condemned for lack of inclusivity and transparency, with public opinion being disregarded.[80] Article 23(1) of the Treaty provides that '[i]n pursuance of the objectives of this Treaty, SADC shall seek to involve fully, the peoples of the Region and non-governmental organisations in the process of regional integration'.

The suspension of the Tribunal, an integral part of the SADC institutional architecture and the only judicial organ of the organisation, was without doubt an important decision/action in relation to the broader process of regional integration. The process failed to fully involve SADC citizens and NGOs, which amounts to a violation of article 23.

In Law Society of South Africa v The President of the Republic of South Africa and two others, a matter pending in the High Court of South Africa,[81] the applicant avers in paragraph 42:

[78] Article 60.

[79] Paragraph 24 of the Maputo Communique.

[80] See G Erasmus ' The new Protocol for the SADC Tribunal: Jurisdictional changes and implications for SADC community law' *tralac Working Paper No. US15W01/2015* pages 2-3 available at http://www.tralac.org/images/docs/6900/us15wp012015-erasmus-new-protocol-sadc-tribunal-20150123-fin.pdf (accessed 23 September 2015).

[81] Case no. 20392/15. In this case, the Law Society of South Africa is seeking an order declaring that the participation by the President of South Africa in the suspension of the SADC Tribunal and his signing of the 2014 Protocol were unconstitutional.

> All deliberations regarding the review of the Tribunal's mandate were conducted solely by the Heads of State and Governments (sic) of the SADC Member States, SADC organs and SADC officials, to the exclusion of the citizens within SADC.

This averment is not controverted by the respondents' answering affidavit. It has also been established that the SADC Secretariat itself did not initiate any consultation. Indeed it would appear that the SADC Secretariat has always treated the issue of the Tribunal as a high level political issue, to be dealt with exclusively by the relevant institutions of SADC.[82] While consultation was not initiated by the Secretariat, civil society organisations such as the SADC Lawyers Association on several occasions attempted to lobby the Secretariat and member states.[83]

It should also be noted that in preparing the report WTI reached out to states, members of the Tribunal and other key stakeholders. WTI received input from four Southern African NGOs and also participated in roundtable discussions organized by SADCLA and ICJ which were also attended by members of the SADC Secretariat.[84] However, very few of the recommendations in the WTI report were included in the 2012 draft protocol and even less in the 2014 Protocol, discussed further below.

The provisions on the participation of civil society in the Treaty establishing the EAC are similar to those in the SADC Treaty. Article 7(1)(a) makes one of the principles of the EAC 'people-centered and market-driven co-operation'. Also, the preamble of the EAC Treaty speaks to the need for a strong participation by the private sector and civil society in the EAC integration scheme.[85]

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[82] The authors interviewed a former senior official in SADC who indicated that civil society was not involved in the process. He however indicated that on other matters there is usually interface between SADC and CSOs in the region as represented by the Gaborone based SADC Council of NGOs. He indicated that this organisation normally has access to the Summit agenda and it holds its meetings (where the Secretariat is invited) prior to the Summit and a summary of its resolutions are usually tabled before the Summit.

[83] Information provided by the Executive Secretary of SADCLA.

[84] Email from Lorand Bartels.

[85] See the fourth and 11th recitals.

It was on the strength of the above provisions of the EAC Treaty that the EACJ held, in the case of *East African Law Society & 3 others v Attorney General of the Republic of Kenya & 4 Others*,[86] that failure to undertake wide consultations with the people before amendments were effected infringed the EAC Treaty, notwithstanding the fact that the EAC Treaty amendment procedure set out in article 150 does not specifically prescribe consultations with the people.[87] The finding that there was no consultation did not come about after factual contestation. The conclusion was easily arrived at because the undue haste with which the amendments were effected left no doubt in anyone's mind that there had not been inadequate consultation.

However, in the absence of a clear and detailed rules-based framework of participation provided for in the treaties or other binding legal instruments, the form and extent of consultation will always remain subject to both legal and factual contestation. With regard to SADC, the situation is even worse, since, as intimated above and discussed in detail below, the current judicial void in SADC and lack of access to the future Tribunal (assuming that it will eventually materialise) mean that citizens and civil society in SADC lack a forum in which to either challenge lack of participation in the SADC processes or to challenge decisions and acts or omissions of the institutions of SADC or Member States based on alleged violations of the SADC Treaty.[88]

Consultation with SADC citizens and other stakeholders should not be viewed merely as a right. It is a critical process since it is linked to the issue of transparency, something that is apparently not highly regarded in SADC: During the early 'negotiations' over the future of the SADC

[86]Reference 3 of 2007, decided on 1 September 2008.

[87] With regard to EAC Treaty amendment, the EACJ also made reference to the EAC Partner States' previous practice of consultation as evidence of their agreement on the interpretation of the EAC Treaty provisions on the role of the EAC citizen in the integration process. The EACJ made reference to article 31(3) (b) of the Vienna Convention on the Law of Treaties (signed 23 May 1969 and effective from 27 January 1980) which provides that any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation shall be taken into account. For the court's discussion of the treaty amendment process that was followed and the court's conclusion, see paragraphs 32-70 of the decision.

[88] In the *East African Law Society* case, the EACJ linked the right of citizen participation in EAC affairs to the right of access to the EACJ. In the words of the court, per paragraph 63 of the decision: 'As we observed earlier in this judgment, under Article 7 the people's participation in cooperation activities set out in, and envisaged under the Treaty, is ranked high among the operational principles of the Community. The best illustration in the text of the Treaty is Article 30 where specifically, every resident of a Partner State is empowered to access this Court for the purpose of participating in ensuring compliance with the Treaty.'

Tribunal it is reported that when the then Executive Secretary of SADC, Dr Tomaz Salomão, was asked whether the reports would be made public, he responded that 'neither the media nor SADC citizens needed to know.'[89]

3.3.3 Legal challenges to the suspension of the Tribunal

In July 2011, the Member States of SADC, the SADC Summit and the SADC Council of Ministers were challenged on the legality of the suspension of the Tribunal before the African Commission. The Commission refused to entertain the complaint against the SADC institutions as it reasoned that it had no jurisdiction over international organisations. However, it proceeded with the case against the Member States, only a few of which participated in the proceedings. The Commission delivered its decision effectively dismissing the challenge in November 2013.[90]

The African Commission reasoned that the right of access to the courts as provided for in article 7(1)(a) of the African Charter, which right the applicant alleged was violated by the suspension of the Tribunal, only gives the right of individuals to access courts at the national level within the domestic legal systems of State Parties to the African Charter (as opposed to intergovernmental or supranational judicial organs).[91] The African Commission made a similar finding with regard to article 26 of the African Charter which imposes on AU Member States an obligation to ensure the independence of the courts.[92] The African Commission held that it has no authority to supervise the application and implementation of other international treaties such as the SADC Treaty.[93]

It may be argued that this line of reasoning is in line with the original context in which the Charter was adopted – a context where sub-regional and continental courts did not exist. Using

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[89] See H Melber, 'Promoting the rule of law: Challenges for South Africa's policy' Open Society Foundation for South Africa SAFPI Commentary No. 5, 13 August 2012. See also EN Tjønneland 'Making SADC work? Revisiting institutional reform' in Hansohm *et al* (eds) (2005) 5 *Monitoring regional integration in Southern Africa yearbook* 182. One of the recommendations made by Tjønneland (well before the Tribunal debacle) is that '…SADC has to change its secretive and bureaucratic mode of operation and become more transparent.'

[90] Communication 409/12, *Tembani and Another v Angola and 13 others*, decided at the 54th ordinary session of the African Commission on Human and Peoples' Rights, 22 October to 5 November 2013 (*SADC Tribunal* case).

[91] Paragraph 138 of the finding.

[92] Paragraphs 143-145 of the finding.

[93] Paragraph 131 of the decision.

this as starting point, the question is whether the African Charter can be read progressively to the extent that articles 7 and 26 should now be understood as including a right of access to justice before an international court. One approach would be to be guided by subsequent legal and institutional developments roping in African sub regional economic communities as building blocks of the African Union and the African Economic Community. Arguably, these developments imply that the right of access to courts and their independence are, within the context of the continent wide legal system, as alive at the sub regional levels as they are at the national level,[94] and are thus also deserving of protection under the Charter. On the other hand it may be argued that the African Commission is not in a position to realistically compel states to maintain and fund an international court such as the SADC Tribunal.

Another attempt at rescuing the SADC Tribunal through litigation was made by the Southern African Litigation Centre and the Pan African Lawyers Union who, in November 2012, filed a request for an advisory opinion at the African Court. However, the Court declined the request in March 2013 as it related 'to a matter pending before the African Commission.'[95] Now that the matter is no longer pending before the African Commission it would be possible for civil society to resubmit the request for an advisory opinion to the Court. A factor to consider, though, is that the Court has not yet determined whether NGOs have standing to request advisory opinions from the Court.

Litigation related to the SADC Tribunal has also taken place at the national level in SADC Member States. Following a call by the SADC Lawyers' Association,[96] the Tanganyika Law

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[94] For example article 3(l) the AU Constitutive Act specifically mentions as one of the objectives of the AU the coordination and harmonisation of the policies between the existing and future RECs for the gradual attainment of the objectives of the Union. Also, the preamble of the SADC Treaty itself seeks to associate SADC with continental processes and institutions such as the Lagos Plan of Action and the Final Act of Lagos of April 1980. See also ST Ebobrah *Legitimacy and feasibility of human rights realisation through regional economic communities in Africa: The case of the Economic Community of West African States* (2009) unpublished LLD thesis, Faculty of Law, University of Pretoria 58, 81. Ebobrah's conclusion is that 'RECs are almost firmly entrenched as building blocks for both economic and political integration in Africa' and that '[e]ssentially, this gives room for the RECs to also be positioned as the "building blocks" for implementation of the African Charter.'

[95] Request for advisory opinion, No 002/2012 by Pan African Lawyers' Union and Southern African Litigation Center, Order, 15 March 2013.

[96] 'SADC lawyers resolve to engage SADC leaders and to continue with litigation to ensure the restoration of individual access to the SADC Tribunal', http://www.sadcla.org/new1/sites/default/files/SADC%20Lawyers%20Resolve%20to%20engage,%20continue%20

Society initiated proceedings before the High Court arguing that 'the foreign affairs ministry decision to advise the government to vote for disbanding or suspension' of the SADC Tribunal was contrary to the Constitution of Tanzania. The case was heard in May 2015 but at the time of writing the Court had not handed down a ruling.[97] The Law Society of South Africa in March 2015 launched an application challenging South Africa's participation in the adoption of the 2014 Protocol.[98] It is beyond the scope of this paper to evaluate the national constitutional law arguments put forward in these cases.

As noted elsewhere in this paper the judgments handed down by the Tribunal under the 2000 Protocol remain in force. This led the litigators in the *Campbell* case to institute proceedings before South African courts to enforce the cost order through execution against Zimbabwean property in South Africa. The High Court granted the order and both the Supreme Court of Appeal and the Constitutional Court dismissed the appeal.[99] A property in Cape Town belonging to the Zimbabwean government was auctioned in September 2015.[100]

3.4 The re-establishment of the Tribunal: a new protocol of limitations - limited jurisdiction and limited applicable law

On 18 August 2014, the SADC Summit adopted a new protocol for the SADC Tribunal – the Protocol on the Tribunal in the Southern African Development Community. The Protocol makes a number of significant changes, including the following:

- In contentious cases the Tribunal has been reduced to an interstate dispute resolution forum for contentious matters, with no access to individuals.[101]
- Advisory opinions may only be requested by the Summit and the Council of Ministers.[102]

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with%20litigation%20to%20ensure%20individual%20access%20to%20the%20SADC%20Tribunal.pdf (accessed 2 November 2015).

[97] F Kapama 'High Court mum over SADC tribunal petition outcome', http://www.dailynews.co.tz/index.php/home-news/43225-high-court-mum-over-sadc-tribunal-petition-outcome (accessed 2 November 2015),.

[98] For the submissions in the case see http://www.lssa.org.za/?q=con,384,SADC+Tribunal+matter

[99] *Government of the Republic of Zimbabwe v Fick and Others* (CCT 101/12) [2013] ZACC 22; 2013 (5) SA 325 (CC); 2013 (10) BCLR 1103 (CC) (27 June 2013).

[100] J Evans 'Zim govt property in Cape Town sold for R3.7m', *News24*, http://www.news24.com/SouthAfrica/News/Zim-govt-property-in-Cape-Town-sold-for-R37m-20150921

[101] Article 33.

[102] Article 34.

- The law to be applied by the new Tribunal is limited to 'the SADC Treaty and the applicable SADC Protocol.'[103]
- The new Protocol is no longer an integral part of the SADC Treaty, but now has the same status as any other protocol and is subject to ratification and will come into force after deposit of instruments of ratification by two thirds of Member States.[104] However, there is now inconsistency with the SADC Treaty which in article 16(2) still provides that the Protocol is an integral part of the Treaty.

While no one can divine if and when two thirds of the Member States will deposit their instruments of ratification, it is likely that a judicial void in SADC will remain for some time, especially in light of the lackadaisical approach by the main African RECs when it comes to the establishment and operationalisation of regional courts.[105] The SADC Administrative Tribunal, approved by the Summit in August 2015 and yet to be established, will deal with employment cases brought by SADC staff.

In terms of article 48 of the 2014 Protocol, the 2000 Protocol shall remain in force until the entry into force of the of the 'new' Protocol. However, *de facto*, there is currently no Tribunal in existence.

The 2014 Protocol does not carry transitional arrangements to deal with the judicial void that has been created. Nothing has been said of the pending cases or the legal effect of the decisions that were made before the Tribunal's suspension. Also, in relation to the SADC Protocol on Trade, which gives the Tribunal appellate jurisdiction after the conclusion of trade panels procedure, the new Protocol has not put in place any transitional provisions for the exercise of such appellate jurisdiction.[106]

[103] Article 35.
[104] Articles 52 & 53.
[105] See the background to the establishment of the SADC Tribunal above and a similar discussion in section 4.1 below.
[106] With regard to the absence of transitional provisions in general and with particular reference to the Protocol on Trade see Erasmus (n 80 above) 12-16.

4. Comparative institutional framework and operations of other international courts in Africa

4.1 Introduction

This section of the report conducts a comparative assessment on the institutional framework and experiences of African international courts. It considers the African Court, the Common Market for Eastern and Southern African States Court of Justice (COMESA Court), the East African Court of Justice (EACJ) and the Economic Community of West African States Court of Justice (ECOWAS Court).

International courts are relatively new in Africa, and their operationalisation took quite some time. For instance, the first judges of the ECOWAS Court, provided for under a 1991 Protocol, were only appointed in 2001 and the Court only received its first matter in 2004. The EACJ was formally established in December 2001, but its Rules of Procedure were only adopted in November 2004 and the Court received its first case in 2005. The COMESA Court was only constituted with the appointment of judges in June 1998 and it began to hear cases in 2002. The African Court was established through a Protocol adopted in 1998 which entered into force in 2004. Its first judges were elected in 2007, but the Court has so far decided only three cases on the merits. Given this background, it would come as no surprise if SADC Member States take their time in re-constituting the SADC Tribunal. At the moment, while citizens of some other RECs have access to their respective regional courts, SADC citizens have no such right. Not only are SADC citizens deprived of an additional layer of human rights protection, but the SADC integration process itself is generally negatively impacted since SADC citizens have no right to challenge the legality of acts or omissions by the institutions of SADC or the SADC Member States related to the SADC integration project.

4.2 Access: Contentious cases

Similar to both the 2000 and 2014 SADC Protocols, African international courts considered in this section have jurisdiction to consider disputes between states.[107] As was the case under the 2000 Protocol, states in all three RECs can submit cases to their respective sub-regional courts

[107]COMESA Treaty art 24; EAC Treaty art 28; ECOWAS Protocol art 10.

against another member state, an organ or institution of the Community.[108] In all three Courts, natural and legal persons can bring cases against states and the Community.[109]

With regard to the ECOWAS Court, individuals could initially not submit cases to the Court, but states were entitled to submit cases on behalf of their national against another Member State.[110] This provision largely caused the Court to lie dormant for many years – until 2004 when an individual brought a matter before the ECOWAS Court. In that case, a Nigerian businessman alleged that Nigeria's unilateral closure of the border with Benin violated his right of free of movement.[111] The ECOWAS Court declined to deal with the case due to the lack of jurisdiction to deal with a matter brought by individuals. Subsequently, the judges of the Court spear-headed a campaign for the expansion of the Court's jurisdiction. These efforts were in line with the promise in the 2001 ECOWAS Protocol on Democracy and Good Governance.[112]

In COMESA and the EAC, the Secretary-General can institute proceedings against a Member State, though only with the approval of the respective Council of Ministers.[113] The ECOWAS Authority has a more autonomous mandate to refer cases to the Court.[114] The EAC Treaty grants the EACJ jurisdiction over disputes between the Community and its employees related to employment matters.[115] National courts and tribunals may request preliminary rulings.[116] The preliminary ruling procedure has already been utilized in the EAC by the High Court of Uganda.[117]

On the exhaustion of local remedies rule, the requirement applies in three of the courts considered in this paper (African Court, COMESA Court and SADC Tribunal under the 2000 Protocol) with regard to cases submitted by legal or natural persons. The ECOWAS Court and

[108]COMESA art 24; EAC art 28; ECOWAS art 10.
[109]COMESA art 26; EAC art 30; ECOWAS art 10.
[110]ECOWAS Protocol art 9(3) of the 1991 Protocol of the ECOWAS Court.
[111]ECOWAS Court, *Olajide Afolabi v Nigeria*, Suit no ECW/CCJ/APP/01/03 (27 April 2007).
[112]Art 1(h) : individuals "shall be free to have recourse to the common and civil law courts, a court of special jurisdiction …"
[113]COMESA art 25; EAC art 29
[114]Protocol art 9.
[115]EAC art 31.
[116]EAC art 34.
[117]See *Attorney general of Uganda v Tom Kyahurwenda*, Reference No. 1 of 2014.

the EACJ does not require exhaustion of local remedies. However, with regard to the EACJ, a two-month limit on submission of cases poses a significant barrier to access to justice.[118]

At the regional level, cases can only be submitted *directly* to the African Court by individuals and NGOs alleging violations in seven states which have made a declaration allowing for direct access to the Court.[119] Tanzania and Malawi are the only SADC States which have made such a declaration. This means that most citizens within the SADC region have limited access before African courts.

4.3 Access: Advisory cases

The highest decision-making bodies in COMESA (the Authority, the Council), the EAC (the Summit) and in SADC (the Summit), as well as Member States, can request advisory opinions from the Court.[120] The advisory jurisdiction of the ECOWAS Court is broader, in that it allows, in addition to the Authority, Council and Member States, all ECOWAS institutions to request an advisory opinion from the Court.[121] In the EAC, the Summit, the Council or a Member State may request the EACJ to give an advisory opinion regarding a question of law arising from the EAC Treaty which affects the Community.[122] The EACJ had received a request from the Council of Ministers to give an advisory opinion concerning the application of the principle of variable geometry as provided in the EAC Treaty.[123]

4.4 Substantive jurisdiction and applicable law

The current jurisdiction of the EACJ is to interpret and apply the EAC Treaty.[124] Subsequently, the Council of Ministers is to initiate and adopt a new protocol to stretch the jurisdiction of the Court to include human rights.[125] In 2012, a Human Rights Bill was adopted by the East African Legislative Assembly. However, the Bill has not yet been assented to by the Summit.

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[118]EAC art 30(2).
[119]Protocol establishing the African Court art 34(6). The states that have made this declaration are Burkina Faso, Côte d'Ivoire, Ghana, Malawi, Mali, Rwanda and Tanzania.
[120]COMESA art 32; EAC art 36.
[121]ECOWAS Protocol art 11.
[122] Article 36 of the EAC Treaty.
[123] See Application No 1 of 2008, in the *Matter of a request by the Council of Ministers of the EAC for an Advisory Opinion.*
[124] Article 27 of the EAC Treaty.
[125] See article 27(2) of the EAC Treaty.

Initially, the ECOWAS Court did not possess a human rights mandate. The Court managed to acquire an explicit human rights mandate after a series of coordinated campaign in which bar associations, NGOs, and ECOWAS officials — in addition to ECOWAS Court judges themselves — mobilized to secure member states' consent to transform the Court.[126] In addition, the normative force of the promise in the 2001 Democracy and Good Governance Protocol, as adopted by the ECOWAS Heads of State and Government, and the ECOWAS Court Judges played an important part in this development.

4.5 Practice

A brief survey of the practice in the three courts is provided, with a view to informing the discussion on the "human rights"-mandate of the SADC Tribunal.

4.5.1 East African Court of Justice

The EACJ has decided a few cases related to the regional integration agenda. In *Samuel Mohochi v Attorney General of Uganda*,[127] the EACJ had ruled on a matter concerning the application of Common Market Protocol in Uganda. The applicant was denied entry into Uganda contrary to the right to free movement as guaranteed in the Common Market Protocol. The EACJ found Uganda in breach of the EAC Treaty and the Common Market Protocol.

Human rights jurisdiction of the EACJ is a paradox.[128] There are those who argue that article 27 of the EAC Treaty 'does not foreclose individual referrals on the basis of human rights'.[129] This argument is framed on the basis that the EAC Treaty recognises human rights as one of the founding principles in running the activities of the Community,[130] which the EACJ is tasked to interpret. The EACJ's position in cases containing human rights allegation is clear. The Court will not 'abdicate' its interpretive duty, even if a matter in dispute contains a human rights allegation.[131]

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[126]KJ Alter, L R Helfer, and JR McAllister 'A new international human rights court for West Africa: The ECOWAS Community Court of Justice' (2013) 107 *The American Journal of International law* 738.

[127]*Samuel Mohochi v Attorney General of Uganda*, Ref No 1 of 2011, EACJ First Instance Division.

[128] For a general discussion on the controversy of human rights authority of the EACJ see A Possi ' Striking a balance between community norms and human rights: The continuing struggle of the East African Court of Justice' (2015) 15 *African Human Rights Law Journal* 192-213.

[129] F Viljoen *International human rights law in Africa* (2007) 505.

[130] Article 6(d) and 7(2) of the EAC Treaty.

[131]*James Katabazi & Others v Attorney General of Uganda*, Ref No 1 of 2007, para 39.

However, the EACJ does not make its finding based on human rights violations, as such. The EACJ upholds other principles such as the rule of law, good governance, democracy and social justice, as provided for in the EAC Treaty. In *Independent Medical Legal Unit v Attorney General of Kenya*,[132] for example, the EACJ stated that for the EACJ's jurisdiction to be triggered in matters containing human rights allegations, the applicants must be able to pursue a cause of action which is distinct from human rights violations.[133]

Member States have on different occasions tried to undermine the logic of including human rights norms in REC treaties. In *Plaxeda Rugumba v Secretary General of the EAC & Attorney General of Rwanda* raised an argument similar to that raised by Zimbabwe in *Campbell,* when it claimed that human rights norms established under the EAC Treaty were merely directives. The EACJ acknowledged the relevance of inserting human rights norms into the EAC Treaty, by stating that the inclusion of human rights in the EAC Treaty was not a 'cosmetic' exercise.[134]

As in SADC, and predating developments in Southern Africa, the progressive interpretation of the both the EAC and ECOWAS Courts have also seen efforts to erode these Courts' jurisdiction and optimal operation. In the case of the EAC, individual access was never targeted, as such. The erosion of the Court's authority came in the form of the addition of an appeals chamber to the structure of the Court, which initially was one-tiered. The amendment gave Member States the opportunity to exert stronger influence through renewed appointments to the new chamber, the Appellate Division, which hears appeal from the lower chamber, now called the First Instance Division. Access by individuals was detrimentally affected by the imposition of a new and extremely onerous admissibility rule, requiring that a case be submitted two months from the date of the action complained about, or of the day the action came to the knowledge applicant's knowledge.[135] In ECOWAS, similar efforts, initiated by The Gambia, were unsuccessful. These two instances – viewed together with Zimbabwe's role in SADC -- seem to suggest that the relative political weight of a state advancing a treaty-amending agenda to a significant extent determines the outcome of such a process.

[132]App No 2 of 2012, EACJ Appellate Division.
[133] As above, page 10-11.
[134]Ref No 8 of 2010, 26.
[135]Art 30(2) EAC Treaty.

4.5.2 The ECOWAS Community Court of Justice

The ECOWAS Court is the only African sub-regional Court which explicitly granted with a human rights jurisdiction. The Court's human rights mandate has not been in doubt since the extension of its mandate to specifically deal with human rights. The ECOWAS Court's decisions ranging from education, labour, social economic rights, slavery, employment and trade. The scope of its decisions has undoubtedly shaped the integration process in West Africa.

The Court has consistently developed to be the most active and bold adjudicator of human rights among sub-regional courts in Africa.[136] The high involvement of the ECOWAS Court in human rights is because of its broad access and standing rules which permit individuals and non-state actors to bypass national courts and file cases directly with the Court. It is a fact that the ECOWAS Court has already decided more human rights cases than the regional court - the African Court.

4.5.3 COMESA Court of Justice

Little is documented about the COMESA Court. In fact the Court is almost invisible. In spite of the COMESA Treaty containing human rights norms, similar to the EAC and ECOWAS Treaties, the COMESA Court has not been active in human rights. The Court has overwhelmingly adjudicated disputes between COMESA and its employees and some few cases on trade. There is little mobilisation initiatives from non-state actors and regional bar associations to make COMESA Court activist. The current seat of the Court in Khartoum, Sudan, has not provided a base for the litigants in the same way as Arusha, Tanzania has for the EACJ and Abuja, Nigeria, has for the ECOWAS Court.

The COMESA Court has received one inter-state dispute.[137] In that case, Ethiopia sought from Eritrea release of goods, belonging to Ethiopians detained at the Eritrean ports of Assab and Massawa in contravention of provisions of the COMESA Treaty, as well as damages

[136]KJ Alter, L R Helfer, and JR McAllister 'A new international human rights court for West Africa: The ECOWAS Community Court of Justice' (2013) 107 *The American Journal of International law* 730, 731.

[137] See *Ethiopia v Eritrea* COMESA Reference No. 1/1999. The proceedings in the matter were subsequently stayed *sine die* on the submission by Ethiopia that the disputing States had entered into a peace agreement under which the dispute could be settled.

5. Conclusion

By suspending the SADC Tribunal, the Summit acting as a collective of the political will of Member States, and indeed the individual Member States acting through the agency of their respective heads of state or government, clearly violated article 6(6) of the SADC Treaty. Article 6(6) obliges Member States 'to co-operate with and assist institutions of SADC in the performance of their duties'. Instead of taking action in response to Zimbabwe's disdain for the Tribunal culminating in a concerted effort to seriously incapacitate the Tribunal, the Summit and the Member States failed in their duty to assist the Tribunal in the performance of its duties.

In the contemporary world of international diplomacy, states rarely opt to sue each other before an international court. Diplomacy and geopolitics tend to prevail over legal recourse in dispute settlement between states. If the 2014 Protocol would enter into force in its current form it is likely that the Tribunal, even if officially revived, will in practice be dormant due to the restriction on individual access. The 2014 Protocol turns back the clock. While the mandate of the ECOWAS Court was expanded, SADC has moved in the other direction and removed access to justice.

Individuals from the SADC region face many limitations in accessing their rights in the international arena. Only six of the 15 SADC members have subjected themselves to the African Court's contentious jurisdiction. Of these only two - Malawi and Tanzania - have accepted individual direct access.

Individuals of the nine remaining states cannot access the regional human rights court. The decision of Council and Summit in August 2012 to suspend definitely the Tribunal consequently affects the rights of access to justice and to an effective remedy for litigants in SADC, both natural and legal persons, when domestic courts are unwilling or unable to offer effective relief. The yet to be established Tribunal with inter-state jurisdiction and the SADC Administrative Tribunal will be inadequate to ensure that the objectives set out in the SADC Treaty are met. According to article 16 of the Treaty, which remains in force, the role of the Tribunal is 'to ensure adherence to and the proper interpretation' of the Treaty and subsidiary instruments. This cannot be achieved with a Tribunal left with severely limited jurisdictional powers.

6. Recommendations

The consultant was requested to

> Provide recommendations on measures that can be taken and implemented to strengthen and capacitate the SADC Tribunal to ensure that it is an effective, independent, efficient regional judicial institution that can properly dispense justice to the citizens and governments of SADC.

Since the SADC Tribunal is not currently operational the following recommendations will deal with what actions SADC Member States could take to ensure that an effective, independent and efficient Tribunal is re-established.

The recommendations below relate to different scenarios. Some speak to the short term, aimed at preventing the entry into force of the 2014 Protocol. Others depart from the premise that the new Protocol does not enter into force at all, or, at least, not in the near future. We also make some recommendations, should the Protocol enter into force.

Recommendation 1: Raising awareness and understanding about the importance of individual access to the SADC Tribunal among the people in SADC states.

The existence, suspension and potential role of the SADC Tribunal, on the one hand, and the importance of and the proposed inroads to individual access to the Tribunal, on the other hand, are not well known within the region. Attempts to reinvigorate the SADC Tribunal will be enhanced if there is broader societal interest in and appreciation of the issue. The reach of the Coalition for an Effective SADC Tribunal should be increased to include a broader array of stakeholders and civil society coalitions, including law associations, the media, opinion leaders, trade unions and academics. The immediate aim should be to create a critical mass to raise awareness among SADC citizens about the role of individual access. National Parliaments should, in particular, be targeted as part of this campaign. Ultimately, the aim is to get the SADC Summit to reconsider its decision to suspend and, by adopting the new Protocol, to restrict access to the Tribunal to states, and to operationalise and re-establish the Tribunal as

an effective institution.

Recommendation 2: Lobbying and advocacy of human rights friendly states in the region

Pressure should be placed on heads of states, relevant ministers, and relevant senior government officials, with a view to persuading them of the need to restore individual access to the Tribunal. It is important to involve key national and other actors that heads of states are likely to listen to.

In this process, human rights-friendly states and individuals/ officials should be approached. Attempts at identifying and targeting rights-friendly states for sustained lobbying and advocacy should take into account opportunities to exert further international pressure on the particular states, such as state reporting under UN and AU human rights treaties. The Coalition and its partners may for example submit shadow reports to influence the consideration by regional and UN bodies of human rights reports, the African Peer Review Mechanism (APRM) and the Universal Periodic Review (UPR) process; and draw attention to the SADC Tribunal issue when these reports are considered and are receiving media attention. Advocacy events should be organized to coincide with human rights-related events in the targeted states, such as national human rights days, or other celebratory events such as Africa Day. Malawi and Tanzania, two states that have accepted direct access to the African Human Rights Court, should in particular be targeted. Tanzania is also the only SADC Member State that is also a member of the EAC, and as such, under the jurisdiction of the EAC Court which also allows for individual access.

Recommendation 3: States should refrain from ratifying the new SADC Protocol.

This recommendation is premised on the finding that the Tribunal operating under the 2014 Protocol would be a largely ineffectual. There is no reason to let the Protocol enter into force. The Coalition and all its members, and civil society more broadly, should campaign for the non-ratification of the 2014 Protocol, which would imply the restoration of the old Protocol.

Recommendation 4: The SADC Summit should operationalise the Tribunal to allow it to function in accordance with the old Protocol through election of members of the Tribunal and the re-establishment of the Tribunal registry in Windhoek.

This recommendation is premised on the finding that the 2000 Protocol remains in force and will only formally cease to have legal validity once the 2014 Protocol has entered into force. Member States have an obligation to operationalise the Tribunal so that it can fulfil its role as provided for in article 16 of the Treaty. Lobbying and advocacy campaigns, discussed above, should also comprise this element.

Recommendation 5: Any revision of the Protocol should be transparent with full involvement of SADC citizens and key stakeholders, including civil society and non-governmental organisations, in accordance with article 23 of the SADC Treaty.

This recommendation is premised on the assumption that revisions of the Protocol may be necessary. Revision should take the recommendations of the 2011 review report as a starting point and include SADC citizens and key stakeholders in a transparent process in accordance with article 23 of the SADC Treaty.

States regularly revise protocols before they enter into force. There is therefore no reason to see the 2014 Protocol as the final word on the Tribunal's future. An example is the Protocol establishing the African Court of Justice which never entered into force as AU Member States decided to merge the African Court of Justice with the African Court on Human and Peoples' Rights and therefore adopted the Protocol on the African Court of Justice and Human Rights.

Recommendation 6: The SADC Summit should put pressure on Member States which have not implemented the judgments of the SADC Tribunal to do so.

This recommendation is premised on article 16(5) of the Treaty which provides that '[t]he decisions of the Tribunal shall be final and binding'. The judgments delivered by the SADC Tribunal until 2010 remains in force and should be implemented by Member States.

Recommendation 7: Submission of request for advisory opinion to African Court

The Coalition partners should explore the possibility and utility of submitting a request for an advisory opinion to the African Court on the question whether the removal of the right to individual access to the SADC Tribunal violates the African Charter and the SADC Treaty. This would be a revival of the request, previously made, where the African Court found that it lacked jurisdiction on narrow technical grounds, namely, that the matter was pending before the African Commission. Since the African Commission has subsequently disposed of the matter that had been pending before it, the rationale for the Court's refusal to consider the advisory request no longer exists. In formulating the request, the reasons for the finding by the African Commission in the *SADC Tribunal* case[138] – that the removal of individual to the SADC Tribunal access does not violate the African Charter – should be squarely dealt with. The question should be posed whether the Court is likely to arrive at a view different to that of the African Commission. In our view, there is a strong likelihood that the Court may arrive at a different conclusion. Because the Court has jurisdiction over not only the AU, but other international human rights treaties, its authority to deal with matters relating to the SADC Tribunal is much more securely anchored that that of the Commission. In the absence of a definitive finding that NGOs are entitled to submit a request for advisory opinions to the African Court, this issue should also be addressed as part of the substance of the request.

Recommendation 8: Alternative strategies to ensure effective functioning of the rebranded Tribunal

As an alternative to advocacy and lobbying, and accepting the possibility that the 2014 Protocol may in fact enter into force, measures should be identified to enhance the effective functioning of the rebranded Tribunal.

[138] n 90 above.

Recommendation 9: Engagement with the broader political context

Individual access is not a goal in itself, but aims to contribute to improve the rule of law within SADC Member States. Efforts to restore individual access should therefore be undertaken against this background, and should aim to strengthen democracy and extend the role of popular participation in policy-making. At the SADC level, for example, the establishment of a SADC Parliament with full legislative functions should be pursued.

Recommendation 10: Engaging African human rights institutions to persuade SADC officials to reinstate the previous SADC Tribunal/individual access

This recommendation is based on the existing regular meetings between African human rights institutions and RECs. Such meetings can be used as platforms to persuade SADC officials to reinstate the SADC Tribunal in its original form.

Annex 1: Comparison between the 2000 and 2014 SADC Protocols and other African courts

Issue	SADC 2000 Protocol	SADC 2014 Protocol	EACJ	ECOWAS	COMESA	ACtHPR
Access: Contentious cases	States Natural persons Legal persons National courts or tribunals (request for preliminary rulings) Community organs	Disputes between Member States (Art 33)	States Natural persons Legal persons National courts or tribunals (request for preliminary rulings) Secretary-General	States Natural persons Legal persons National courts or tribunals (request for preliminary rulings) Authority	States Natural persons Legal persons National courts or tribunals (request for preliminary rulings) Secretary-General	States African Commission African intergovernmental organisations Natural persons (if art 34(6) declaration) NGOs (if art 34(6) declaration)

Possible respondents	States Community	States	States Community	States Community	States Community	States
Exhaustion of local remedies	Yes	N/A	No	No	Yes	Yes
Appellate jurisdiction	A 2007 amendment of the Protocol provided for appellate jurisdiction of the Tribunal in relation to the findings of a panel established under a SADC Protocol.	No	Should be provided in future	No	No	No
Access: Advisory cases	Summit Council (Art 20)	Summit Council (Art 34)	Summit Council Member	ECOWAS institutions Member States	Authority Council Member	AU organs States African organisations

			States		States	recognized by AU
Substantive jurisdiction	Interpretation and application of the SADC Treaty Interpretation, application or validity of the Protocols and all subsidiary instruments All matters specifically provided for in any other agreements which confer jurisdiction on the Tribunal (Art 14)	SADC Treaty and Protocols (Art 33)	EAC Treaty Staff matters	ECOWAS Treaty, Acts and Protocols Human rights Staff matters	COMESA Treaty Staff matters	African Charter on Human and Peoples' Rights Other relevant human rights instruments ratified by the state

Enforcement of decisions	Procedure for registration of foreign judgments shall govern enforcement All measures necessary to ensure execution Decisions are binding on the parties and enforceable within the territories of the State concerned Failure to comply may be referred to the Tribunal by any party concerned The Tribunal shall report failure to	All measures necessary to ensure execution Decisions are binding on the parties Failure to comply may be referred to the Tribunal by an affected Member State The Tribunal shall report failure to comply to the Summit for appropriate action (Art 44)	Civil procedure	Civil procedure	Civil procedure	Monitored by AU Executive Council

	comply to the Summit for appropriate action (Art 32)					
Status of instrument providing for Tribunal/Court	Integral part of SADC Treaty (Art 16(2) of the SADC Treaty))	Protocol subject to ratification (Art 53)	Provisions on Court included in Treaty	Provisional application of 2005 Supplementary Protocol	Provisions on Court included in Treaty	Protocol subject to ratification