



College of Law and Management Studies
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**The Human Rights Jurisdiction of the SADC Tribunal and the East African Court
of Justice: legal and political implications**

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This thesis submitted in partial fulfilment of the requirements for the
degree of Master of Laws at the University of Kwa-Zulu Natal.

19 February 2016

DECLARATION

I, Simbarashe Tembo, Registration Number: 211541959 hereby declare that the dissertation entitled **The Human Rights Jurisdiction of the SADC Tribunal and the East African Court of Justice: legal and political implications**, is my own work, and that all sources utilised or quoted have been appropriately acknowledged and referenced. This dissertation is being submitted for the Degree of Master of Laws (LLM) at the University of KwaZulu-Natal, and has not been submitted for a degree or examination at any other university.

Signed: _____

Date: February 19, 2016

Place: University of Kwa-Zulu Natal, Howard College Campus, Durban.

Dedication

This work is a special dedication to my late brother, Charles Tembo, who sowed the seeds of academic excellence in the family. He was my early inspiration, he showed me the path, and that, I will follow to even greater heights. May His Soul Rest in Eternal Peace.

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Abstract

Sub-regional Economic Communities have increasingly become important in the promotion, protection, and human rights in Africa. Sub-regional human rights courts potentially bring international justice closer to victims in their respective regions. However, there is a debate surrounding the acquisition of human rights jurisdiction by the SADC Tribunal and the East African Court of Justice through broad purposive interpretation of their respective treaties. Many scholars however agree that the judges correctly afforded human rights jurisdiction to both Courts. They argue that human rights jurisdiction is an incident of the principles rule of law, democracy and good governance, which find meaning within the ambit of both treaties. The cases of *Mike Campbell v The Republic of Zimbabwe*, in the SADC Tribunal, and *Katabazi v The Secretary General of the EAC*, in the EACJ resulted in the conferment of human rights jurisdiction on both Courts. Even though these cases were fundamentally similar, they received varying responses from their respective Sub-regional Economic Communities. This work critically analyses the human rights jurisdiction of these Courts and unpacks these different reactions. The SADC Tribunal is currently suspended and a New Protocol to establish a new Tribunal without human rights jurisdiction was adopted. By using Roux's theory of 'tactical adjudication', it aims to show how the negative reaction to the SADC Tribunal's judgment might have been avoided or mitigated, thereby maintaining its institutional security.

Contents

DECLARATION	ii
Dedication	iii
Acknowledgments	iv
Abstract	v
List of acronyms	ix
Chapter 1	1
INTRODUCTION	1
1.1 Introduction and overview of the study	1
1.2 Problem Statement	3
1.3 Research Questions	3
1.4 Literature Review	4
1.5 Relevance of the Study	7
1.6 Research Methodology	7
1.7 Limitations of the study	8
1.8 Overview of chapters	8
1.9 Delimitation	9
Chapter 2	11
HUMAN RIGHTS IN REGIONAL COURTS: A HISTORICAL OVERVIEW	11
2.1 Introduction	11
2.2 Historical Development of Regional Human Rights Regimes	13
2.2.1 The American System	14
2.2.2 European System	15
2.2.3 The African System	15
2.3 Human Rights Protection at Regional Level and Sub-Regional	17
2.4 Judicial and Non-Judicial Enforcement of Human Rights	20
2.4.1 Domestic law	20
2.4.2 Intergovernmental mechanisms	22
2.5 Conclusion	27
Chapter 3	30
HUMAN RIGHTS JURISDICTION IN REGIONAL COURTS: A CONCEPTUAL OVERVIEW	30
3.1 Introduction	30
3.2 What is Jurisdiction?	31
3.3 The concept of jurisdiction	33

3.4 <i>Types of Jurisdiction of international courts and tribunals</i>	34
3.4.1 <i>Prescriptive jurisdiction</i>	34
3.4.2 <i>Enforcement Jurisdiction</i>	35
3.4.3 <i>Adjudicative jurisdiction</i>	36
3.5 <i>Subject matter jurisdiction</i>	37
3.6.1 <i>The American system</i>	41
3.6.2 <i>The European system</i>	44
3.6.3 <i>The African System</i>	45
3.7 <i>Exhaustion of Local Remedies in Individual Petitions.</i>	45
3.7.1 <i>Substantial and procedural nature of the rule</i>	46
3.8 <i>Interstate Petitions</i>	49
3.8.1 <i>The American system</i>	50
3.8.2 <i>The European system</i>	50
3.8.3 <i>The African system</i>	51
3.9 <i>Conclusion</i>	52
Chapter 4	54
THE HUMAN RIGHTS JURISDICTION OF THE SADC TRIBUNAL: THE <i>CAMPBELL</i> CASE AND ITS AFTERMATH	54
4.1 <i>Introduction</i>	54
4.2 <i>The Tribunal: A Brief Background</i>	55
4.2.1 <i>Mike Campbell Private Ltd V Republic of Zimbabwe (interim decision)</i>	58
4.2.1.1 <i>Background to litigation against Zimbabwe.</i>	58
4.2.2 <i>Mike Campbell Private Ltd V Republic Of Zimbabwe (merits)</i>	60
4.3 <i>Human Rights Jurisdiction of the Tribunal</i>	61
4.4 <i>Enforcement of the SADC Tribunal Decision</i>	64
4.4.1 <i>Fick Cases (SADC Tribunal, North Gauteng High Court, Supreme Court of Appeal and the Constitutional Court of South Africa)</i>	65
4.5 <i>The Suspension of the Tribunal</i>	68
4.5.1 <i>The legality of the decision to suspend the Tribunal</i>	70
4.6 <i>The New Protocol: Fundamental Concerns</i>	72
4.6.1 <i>Specific provisions</i>	74
4.6.2 <i>Implications of Article 33 on Human Rights</i>	74
4.6.2 <i>Was a New Protocol Necessary?</i>	77
4.7 <i>Conclusion</i>	80
Chapter 5	84

THE HUMAN RIGHTS JURISDICTION OF THE EAST AFRICAN COURT OF JUSTICE	84
5.1 Introduction	84
5.2 The East African Court of Justice: A Brief Background	85
5.3 Human Rights Jurisdiction of the East African Court of Justice	86
5.4 <i>Katabazi v Secretary General of the East African Community</i>	88
5.4.1 Personal jurisdiction of the court.	90
5.5 Human Rights Legal Framework; Pertinent Issues	91
5.6 Other Human Rights Developments	92
5.7 Jurisdictional Relationship with Other Judicial Institutions	94
5.7.1 Concurrent jurisdiction	94
5.8 Post <i>Katabazi</i> Developments	98
5.9 Enforcement of Decisions In The EACJ.....	100
5.10 Conclusion	101
Chapter 6	104
CONCLUSIONS AND RECOMMENDATIONS	104
6.1 Introduction	104
6.1.1 The SADC Tribunal and East African Court of Justice.....	105
6.1.2 The differences between <i>Campbell</i> and <i>Katabazi</i>	108
6.4 Broader Perspective	110
6.5.1 <i>Manneh V the Gambia</i>	111
6.5.2 <i>Musa Sadyikhan v The Gambia</i>	113
6.5 Avoiding Backlashes.....	114
6.5.1 What is Tactical Adjudication?	114
6.5.2 Tactical adjudication in practice	115
6.5.3 Application to the SADC Tribunal	118
6.7 General conclusions	119
6.8 Main findings	120
6.9 Recommendations.....	122
Bibliography	123

List of acronyms

AHRLJ	African Human Rights Law Journal
APRM	African Peer Review Mechanism
AU	African Union
COMESA	Common Market for Eastern and Southern Africa
CoE	Council of Europe
EAC	East African Community
EACJ	East African Court of Justice
ECCJ	ECOWAS Community Court of Justice
ECHR	European Convention for the Protection of Human Rights and Fundamental Freedoms
ECJ	European Court of Justice
ECtHR	European Court of Human Rights
ICJ	International Court of Justice
NEPAD	New Partnership for Africa's Development
OAU	Organisation of African Unity
RECs	Regional Economic Communities
PCIJ	Permanent Court of International Justice
SADC	Southern Africa Development Community
UDHR	Universal Declaration of Human Rights
UN	United Nations

Chapter 1

INTRODUCTION

Where do universal human rights begin? In small places, close to home. So close and so small that they cannot be seen on any maps of the world. Yet they are the world of an individual person; the neighbourhood he lives in; the school or college he attends; the factory, farm, or office he works. Such are the places where every man, woman, and child seeks equal justice, equal opportunity, equal dignity, without discrimination. Unless these rights have meaning there, they have little meaning anywhere. Without concerted citizen action to uphold them close to home, we shall look in vain for progress in the larger world.¹

1.1 Introduction and overview of the study

Post World War global integration resulted in the formation of several regional and sub-regional blocks. The Council of Europe and the Organisation of American States established their regional system with their main focus being on human rights. Africa was no exception to this, though it only joined the bandwagon at a later stage. The African Union² (formerly known as the Organisation of African Unity³), as well as sub-regional economic- political groupings such as the Economic Community of West African States (ECOWAS)⁴, the East African Community (hereinafter referred as EAC), and the Southern African Development Community (SADC), formerly known as the Southern African Development Co-ordination Committee (SADCC) are notable examples. The above-mentioned organisations have their own courts and tribunals. Sub-regional systems are a uniquely African phenomenon. Their

¹ Words of Eleanor Roosevelt, the first Chairperson of the UN Commission on Human Rights, she was also involved in the drafting of the UDHR as quoted by Weissbrodt and de la Vega *International Human Rights: An Introduction* (2007) 342.

² The OAU initiatives paved the way for the birth of AU. In July 1999, the Assembly decided to convene an extraordinary session to expedite the process of economic and political integration in the continent. Since then, four Summits have been held leading to the official launching of the African Union.

³ Organisation of African Unity established on 25 May 1963.

⁴ Economic Community of West African States Treaty signed in 1975 and came into force the same year.

purpose, at conception, was for conflict resolution and economic integration. As Ebobrah points out, they were ‘originally founded as rallying points for progressive economic integration aimed at improving the living standards of the citizens...’⁵ Economic integration can only become a reality in conflict free zones hence human rights have become an indispensable part of regional and sub-regional jurisprudence. This has, however, resulted in problems ranging from the jurisdiction of the courts to the enforcement or implementation of the decisions.

The importance of human rights has been increasingly acknowledged by the intergovernmental bodies that have striven for African unity since the 1960s. The founding document of the OAU (replaced by the AU),⁶ among others, identifies the promotion and protection of human rights as its key objective and undertakes to function in a manner consistent with this objective.⁷ Consequently, the African Charter on Human and People’s Rights (ACHPR)⁸ adopted in 1981 is a clear testimony of the OAU’s commitment to human rights. The African bloc set up a Commission⁹ to be the guardian of the African Charter¹⁰.

The establishment of sub regional courts therefore come as a compliment to the ‘OAU founding fathers’ commitment to human rights.¹¹ Given that sub-regional human rights systems are relatively new and unique, their development has been a subject of debate and filled with controversy.¹²

Notably, the scope of human rights in the East African Court of Justice and the Southern African Development Community Tribunal is highly contentious. The Courts have, however, interpreted the relevant provisions of the founding documents so as to afford both

⁵ S. T Ebobra “Human Rights Developments In African Sub-Regional Economic Communities During 2009” (2010) 23 *African Human Rights Law Journal* 312.

⁶ OAU Charter of 1963, Addis Ababa .

⁷ OAU charter states at Article II that 1. The Organization shall have the following purposes: (a) To promote the unity and solidarity of the African States; (b) To coordinate and intensify their cooperation and efforts to achieve a better life for the peoples of Africa; (c) To defend their sovereignty, their territorial integrity and independence; (d) To eradicate all forms of colonialism from Africa; and (e) To promote international cooperation, having due regard to the Charter of the United Nations and the Universal Declaration of Human Rights.

⁸ The uniqueness of the African Charter on Human and People’s Rights (ACHPR) that it deals with African problems. For example, the African Charter on Human and People’s Rights has a set of third generation rights, also known as rights of solidarity. Human rights scholars have applauded the African Charter for including socio-economic and cultural rights as well as civil and political rights in one binding instrument.

⁹ African Commission on Human and Peoples Rights.

¹⁰ African Charter adopted also known as the Banjul charter adopted in 1981 and came into force 1986.

¹¹ One may however argue that the fact that the charter on came into force 5years after its adoption speaks into the sincerity of the African leaders.

¹² Decisions of the EACJ and the SADC Tribunal in the cases of *Katabazi v Secretary General* and *Mike Campbell v Republic of Zimbabwe* respectively illustrate this.

courts a human rights mandate.¹³ These developments were seen by the political organs of both regions as judicial activism on the part of the courts. In the East African region recommendations were made for the Council of Ministers to come up with a legal framework for the Court in order to clarify its human rights jurisdiction. In the Southern African region, human rights cases led to the suspension of the Tribunal. A proposed New Protocol to reinstate the Tribunal, adopted in August 2014, excludes individual petitions to the Court and, therefore, eliminates the Tribunal's human rights jurisdiction.

1.2 Problem Statement

Although notable progress has been made in the area of human rights in sub-regional courts, the interpretation of the courts' competence in human rights cases has been contentious. Both the SADC Tribunal and the East African Court of Justice adopted similar interpretations of their human rights jurisdiction in the cases of *Campbell v Republic of Zimbabwe*¹⁴ and *Katabazi v Secretary General of the East African Community*¹⁵ respectively. In spite of support from civil society, human rights lawyers and human rights organisations, the two courts suffered backlashes from the political arms of these Regional Economic Communities as a result of these decisions. Their responses were varied. Whilst the EAC called for the adoption of a Protocol extending the jurisdiction of the Court, SADC summit of heads of states and government suspended the tribunal and adopted a New Protocol on the Tribunal. The EAC has not yet extended the jurisdiction to human rights and the SADC's New Protocol has not yet been ratified by the requisite two thirds of member states.¹⁶

It is on this basis that the need to critically examine the interpretation of human rights jurisdiction of the two courts arises, and consider the extent to which the courts can ensure their institutional security when faced by similar cases in the future.

1.3 Research Questions

This work addresses a number of questions. Firstly, whether sub-regional systems can be effective human rights mechanisms. Secondly, what was the legal basis of the human rights jurisdiction of the SADC Tribunal and EACJ. Thirdly, how the different reactions of

¹³ Particularly Article 27(2) of the East African Community Treaty and the Protocol on the SADC Tribunal.

¹⁴ *Mike Campbell Private Ltd V Republic Of Zimbabwe* SADC (T) Case No. 02/2007 and *Mike Campbell Private Ltd V Republic Of Zimbabwe* SADC (T) Case No. 03/2009.

¹⁵ *Katabazi v Secretary General of the East African Community* (2007) AHRLR 119 (EAC 2007).

¹⁶ As at 31 August 2015.

political arms of the Regional Economic Communities to the interpretation of jurisdiction adopted by the SADC Tribunal and the EACJ can be explained. Finally, whether these reactions could have been avoided despite the threats to institutional security of the SADC Tribunal.

1.4 Literature Review

There is a substantial amount of literature on the role of sub regional courts in protecting and promoting human rights. A number of scholars have also written on human rights jurisdiction of sub-regional courts.

Ebobrah traces the development of sub-regional courts in Africa and their role in the promotion and protection of human rights. He defines sub regional courts as, ‘judicial bodies set up to interpret and apply the treaty of the relevant REC.’¹⁷ Ebobrah points out that in East and Southern Africa no clear human rights competence exists. This scholar illustrates the gradual movement that the Courts have taken towards acquisition of competence to receive human rights cases. In this regard, this paper will look at how the SADC and the EAC have dealt with this acquired human rights jurisdiction and the consequences thereof.

Swart puts across the argument that regionalism in the context of human rights law has distinct advantages. Regional systems of human rights supervision reflect specific needs and cultural preferences and regional arrangements are frequently seen to be more effective with a higher capability to pay attention to local conditions and detail¹⁸. This text is useful in explaining the role that is played by sub-regional courts at sub regional level; it however overlooks the contentious nature of the jurisdiction of these courts.

Much of the literature on this subject focuses specifically on the viability of the regional courts as human rights courts. For example, Ebobrah writes on what he calls supranational judicial protection of human rights by sub-regional courts. He further argues that the courts were established as ‘rallying points for progressive economic integration aimed at improving the living standards of their citizens.’¹⁹ His argument follows that courts operate as human rights courts in order to create an environment conducive for economic

¹⁷S T. Ebobrah, “Litigating Human Rights Before Sub-Regional Courts In Africa: Prospects And Challenges” (2009) 17 (1) *African Journal of International and Comparative Law* 79-101.

¹⁸M Swart. “Alternative Fora For Human Rights Protection? An Evaluation Of The Human Rights Mandates Of The African Sub-Regional Courts” (2013) 3 *South African Law Journal* 437-452.

¹⁹Supra note 17.

integration. Murungi is of the same view, she points out that the adoption of strong human rights values and institutions creates confidence for investors and trading partners and ensures effective participation of individuals.²⁰

Ebobrah gives an extensive discussion on the enforcement mechanisms available in these courts and illustrates how politics has been a deterring factor in the effective implementation of the Court's resolutions. In addition to that, he argues that the cases in these courts allow for a development of sub-regional human rights system jurisprudence. Finally, he concludes that the 'pursuit of economic integration on the continent would be meaningless if conflicts prompted by human rights violations at national level are allowed to continue.'²¹ This indicates that according to this scholar, the courts only operate as human rights courts as a consequence of the objective of promoting regional integration. In this regard, it is critical to note that this research seeks to explore the human rights jurisdiction as contemplated in their respective protocols through interpretation of the relevant provisions and interpretative methods adopted by the courts in various cases.

Similarly, other scholars such as Gathii explore the general reluctance of national courts in the East African Community to implement the decisions of the courts. These scholars argue that this reluctance to enforce human rights 'guarantees' is particularly because at its conception the founders of the EAC did not contemplate having a court with a human rights mandate. However, in recent times the EACJ exemplifies an emerging trend of human rights enforcement. Gathii stresses the fact that even though this emerging human rights trend is commendable a lot still needs to be done in order to bridge the enforcement gap. This scholar also deals with how the EACJ has transformed itself in redefining its role.²² This therefore needs to be explored further in light of recent developments in SADC and see how the EACJ can be used to mould a new SADC Tribunal.²³ Viljoen supports the activist posture taken by the Court.²⁴

²⁰ L N Murungi "Revisiting The Role Of Sub-Regional Courts In The Protection Of Human Rights In Africa" (2009) *University of Pretoria*. Accessed at <http://repository.up.ac.za/bitstream/handle/2263/12656/murungi.pdf?sequence=1>

²¹ Supra note 17.

²² J Gathii, *Mission Creep or a Search for Relevance: The East African Court of Justice's Human Rights Strategy* (2014) Forthcoming 24th *Duke Journal of International Comparative Law*.

²³ From Campbell to the new Protocol.

²⁴ See F Viljoen *International Human Rights Law in Africa* (2007) for a general discussion on the changing trend in the RECs at 497-8.

Bossa illustrates the need to extend the jurisdiction of the EACJ and expresses concern on the slow pace at which the transformation is taking place.²⁵ The EACJ adopted a resolution that it will adopt a protocol to extend the jurisdiction of the Court to human rights matters. The reluctance on the part of the politicians, that is, the Council of Ministers is dealt with. Bossa points out that at times the Council of Ministers' meetings have been postponed at short notice regardless the urgency of the council business. This signals lack of political will to extend the jurisdiction of the Court to human rights matters.

In addition, Ruhangisa explores how the existence of concurrent jurisdictions in the EAC has hindered the adoption of the protocol extending the jurisdiction of the Court. The regional bloc continues to establish other dispute resolution mechanisms which erode the jurisdiction of the Court. The Court has concurrent jurisdiction with other regional blocs.²⁶

He notes that 'while this increase in judicial and quasi-judicial dispute settlement mechanisms may be considered an indication of willingness of states to submit themselves to the rule of law in their interactions with international community, a number of dangers concomitant to the same way may also be identified.'²⁷ One such danger is that the new protocol will not be adopted.

Naldi writes an analysis of the decision of the SADC Tribunal in the case of *Campbell v Republic of Zimbabwe*. This author argues that while the Tribunal's decision was correct it could have been reasoned in a more persuasive way. This scholar however commends the Tribunal for establishing itself as a human rights forum.²⁸

Tembo is of the view that African human rights system as a whole strengthens the universality of human rights and places a substantial limit on the principle of sovereignty.²⁹

Nevertheless, the same cannot be true for Southern Africa, if viewed in isolation, where seemingly sovereignty is the determining factor. In this regard, this research will explore how the principle of sovereignty has hindered the jurisdiction of the SADC Tribunal.

²⁵ S Bossa "Towards a Protocol extending the Jurisdiction of the East African Court of Justice" (2006) 31 *East African Journal of Human Rights and Democracy*.

²⁶ ECOWAS court being a notable example.

²⁷ J E Ruhangisa 'The East African Court Of Justice: Ten Years Of Operation (Achievements And Challenges)' Paper presented during the inter-parliamentary relations seminar, Burundi National Assembly, Bujumbura.

²⁸ G J Naldi "Mike Campbell (Pvt) Ltd et al v The Republic of Zimbabwe: Zimbabwe's Land Reform Programme Held in Breach of the SADC Treaty" (2009) 53 (2) *Journal of African Law*. 305-320.

²⁹ S Tembo "An Analysis Of The SADC Tribunal And The East African Court Of Justice; A Human Rights Perspective" (2015) *University of Kwa-Zulu Natal Students Law Review* 113-130.

Adjami's text explores the status of international human rights law in national courts (domestic) and argues that due to lack of independence in some African countries governments intervene to overturn progressive court decisions on human rights issues.³⁰

Moyo notes that, "the regional commitment echoed in the provisions cited above suggests that the Tribunal's jurisprudence is an integral part of its institutional mandate. Member states should therefore co-operate with and assist the Tribunal in the performance of its duties. However, there are no mechanisms through which the Tribunal can supervise the implementation of its decisions. Thus, political leadership and good faith are needed at the Summit level if the Tribunal's judgments are to be worth the paper they are written on."³¹

It is important to note that there has not been much literature or published work on the new SADC protocol signed in 2014. However, Tembo points out that 'the new Protocol to the Tribunal needs provisions that stipulate the measures that should be taken in order to deal with non-compliance.'³² This gives rise to critical research questions, which will be dealt with in this paper.

1.5 Relevance of the Study

This study aims to show that the importance of sub regional human rights systems cannot be underestimated. Sub-regional human rights systems bring international justice close to the victims of abuses by state machinery. As such, any conduct that is deemed to be inconsistent with human rights principles in the founding documents of the Regional Economic Communities should be deemed unlawful and invalid. In addition, it is suggested that the regional judicial bodies can grow stronger if they learn from each other's weaknesses and strengths. Finally, this study serves to suggest a strategy of adjudication that could see sub-regional courts existing in harmoniously with the political bodies of sub-regional blocs

1.6 Research Methodology

The study takes the form of a comparative analysis of the jurisdictions of the SADC Tribunal and that of the EACJ. Other regional and sub-regional systems are used as points of reference. This is a library-based study, digital and physical, published and unpublished

³⁰ M E. Adjami, "African Courts, International Law, And Comparative Case Law: Chimera Or Emerging Human Rights Jurisprudence?" (2002) 24 *Michigan Journal of International Law* 103.

³¹ A Moyo "Defending human rights and the rule of law by the SADC Tribunal: Campbell and beyond" (2009)

² *African Human Rights Law Journal* 590-614.

³² Supra note 29.

resources containing primary and secondary sources are used. The two Courts are juxtaposed and a comparative analysis undertaken.

1.7 Limitations of the study

The very nature of the research methodology in this study places a huge barrier to other relevant sources of information. A pure desktop study confines the researcher to literature that is readily available for the researcher. This means that information that could have been obtained through interviews or visits to the SADC Tribunal or EACJ is not relied on. In addition, there is limited literature on the New Protocol on the SADC Tribunal hence newspaper articles are relied on thereby limiting this study to speculation and opinion. Finally, new developments in the EACJ and the SADC Tribunal limits the scope of this study; hence the need to limit this study to events, cases and advisory opinions prior to 31 August 2015.

1.8 Overview of chapters

Chapter 1

This will take the form of an introduction to the study, taking the format used in the research proposal, but will not necessarily be a replication. It will comprise of a detailed background and an analysis of the existing literature.

Chapter 2

Regional human rights systems are unpacked in this chapter. This comprises the historical development of regional human rights mechanisms including a discussion on the importance of human rights protection at regional and sub-regional level. Finally, a discussion on the judicial and non-judicial enforcement of human rights is made.

Chapter 3

This chapter makes a detailed analysis of the concept of jurisdiction of international organisations. The relationship between human rights jurisdiction and use of individual petitions in human rights courts is analysed.

Chapter 4

This chapter introduces the SADC Tribunal. It focuses on the human rights jurisdiction of the SADC Tribunal. This chapter will analyse how the SADC Tribunal acquired its human rights jurisdiction. The issue of implementation of the decisions of the Court by domestic courts is also scrutinised. Lastly, the human rights implications of the proposed protocol are put into perspective.

Chapter 5

The East African Court of Justice is introduced. The human rights jurisdiction of the EACJ will be the focal point. This chapter will acknowledge that the Court has done relatively well in discharging its mandate. The issue of implementation of the decisions of the Court is also looked at.

Chapter 6

This chapter will serve as a concluding chapter. It will sum up all the arguments raised in the preceding chapters. It will also make a comparative analysis of the decisions of the SADC Tribunal and the East African Justice and the reactions of the political organs thereto and necessary recommendations are made.

1.9 Delimitation

This study is confined to the period running up to 31st December 2015. Any new developments in respect of the new Protocol on Tribunal will substantially affect the scope of the study. Since the new Protocol is not yet in force, the Tribunal shall be deemed suspended throughout the study. If the new protocol comes into force before completion of this study, it will not be incorporated and will consequently be referred to as the 'proposed protocol.' This is because any developments in respect of the new protocol fall outside the scope of this study.

Chapter 2

HUMAN RIGHTS IN REGIONAL COURTS: A HISTORICAL OVERVIEW

2.1 Introduction

The notion of human rights protection at sub-regional level cannot be discussed without first looking at the historical development of human rights at the regional and international level. As such, it is important to discuss how the early international organisations led to the ‘universalisation’ of human rights. The end of the World War II marked the beginning of a new era of a ‘universal’ human rights system. In December 1948, the United Nations’ General Assembly³³ adopted the Universal Declaration of Human Rights³⁴ (hereafter referred as the UDHR). As Baderin and Ssenyonjo put it, ‘the UDHR is considered today as the legal baseline for modern international human rights law...’³⁵ The adoption of human rights legal framework was prompted by the atrocities committed during the Second World War. The war crimes ‘provoked significant humanitarian concerns and moved the world community to call for international measures aimed at ensuring the legal protection of human rights and achievement of world peace and security.’³⁶ International efforts were made to prevent a repeat of the crisis. Other scholars have observed that ‘gradually over the same period the United Nations, other international organisations, regional institutions and governments have developed various procedures for protecting against and providing remedies for human rights abuses.’³⁷ It is the development of those procedures at regional level that are of interest in this chapter.

³³The General Assembly (GA) is the main deliberative, policymaking and representative organ of the UN. Decisions on important questions, such as those on peace and security, admission of new members and budgetary matters, require a two-thirds majority. Decisions on other questions are by simple majority. Each country has one vote.

³⁴The preamble of the UDHR says ‘a common standard of achievement for all peoples and all nations, to the end that every individual and every organ of society, keeping this Declaration constantly in mind, shall strive by teaching and education to promote respect for these rights and freedoms and by progressive measures, national and international, to secure their universal and effective recognition and observance, both among the peoples of Member States themselves and among the peoples of territories under their jurisdiction. Human rights jurisdiction of sub-regional courts.’

³⁵MA Baderin and M Senyonjo “Development of International Human Rights Law Before and After the UDHR.” (2010) *SOAS School of Law Research Paper* No. 02/2011; See also M Mutua *Human Rights: A Political and Cultural Critique* (2002) 15 who shares a similar view that the UDHR is the “grandest of all human rights documents.”

³⁶Baderin and Senyonjo, *Ibid*.

³⁷D Weissbrodt and C de la Vega. *International Human Rights: An Introduction* (2007) 3.

Since its formation, the United Nations undertook to promote and protect human rights. Article 1 of the UN Charter states that, *inter alia*, the purpose of the UN is ‘...promoting and encouraging human rights and fundamental freedoms...’³⁸ Pursuant to these objectives, the International Covenant on Civil and Political Rights (ICCPR)³⁹ and the International Covenant on Social Economic and Cultural Rights (ICESCR),⁴⁰ were adopted in 1966 and came into force in 1976. The two documents cover wide ranging aspects of human rights and have been hailed as comprehensive human rights instruments.

Various regional human rights mechanisms were established around the 1950s thereby facilitating the proliferation of regionalised human rights. Sub-regional human rights systems were established later in the century and these are particularly unique to Africa as will be shown in the following chapters. Weston *et al*⁴¹ notes that, ‘... the regional development of human rights norms, institutions and procedures is likely to grow.’ The reasons for the development of regional and sub-regional systems are explained by Weston *et al* as homogeneity that exists within regions, and geographic proximity, cultural proximity and the socio economic interdependence that exist at regional level. Human rights instruments thus flourish when facilitated by alliances based on commonalities, and these are found at regional level.⁴² According to the European Union Directorate;⁴³ ‘regional human rights protection mechanisms constitute the main pillars of the international system for the promotion and protection of human rights.’⁴⁴ There is a tendency worldwide to consider regional human rights systems as important pillars of international human rights promotion and protection and there are increasing efforts to strengthen and improve existing ones.

³⁸ Article 1 of the United Nations Charter.

³⁹ ICCPR was designed to protect civil and political rights of citizens of signatory states together with the ICESCR; they have evolved to become part of international customary law and are often jointly referred to as the International Bill of Rights.

⁴⁰ Ibid.

⁴¹ Weston *et al* ‘Regional Human Rights; Comparison And Appraisal’ (1987) 20 *Vanderbilt Journal of Transnational Law* 585.

⁴² Ibid.

⁴³ Directorate-General for External Policies of the Union is responsible for organising the work of Parliament's committees and inter parliamentary delegations in the field of external policies. For more information on the role of the Directorate see <http://www.europarl.europa.eu/the-secretary-general/en/organisation/directorategenerals/externalpolicies.html>

⁴⁴ Directorate-General For External Policies. Directorate B Policy Department Study. *Role of Regional Human Rights Mechanisms*. DROI 2010.

2.2 Historical Development of Regional Human Rights Regimes

The Universal Declaration of Human Rights (UDHR) was the first international human rights instrument. Article 55 of the Charter provides that;

With a view to the creation of conditions of stability and well-being, which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, the United Nations shall promote... [*inter alia*] universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion.

In 1977, having seen the proliferation of human rights at regional levels, the United Nations advised member states to ‘consider agreements with a view to the establishment within their respective regions of suitable regional machinery for the promotion and protection of human rights.’⁴⁵ This set into motion the regionalisation of human rights protection and promotion. According to Shelton, ‘as a consequence, no State today can claim that its treatment of those within its jurisdiction is a matter solely of domestic concern.’⁴⁶

The Council of Europe⁴⁷ and the Organisation of American States (OAS)⁴⁸ were the first to draft their own human rights instruments at regional level and were later followed by the African Union (then known as the Organisation of African Unity).⁴⁹

⁴⁵Supra note 45, 585. See especially Resolution 32/127... ‘mindful of suggestions made for the establishment in regions where it does not exist, of regional machinery for the protection of human rights, *Aware* of the importance of encouraging regional co-operation for the promotion and protection of human rights and fundamental freedoms...1. *Appeals* to States in areas where regional arrangements in the field of human rights do not yet exist to consider agreements with a view to establishment within their respective regions of suitable regional machinery for the promotion and protection of human rights; 2 *Requests* the secretary general, under the program of advisory services in the field of human rights, to give priority to the organisation, in regions where no regional commission on human rights exists, of seminars for the purposes of discussing the usefulness and advisability of the establishment of regional commissions for the promotion and protection of human rights.’

⁴⁶D Shelton *Regional Protection of Human Rights* (2008) 1.

⁴⁷Comprises of 47 member states, all members are also signatories to the European Convention on Human Rights.

⁴⁸It is made up of 35 independent states of the Americas. It was established in 1948 after the signing of the Charter of the OAS.

⁴⁹European Convention of Human Rights was signed in 1950 and the Inter- American Convention on human rights was signed in November 1969.

2.2.1 *The American System*

The 9th International Conference of American States adopted the American Declaration on the Rights and Duties of Man in 1948.⁵⁰ The Charter of the Organisation of American States was signed in 1948 and it eventually entered into force in 1951.⁵¹ Article 34 of the Charter provides that:

Member states agree that equality of opportunity, the elimination of extreme poverty, equitable distribution of wealth and income and the full participation of their peoples in decisions relating to their own development are, among others, basic objectives of integral development.⁵²

The American Convention on Human Rights (ACHR) was adopted in 1969 in San José in Costa Rica. It subsequently came into force in 1978 after the requisite number of countries ratified it.⁵³ The Inter-American Commission of Human Rights and the Inter-American Court of Human Rights (referred to as the Commission and ACtHR or the Court respectively) were established to interpret and implement provisions of various instruments.⁵⁴ The Commission was established in 1959 and later amended through the Protocol of Buenos Aires to implement the American Declaration on the Rights and Duties of Man and subsequently acquired a role to implement the Convention in 1978. The Inter-American Court of Human Rights has both contentious and advisory jurisdiction. In order for a case to be decided, State parties have to accept the jurisdiction. State parties can also consult the Court in respect of interpretation of the Convention or other human rights treaties. It is important to note that these instruments come on the pretext of widespread dictatorship, communism and chronic states of emergencies in the region.⁵⁵

⁵⁰ See for example Weissbrodt and de la Vega, *Supra* note 45, who argue that while the declaration was not a binding resolution it has gradually developed into a binding interpretation of the OAS Charter.

⁵¹ As amended by the Protocol of Buenos Aires in 1970, Protocol of Cartagena de Indias in 1988, Protocol of Managua in 1996, and Protocol of Washington in 1997.

⁵² Article 34 of the Organisation of American States Charter.

⁵³ Ratified by Argentina, Barbados, Bolivia, Brazil, Chile, Colombia, Costa Rica, Dominica, Dominican Republic, Ecuador, El Salvador, Grenada Guatemala, Haiti, Honduras, Jamaica, Mexico, Nicaragua, Panama, Paraguay, Peru, Suriname, Trinidad, Uruguay and Venezuela

⁵⁴ Including the American Declaration of the Rights and Duties of Man, Inter-American Convention To Prevent And Punish Torture, Protocol on San Salvador²: Additional Protocol To The American Convention on Human Rights in the Area of Economic, Social And Cultural Rights; Protocol To The American Convention On Human Rights To Abolish Death Penalty, Inter –American Democratic Charter, among others

⁵⁵ *Supra* note 37.

2.2.2 European System

The European Convention on Human Rights came into force in 1953 and was followed by the adoption of several human rights protocols.⁵⁶ The European Convention of 1953 established the European Commission of Human Rights (the European Commission) and the European Court of Human Rights (the European Court). Essentially, this was the birth of a regional human rights system in Europe.⁵⁷ The two institutions had automatic jurisdiction over interstate disputes.

The Court is now the only human rights adjudication body in the region, the Commission became obsolete following the restructuring of the European Court after 1998. The European Commission was abolished after the adoption of Protocol no 11 to the Convention on the Protection of Human Rights and Fundamental Freedoms. The European Court of Human Rights addresses three types of disputes. It accepts complaints from individuals, groups of individuals and non-governmental organisations whose rights have been violated by any one of the Convention States.⁵⁸ Article 33 of the Convention provides for the Court's jurisdiction over inter-state disputes and a limited advisory jurisdiction.⁵⁹

2.2.3 The African System

The Organisation of African Unity's (OAU) eighteenth Assembly of Heads of States and Governments adopted the African Charter on Human and Peoples Rights, also known as the Banjul Charter, in 1981 in Banjul. The Charter came into force six years later, on October 21 1986.⁶⁰ The Banjul Charter made provision for the establishment of the African Commission of Human Rights and the African Court of Human and Peoples Rights.

⁵⁶ Such protocols are 1. Enforcement of certain Rights and Freedoms not included in Section I of the Convention 2. Conferring upon the European Court of Human Rights Competence to give Advisory Opinions 3. Protecting certain Additional Rights 4. Amending Articles 22 and 40 of the Convention and 5. Amending Articles 29, 30, and 94 of the Convention

⁵⁷ The Commission became obsolete after the restructuring of the European Court after 1998; however, its main function was to consider admissibility of cases and to attempt to secure friendly settlements.

⁵⁸ Albania, Andorra, Armenia, Austria, Azerbaijan, Belgium, Bosnia and Herzegovina, Bulgaria, Croatia, Cyprus, Czech republic, Denmark, Estonia, Finland, France, Georgia, Germany, Greece, Hungary, Iceland, Ireland, Italy, Lithuania, Liechtenstein, Latvia, Luxembourg, Malta, republic of Moldova, Monaco, Montenegro, Netherlands, Norway, Poland, Portugal, Romania, Russia, san Marino, Serbia, Slovak Republic, Slovenia, Spain, Sweden, Switzerland, Turkey, Ukraine, and United Kingdom.

⁵⁹ Issues of accessibility by individuals will be discussed at length in the following chapters.

⁶⁰ See the African Charter on Human and Peoples Rights ratification table at

<http://www.achpr.org/instruments/achpr/ratification/>

Pursuant to this provision, the African Commission on Human Rights came into force in 1987 and the African Court of Human Rights (African Court) subsequently came into force in 2004 with a mandate to interpret the provisions of the Charter.

In June 1998, the OAU adopted the Protocol to the African Charter on Human and People's Rights on the establishment of an African Court on Human and Peoples Rights.⁶¹ The African Court was intended to complement the African Commission's oversight in regional human rights. Nmeheille points out that, 'the adoption of the Protocol was a culmination of an effort that began four years earlier in 1994 a year that marked the beginning of a new dispensation in the mission to strengthen institutional mechanisms for human rights protection.'⁶² Before the creation of the regional mechanisms, 'among the decisions taken by African heads of states during the summit meeting was creation of an African human rights defence mechanism. They spoke in unison and expressed concern over violations of human rights and stated that these have become a disturbing feature in the continent.'⁶³

The OAU had been for long been contemplating establishing human rights at a regional level. Dlamini points out that:

At the 1961 Lagos Congress on the Primacy of Law, the meeting recommended a study to consider the possibility of both a Human Rights Convention for Africa and a regional Human Rights Tribunal, similar to the European or the American Commission on Human Rights. This proposal resurfaced at many subsequent seminars and in particular at the 1969 Cairo Seminar where it was agreed that this move was desirable. Although the Secretary-General of the UN subsequently communicated that recommendation to the OAU and all the governments of the OAU member states, no action was taken.⁶⁴

This shows that even though it took unnecessarily long for the African block to agree on a human rights body, it did not ignore its desirability. However, concerns have been raised over the issues of resources of the commission. Murray, for instance, submits that 'certainly

⁶¹To date, only the following twenty six (26) States have ratified the Protocol: Algeria, Burkina Faso, Burundi, Cote d'Ivoire, Comoros, Congo, Gabon, Gambia, Ghana, Kenya, Libya, Lesotho, Mali, Malawi, Mozambique, Mauritania, Mauritius, Nigeria, Niger, Rwanda, South Africa, Senegal, Tanzania, Togo, Tunisia and Uganda.

⁶²VO Nmeheille 'Development of the African Human Rights System in the Last Decade' *Human Rights Brief* 11 no 3 (2004).

⁶³CRM.Dlamini 'Towards a regional Protection of human rights in Africa: The African Charter on Human and Peoples' Rights' (1991)24 *Comparative and International Law Journal of South Africa* 196.

⁶⁴*Ibid*, 189.

in the course of its history, the ACHPR has faced difficulties. Some of the African Commission on Human and Peoples Rights' members are clearly not independent of government, it has lacked resources and impact of its work is often debatable.⁶⁵

Sub-regional courts in Africa also form part of the international human rights system. Initially formed as part of sub-regional community structures, the Southern African Development Community Tribunal (SADC Tribunal),⁶⁶ Economic Community of West African States Court (ECOWAS Community Court)⁶⁷ and the East African Court of Justice (EACJ)⁶⁸ have become an integral part of their respective regions' human rights systems.

The development and acquisition of human rights jurisdiction by these Courts/ Tribunals will be discussed in more detail in the chapters to follow.

2.3 Human Rights Protection at Regional Level and Sub-Regional

The importance of supranational human rights protection cannot be underestimated. Regional human rights systems have evolved over time to become an important aspect of international law. The main reason for evolvement of regional human rights systems, for example in Europe, is explained by Shelton;

Europe had been a theatre of greatest atrocities of the Second World War and felt compelled to press for international human rights guarantees as part of European reconstruction. Faith in western European traditions of democracy, the rule of law and individual rights inspired belief that a regional system could be successful in avoiding future conflict...⁶⁹

In addition, regional human rights mechanisms are 'commonly thought to be potentially more effective than the United Nations'⁷⁰ because they are better able to take account of regional conditions.'

In Africa, international human rights instruments and institutions emerge as part of regional integration. Regional integration is instrumental in the promotion and development of trade,

⁶⁵ R Murray "International Human Rights Neglect Of Perspectives From African Institutions" (2006) 55 *International and Comparative Law Quarterly* 193-204.

⁶⁶ Established on the 18th of August 2005.

⁶⁷ Created pursuant to the provisions of Articles 6 and 15 of the Revised Treaty of the Economic Community of West African States (ECOWAS) in 1991.

⁶⁸ The Treaty establishing the EACJ was signed in 1999 and it only became operational in 2000. Judges were sworn in on the 30th of November 2001.

⁶⁹ D Shelton, *The promise of regional human rights systems*, in D Shelton, *Regional Protection of Human Rights*, (2008).

⁷⁰ C Gevers "Human Rights Law Lecture Notes," *University of KwaZulu-Natal* 2011.

social and political cohesion amongst states. Regionalism in Africa resulted in the formation of sub-regional political and economic groupings that have lately become important human rights platforms. Many scholars prefer to discuss the notion of sub-regional human rights under the much broader concept of Regional Economic Communities (RECs). Ebobrah argues that, ‘in pursuit of regional economic integration supranational organs were established in the RECs to enhance the smooth operation of various groupings. One organ that commonly appears in RECs is a judicial body set up to resolve disputes within communities.’⁷¹ This therefore reinforces the idea that, at inception, regional bodies were established ‘as rallying points for progressive economic integration aimed at improving the living standards of their citizens’⁷² The African Union is not an exception. Murray describes the AU as:

... Africa’s principal organisation for the promotion of socio-economic integration of the continent. It focuses on issues of peace, security and stability as a prerequisite for the implementation of the Union’s development and integration agenda. AU’s stated objectives, as follows, include human rights; to promote and protect human and peoples rights in accordance with African Charter on Human and Peoples Rights and other relevant human rights instruments.⁷³

The importance of RECs is reiterated by Babatunde where he says, ‘... the idea is premised on the logic that the successful realisation of both political and economic aspects cannot disregard the existence of basic legal norms that promotes national and transnational democratic development, accentuates uniform compliance with transnational directives and promotes and sustains continued interaction amongst relevant stakeholders.’⁷⁴ It should be noted that scholars tend to ignore the fact that the successes of these RECs depend largely on political will. African political leaders have a well-documented history of non-compliance with international laws and disregard for human rights.⁷⁵ Ebobrah makes an important observation when he says, ‘commendable as these developments may be, it

⁷¹ Supra note 17.

⁷² S T Ebobrah ‘Human Rights Developments In Sub-Regional Courts In Africa’ (2009) 9 *African Human Rights Law Journal* 312.

⁷³ R Murray cited in Shelton, *Regional Protection of Human Rights*, (2008) 88-89.

⁷⁴ F. Babatunde ‘Exploring legal imperatives of regional integration in Africa’ (2012) 4 (1) *The Comparative and International Law Journal of Southern Africa* 66.

⁷⁵ See T Murithi ‘The African Union and the International Criminal Court: An Embattled Relationship?’ 2013 8 *Institute For Justice and Reconciliation Policy Brief*. 3, 4.

appears there are issues that need to be addressed before RECs would become havens for human rights realisation.⁷⁶

In Africa, the regional organisations were established not only for the purposes of economic integration but also as part of the process of the formation of a political union. However, lack of homogeneity in the African region has been a deterring factor. Babatunde is of view that, ‘the extent to which member states adhere to indicators such as fundamental rights, good governance, transparent electoral processes, independence of the judiciary and the rule of law determines the smooth and uniform implementation of integration goals.’⁷⁷ This shows that human rights are an indispensable part of the integration process.

In Africa there exists serious human rights issues such persecution of political opponents, ill treatment of aliens, over reliance on the military in dealing with civil unrest, genocides and endless civil wars. Adjami points out that, ‘state collapse, humanitarian crisis and war are the faces of Africa that the world see today. Lost in the tide of dark images are incremental steps for protection of human rights.’⁷⁸ Africa has done much in order to ensure regionalised human rights protection. Regional and sub-regional mechanisms were created to counter these human rights violations on the continent.

The importance of regional human rights systems is that once a state ratifies an international instrument, it means it has recognised the rights contained therein, cannot act contrary to those provisions, and cannot raise the principle of sovereignty as justification of any violation thereof.⁷⁹ Ebobrah agrees with the view that human rights protection appropriately belongs to the supranational platforms and a state cannot raise the issue of sovereignty.⁸⁰ He says, ‘at inception, Regional Economic Communities (RECs) in Africa generally stuck with their economic focus leaving political issues to wider continental forum. With respect to human rights, the feeling among some African leaders was that the issue was too political and could be used as a ‘pretext for intervening in their countries internal affairs’ hence it

⁷⁶Supra note 17, 79-101.

⁷⁷F. Babatunde “Exploring Legal Imperatives of Regional Integration In Africa.” (2012) 41 *The Comparative and International Law Journal of Southern Africa* 66.

⁷⁸M E. Adjami “African Courts, International Law, And Comparative Case Law: Chimera Or Emerging Human Rights Jurisprudence?” (2003) 24 *Michigan Journal of International Law* 103.

⁷⁹C R M. Dlamini “Towards a regional Protection of human rights in Africa: The African Charter on Human and Peoples' Rights” (1991)24 *Comparative and International Law Journal of South Africa* 189.

⁸⁰Supra note 17.

was argued that the treatment of human rights more appropriately belonged in other international fora.⁸¹

Having discussed the importance of regional and sub-regional human rights protection above, it is crucial that the enforcement mechanisms available at these levels be discussed.

2.4 Judicial and Non-Judicial Enforcement of Human Rights

In his 1994 Wieck Lecture at the University of Akron's School of Law, Judge Edward Re stated that;⁸²

Regardless of the underlying basis, no nation today can claim the sovereign right to violate those universal rights deemed to be fundamental or unalienable. Hence, because of the acceptance of international legal norms in the area of human rights, the effort today is not merely to assert fundamental rights and freedoms to which human beings are entitled, but rather to strengthen the enforcement mechanisms that must exist to give these rights vitality and to make them a reality.⁸³

Regional instruments were designed to promote and protect human rights. Enforcement mechanisms are however still far from ideal. There have been some criticisms levelled against some of the enforcement mechanisms. Human rights are enforced by means of both judicial and non-judicial mechanisms.

2.4.1 Domestic law

With the development of constitutionalism in a number of African States, human rights have become easily enforceable at domestic level. Regardless of whether or not a state has a codified bill of rights, it is likely that it has legislation or a provision in the constitution that

⁸¹S T. Ebobrah, "Litigating Human Rights Before Sub-Regional Courts In Africa: Prospects And Challenges" (2009) 17 (1) *African Journal of International and Comparative Law* 79.

⁸² Chief Judge Emeritus of the United States Court of International Trade and Distinguished, Professor of Law St. John's University School of Law. Judge Re was Chairman of the Foreign Claims Settlement Commission of the United States and Assistant Secretary of State for Educational and Cultural Affairs. He served as Chair of the American Bar Association's Section of International and Comparative Law, and President of the American Society of Comparative Law and is a Member Emeritus of the Board of Higher Education of the City of New York. Having served in World War II and during the Korean conflict, Judge Re is a Colonel in the Judge Advocate General's Department of the United States Air Force (Retired). Effective December 15, 1993, the International Association of Judges appointed Judge Re as its Principal Representative to the United Nations. On January 13, 1994, Chief Justice Rehnquist appointed Judge Re a member of a new U.S. Judicial Conference Committee on International Judicial Relations. Accesses at <http://www.uakron.edu/dotAsset/e8af5cfc-e8ce-4552-98a8-4a07de1b4c15.pdf>

⁸³E. D. Re "Judicial Enforcement of International Human Rights" (1994) 27 (3) *Akron Law Review* 4.

binds the State to conform to the principles of human rights or recognise the application of international law in domestic courts. According to Steiner and Alston, ‘human rights violations occur within a state, rather than on the high seas or in the outer space outside the jurisdiction of one state. Ultimately, effective protection must come from within a state.’⁸⁴

Courts play a crucial role in enforcing international human rights law. Various national constitutions require courts to apply international law when faced with human rights cases.⁸⁵

Some international laws have provisions that require states to incorporate international law into domestic legislations. For example, the ICCPR encourages states to ‘adopt such legislative or other measures as may be necessary to give effect to rights recognised in the... covenant.’⁸⁶

Application of international law, however, depends on whether a country subscribes to a monist or a dualist legal system. Monists have international law as part of the overall legal system. According to Killander, monist theory provides that international and national law are a manifestation of a single conception of law.⁸⁷ Dualists place a distinction between domestic and international law and courts apply only international law that has been incorporated into the domestic legal system.⁸⁸ Even so, some international laws have evolved to form part of international customary law⁸⁹ and such laws are applied regardless their status in domestic legislation.⁹⁰

In both the European and African systems, there is no formal obligation on the member states to incorporate provisions of the convention into their domestic law. Application and status of the Convention therefore varies from one state to another.⁹¹ Even so, most

⁸⁴HJ Steiner and P Alston *International human rights in context; Law, Politics and Morals*.(2000) 987

⁸⁵For example the South African constitution section 39 (1) when interpreting the Bill of Rights, a court, tribunal or forum (a)...(b) Must consider international law... the Zimbabwe constitution (Amendment No. 20.Act, 2013) section 46 (1) when interpreting this chapter, a court, tribunal, forum, or body – (a)...(b)... (c) Must take into account all international law and all treaties and conventions to which Zimbabwe is a party...⁸⁶ In particular Article 2 (2) of the International Covenant on Civil and Political Rights.

⁸⁷M Killander *International Law And Domestic Human Rights Litigation In Africa* 2010.

⁸⁸J Dugard *International Law: A South African Perspective* 2011.

⁸⁹ According to Rosennein, Customary international law “... consists of rules of law derived from the consistent conduct of States acting out of the belief that the law required them to act that way.” The elements of customary international law include: 1. The widespread repetition by States of similar international acts over time (State practice); 2. The requirement that the acts must occur out of a sense of obligation (opinion juris) and; 3. That the acts are taken by a significant number of States and not rejected by a significant number of States.’ S Rosennein *Practice and Methods of International Law* (1984) 55.

⁹⁰See generally Killander, Supra note 87, 11, who argues that ‘... the epitome of dualism is arguably exaggerated. Firstly; most would argue that customary international law form part of the law of the land in common law countries. Secondly, unincorporated treaties play an increasingly important role, though courts may not directly apply them 11.

⁹¹HJ Steiner and P Alston. *International human rights in context; Law, Politics and Morals* (2000), 1001.

countries embark on constitutional reform in order to align their national legislations and constitutions resulting in an indirect application of the Convention in domestic courts.

Semi-judicial organs such as human rights commissions and ombudsmen also play a part in the enforcement of human rights in the domestic setting. These organs are normally independent or semi-independent and quasi-governmental. Scholars acknowledge the importance of these organs, and they term them National Human Rights Institutions (NHRIs).⁹² The development and operations of these organs is guided by what are called the Paris Principles⁹³. The Paris principles emphasize the necessity for NHRIs to be as ‘autonomous from the government as possible, to represent the pluralist interests of civil society, and to be given adequate powers of investigation, as well as sufficient resources.’⁹⁴

2.4.2 Intergovernmental mechanisms

Human rights can be forced by domestic or international mechanisms. Human rights enforcement at regional and sub-regional level has been problematic for quite some time now. The major impediment to judicial enforcement of human rights is the notion of state sovereignty. States run on autocratic lines are usually quick to raise state sovereignty when faced with a human rights crisis. This makes it difficult for enforcement mechanisms to fully operate without any hindrance. It should be noted that States bear the primary responsibility of enforcing human rights, however, lack of consensus on the enforceability and application of certain rights has made it difficult.⁹⁵ Human rights treaties acquire a legal effect after being incorporated into domestic laws of a State.

Human rights are enforced through use of courts, statutes, tribunals and human rights treaties. One issue that has been problematic is the authority to impose sanctions on states

⁹²See for example Weissbrodt and de La Vega, *Supra* note 37.

⁹³These are principles relating to the status of national institutions in the enforcement of human rights adopted by the United Nations General Assembly Resolution 48/134 of 20 December 1993. Paris Principles state that ‘a national institution shall, inter alia, have the following responsibilities (a) To submit to the Government, Parliament and any other competent body, on an advisory basis either at the request of the authorities concerned or through the exercise of its power to hear a matter without higher referral, opinions, recommendations, proposals and reports on any matters concerning the promotion and protection of human rights; the national institution may decide to publicize them; these opinions, recommendations, proposals and reports, as well as any prerogative of the national institution...’

⁹⁴Principles relating to the Status of National Institutions (The Paris Principles) Adopted by General Assembly resolution 48/134 of 20 December 1993.

⁹⁵Justiciability of socio-economic rights has proved problematic in developing countries. For detailed analysis on whether socio-economic rights are justiciable, see *SERAC v Nigeria* AHRLR 60 (ACHPR 2001); *Government of the Republic of South Africa v Grootboom* [2000] ZACC 19, 2001 (1) SA 46 (CC), 2000 (11) BCLR 1169 (CC).

that have violated their human rights mandate. International courts have often been viewed as the ‘gold standard’ for the enforcement of human rights at both domestic and international level.

Other than through courts, human rights instruments are also enforced through reporting and monitoring mechanisms.⁹⁶ According to Saunders, ‘far from being “toothless” these enforcement mechanisms have potential to directly impact human rights courts with strong enforcement authority.’⁹⁷ This argument was made in support of the notion of an integrated enforcement. Integrated enforcement is described by Saunders ‘as integrated enforcement requires interaction between overlapping treaties that, between them, contain a reporting or monitoring mechanism, as well as an adjudicatory tribunal.’⁹⁸ The potential that international mechanisms have in enforcing human rights cannot be understated. For example, the Council of Europe provides for the expulsion by the Committee of Ministers of states found guilty of the most serious and repeated breaches of the principle upon which the Council is based including the protection of human rights. Most treaties are supported by mechanisms that monitor and report States’ compliance with their human rights obligations and not by courts or tribunals. Saunders further argues that even though monitoring and reporting is often criticised, critics overlook the potential that they may have if used in tandem with other mechanisms.⁹⁹

2.4.1.1 Monitoring and Reporting

The effectiveness of monitoring and reporting is limited by the fact that the organs responsible lack authority to impose certain obligations or even sanctions to ensure compliance. Saunders notes that, ‘it is true, of course, that reporting¹⁰⁰ committees are

⁹⁶ See for example <http://www.endvawnow.org/en/articles/994-what-is-human-rights-monitoring.html>. Human rights monitoring mechanism gathers human rights information in a country through various means and advocate to address found violations. It involves documentation, of violations so that the information can be used effectively.

⁹⁷ P Q Saunders “The Integrated Enforcement of Human Rights.” (2012) 45 *International Law and Politics* 98.

⁹⁸ Ibid.

⁹⁹ Supra note 97, 100.

¹⁰⁰ For meaning see for example Training Manual on Human Rights Monitoring - Chapter XX: Human Rights Reporting; Reporting is an essential element of the human rights monitoring function. Reporting must be adapted to the mandate of the human rights field operation and to the needs of those officers who are managing it... External reports are those which are produced by the field operation staff, using information contained in the internal reports, for a wider distribution including, for example, UN Headquarters in Geneva or New York, other UN bodies (e.g. the General Assembly, the Commission on Human Rights) or mechanisms (e.g., country

generally not vested with authority to order operations or demand that non-compliant states correct their behaviour.’¹⁰¹ The problem has always been on how to obtain such authority and if obtained what form of punitive measures can be used for non-conformity.

It should be noted that the reporting mechanism has its own distinct advantages. It allows for a number of key players to be involved in the system. This has the potential of ensuring efficiency and production of thorough reports. Saunders is of the view that, ‘even though reporting is neither coercive nor persuasive; it contributes to the creation of a human rights culture.’ The use of reporting by state parties is an indispensable part of the implementation process. Symonides argues that reporting is, ‘an important contribution to the promotion and protection of these rights at the national level.’¹⁰² This is considered to be the basic method of independent international monitoring of compliance by State parties with their treaty obligations.

It should be noted that since reporting is done by states themselves, there are international mechanisms set to counter ‘manufactured reports.’ Chances are that some states may give reports that do not necessarily reflect the actual situation within a country. Even though it is state parties who do the reports, according to Symonides, ‘treaty bodies are not passive recipients of the governmental ‘products’ but on the contrary, are active and enquiring examiners.’ This helps in curtailing malcontents in the reporting process.

The African system adopted a unique monitoring mechanism called the African Peer Review Mechanism (APRM) in 2003. This monitoring mechanism is broad and is not confined to human rights only. It aims to ‘encourage conformity in regard to political, economic and corporate governance values, codes and standards among African states and the objectives in socio-economic development within New Partnership for Africa’s Development (NEPAD).’¹⁰³ It should be noted that this APRM is under the direct control of the AU and therefore not a judicial mechanism per se. du Plessis and Stone are sceptical about the prospects of the APRM, they point out that, ‘these developments are important, and on paper look impressive. What remains to be seen, however is whether African states

or thematic rapporteurs), the international community, or the media. accessed at <http://www1.umn.edu/humanrts/monitoring/chapter20.html>.

¹⁰¹Supra note 97, 98.

¹⁰²J Symonides *Human Rights: International Protection Monitoring, Enforcement*. (2003) 59

¹⁰³See for example M du Plessis and L Stone “A court not found?” (2007) 7 *African Human Rights Law Journal* 522-544.

have the political will to mobilise the AU Peer Review Mechanism, to act against errant member states who abuse human rights.’¹⁰⁴

African states also have an obligation to submit biennial reports to the African Commission for examination in terms of article 62 of the African Charter.¹⁰⁵ The Charter says states must present reports on ‘the legislative and other measures adopted to give effect to the African Charter.’¹⁰⁶

In the European system, there are various monitoring mechanism that operate under the supervision of the European Council, these include the European committee on the prevention of torture and inhuman degrading treatment or punishment (CPT), the European Committee on Social Rights (ECSR), Commissioner for Human Rights, Advisory Committee On The Framework Convention For The Protection Of National Minorities (FCNM). According to Beco, the monitoring the European system can be classified into three forms, the first is treaty based monitoring, the second is judicial monitoring and the third is by looking at the nature of the right, whether it is a substantive right or vulnerable groups.¹⁰⁷

The monitoring and reporting mechanism if employed properly has the potential to inculcate a human rights culture amongst states.

4.4.1.2 Regional Courts

The Inter-American Court has been instrumental in the enforcement of human rights within its region. States that do not comply with decisions of the Court face serious repercussions in terms of the American Convention. However, no state has ever been denied membership or expelled based on human rights violations since the organisation was established, but other measures have been taken, including suspending the right of a government to participate while maintaining the state’s legal obligations.¹⁰⁸ This is what transpired in the Cuban case¹⁰⁹ where it was held that;

¹⁰⁴ Ibid.

¹⁰⁵ GWM Mugwanya “Examination of State Reports by the African Commission; A Critical Appraisal” (2001) 2 *African Human Rights Law Journal*.

¹⁰⁶ Article 62 of the African Charter.

¹⁰⁷ GD Beco. *Human Rights Monitoring Mechanisms of the Council of Europe*. (2012) .

¹⁰⁸ See for example D Shelton, *Regional Protection of Human Rights*, (2008)

76. ¹⁰⁹ Ibid.

It is evident that the ties of the Cuban government with the Sino-Soviet bloc will prevent the said government from fulfilling the obligations stipulated in the Charter of the organisation and Treaty of Reciprocal Assistance. Such a situation in an American state violates the obligations inherent in membership in the regional system and is incompatible with that system...¹¹⁰

In the European system, the European Court of Human Rights is only used when domestic remedies have been exhausted. According to Murray, ‘the role of international tribunal is subsidiary and only becomes necessary and possible when the state has failed to afford the required relief.’¹¹¹ The two ways in which member states can be held accountable for human rights violations is through individual petitions as recognised in Article 34¹¹² and through the interstate procedures as set out in Article 33.¹¹³

Denmark v. Greece; Norway v. Greece; Sweden v. Greece and Netherlands v. Greece (the Greek Case)¹¹⁴ illustrates how the Council of Europe enforces its human rights mandate. What transpired in the Greek case is that Denmark, Norway, Sweden and Netherlands filed two interstate applications against the Greek government. In the applications, it was alleged that Greece had violated the European Convention on Human Rights’ Articles 3,5,6,7,9,10,11,13, and 14. They alleged that Greece had violated human rights through arbitrary detentions, torture, and use of irregular military trials and censorship of the press. The Commission’s finding as that Greece had violated these provisions except for article 7. The Greek government denounced the Convention before the Council of ministers could decide on a proper sanction.¹¹⁵

This case is important in illustrating that international mechanism are effective only where the state party consents to the judgment or binds itself to the findings of the relevant body..

Depending on the nature and circumstances of each case, article 13 of the European Convention provides for a right to a remedy for the violation of rights in the Convention. The European Court has the power to order satisfaction that is just as provided for under

¹¹⁰Ibid, 79.

¹¹¹R. Murray “A Comparison between the African and the European Courts of Human rights.” (2002) 2 *African Human Rights Law Journal* 195-222.

¹¹²‘Individuals’ in terms of article 34 include a person, nongovernmental organization or a group of individuals.

¹¹³The application of article 33 is only limited to disputes between State Parties to the Convention.

¹¹⁴*ResDH(70)1 15 April 1970 The Greek Case (Applications No. 3321, Denmark v. Greece ; No.3322/67, Norway v. Greece ; No. 3323/67, Sweden v. Greece ; No. 3344/67, Netherlands v. Greece.*

¹¹⁵Supra note 109.

article 41. The form of satisfaction can be a costs order or compensation. The Council of Ministers supervises enforcement and adopts resolutions on whether a particular state has complied with a decision of the European Court of Human Rights.

The African system also provides for appropriate remedies in order to enforce human rights. Article 27 of the Protocol on the African Court provides that if a state is found to be in violation of human rights, the Court, ‘shall make the appropriate orders to remedy the violation, including the payment of fair compensation or reparation.’ In addition to this, the protocol requires states to comply with decisions in cases in which they are parties within the period stipulated by the Court and to guarantee execution thereof.¹¹⁶

Judgments of such regional courts are;

[a] repository of legal experience to which it is convenient to adhere; because they embody what the Court has considered in the past to be good law; because respect for decisions given in the past makes for certainty and stability, which are of essence of the orderly administration of justice; and (a minor and not invariably accurate consideration) because judges are naturally reluctant, in the absence of compelling reasons to the contrary, to admit that they were previously in the wrong.¹¹⁷

It has also become common practice that states found in violation of international treaties are punished by the imposition of sanctions.¹¹⁸ The use of sanctions may be seen as effective way of ensuring compliance, it is however generally agreed that use of sanctions can be detrimental to human rights efforts.¹¹⁹

2.5 Conclusion

The introduction of regional blocs, whether created as rallying points for economic growth or as a means for political cooperation gave birth to regional human rights systems. The existence of human rights systems at regional level signifies the importance of human rights in modern day international relations. It has been argued that supranational bodies are the ideal platforms for the promotion and protection of human rights, especially in respect of

¹¹⁶See Article 30 of the Protocol on the African Court.

¹¹⁷H Lauterpacht *The development of International Law by the International Court* (1958) 14 cited by du Plessis and Stone, *Supra* note 103.

¹¹⁸See especially Shelton’s discussion on the use of sanction (*infra* note 143).

¹¹⁹*Supra* note 108.

state driven violations. Supranational bodies are equipped with both judicial and non-judicial mechanisms that allow for the enforcement of human rights at international level. The use of monitoring and evaluation, though not free of limitations provide international human rights bodies with the right tool for the promotion and protection of human rights. The use of courts solely dedicated to human rights ensures judicial enforcement of human rights. In addition, it has also been argued that since no state exist in isolation, the use of sanctions can, if properly implemented; prove to be vital in instilling a human rights culture. As noted above, sanctions should be applied with caution as they may end up hurting innocent members of the population. Adjudication of human rights disputes result in orders for reparations, compensation or restitution. This helps in ensuring that victims of human rights receive fair satisfaction for the violation.

Chapter 3

HUMAN RIGHTS JURISDICTION IN REGIONAL COURTS: A CONCEPTUAL OVERVIEW

3.1 Introduction

In almost all the cases that come before international courts, jurisdiction of the court becomes one of the main issues. It is either one of the parties is contesting the subject matter jurisdiction of the court or the other competences. With the individual increasingly becoming a subject of international law, use of individual petitions (personal jurisdiction) has correspondingly become a subject of debate.¹²⁰ This chapter will therefore explore the concepts that underlie the position of an individual in international human rights law. The broad concept of jurisdiction will be discussed; this will include a discussion on prescriptive, enforcement and adjudicative jurisdiction. The inter-American, African and European human rights systems will be used to illustrate the operation of various facets of jurisdiction.

The right to individual petitions in international courts and tribunals is seen as core to the promotion and protection of human rights.¹²¹ It is, therefore, important to discuss the concept of individual petitions and its relationship with jurisdiction in international human rights law. The concept of jurisdiction in international human rights law is complex. It is multifaceted and confusing. In order to have a thorough discussion of jurisdiction as applied in international human rights law, it is necessary to narrow it down to the issues to be discussed in this piece of writing. Hence, this work shall be confined to international organisations' jurisdiction as far as adjudicatory, prescriptive and enforcement jurisdiction is concerned.

This chapter will discuss the conceptual underpinnings of 'jurisdiction', which is then followed by brief discussions of the various types of jurisdiction as used in international

¹²⁰ See for example P Lemmens and W Vandenhole *Protocol No.14 and reform of the European Court of Human Rights* 2005.

¹²¹ See for example Lemmens and Vandenhole, above, who argue that the 'main purpose of this petition mechanism is not to redress individual grievances, but to identify situations of serious violations of human rights and to mobilise international pressure upon states that bear responsibility with a view to bring violation to an end.'

law.¹²² It should be noted that more focus shall be placed on adjudicatory jurisdiction as it gives rise to several debates on individual petitions and exhaustion of domestic remedies. Finally, one cannot discuss individual petitions without contrasting it with interstate petitions hence a discussion on interstate petitions will precede the conclusion of this chapter.

3.2 What is Jurisdiction?

The term jurisdiction is defined as the power or competence of a court or tribunal.¹²³ This definition is broad and all encompassing. It connotes all powers associated with courts that include powers to pronounce matters of law, receive cases, render judgements and enforce them. According to Colangelo, ‘jurisdiction is not a monolithic concept [it] comprises of prescriptive jurisdiction, adjudicative jurisdiction and enforcement jurisdiction.’¹²⁴ Walsh defines jurisdiction as, ‘the right by which judges exercise their power.’¹²⁵ The United States of America’s Supreme Court has also defined jurisdiction in some of its judgements. In *Ex Parte Walker*,¹²⁶ the US Supreme Court defined jurisdiction as, ‘the power or authority to pronounce the law and pass and settle by its judgements in the rights of the parties touching the subject matter in controversy and enforce such sentence.’ Justice Baldwin in the case of the *State of Rhode Island V State of Massachusetts*¹²⁷ said;

the power to hear and to determine a cause is jurisdiction; it is *coram judici* whenever a case is presented which brings this power into action; if the petitioner states such a case in his petition that on a demurer the court would render judgement in his favour, it is an undoubted case of jurisdiction, whether an answer denying and putting in issue the allegations on petition, the petitioner makes out his case, is the exercise of jurisdiction conferred by the filing of a petition containing all requisites and in the manner prescribed by law.¹²⁸

¹²² Note that broader concepts of territorial or extra-territorial jurisdiction have been deliberately omitted as jurisdiction is dealt with only as far as it relates to international human rights law in its strictest sense.

¹²³ E T Lee “The Dubious Concept of Jurisdiction” (2003) 54 *Hastings Law Journal*, 1613-1640 Available at SSRN: <http://ssrn.com/abstract=510384>, 1614.

¹²⁴ A J Colangelo “What Is Extraterritorial Jurisdiction” (2014) 99 *Cornell Law Review* 1303. Accessed at: <http://scholarship.law.cornell.edu/clr/vol99/iss6/2>.

¹²⁵ J W Walsh “The True Meaning of the Term “Jurisdiction.” (1901) 49 (6) *The American Law Register* (1898-1907) *The University of Pennsylvania Law Review* 346-356.

¹²⁶ *Ex Parte Walker* 25 Ala. 81.

¹²⁷ *State of Rhode Island V State of Massachusetts* 37 U.S. 657 (1838).

¹²⁸ Cited by Walsh *Supra* note 125, 347-348.

The above definition approves Pasqualucci's view of jurisdiction. According to Pasqualucci, 'jurisdiction is the legal authority of a court to consider matters before it. Essentially jurisdiction is a condition precedent to the court's authority to make a decision on the substantive legal issues in the case.'¹²⁹ Hence, the exercise of jurisdiction depends on the powers vested in the body seeking to act upon a matter. Eno notes that, 'any mechanism possesses jurisdiction over matters only to the extent granted to it by the enabling act or legislation. The question of whether a given mechanism has the power to determine a jurisdictional question is decided and determined by that mechanism.'¹³⁰

Gevers and Vrancken, in defining jurisdiction, place a distinction between jurisdiction as exercised by states and by international organisations. 'In one sense, jurisdiction refers to 'the extent of each state's right to regulate conduct or the consequences of events'. In another, it describes the competence of international institutions (such as international courts and quasi-judicial mechanisms) to exercise power over states (as the case of the International Criminal Court).'¹³¹

It is also important to compare and contrast the jurisdiction of international organisations from state jurisdiction. According to Liivoja 'in abstract terms, the jurisdiction of states and the jurisdiction of tribunals are both instances of the concept of the scope of the powers of a legal institution.'¹³² However, state jurisdiction is distinctively defined as the 'power of a state under international law to regulate or otherwise impact upon people, property and circumstances.'¹³³ It should be noted that the three forms of jurisdiction of international organisations are also evident in the concept of state jurisdiction. In this regard Liivoja says;

Prescriptive jurisdiction refers to the capacity of a state 'make its law applicable to the activities, relations, or status of persons in things, whether by legislation, by executive act or order, by administrative rule or regulation or by determination of a court.' Adjudicative jurisdiction encompasses the capacity of a state 'to subject persons or the things to the process of its courts or administrative tribunals.' Finally, enforcement jurisdiction covers state capacity to 'induce or compel compliance with

¹²⁹ JM Pasqualucci. *The Practice and Procedure of The Inter-American Court Of Human Rights*. (2013) 117.

¹³⁰ R W Eno 'The Jurisdiction of The African Court on Human And People's Rights' (2002) 2 *African Human Rights Law Journal*.

¹³¹ C Gevers and P Vrancken. In: H Strydom *International Law* (2015).

¹³² R Liivoja "The Criminal Jurisdiction Of States; A Theoretical Primer" 7 (2010) *NoFo* 27. ¹³³ Ibid at 28, 29.

its laws or regulations whether through the courts or by use of executive, administrative, police or other non-judicial action.’¹³⁴

Nevertheless, this work is confined to the meaning of jurisdiction in as far as jurisdiction of international organisations is concerned.

3.3 Jurisdiction of international and regional courts

The scope of jurisdiction of international courts is determined by the treaty under which the court (or any organ) exercising that power is established. For example, a treaty may grant jurisdiction of a court over all ratifying parties obligatory *stricto sensu*. A ratifying state therefore subjects itself *ipso facto* to the court’s jurisdiction.¹³⁵ Treaties may also make provisions for jurisdiction to be acquired on ad hoc basis, and in some cases provide for an optional acceptance of the jurisdiction by state parties. Martin lists seven requirements for the exercise of jurisdiction as a) that the respondent state must have ratified the treaty and any protocols recognising the competence of the Tribunal to decide the case; b) the respondent state must have ratified the treaty before the alleged human rights violations occurred; c) the complainant must allege violations of rights from which the state party has not derogated during a state of emergency, nor of which a state has made reservations; d) the complainant must have exhausted or constructively exhausted domestic remedies; e) the complaint has been filed within the prescribed time from the date of exhausting domestic remedies; and f) the subject matter of the complaint is not pending before another international proceeding.¹³⁶

3.3 The concept of jurisdiction

The concept of jurisdiction has developed over time. States have always recognised the fact that sovereignty is a key element in international relations. Power to investigate, prosecute and punish is an essential part of state sovereignty. Classical jurisdiction was confined to national jurisdiction.¹³⁷ This meant that only a state could exercise power over its citizens, and its treatment of its citizens was neither to be questioned nor a matter of international concern. International law did not originally interfere in the way a state exercises its sovereign power. Emphasis was placed on territoriality. ‘The emergency of custom on

¹³⁴ Ibid at 29.

¹³⁵ J M Pasqualucci *The Practice and Procedure of The Inter-American Court of Human Rights* (2013) 117

¹³⁶ Martin... et al *International Human Rights and Humanitarian Law: Treaties Cases and Analysis* (2006).

¹³⁷ RW Eno “the jurisdiction of the African Court on Human and Peoples’ Rights” (2002) 2 *African Human Rights Law Journal*.

universal jurisdiction over piracy marked an important development, but this development was possible largely because the crime of piracy was committed on the high seas, beyond territorial control of any state.’¹³⁸ Jurisdiction in international law started to develop significantly after the world wars. Inazumi notes that ‘in dealing with the crimes committed during the world wars, the international community came to realise the need to overcome the flaws of traditional jurisdictional system and consequently to adjudicate certain crimes at international level.’¹³⁹ Human rights treaties after the world war incorporated the concept of jurisdiction.

3.4 Types of Jurisdiction of international courts and tribunals

3.4.1 Prescriptive jurisdiction

Prescriptive jurisdiction is the power to make and apply law to persons or things that ‘regulate real-world conduct.’¹⁴⁰ Technically, this refers to the power to pronounce legislation or any relevant legislation. According to Ryngaert, ‘prescriptive jurisdiction refers to the jurisdiction to prescribe, *i.e.*, to make its law applicable to activities, relations, or status of persons, or the interests of persons in things, whether by legislation, by executive action or order, by administrative rule or regulation or by determination by a court.’¹⁴¹ If a domestic court is applying international law, ‘it is exercising adjudicatory jurisdiction only, because the substantive legal rule that is being applied to the defendant’s conduct has been prescribed by international community as a whole.’¹⁴² Shelton¹⁴³ lists six recognised bases for the exercise of prescriptive jurisdiction as i.) Territory ii.) Nationality. iii.) Objective territoriality iv.) Protective principle v.) Passive personality and vi.) Universality.¹⁴⁴ These bases apply to the exercise of jurisdiction by States rather than by international bodies. However, they may be used to demystify the concept of prescriptive jurisdiction of regional bodies. For example, territory can be used to explain the fact that

¹³⁸Ibid.

¹³⁹Ibid.

¹⁴⁰ H M. Wasserman “Prescriptive Jurisdiction, Adjudicative Jurisdiction, and the Ministerial Exemption” (2012) 160 *University of Pennsylvania Law Review*.

¹⁴¹ C Ryngaert *Jurisdiction In International Law* (2015).

¹⁴²Ibid .

¹⁴³ D Shelton. *The Oxford Handbook of International Human Rights Law* (2013).

¹⁴⁴ According to Shelton territory refers to the location of the conduct, nationality is the citizenship of the actor, objective territoriality/effects of jurisdiction refers to the location of the effects of the conduct, the protective principle is the protection of the state’s vital interests, passive personality is the citizenship of the victim of the conduct and universality being particularly the egregious conduct subject to regulation by international community as a whole.

human rights treaties apply to State Parties' territories including occupied territories.¹⁴⁵

Therefore, an international body acquires jurisdiction to make legal pronouncements in respect of those territories falling within its respective territories.

3.4.2 Enforcement Jurisdiction

Enforcement jurisdiction refers to the 'power to induce or compel compliance or to punish non-compliance with its laws or regulations, whether through courts or by use of executive, administrative, police or other non-judicial action.'¹⁴⁶ In Europe for example, Shelton notes that the European Court of Human Rights and the European Court of Justice are 'supervisory bodies established to ensure compliance with regional obligations.'¹⁴⁷

As stated before, supervisory bodies are established to ensure compliance with decisions of the Court. Article 32¹⁴⁸ of the Convention¹⁴⁹ obliges States to accept the jurisdiction of the Court, hence, no state can denigrate on its obligations in enforcing a judgement issued against it.¹⁵⁰ This is reinforced by Article 46 (1) of the Convention¹⁵¹ which state that, 'the High Contracting Parties undertake to abide by the final judgement of the Court to which they are parties.' The implementation of the Court's judgements is monitored by the Committee of Ministers, 'which ensures that measures taken are appropriate and actually

¹⁴⁵ See for example the case of *Loizidou v Turkey* (Application no. 15318/89) in which the European Court of Human Rights was asked to determine whether Turkey was responsible for the alleged violation of the petitioner's rights under article 1 on Protocol number 1 with respect to her properties in northern Cyprus. The court held that, 'it follows... that the continuous denial of the applicant's access to her properties in Northern Cyprus and the ensuing loss of all control of the property is a matter which falls within Turkey's 'jurisdiction' within the meaning of Article 1 of Protocol no. 1 and is thus imputable to Turkey.' full document available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-57920> . For further discussion on this case see S Kavaldjieva 'Jurisdiction of the European Court of Human Rights: Exorbitance In Reverse? Can, And Should, An Iraqi Victim Of Human Rights Abuses Inflicted By U.K. Troops Have A Remedy In U.K.Courts Under The European Convention Of Human Rights?' (2005- 2006) 507 *Georgetown Journal Of International Law*.

¹⁴⁶ American Society of International Law "Jurisdictional, Preliminary, and Procedural Concerns," In: *Benchbook on International Law II* .A (Diane Marie Amann ed., 2014), available at www.asil.org/benchbook/jurisdiction.pdf

¹⁴⁷ D Shelton "Boundaries Of Human Rights Jurisdiction In Europe" (2003) 13 *Duke Journal Of Comparative and International Law* 95.

¹⁴⁸ Sections 1 and 2.

¹⁴⁹ Ibid.

¹⁵⁰ 'Seeking to exhibit compliance with an ever-increasing number of judgments against it, Russia pays monetary judgments awarded by the Court in a timely fashion. At the same time, Russia violates the spirit and letter of the European Convention for the Protection of Human Rights and Fundamental Freedoms (the "European Convention" or "Convention") by ignoring the substance of the ECHR judgments, failing to implement measures that are necessary to punish wrongdoers and prevent human rights violations in the future, and engaging in techniques, including intimidation of human rights applicants, attorneys, and activists, that are designed to dissuade Russian nationals, including Chechen residents, from accessing the ECHR.'

¹⁵¹ European Convention on human Rights.

achieve the outcome sought in the [C]ourt's judgement.¹⁵² Depending on the circumstances of the case, the Court may order the respondent state to take measures in favour of the petitioner to put an end to violation or to effect *restitutio in integrum* where applicable or to prevent future similar violations.¹⁵³ The Court has also been able to order respondents to take certain steps, for example, releasing prisoners.¹⁵⁴ Miller acknowledges the role played by the Committee of Ministers in ensuring that judgements are enforced where he says, 'the CM [Committee on Ministers] has always been responsible for establishing violations, supervising the execution of court judgements or accepting "friendly settlements."¹⁵⁵ Article 46(2) specifically says that once a judgment has been made final it is transmitted to the Committee of Ministers for execution.¹⁵⁶

It has been previously submitted that the African human rights system carries out its enforcement through its monitoring and reporting mechanisms under the African Charter. In addition, Article 27 of the Protocol on the African Court provides that if a state is found to be in violation of human rights, the Court 'shall make the appropriate orders to remedy the violation, including the payment of fair compensation or reparation.'¹⁵⁷ Therefore, it can be safely argued that the African Court enjoy enforcement jurisdiction in terms of Article 27.

3.4.3 Adjudicative jurisdiction

Adjudicative jurisdiction is the power to adjudicate or to receive a matter. This is defined as, 'authority to subject persons to the process of State's court or proceeding.' Even though this definition specifically refers to domestic courts, its meaning can be used in regional and international courts as well. In the absence of adjudicative jurisdiction, a court cannot decide on an issue, if it does, its decision is a nullity. The main concerns under adjudicative

¹⁵²V Miller 'The European Convention on Human Rights and the Court of Human Rights: Issues and Reforms' Accessible at

<http://researchbriefings.files.parliament.uk/documents/SN05936/SN05936.pdf>.¹⁵³Ibid.

¹⁵⁴ See especially the case of *Assanidze v Georgia*, the core issues in this case was whether the Ajarian Autonomous Republic ('AAR') was within the 'jurisdiction' of Georgia under Article 1

of the Convention for the Protection of Human Rights and Fundamental Freedoms ('European Convention on Human Rights', 'ECHR'). Whether the continued detention of Tengiz Assanidze within the AAR, after the issuing of a Pardon by the President of Georgia and an acquittal in the Georgian Supreme Court, amounted to a violation of Assanidze's right to liberty under Article 5(1) of the ECHR. Whether the failure of the AAR to comply with the judgment acquitting Assanidze had infringed his right to a fair trial under Article 6(1) of the ECHR and the Court held that *Georgia was to secure* Assanidzes' release at the earliest possible date' available at Oxford Public International Law (<http://opil.oup.com>); see also *Ilascu v Russia and Moldova*.

¹⁵⁵Supra note 152, 5.

¹⁵⁶For procedures for the implementation of judgments see Miller *ibid* or visit the council of Europe website http://www.coe.int/t/dghl/monitoring/execution/default_en.asp

¹⁵⁷Article 27 of the African Charter on Human and Peoples Rights.

jurisdiction are whether the court has the power to hear a matter in respect of the subject matter of a lawsuit, and also the question as to whether or not the court has power to receive a petition from person before the court. These form what is known as subject matter jurisdiction and personal jurisdiction respectively

3.5 Subject matter jurisdiction

Subject matter jurisdiction is also referred to as *ratione materiae*. This raises the question of whether the body seeking to exercise power has the authority to act upon matters of that nature or whether the court is competent to hear that kind of lawsuit considering the cause of action. Subject matter jurisdiction is derived from relevant legislation in domestic law and conventions or treaties in international law. For example, Articles 4 and 7 of the Protocol on the African Court gives the Court the power to adjudicate disputes in which it is alleged that a state party to the protocol has violated the African Charter on Human and People's Rights or any other human rights instrument ratified by the respondent state. Article 3(1) of the Protocol specifically states the subject matter jurisdiction of the court as, 'all cases and disputes submitted to it concerning the interpretation and application of the Charter, this Protocol and any other relevant human rights instrument ratified by the states concerned.'¹⁵⁸

In addition to this provision, Article 7 provides, 'the Court shall apply the provisions of the Charter and any other relevant human rights instruments ratified by the states concerned.'¹⁵⁹

In the European system, subject matter jurisdiction of the European Court of Human Rights is laid out in the European Convention on Human Rights. Article 32(1) of the European Convention set out that; the court has jurisdiction over all matters concerning the interpretation and application of the convention and any other relevant protocols. The European Convention is a human rights document; therefore the European Court has a human rights jurisdiction. It has no jurisdiction over any other legal instrument.

The subject matter jurisdiction of both the American Commission on Human Rights and the Inter-American Court of Human Rights is express. The court is specifically empowered to hear allegations of state violations of the American Convention and other binding human rights instruments¹⁶⁰ of the Organisation of American States.¹⁶¹ The American Convention

¹⁵⁸ Article 3 (1) of the Protocol on the African Court of Human and People's Rights.

¹⁵⁹ Ibid, Art. 7

¹⁶⁰ American Convention on Human Rights, "Pact of San José, Costa Rica", 1969; Inter-American Convention to Prevent and Punish Torture, 1985; Additional Protocol to the American Convention in the area of

is a human rights instrument that contains a number of human rights provisions.¹⁶² Thus, one can safely say that the Court has the power to hear allegations of human rights violations by state parties as contemplated in the Convention. The human rights jurisdiction of the inter-American Court is set out in Article 41 of the American Convention. In terms of Article 41, the Court has power to develop awareness of human rights, making recommendations to OAS Member States, preparing studies or reports, requesting information from OAS Member States, responding to and advising OAS Member States on matters relating to human rights and submitting annual reports to the OAS General Assembly. Article 62(3) also provides for the human rights jurisdiction of the Court; it gives the Court the power to interpret and apply the provisions of the Convention. The Court has power to receive petitions and other communications as envisaged in the convention. As stated before, the Court only receives interstate human rights disputes, individual human rights petitions are only received through the Commission.

The Court can receive petitions in respect of human rights matters. The Commission has the power to investigate and report human rights situation in any country in the region, including the thirty-five member states¹⁶³ of the organisation of American states as well as Cuba even though Cuba is barred from membership.¹⁶⁴ The Commission's jurisdiction is limited to human rights matters. The human rights jurisdiction of the Commission is broader than that of the Court; it can receive petitions in respect of the violations of rights enshrined

Economic, Social and Cultural Rights, "Protocol of San Salvador", 1988; Protocol to the American Convention on Human Rights to Abolish the Death Penalty, 1990; Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women, "Convention of Belém do Pará," 1994; Inter-American Convention on Forced Disappearance of Persons, 1994; Inter-American Convention on the Elimination of All Forms of Discrimination against Persons with Disabilities, 1999.

¹⁶¹ See Article 62(3) of the American Convention.

¹⁶² Such as the right to juridical personality; the right to life the right to humane treatment; the right of every person not to be subject to slavery or to involuntary servitude; the right to personal liberty; the right to a fair trial; Freedom from ex post facto laws; the right of every person to be compensated in accordance with the law in the event of having been sentenced by a final judgment through a miscarriage of justice; the right to privacy; the right to freedom of conscience and religion; Freedom of thought and expression; the right of reply; the right of assembly; Freedom of association; the rights of the family; the right to a name; the rights of the child; the right to nationality; the right to property; Freedom of movement and residence; the right to participate in government; the right to equal protection; the right to judicial protection; and the right to the progressive development of economic, social and cultural rights.

¹⁶³ Antigua and Barbuda, Argentina, Barbados, Belize, Bolivia, Brazil, Canada, Chile, Colombia, Costa Rica, Cuba, Dominica, Dominican Republic, Ecuador, El Salvador, Grenada, Guatemala, Guyana, Haiti, Honduras, Jamaica, Mexico, Nicaragua, Panama, Paraguay, Peru, Saint Kitts and Nevis, Saint Lucia, Saint Vincent and the Grenadines, Suriname, The Bahamas, Trinidad and Tobago, United States of America, Uruguay and Venezuela.

¹⁶⁴ L. Shaver "The Inter-American Human Rights System: An Effective Institution for Regional Rights Protection?" (2010) 9 *Washington University Global Studies Law Review* 639

in the American Declaration of Rights¹⁶⁵ against a state that is not a party to the convention.¹⁶⁶ This means that the Commission is competent to receive petitions alleging violation of economic, social and cultural rights even if the respondent state has not ratified the Additional Protocol to the Convention on human rights in the Area of Economic Social and Cultural Rights.¹⁶⁷

3.6 Personal jurisdiction

History indicates that the individual petition system in international law is not a new phenomenon. It has long been established that individuals should have access to international courts and tribunals.¹⁶⁸ This was, however, only limited to the exercise of diplomatic protection of individuals from violations by other states other their own.¹⁶⁹ The Central American Court of Justice (CACJ)¹⁷⁰ was the first international court to entertain petitions by ‘individuals of one state against the government of another state’ as contemplated in Article 2 of the Convention for the Establishment of the Central American Court of Justice.¹⁷¹

The present day use of individual petitions in international human rights courts is seen as essential in the promotion and protection of human rights. Individual petitions in international law are an incident of the promotion of the individual’s right to access to justice by making courts accessible to all.¹⁷² Individual petitions speak to the core of the fundamental right to access to courts.¹⁷³ Right to individual petition in international law

¹⁶⁵The American Declaration of Rights was adopted by American states in Colombia in 1948. It sets forth civil and political rights of citizens of American States.

¹⁶⁶See article 49 of the Commission Procedures.

¹⁶⁷The additional protocol is also known as the san Salvador protocol

¹⁶⁸Note that there are various debates on whether the individual has a right to access to court in terms of international.

¹⁶⁹I Butler “A Comparative Analysis Of Individual Petition In Regional And Global Human Rights Protection Mechanisms” (2004) 23 *The University of Queensland Law Journal*.

¹⁷⁰ See for example Butler *ibid* who says, ‘the CACJ was established in 1907 as part of a plan to create and maintain peace between five Central American states with a long history of violence. The CACJ was established to ‘decide every difference or difficulty that may arise amongst them, of whatsoever nature it may be.’ See also Article 1 of the Convention for the Establishment of the Central American Court of Justice.

¹⁷¹I Butler “A Comparative Analysis Of Individual Petition In Regional And Global Human Rights Protection Mechanisms” (2004) 23 *The University of Queensland Law Journal* 23.

¹⁷²Scholars Zwaak and Cachia, are of the same view, for example referring to the use of individual petitions in the European Court they argue that, ‘undoubtedly, the strength and effectiveness of the European system of the protection of human rights lies in the right to individual petition. It is this direct access of the individual to an international organ competent to examine his/her complaint of a violation of one of the rights and freedoms recognized in the European Convention that has so far ensured a progressive development in the protection of fundamental rights within the domestic systems of the member states.’

¹⁷³This argument supports an activist posture taken by some scholars and human rights court the right to individual petitions is a substantial right.

refer to ‘entitlements that individuals or groups may have, under certain international instruments, to address an international body with respect to the alleged non-compliance of a State with human rights standards.’¹⁷⁴ Such a right is conferred on everyone including third parties whose rights have not been directly violated.¹⁷⁵ According to Vandenhole, the term individual petition, ‘in its most developed form... attains a judicial connotation in so far as complaints can be examined and decided by an international court empowered to grant appropriate remedies to the applicant, if any human rights violation is established.’¹⁷⁶ In Europe, Protocol No 11¹⁷⁷ brought about a fundamental change in the human rights system through making the Court accessible to individuals. ‘Protocol 11 constitutes, in our opinion, an important reform of the control mechanism of the European Convention which could contribute to enhancing the role of the Court in the European system of protection of human rights and fundamental freedoms.’¹⁷⁸ The importance of individual petitions in the promotion and protection of human rights is best illustrated by Zwaak and Cachia:

If one considers the applications brought by individuals and the outcome of those applications, not only on an individual basis, but also with regards to the effect of such decisions on the protection of fundamental rights within Turkey for all and not only for individual applicants, one cannot but conclude that this has produced a change towards better ensuring and affording that protection even on a domestic level. Due to the importance and effect of the right of individual petition, not only for the applicant but also for the domestic position, it would be a great pity if the European system changed in such a way so as to undermine or restrict the greater benefits of direct access of the individual to the Court simply to do away with the backlog that has been created.¹⁷⁹

Nevertheless, as will be shown later, even though individual petition systems are far from being perfect, they signify a move towards recognition of the individual in international

¹⁷⁴W Vandenhole *Protocol No. 14 and the Reform of the European Court of Human Rights* (2005) 46.

¹⁷⁵Ibid.

¹⁷⁶Ibid, 47.

¹⁷⁷See for example J Costa “The European Court of Human Rights and Its Recent Case Law” (2003) 38 *Texas International Law Journal* 455 who notes that Protocol No. 11 to the Convention, which entered into force at the end of 1998, represents an important step toward strengthening the judicial character of the Convention machinery. In a few words, the new system has consisted of abolishing the European Commission of Human Rights and the quasi-judicial role of the Committee of Ministers, while transforming the Court into a permanent, full-time judicial body, merging the secretariat of the former Commission and the Registry of the “old.” Court.’

¹⁷⁸Editorial *Maastricht Journal of European and Comparative Law* (1994) 119

¹⁷⁹L F Zwaak and T Cachia. "The European Court of Human Rights: A Success Story?" 2004 3 *Human Rights Brief* 11 32-35, 54.

law.¹⁸⁰ As Butler would point it out, ‘although the individual petition mechanisms of the modern human rights systems suffer from short comings, their difference from historical examples and their continued growth confirms the individual as a rights bearing subject of international law.’¹⁸¹ This will be discussed in detail in the following chapters in relation to the SADC Tribunal and the East African Court of Justice.

3.6.1 *The American system*

The Commission

The inter-American Commission on Human Rights has the power to receive individual petitions alleging a violation of the American Convention or any relevant protocol of the Organisation of American States.¹⁸² The Convention has an express individual petitions provision. In terms of Article 44, ‘any person or group of persons, or any non-governmental entity legally recognized in one or more member states of the Organization, may lodge petitions with the Commission containing denunciations or complaints of violation of this Convention by a State party.’¹⁸³ This is, however, subject to requirements set out under Article 46. The requirements set out in Article 46 are; i). That the remedies under domestic law have been pursued and exhausted in accordance with generally recognized principles of international law; ii). That the petition or communication is lodged within a period of six months from the date on which the party alleging violation of his rights was notified of the final judgment; iii). That the subject of the petition or communication is not pending in another international proceeding for settlement; and iv). That, in the case of Article 44, the petition contains the name, nationality, profession, domicile, and signature of the person or persons or of the legal representative of the entity lodging the petition.

The general rule is that individual petitions can only be brought against a State party to the convention.¹⁸⁴ However, in terms of Article 49 of the Commission Procedures the Commission may also receive petitions alleging a violation of the American Declaration by

¹⁸⁰ Ibid.

¹⁸¹ I Butler ‘A Comparative Analysis of Individual Petition In Regional and Global Human Rights Protection Mechanisms’ (2004) 23 *The University of Queensland Law Journal*.

¹⁸² L Shaver ‘The Inter-American Human Rights System: An Effective Institution for Regional Rights Protection?’ (2010) 9 *Washington University Global Studies Law Review*, 639.

¹⁸³ The American Convention Article 44.

¹⁸⁴ Commission Procedures Articles 26-36.

states that have not ratified the Convention.¹⁸⁵ Thomas Buergenthal, former president of the Inter-American Court quoted by Weston explains this position that;

As a [an O.A.S.] Charter organ, the Commission has jurisdiction over all O.A.S. Member States, whether or not they have ratified the Convention; as a Convention organ, its jurisdiction extends only to the States Parties to the Convention. Here its jurisdiction is more specific and its powers more extensive. The powers of the Commission as Charter organ lack precision, which is just as well, for the ambiguities about the scope of its powers gave it greater flexibility to deal imaginatively with gross violations of human rights prior to the entry into force of the Convention. It retains that flexibility in dealing with states that have not ratified it and in responding to emergency situations involving large-scale human rights abuses in the region.¹⁸⁶

The Commission determines admissibility of individual petitions in terms of Articles 46 and 47 of the Convention. The key admissibility requirement is that the Commission has jurisdiction in respect of both the individual petitions and subject matter jurisdiction and that the petitioner has exhausted domestic remedies in terms of Article 46 (1) (a).¹⁸⁷

The Commission can only forward a petition to the Court if no friendly settlement¹⁸⁸ could be reached between the parties.¹⁸⁹

The Inter-American Court

¹⁸⁵ L Shaver 'The Inter-American Human Rights System: An Effective Institution for Regional Rights Protection?' (2010) 9 *Washington University Global Studies Law Review*, 650.

¹⁸⁶ Weston ... et al 'Regional Human Rights; Comparison and Appraisal' (1987) 20 *Vanderbilt Journal of Transnational Law*.

¹⁸⁷ The wording of the convention is that, 'Admission by the Commission of a petition or communication lodged in accordance with Articles 44 or 45 shall be subject to the following requirements: a) the remedies under domestic law have been pursued and exhausted in accordance with generally recognized principle of international law.' See a detailed discussion on the rule below.

¹⁸⁸ See for example http://www.oas.org/en/iachr/friendly_settlements/docs/Report-Friendly-Settlement.pdf where the OAS acknowledges that 'While the individual petition system establishes a procedure to determine whether the international responsibility of a State has been engaged by a human rights violation, it also provides the possibility of reaching a friendly settlement on the matter, based on observance of the human rights set forth in the American Convention on Human Rights, the American Declaration of the Rights and Duties of Man, and other regional human rights instruments, at any stage during the examination of a petition or case. Although a friendly settlement is not a decision on the merits of the case before the Commission, this voluntary agreement reached by the parties may include public recognition and acceptance of responsibility by the State, as has occurred in numerous cases.' In addition 'The friendly settlement mechanism opens a venue for dialogue between petitioner and State, where both sides can reach agreements on reparation measures for the alleged victims and often for the society as a whole.'

¹⁸⁹ Article 38 of the American Convention on Human Rights.

The contentious jurisdiction of the Court does not include individual petitions and is only limited to State Parties to the American Convention and the American Commission.¹⁹⁰ The Court can only receive petitions in terms of Article 61 provided requirements set out in Articles 48 and 50 are met.¹⁹¹ This however, does not mean that the Court cannot hear matters involving individuals as petitions are filed to the Court by the Commission on behalf of the individual.¹⁹² Butler sums up individual petitions in the inter-American court as follows; ‘claimants must have their cases decided by the American Commission before being able to proceed to the Court. Changes to the Commission's Rules of Procedure mean that cases where the state is found in violation will almost always proceed to the Court.’¹⁹³ Even though cases ‘almost always reach the Court,’ it cannot accept direct individual petitions.¹⁹⁴ In addition to this, individual petitions in the American system are also limited by the status of the respondent state. Butler concedes;

...the power to adjudicate individual claims in respect of OAS member states not party to the American Convention was not expressly granted by the OAS, and although initially contested by some states, appears now to have been accepted. Access to the Inter-American Court on Human Rights (the American Court) is limited to those claiming against state parties to the American Convention who have expressly accepted the Court's jurisdiction.¹⁹⁵

The Inter-American system has not been free of problem in dealing with the growing number of individual petitions.¹⁹⁶ Shelton attributes the rise in individual petitions to the fact that most countries have transitioned from repressive regimes to democratic governance, in addition to the growth of civil society and international human rights systems.¹⁹⁷ Shelton notes that these,

¹⁹⁰ Ibid, Article 61.

¹⁹¹ Articles 48 and 50 essentially outlines that when the Commission receives a petition, if it considers it admissible, it requests information on the alleged violation from the respondent state within a reasonable period. The Commission is also empowered by this provision to declare the petition ‘out of order’ on the basis of information received; if admissible the Commission examines and verifies facts. The Commission will attempt to reach a friendly settlement. If not reached the Commission draws its report. The Commission has authority to make proposals and recommendations in its report.

¹⁹² Note that the commission can file individual petitions only if it has exhausted its internal procedures which include an attempt at reaching a friendly settlement.

¹⁹³ I Butler “A Comparative Analysis Of Individual Petition In Regional And Global Human Rights Protection Mechanisms” (2004) 23 *The University of Queensland Law Journal* 27-28

¹⁹⁴ Compare with the European Court of Human Rights.

¹⁹⁵ Supra note 193.

¹⁹⁶ Ibid.

¹⁹⁷ D Shelton “Boundaries Of Human Rights Jurisdiction In Europe” (2003) 13 *Duke Journal Of Comparative and International Law*.

have resulted in growing expectations of victims and their representatives that the Inter-American system can address all individual and systemic violations of human rights, including police violence, disappearances, violence against women and sexual minorities, restitution and demarcation of indigenous ancestral lands, discrimination, lack of due process and independence in judicial bodies, attacks on human rights defenders and the media, and other widespread intractable problems in the Hemisphere.¹⁹⁸

Consequently, ‘the result is a steady growth in the number of petitions brought to the IACHR, creating an ever-increasing backlog of petitions to be processed, long delays, and repeated if not always successful efforts to reform case management.’¹⁹⁹

3.6.2 *The European system*

Unlike in the Inter-American Court of Human Rights, individuals have direct access to the Court. The term individual is used to refer to any natural persons or juristic persons and it also includes any non-governmental organisations or a group of persons regardless of the number of individuals who form membership of that group.²⁰⁰ This direct access to the Court is a result of the coming into effect of Protocol no. 11²⁰¹ which effectively dissolved the European Commission on Human rights in 1998.²⁰² Before the Protocol no. 11, ‘recognition of the right of individual application was, however, optional and it could therefore be exercised only against those states which had accepted it.’²⁰³ Complaints were first examined by the Commission to determine admissibility. The Commission would seek to reach a friendly settlement failure of which the case would be referred to the Court for a final and binding decision. The Court is now competent to receive petitions from individuals

¹⁹⁸Ibid.

¹⁹⁹D Shelton “The Rules and the Reality of Petition Procedures In The Inter-American Human Rights System” *The George Washington University Law School* “The Future of the Inter-American Human Rights System” Working Paper #2 May 2014.

²⁰⁰Protocol no 11 article 34 sets the jurisdiction of the Court as the power to, ‘receive applications from any person, non-governmental organisation or group of individuals claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in the Convention or the protocols thereto. The High Contracting Parties undertake not to hinder in any way the effective exercise of this right.’

²⁰¹According to Zwaak and Cachia, *Supra* note 181, the Protocol was adopted as a result of a lengthy debate on the need to reform the convention’s supervisory machinery by simplifying the structure and shortening the process and cementing the judicial character of the mechanism.

²⁰²See for example Zwaak and Cachia, *ibid*, who notes that, ‘under Protocol No. 11 to the Convention the existing, part-time Court and Commission were replaced by a single, full-time Court. The acceptance of individual petition and the acceptance of the Court’s jurisdiction became compulsory. With respect to individual petitions the Committee of Ministers did not play a role any longer. Responsibility for supervising the execution of judgments lies with the Committee of Ministers of the Council of Europe.’

²⁰³*Supra* note 181.

who claim violation of any of their Convention rights by a State Party. This right is exercised regardless nationality, place of residence or civil status.²⁰⁴ The Court is peculiar in that it has a grand chamber which acts as an appeal ‘bench’ which is made up of seventeen judges.²⁰⁵ Individuals have a right to access this Court if the cases raises, ‘a serious question affecting the interpretation of or application of the Convention or protocols thereto, or serious issue of general importance.’²⁰⁶

3.6.3 The African System

The personal jurisdiction of the African court is divided into two. There is a compulsory and an optional jurisdiction. Article 5 provides for compulsory jurisdiction in respect of petitions brought by the African Commission, member states, and intergovernmental organisations. The optional jurisdiction is set out in articles 5(3) and 34 (6) of the Protocol on the African Court. This jurisdiction is exercised on either the discretion of the Court or that of the respondent state. The state must have made an express declaration allowing the Court to receive individual petition from its citizens. The Court has discretion to accept or deny the access.²⁰⁷

3.7 Exhaustion of Local Remedies in Individual Petitions.

Individuals are often called upon to exhaust domestic remedies before they can approach an international court or tribunal. The rationale behind this requirement in international human rights law is that ‘before proceedings are brought to an international body the state must have had the opportunity to remedy matters through its own legal system.’²⁰⁸ The International Court of Justice in the *Interhandel* case noted that ‘the rule that local remedies must be exhausted before international proceedings may be instituted is a well-established rule of customary international law Before resort may be had to an international court ... it has been considered necessary that the state where the violation occurred should have an opportunity to redress it by its own means, within the framework of its own domestic legal

²⁰⁴The only requisite being that violation must have been perpetrated by or within the jurisdiction of the state concerned.

²⁰⁵D Shelton ‘Boundaries Of Human Rights Jurisdiction In Europe’ (2003) 13 *Duke Journal Of Comparative and International Law*.

²⁰⁶See Shelton *ibid*; Article 43 of Protocol no. 11.

²⁰⁷RW Eno “Jurisdiction Of The African Court” (2002) 2 *African Human Rights Law Journal* 230.

²⁰⁸D’Ascoli, Silvia and Scherr, Kathrin Maria, The Rule of Prior Exhaustion of Local Remedies in the International Law Doctrine and its Application in the Specific Context of Human Rights Protection (February 2007).

system.²⁰⁹ The question that often arises is whether this requirement is a substantial or a procedural requirement. This raises another question on whether it is a requirement that calls for strict compliance or not.

History shows that this requirement is traditionally entrenched in interstate diplomatic practice. Amerasinghe asserts that, ‘the rule that such remedies must be exhausted owes its origins to the diplomatic protection of aliens in which area it was first applied.’²¹⁰ The rule of exhaustion of domestic remedies can be traced back to the Peace of Westphalia.²¹¹ This constituted what has been referred to as a ‘landmark in the origins and formation of modern international law, the time from which state practice in the modern sense of the term would begin to develop.’²¹² Westphalia provides examples of reprisals; thus a treaty of 1664 between Spain and Netherlands provided for prior resort to domestic courts and procedures. In addition, ‘states further agreed that in the future reprisals case of manifest denial of justice after communicating the matter to the minister of the country concerned, so that in a period of four months he could ensure that local justice was accomplished.’²¹³ Trindade notes that ‘the practice of the United Kingdom is illustrative of the observance of the requirement of exhaustion of local remedies prior to the exercise of diplomatic protection.’²¹⁴ There have been developments particularly in the twentieth century that saw the rule being extended from its original area of application namely; diplomatic protection of nationals abroad, to the protection of human rights, even though this has been done by means of express incorporation in agreements between states.²¹⁵

3.7.1 Substantial and procedural nature of the rule.

The history discussed above has shown that, ‘the principle was an essential and absolute condition for the determination of an international wrongful act.’²¹⁶ As a substantive rule,

²⁰⁹ Martin et al, *Infra* note 218; *Interhandel* case (*Switz v U.S.*), [1959] I.C.J. 6, 27 (Mar 21).

²¹⁰ C F Amerasinghe *Local Remedies In International Law* 2004 2nd ed 3.

²¹¹ A series of treaties signed in 1648 which brought to an end the eight years war between the Spanish and the Dutch.

²¹² A.A. Cançado Trindade “Origin and Historical Development of The Rule Of Exhaustion Of Local Remedies In International Law.” Accessed at <http://rbdi.bruylant.be/public/modele/rbdi/content/files/RBDI%201976/RBDI%2019762/Etudes/RBDI%201976.2%20-%20pp.%20499%20%C3%A0%20527%20-%20A.%20A.%20Cancado%20Trindade.pdf>²¹³ Ibid.

²¹⁴ Ibid, 514.

²¹⁵ C F Amerasinghe *Local Remedies In International Law* 2004 2nd edition; D’Ascoli, Silvia and Scherr, Kathrin Maria, “The Rule of Prior Exhaustion of Local Remedies in the International Law Doctrine and its Application in the Specific Context of Human Rights Protection” (February 2007).

²¹⁶ Ibid, D’Ascoli and Scherr .

exhaustion of domestic remedies entails ‘prior necessity for the individual to employ all the remedies available under internal law.’²¹⁷ This essentially means that if local remedies have not been exhausted, a state’s action cannot amount to a wrongful act in international law. This serves to illustrate the substantive nature of the rule. In this vein, violation of a right becomes an international wrongful act if the local remedies have failed to provide the necessary satisfaction. D’Ascoli and Scherr sum this as ‘...the claim that the rule of exhaustion of local remedies is of substantive character implies that no international responsibility can arise until the claim has been rejected by the local courts or authorities.’²¹⁸ In addition, the inter-American Commission, in the case of *Velasquez v Rodriguez* maintained that the issue of exhaustion of domestic remedies must be decided jointly with the merits of that case, rather than in the preliminary phase. This argument speaks to the substantive nature of the rule. In this case, the Commission further argued that, ‘prior exhaustion of remedies is a requirement for the admissibility of petitions presented to the [C]ommission, but not a prerequisite for filing applications with the [C]ourt...’²¹⁹

The procedural nature of the rule is premised on the argument that ‘where there has been an original wrong on the part of the state followed by a failure to redress it amounting to denial of justice, the denial may be a necessary condition of intervention, but it is not on the ground of it.’²²⁰ D’Ascoli and Scherr cite Permanent Court of International Justice²²¹ decision in *France v Italy (Phosphates in Morocco case)* where the Court confirmed the procedural nature of the rule that ‘...the alleged denial of justice ... exercises no influence either on the accomplishment of the act or on the responsibility ensuing from it.’²²²

Exhaustion of domestic remedies is a requirement in international law as a result of the need to respect state sovereignty which is a factor in international dispute settlement and it also attributes a certain order to international procedures as such.²²³ The United Nations lists the objective as ‘... to enable the respondent state the first opportunity to correct harm and make

²¹⁷ Ibid.

²¹⁸ Ibid, 4.

²¹⁹ Martin... et al *International Human Rights And Humanitarian Law: Treaties Cases And Analysis* (2006) 291.

²²⁰ C F Amerasinghe *Local Remedies In International Law* 2004 2nd edition.

²²¹ Predecessor of the International Court of Justice (ICJ) as established by the Covenant of League of Nations in 1922 and dissolved in 1946.

²²² *France v Italy Series A/B No 74, ICGJ 326 (PCIJ 1938), 14th June 1938.* ²²³ C F Amerasinghe *Local Remedies In International Law* (2004).

redress.²²⁴ D'Ascoli and Scherr make reference to the European Court of Human Rights case of *Akdivar v Turkey*²²⁵ where the judge noted that '... the rule of exhaustion of local remedies ... obliges those seeking to bring their case against the state before an international judicial or arbitral organ to use first the remedies provided by the legal system... the rule is based on the assumption, reflected in Article 13 of the convention that there is an effective remedy available in respect of the alleged breach in the domestic system whether or not the provisions of the convention are incorporated in national law. In this way it is an important aspect of protection established by the convention is subsidiary to the national systems safeguarding human rights.'²²⁶

From the above statement, it can be gathered that the remedy should be available and it should also be effective.²²⁷ 'A remedy is considered available if it can be pursued by the applicant without difficulties or impediments.'²²⁸ Consequently, it is considered effective 'when it actually exists within the domestic legal system and when it offers a reasonable prospect of success.'²²⁹ In addition, '... [if] the exhaustion of a particular remedy is futile and not helpful, then such a remedy need not be exhausted.'²³⁰ Rogue states usually try to frustrate the process. Hence there are exceptions to the rule. The exceptions to the rule of exhaustion of domestic remedies are that the victim has shown that the domestic remedies are ineffective, unavailable or that they are unreasonably delayed.²³¹ Martin notes that;

when remedies are denied for trivial reasons or without examination on the merits, or there is proof of the existence of a practice or policy ordered or tolerated by government, the effect of which is to impede persons from invoking internal

²²⁴International Norms and Standards Relating To Disability Part II. International Human Rights System. 2/11 accessible at <http://www.un.org/esa/socdev/enable/comp201.htm>.

²²⁵ Application no. 21893/93, judgment handed on the 16th of September 1996.

²²⁶ Ibid.

²²⁷ See the case *Claim of Ship-owners (Finland v Great Britain)*, 3 R.I.A.A. 1479 (May 9, 1934).

²²⁸ D'Ascoli, Silvia and Scherr, Kathrin Maria, 'The Rule of Prior Exhaustion of Local Remedies in the International Law Doctrine and its Application in the Specific Context of Human Rights Protection' (February 2007), 12.

²²⁹ Ibid ; also see the case of *Campbell Pvt Ltd v Republic of Zimbabwe* where the Amendment no 17 prevented property owners from approaching the courts in respect of the land reform process and the land compulsorily acquired by the state in terms of this provision. ²³⁰ Supra note 227.

²³¹ Martin *et al*, Supra note 218, cites the Inter-American commission ruling that domestic recourse available must be of a judicial rather than a political nature and that 'where a domestic entity investigating the subject matter of the petition was the body most likely responsible for the alleged violations, an exception to the exhaustion rule would apply.'

remedies that would normally be available to others, resort to such remedies becomes a senseless formality.²³²

This rule stems from generally accepted principle of international human rights law that states bear the primary burden of protecting human rights. The reasoning behind this is that domestic remedies are more effective because they are easily accessible, and proceed more quickly than in an international body.²³³

3.8 Interstate Petitions

While individual petitions play a crucial role in the promotion and protection of fundamental human rights, interstate petitions are best suited for resolving political disputes. All international human rights systems discussed in this study provide for interstate petitions.²³⁴ This is particularly because states are primarily responsible for the enforcement of human rights and abiding by their international obligations in terms of the laws of treaties.²³⁵ In interstate procedures the petitioner alleges that the respondent state has violated any of its obligations under a relevant international law. However, states are generally reluctant to file petitions against other states.²³⁶ Pasqualucci contends that, 'even when a state is concerned about human rights violations, political reality often inhibits it from making accusations about another state for fear of jeopardizing its economic interests or having its own practices evaluated.'²³⁷

States enjoy the privilege of having direct access to the courts. Some courts were initially set up as interstate disputes adjudication bodies and individual petitions restricted to commissions.²³⁸ This was seen as a limitation on the individual right to access to international courts and thus extended jurisdictions to include individual petitions. Scholars agree that restricting courts and tribunals to individual petitions places substantial limits on individual human rights. Hence, some courts now entertain both individual and interstate

²³² Martin... et al *International Human Rights And Humanitarian Law: Treaties Cases And Analysis* (2006).

²³³ See <http://www1.umn.edu/humanrts/svaw/law/un/exhaustion.htm>

²³⁴ In the European Court of Human Rights; the inter-American Court of Human Rights and the American Commission on Human Rights.

²³⁵ It is generally accepted in international human rights law that a state bears the primary responsibility for the protection of its citizens.

²³⁶ This is because states prefer to protect their diplomatic and trade relations with each other, litigation in international courts may be considered detrimental to need to maintain these relations.

²³⁷ J M Pasqualucci, *The Practice And Procedure of The Inter-American Court of Human Rights* Cambridge, (2013) 116

²³⁸ As shown in the detailed discussion under individual petitions.

petitions. In practice, however, in interstate disputes, international courts exercise advisory jurisdiction.

3.8.1 *The American system*

The American system provides for State Parties' direct access to the Court. The Commission also enjoy competence to receive interstate complaints.²³⁹ The American Convention provides that state parties may file communications alleging human rights abuses against other state parties.²⁴⁰ Inter-American Commission on Human Rights has authority to consider inter-state complaints only if both of the States Parties, in addition to ratifying the Convention, have formally recognized the competence of the Commission to receive and review such complaints.²⁴¹ According to Judge Buergenthal,²⁴² 'before one state party may bring such charges against another state party, both states must have made separate declarations recognising "the competence of the commission to receive and examine" interstate complaints.'²⁴³

If the respondent state has not formally accepted jurisdiction of the Commission in interstate complaints, the respondent state will have the option to accept the Commission's competence, if it so wishes. The Court on the other hand, also has competence to receive interstate petitions. Article 61 (1) explicitly spells out that the Court can only receive cases from state parties and the Commission subject to procedural requirements set in articles 48 and 50.²⁴⁴

3.8.2 *The European system*

In the European system even though the convention provides for interstate petitions, there has been a general hesitance by states to use this provision. Costa points out that 'there have been a few interstate cases, but in spite of their legal and political importance, they have

²³⁹Infra note 242.

²⁴⁰Article 45(1) of the American Convention.

²⁴¹This means that both state parties should have made separate declarations recognizing the competence of the Commission to receive and examine communications in that respect (Alleging violation of a human right set in the convention by another State) in terms of article 45(3) of the American Convention. Also see ; Inter-American Commission on human rights Rule of Procedure Article 50(1); and J M Pasqualucci, '*The Practice And Procedure Of The Inter-American Court Of Human Rights*' Cambridge, 2013.

²⁴²Sat on the ICJ bench from 2001 to 2010.

²⁴³T Buergenthal "The Normative and Institutional Evolution of International Human Rights" (1997) 19, 4. *Human Rights Quarterly*, 703-723.

²⁴⁴Sub section 2.

represented a very small percentage of the overall case laws.’ Scholars believe that in the European system states are not quick to litigate against each other as this is seen as having the potential to jeopardise diplomatic relations as well as trade. Keller submits that ‘the contracting states are reluctant to expose each other to a procedure that is by its nature undiplomatic and might impair relations with another country.’²⁴⁵ Of the few interstate petitions received by either the Commission or the Court, most of them have been resolved by means of friendly settlements. This serves to illustrate how the interstate petition system is not ideal for the protection of human rights. This is so particularly because when there is a human rights violation, it is the individual or group of individuals who suffer. It is important to mention, however, that interstate applications are important in placing substantial political pressure on the respondent state. Keller notes that ‘while long terms effects of lodging such a complaint may be hard to predict the political and economic pressures produced by an interstate application can yield substantial immediate results.’²⁴⁶ Admirable as it may sound; interstate dispute resolutions have little or no benefit to the individual as a subject of international law.

3.8.3 *The African system*

African human rights system provides for direct access to both the Court and the Commission in respect of interstate applications. In respect of interstate application, there is no need for exhaustion of domestic remedies. Article 5 of the African Charter of Human and Peoples Rights provides direct access under its compulsory jurisdiction to;

the African Commission; the state party which has lodged a complaint to the African Commission; the state party against whom the complaint has been lodged at the African Commission; the state party whose citizen is a victim of a human rights violation; and African intergovernmental organisations.²⁴⁷

However, states rarely litigate against each other. Therefore, the interstate procedure is not used as often as would be expected.

²⁴⁵ Keller... et al *Friendly settlements before the European Court of Human Rights: Theory and Practice* (2010) 74.

²⁴⁶ Ibid

²⁴⁷ RW Eno “Jurisdiction of the African Court” (2002) 2 *African Human Rights Law Journal* 229.

3.9 Conclusion

The concept of jurisdiction is broad; it could however, be deduced from various definitions that jurisdiction refers to power or authority. This power is further narrowed down to refer to power to adjudicate, prescribe and to enforce the law. In addition to this, in order for a court or tribunal to have competence in a case it has to have a subject matter and a personal jurisdiction. Most human rights instruments have an express human rights jurisdiction save for a few sub-regional courts such as the East African Court of Justice and the SADC Tribunal whose human rights jurisdiction is not express as will be shown in the following chapters. The exercise of jurisdiction in by regional courts is dependent on the interpretation of the relevant empowering instrument. The role of the individual in international law is increasingly becoming important. Individual petition system forms the core of the individual's position at the international level. It was shown that individual petition system, in its most developed form attains a judicial connotation in so far as complaints can be examined and decided by an international court empowered by granting appropriate remedies to the applicant if any human rights violation is established. The European individual petition system is more developed, and in the American Court, individuals can only access the Court through the Commission. It was however, shown that in order for an individual to access international courts and tribunal, he or she has to first comply with the requirement of exhaustion of domestic remedies. This requirement exists in all the human rights system used to demonstrate its operation in this chapter. In some cases exhausting domestic remedies can be practically impossible hence the exceptions to the rule.

Chapter 4

THE HUMAN RIGHTS JURISDICTION OF THE SADC TRIBUNAL: THE *CAMPBELL* CASE AND ITS AFTERMATH

4.1 Introduction

Sub-regional human rights mechanisms are a uniquely African judicial mechanism established by political or economic blocs at the sub regional level establish them. In Africa, there exist more than four sub-regional groupings with at least one legal instrument relating to human rights.²⁴⁸ However, human rights reference in some of these instruments is not clear and their interpretations are a subject of legal debate. It is argued that the emergence of regional and sub-regional organisations and their respective courts and tribunals illustrate the development of regional human rights and increasing role of the individual as a subject of international law.²⁴⁹ Some sub-regional courts were established as human rights courts, whilst others were established for the sole purpose of economic integration and corporation.²⁵⁰ It is a settled principle of international law that states bear the primary responsibility for the protection of individuals.²⁵¹ However, the exercise of this responsibility is only primary and is not exercised to the exclusion of all other actors, hence sub-regional human rights bodies.

The inclusion of provisions for individual petitions in various human rights instruments is a manifestation of the importance of the right to individual petitions and demonstrates the undeniable fact there exist the right to access to justice at international law. Mindful of the

²⁴⁸ For example The East African Community, Economic Community of West African States, southern African Development Community, Economic Community of West African States and others.

²⁴⁹ ‘The evolution and progressive development of the international legal system in the twentieth century, and particularly after World War II, has caused a considerable increase in the importance of humanitarian values in the process of creation of international legal rules. The protection of both individuals and groups from any kind of violence, guaranteeing their freedom and dignity, has become one of the essential concerns of the international community.’ A Orakhelashvili “The Position of the Individual in International Law” 31 (2000), No. 2, 10 *California Western International Law Journal*.

²⁵⁰ Regional systems established for the sole purpose of integration and corporation also have human rights as their cardinal principles thereby extending their various mandates to include human rights. See for example O C Ruppel who points out that ‘In general terms, *regional integration* can be described as a path towards gradually liberalising the trade of developing countries and integrating them into the world economy. At first glance it appears that the promotion and protection of human rights is not within the RECs’ focal range... human-rights-related matters play a vital role within the RECs’ legal framework as well as in their daily practice, as many have implemented certain provisions in their mandate that have an impact on human rights and good governance.’ O C Ruppel “Regional Economic Communities And Human Rights In East And Southern Africa” available at http://www.kas.de/upload/auslandshomepages/namibia/Human_Rights_in_Africa/9_Ruppel.pdf (accessed on 09 September 2015).

²⁵¹ O De Schutter *Transnational Corporations and Human Rights* (2006) 36.

fact that States have the primary responsibility to promote, respect and protect the rights of individuals, international law guards against abuse of the right to petition international court by placing a procedural requirement of the need to exhaust domestic remedies by individuals before invoking international procedures.

Recent developments in the SADC Tribunal indicate that whereas the general trend in international law indicates emphasis on the individual as right bearing in the eyes of international law worth the right to access international courts, the Tribunal is in the process of diminishing this right.²⁵² Needless, be it mentioned that, such a retrogressive effort cannot be condoned, whether by means of reason or morality.

A careful retracing of the path through which the SADC Tribunal developed will help one make a detailed analysis of where the Tribunal is now and where it is going and the prospects for human rights in the region. One of the fundamental points of discussion in this chapter is the precarious position that the Tribunal finds itself in because of its interpretation of its human rights jurisdiction in the case of *Mike Campbell Private Ltd v Republic of Zimbabwe* (Campbell).²⁵³ The events that led to the suspension of the SADC Tribunal and the subsequent enactment of the New Protocol (2014 Protocol)²⁵⁴ will be analysed. The case of *Campbell*²⁵⁵ brought the Tribunal under the wrath of the heads of state and government and this warrants a detailed scrutiny of the consequences associated therewith. The legality of the suspension that ensued Campbell then the subsequent adoption of a New Protocol will be put into perspective. It will be argued that the suspension of the Tribunal was a violation of the SADC Treaty since it does not provide for the suspension of the Tribunal and the New Protocol is illegal for the reason that it is a product of an illegal process.

4.2 *The Tribunal: A Brief Background*

The Southern African Development Community (SADC) was established in 1992 as a direct replacement of the Southern African Development Co-ordination Conference (SADCC)²⁵⁶

²⁵²See for example A Orakhelashvili, *Supra* 248, at 240, who note that ‘there is no longer any doubt that the rights of the individual exist outside the domestic jurisdiction of States and that these rights concern the whole international community.’

²⁵³*Mike Campbell Private Ltd V Republic Of Zimbabwe* SADC (T) Case No. 2/2007.

²⁵⁴2014 Protocol on The Tribunal In The Southern African Development Community.

²⁵⁵*Mike Campbell Private Ltd V Republic Of Zimbabwe* SADC (T) Case No. 2/2007.

²⁵⁶The predecessor of the Southern African Development Community.

after the signing of the SADC Treaty²⁵⁷ in Windhoek, Namibia. The SADCC had been created in the 1980 after the majority of Southern African countries had attained independence from colonial rule. It was formed in Lusaka, Zambia. The aim of the SADCC was to pursue policies to facilitate the economic development and independence of these countries from Apartheid South Africa and to achieve an integrated development of the region.²⁵⁸ After the signing of the 1992 Treaty, SADC Tribunal and other SADC organs became an integral part of the sub-regional system. The Treaty provided for the establishment of the SADC Tribunal, an adjudicatory institution that was tasked with dispute resolution in the region under Article 9 (1) (f).²⁵⁹ The SADC Tribunal was established with a view to ensure that every country in the region respects and conforms to the objectives and principles contained in the SADC Treaty.²⁶⁰

Article 6 ‘General Undertakings’ say that member states will, ‘adopt measures to promote the achievement of the objectives of the community and will refrain from anything likely to jeopardise the achievement of these objectives or implementation of the treaty provisions.’²⁶¹ These objectives include to; 1..a) achieve development and growth, alleviate poverty, enhance the standard and quality of life of the people of Southern Africa and support the socially disadvantaged through regional integration; b) evolve common political values, systems and institutions; c) promote and defend peace and security; d) promote self-sustaining development on the basis of collective self-reliance, and interdependence of member states; e) achieve complementarity between national and regional strategies and programmes; f) promote and maximise productive employment and utilisation of resources of the region; g) achieve sustainable utilisation of natural resources and effective protection of the environment; h) strengthen and consolidate the long standing historical, social and cultural affinities and links among the peoples of the region.²⁶² Article 16²⁶³ gives effect to Article 9 (1) (f) and it provides, *inter alia*, that the decisions of the Tribunal shall be

²⁵⁷Treaty of the Southern African Development Community.

²⁵⁸R. H. Thomas ‘Angola-Botswana-Lesotho-Malawi-Mozambique-Namibia-Swaziland-Tanzania-Zambia-Zimbabwe:Treaty Of The Southern African Development Community’ (1993) 32, 1 *International Legal Materials* 116-135.

²⁵⁹Article 9 establishes all SADC institutions.

²⁶⁰*Mike Campbell Private Ltd V Republic Of Zimbabwe* SADC (T) Case No. 2/2007.

²⁶¹RH Thomas ‘Angola-Botswana-Lesotho-Malawi-Mozambique-Namibia-Swaziland-Tanzania-Zambia-

Zimbabwe:Treaty Of The Southern African Development Community’ (1993) 32, 1 *International Legal Materials* pp. 116-135; see also Article 6 (1) of the SADC Treaty.

²⁶²Article 5 of the SADC Treaty.

²⁶³Article 9 establishes the Tribunal and five other institutions namely the summit of heads of state or government, council of ministers, commissions, the standing committee of officials and the secretariat.

binding.²⁶⁴ Article 6(5) provides for the uniform application of the Treaty.²⁶⁵ The Preamble of the SADC Treaty observes that there is a ‘need to involve the people of the region centrally in the process of development and integration, particularly through the guarantee of democratic rights, observance of human rights and rule of law.’²⁶⁶

A Protocol on Tribunal was adopted in the year 2000 pursuant to the provisions of Article 9 and 16 of the SADC Treaty. The SADC Tribunal became operational in 2005 after a heads of state and government summit convened in Gaborone, Botswana in the same year.²⁶⁷

Members of the Tribunal were accordingly appointed in terms of Article 4 of the Protocol on Tribunal.²⁶⁸ The SADC Tribunal was established with ‘the duty to ensure adherence to and proper interpretation of the Treaty and its subsidiary instruments and to adjudicate disputes referred to it.’²⁶⁹ The jurisdiction of the Tribunal was set out in Article 14 of the Protocol on Tribunal and Procedures Thereof as; ‘jurisdiction over all disputes and all applications referred to it in accordance with the Treaty and this Protocol which relate to: (a) the interpretation and application of the Treaty; (b) the interpretation, application or validity of the Protocols, all subsidiary instruments adopted within the framework of the Community, and acts of the institutions of the Community; (c) all matters specifically provided for in any other agreements that States may conclude among themselves or within

²⁶⁴In terms of this provision, the Tribunal shall be constituted to ensure adherence to and proper interpretation of the provision of the SADC Treaty and its subsidiary instruments and to adjudicate matters referred to it. It also provides for a Protocol on Tribunal to be adopted at a summit of heads of states or government.

²⁶⁵This complements the Vienna Convention On The Law Of Treaties’ Article 3.

²⁶⁶The preamble SADC Treaty.

²⁶⁷See for example the 2005 SADC Summit Communique; para 40 states that ‘ In operationalising the SADC Tribunal in terms of the Protocol on Tribunal, Summit approved the appointment of the following ten (10) members of the Tribunal: Dr. Roberto Kambovo of Angola; Dr. Onkemetse B. Tshosa of Botswana; Hon. Justice Isaac Jamu Mtambo of Malawi; Chief Justice Ariranga Govindasamy Pillay of Mauritius; Hon. Dr. Luis Antonio Mondlane of Mozambique; Hon. Justice Petrus T. Damaseb of Namibia; Hon. Justice Stanley B. Maphalala of Swaziland; Hon. Justice Frederick B. Werema of Tanzania; Hon. Justice F. M. Chomba of

Zambia; and Hon. Justice Antonia Guvava of Zimbabwe.’ And para 41 ‘Summit also designated the initial five regular Members of the Tribunal as follows: Dr. Roberto Kambovo of Angola; Dr. Onkemetse B. Tshosa of Botswana; Hon. Justice Isaac Jamu Mtambo of Malawi; Chief Justice Ariranga Govindasamy Pillay of Mauritius; Hon. Dr. Luis Antonio Mondlane of Mozambique.’

²⁶⁸In terms of this provision; ‘1. Each State may nominate one candidate having the qualifications prescribed in Article 3 of this Protocol. 2. Due consideration shall be given to fair gender representation in the nomination and appointment process. 3. The Members shall be selected by the Council from the list of candidates so nominated by States. Nominations for the first appointment shall be called within three (3) months, and the selection shall be held within six (6) months, of the date of entry into force of this Protocol. 4. The Members shall be appointed by the Summit upon recommendation of the Council. 5. Where a Member is appointed to replace a Member whose terms of office has not expired, the Member so appointed shall serve for the remainder of his or her predecessor’s term. 6. Any appointment to fill a vacancy referred to in paragraph 5 shall be conducted within three (3) months of the vacancy occurring. The procedure referred to in the preceding paragraphs shall apply mutatis mutandis.’ For the names of members appointed, *ibid*.

²⁶⁹N Murungi ‘Revisiting The Role Of Sub-Regional Courts In The Protection Of Human Rights In Africa’ (2009); Treaty of the Southern African Development Community Article 16 (1).

the community and which confer jurisdiction on the Tribunal.²⁷⁰ This provision does not give the Tribunal a clear human rights mandate. Human rights jurisdiction of the Court was clarified in the case of *Mike Campbell Pvt Ltd*.²⁷¹

4.2.1 Mike Campbell Private Ltd V Republic of Zimbabwe (interim decision)

On 11 October, 2000, Mike Campbell (Pvt) Limited and William Michael Campbell filed an application with the Tribunal in which they challenged the acquisition by the Zimbabwe Government of immovable property, known as Mount Carmell farm in Zimbabwe. Simultaneously, they filed an application in terms of Article 28²⁷² of the Protocol on Tribunal (the Protocol), as read with Rule 61 (2) - (5) of the Rules of Procedure of the SADC Tribunal, for an interim measure restraining the respondent from expropriating the applicants' land, pending a final order. On 13 December 2007, the interim relief sought was granted. The Court held that;

the Tribunal grants the application pending the determination of the main case and orders that the Republic of Zimbabwe shall take no steps, or permit no steps to be taken, directly or indirectly, whether by its agents or by orders, to evict from or interfere with the peaceful residence on, and beneficial use of, the farm known as Mount Carmell of Railway 19, measuring 1200.6484 hectares held under Deed of Transfer No. 10301/99, in the District of Chegutu in the Republic of Zimbabwe, by Mike Campbell (Pvt) Limited and William Michael Campbell, their employees and the families of such employees and of William Michael Campbell.²⁷³

Seventy-seven other persons applied for the same order and were granted the interim relief sought.

4.2.1.1 Background to litigation against Zimbabwe.

On the turn of the 21st Century, Zimbabwe embarked on a land reform process. This land reform was a result of a fallout between the Zimbabwe government and the British

²⁷⁰ 2000 Protocol on Tribunal and Procedures Thereof.

²⁷¹ *Mike Campbell Private Ltd V Republic Of Zimbabwe* SADC (T) Case No. 2/2007.

²⁷² This provision states that 'the Tribunal or the President may, on good cause, order the suspension of an act challenged before the Tribunal and may take other interim measures as necessary.'

²⁷³ Supra 270.

government after the later had backtracked on its Lancaster House commitments.²⁷⁴ The terms of the Lancaster House Agreement were that Zimbabwe was to carry out a British-funded land reform exercise in order to address the colonial legacy of land ownership imbalances.²⁷⁵ As a result, Zimbabwe proclaimed a Constitutional²⁷⁶ Amendment Act 17. The relevant provision of the amendment is Section 16(B) 2 and it says;

(a) all agricultural land - (i) that was identified on or before the 8th July, 2005, in the Gazette or Gazette Extraordinary under section 5 (1) of the Land Acquisition Act [Chapter 20:10], and which is itemized in Schedule 7, being agricultural land required for resettlement purposes; or (ii) that is identified after the 5th July, 2005, but before the appointed day (i.e. 16th September, 2005), in the Gazette or Gazette Extraordinary under section 5 (1) of the Land Acquisition Act [Chapter 20:10], being agricultural land required for resettlement purposes; or that is identified in terms of this section by the acquiring authority after the appointed day in the Gazette or Gazette Extraordinary for whatever purposes, including, but not limited to A. settlement for agricultural or other purposes; or B. the purposes of land reorganization, forestry, environmental conservation or the utilization of wild life or other natural resources; or C. the relocation of persons dispossessed in consequence of the utilization of land for a purpose referred to in subparagraph A or B; is acquired by and vested in the State with full title therein with effect from the appointed day or, in the case of land referred to in subparagraph (Hi), with effect from the date it is identified in the manner specified in that paragraph; and (b) no compensation shall be payable for land referred to in paragraph (a) except for any improvements effected on such land before it was acquired.(3) The provisions of any law referred to in section 16 (1) regulating the compulsory acquisition of land that is in force on the appointed day, and the provisions of section 18 (1) and (9), shall not apply in relation to land referred to in subsection (2) (a) except for the purpose of

²⁷⁴The British Government led by Margaret Thatcher invited Zimbabwe's political parties to a constitutional conference in Lancaster, UK in 1979. The British government agreed to provide the resources that would be required to purchase the land for redistribution. The American Government also undertook to help fund the land redistribution process. However, when the Labor Party took over the reins in Britain they informed Zimbabwe about the election of a Labor government "without links to former colonial interests" which meant Britain no longer had any "special responsibility to meet the cost of land purchases."

²⁷⁵See for example M. G Chinamasa 'The Human Right To Land In Zimbabwe: The Legal And Extra-Legal Resettlement Processes' who notes that by 1905, under this new land allocation policy, there were about 60 Native Reserves (NRs), occupying about 22% of the country. Nearly half of the indigenous black population of 700 000 now lived in reserves. They had by then lost approximately 16 million hectares to the white settlers. By 1920, the native reserves constituted an area of 8,7 million hectares, while the number of white settler farms (Company/freehold) reached 2 500, encompassing an acreage of approximately 15 million hectares. ²⁷⁶This was an amendment to the old Zimbabwe Constitution, known as the Lancaster House Constitution.

determining any question related to the payment of compensation referred to in subsection (2) (b), that is to say, a person having any right or interest in the land - (a) shall not apply to a court to challenge the acquisition of the land by the State, and no court shall entertain any such challenge; (b) may, in accordance with the provisions of any law referred to in section 16 (1) regulating the compulsory acquisition of land that is in force on the appointed day, challenge the amount of compensation payable for any improvements effected on the land before it was acquired.²⁷⁷

This provision legitimised expropriation of land without compensation and barred domestic courts from entertaining litigation in respect of expropriated land. Campbell and others took the case to the SADC Tribunal and resulted in the *Mike Campbell Private Ltd and others* case.²⁷⁸

4.2.2 *Mike Campbell Private Ltd V Republic Of Zimbabwe (merits)*

After the interim judgement was handed down, litigation continued on the merits in 2008. On the merits, the Zimbabwe Government (the respondents) argued that the Tribunal lacked jurisdiction in the matter because ‘the SADC Treaty did not spell out benchmarks against which member states’ conduct could be assessed and that if the Tribunal were to borrow these benchmarks from other treaties, it would be legislating on behalf of member states.’²⁷⁹

The Respondents also contended that the Court lacked subject matter jurisdiction and ‘in the absence of a regional protocol on human rights and agrarian reform, the objectives and principles of the Treaty were not binding on member states.’²⁸⁰ The Court thus had to determine the preliminary issues of whether it had jurisdiction to hear the matter and whether the requirement that domestic remedies should be exhausted before approaching the court was complied with. On these issues the Court held that it had jurisdiction in terms of Articles 14(a) and 15 of the Protocol on Tribunal.

On the question of whether the Tribunal had a human rights jurisdiction, the respondents submitted that the listed principles and objectives of the SADC Treaty were non-binding in the absence of a separate protocol on human rights and land reform. The Tribunal reasoned

²⁷⁷ Constitution of Zimbabwe Amendment (Act 17); *Mike Campbell Private Ltd V Republic Of Zimbabwe* SADC (T) Case No. 2/2007.

²⁷⁸ *Mike Campbell Private Ltd V Republic Of Zimbabwe* SADC (T) Case No. 03/2009.

²⁷⁹ Ibid.

²⁸⁰ A Moyo ‘Defending Human Rights And The Rule Of Law By The SADC Tribunal: Campbell And Beyond’ (2009) 2 *African Human Rights Law Journal*, 590-614.

that it had power to develop its own jurisprudence in terms of Article 21(b) of the Protocol²⁸¹ having regard to applicable treaties, general principles and rules of public international law, which are sources of law for the Tribunal.²⁸² Thus, it held that it clearly had jurisdiction in respect of ‘any dispute concerning human rights, democracy and rule of law.’²⁸³ It is this decision that irked the Zimbabwe government leading to the subsequent demise of the Tribunal.

4.3 Human Rights Jurisdiction of the Tribunal

The Tribunal exercises four kinds of jurisdiction. These are the jurisdiction under Article 14²⁸⁴ of the Protocol on Tribunal, the preliminary rulings jurisdiction under Article 16²⁸⁵ of the Protocol on Tribunal, advisory jurisdiction under Article 16.4 of the SADC Treaty as read with Article 20²⁸⁶ of the Protocol and the appellate jurisdiction under Article 20A.²⁸⁷ None of these provisions specifically pronounce the human rights mandate of the Court.

The human rights jurisdiction of the Tribunal became a subject of debate soon after *Campbell*. Ruppel argues that it is, ‘no doubt, that the SADC Tribunal is expected to serve as a key actor in the SADC legal and institutional integration process. The European Union

²⁸¹ Article 21 (b) 2000 Protocol On Tribunal.

²⁸² A Moyo ‘Defending Human Rights And The Rule Of Law By The SADC Tribunal: Campbell And Beyond’ (2009) 2 African Human Rights Law Journal, 590-614.

²⁸³ *Mike Campbell Private Ltd V Republic Of Zimbabwe SADC (T) Case No. 02/2007.*

²⁸⁴ Article 14 says ‘the Tribunal shall have jurisdiction over all disputes and all applications referred to it in accordance with the Treaty and this Protocol which relate to: (a) the interpretation and application of the Treaty; (b) the interpretation, application or validity of the Protocols, all subsidiary instruments adopted within the framework of the Community, and acts of the institutions of the Community; (c) all matters specifically provided for in any other agreements that States may conclude among themselves or within the community and which confer jurisdiction on the Tribunal.’

²⁸⁵ Article 16 says ‘1. Subject to the provisions of paragraph 2 of this Article, the Tribunal shall have jurisdiction to give preliminary rulings in proceedings of any kind and between any parties before the courts or tribunals of States. 2. The Tribunal shall not have original jurisdiction but may rule on a question of interpretation, application or validity of the provisions in issue if the question is referred to it by a court or tribunal of a State for a preliminary ruling in accordance with this Protocol.’

²⁸⁶ Article 20 says ‘The Tribunal shall have jurisdiction to give advisory opinions, which may be requested by the Summit or by the Council in terms of paragraph 4 of Article 16 of the Treaty.’

²⁸⁷ Article 20A (Agreement amending the Protocol) 1. ‘The Tribunal shall have jurisdiction in any dispute relating to the legal findings and conclusions of a panel under a protocol referred to it by a party to the dispute. 2. Only a party to a dispute may appeal a panel report. Third parties which have notified the registrar of a substantial interest in the matter pursuant to the rules may make written submission to, and be given an opportunity to be heard by, the Tribunal. 3 The Tribunal may uphold, modify or reverse the legal findings and conclusions of the panel. 4. In cases of urgency, parties to a dispute and the Tribunal shall make every effort to accelerate the proceedings to the greatest extent possible. 5. An appeal shall be limited to issues of law covered in the panel report and legal interpretations developed by the panel. 6. The Tribunal may call an expert to address them during oral hearings on any matter for the Tribunal’s benefit. 7. Disputes relating to the legal findings and conclusions of a panel established under the Protocol on Trade referred to the Tribunal for appellate review by a party to a dispute shall be dealt with in accordance with that Protocol.’

experience has demonstrated that such dispute settlement bodies can indeed play a significant role in regional integration. However, in order to develop the current SADC dispute settlement system into an ideal model, improvements may have to be considered.²⁸⁸

This speaks to the fact that respect for human rights are indeed critical to the integration process for which the sub-regional bodies are created. As previously argued, human rights are cardinal to the integration process. In addition to this, Ruppel attributes the Tribunal's human rights jurisdiction to '... [the] pressing reality that a century of change has tied the people of the earth in unprecedented intimacy of contact, interdependence of welfare and vulnerability.'²⁸⁹ This means that in a global village, respect for human rights at supranational level is inevitable.

Article 16 (1) of the SADC Treaty would be an ideal starting point for the interpretation of the relevant jurisdictional clauses in the Treaty itself. Article 16 (1) says that 'the Tribunal shall be constituted to ensure adherence to and the proper interpretation of the provisions of this Treaty and subsidiary instruments and to adjudicate upon such disputes as may be referred to it.'²⁹⁰ Thus in *Campbell*, the Tribunal held that it clearly had 'jurisdiction in respect of any dispute concerning human rights, democracy and the rule of law...'²⁹¹ The judges correctly afforded the Tribunal a mandate to promote and protect human rights.

The Tribunal's ruling was not well received, particularly by the Zimbabwe government; Ruppel correctly attributes the collapse of the Tribunal to this ruling. He points out that '...[the Tribunal ruled that] it has jurisdiction to hear human rights complaints, but its exercise of this competence led to a SADC-ordered review of the Tribunal's role and functions in 2010, resulting in the suspension of its activities.'²⁹²

In addition to its human rights jurisdiction, the Tribunal had 'jurisdiction over all matters provided for in any other agreements that member states may conclude among themselves or within the community and that confer jurisdiction to the Tribunal.'²⁹³ The Tribunal was also competent to receive interstate disputes and disputes between individuals and states in addition to its 'exclusive jurisdiction in disputes between organs of the community or

²⁸⁸O C Ruppel and F X. Bangamwabo 'The SADC Tribunal: a legal analysis of its mandate and role in regional integration' in *Monitoring Regional Integration in Southern Africa Yearbook* (2008).

²⁸⁹Ibid.

²⁹⁰Article 16 (1) of the SADC Treaty.

²⁹¹Supra note 279.

²⁹²O C Ruppel and F X. Bangamwabo 'The SADC Tribunal: a legal analysis of its mandate and role in regional integration' in *Monitoring Regional Integration in Southern Africa Yearbook* (2008).

²⁹³Ibid.

between community personnel and the community.²⁹⁴ It is on this latter ground that the Tribunal heard the case of *Ernest Francis Mtangwi v. SADC Secretariat*.²⁹⁵

The 2000 Protocol on Tribunal outlines the subject matter jurisdiction of the Tribunal as;

... jurisdiction over all disputes and all applications referred to it in accordance with the Treaty and this Protocol which relate to: i) the interpretation and application of the Treaty; ii) the interpretation, application or validity of the Protocols and subsidiary instruments adopted within the SADC, and acts of institutions of the community ;and iii) all matters specifically provided for in any other agreements that States may conclude among themselves or within the community and which confer jurisdiction on the Tribunal.²⁹⁶

Critics of the approach used by the Tribunal in Campbell to extend the jurisdiction to human rights argued that a new human rights Protocol was needed in order for the Court to have a human rights jurisdiction.²⁹⁷ Moyo counters this argument where he says, ‘given that the principles of ‘human rights, democracy and the rule of law’ are codified under article 4(c) of the Treaty, held the Tribunal, it was unnecessary to have a separate Protocol on human rights in order to give effect to these principles.’²⁹⁸

The general practice in international law is that a regional human rights court exercises jurisdiction over human rights cases once the applicant has exhausted domestic remedies. As shown in previous chapters, this requirement is entrenched in international law. Almost all regional human rights systems have this provision as a procedural requirement.²⁹⁹ The rationale for this principle is that before a state can be summoned before an international tribunal it must be given an opportunity to remedy any wrong it may have committed through its domestic procedures.³⁰⁰ This requirement is meant to guard against overloading the regional courts with matters that could be dealt with at domestic level and also to preserve and recognise the independence of member states judicial systems. There are, however, situations where strict compliance with this rule may have negative implications

²⁹⁴ Ibid; Article 18 of the 2000 protocol on the SADC Tribunal and Rules Thereof.

²⁹⁵ B Chagara “Southern African Development Community Land Issues; Towards A Sustainable Land Relations Policy” 2012.

²⁹⁶ Article 14 of the 2000 Protocol on Tribunal.

²⁹⁷ This was Zimbabwe’s position on the matter.

²⁹⁸ A Moyo “Defending Human Rights And The Rule Of Law By The SADC Tribunal: Campbell And Beyond” (2009) 2 *African Human Rights Law Journal*, 590-614.

²⁹⁹ See for example the International Court of Justice case of *Interhandel* case (*Switz v U.S.*), [1959] I.C.J. 6, 27 (Mar 21).

³⁰⁰ F Zenda ‘The Sadc Tribunal And The Judicial Settlement Of International Disputes’ (unpublished thesis, University of South Africa, 2010).

on the integrity of the regional or international human rights systems. Moyo cites Ankumah who argues that ‘it is not necessary to comply with the requirement to exhaust local remedies if the complainant has been denied access to them, or if the domestic laws impede due access to legal procedures.’³⁰¹ In applying this principle, ‘the Tribunal will, of course, need to take into account of the existing jurisprudence emanating from other international courts or tribunals...’³⁰² The Zimbabwe government had enacted a statute (Amendment 17) with a provision that, ‘a person having any right or interest in the land shall not apply to a court to challenge the acquisition of land by state and no court shall entertain any such challenge.’³⁰³ This provision illustrates that there were no domestic remedies available for the applicants and the Tribunal correctly enabled the applicants to proceed before the Tribunal. According to Moyo, ‘the Tribunal has competence to exempt parties from proving that they have exhausted local remedies if they show that they were unable to proceed under domestic jurisdiction.’³⁰⁴ This also includes undue delay or the unavailability or ineffectiveness of local remedies. In the case of *Zimbabwe Lawyers for Human Rights and the Institute for Human Rights and Development*,³⁰⁵ that was heard before the African Commission on Human Rights, the Commission had to consider the question as to what constitutes an unduly prolonged process under Article 56(5) of the African Charter. The Commission noted that there are no standard criteria that can be used to determine when the process is said to be unduly prolonged, and each case has to be treated on its own merits.³⁰⁶ Unduly prolonged may mean that there is no justification for the delay.

4.4 Enforcement of the SADC Tribunal Decision

In the case of *Gramara Pvt Ltd and Others V Republic of Zimbabwe*,³⁰⁷ the Zimbabwe High Court refused to register the decisions of the Tribunal in the domestic courts as required by Article 32 (1) of the Protocol on Tribunal.³⁰⁸ According to Hansungule, ‘Patel J, who

³⁰¹ A Moyo ‘Defending Human Rights And The Rule Of Law By The SADC Tribunal: Campbell And Beyond’ (2009) 2 *African Human Rights Law Journal*, 590-614.

³⁰² Supra note 299, at 66.

³⁰³ Constitution of Zimbabwe Amendment (No. 17) Act, 2005.

³⁰⁴ Supra note 300.

³⁰⁵ 294/04 *Zimbabwe Lawyers for Human Rights and the Institute for Human Rights and Development*

³⁰⁶ F Zenda *The Sadc Tribunal And The Judicial Settlement Of International Disputes* (unpublished thesis, University of South Africa, 2010).

³⁰⁷ *Gramara Pvt Ltd and Others V Republic Of Zimbabwe* HC 33/09.

³⁰⁸ Article 32(1) says ‘The law and rules of civil procedure for the registration and enforcement of foreign judgements in force in the territory of the State in which the judgement is to be enforced shall govern enforcement.’

dismissed attempts to register the SADC Tribunal judgment, had the following words to say in support of his decision:

This Constitution is the supreme law of Zimbabwe and if any other law is inconsistent with this Constitution that other law shall, to the extent of the inconsistency, be void. The obvious implications of the supremacy of the Constitution are two-fold. First, to the extent that the common law is invoked to enforce a foreign judgment, the common law must be construed and applied so as to conform with the Constitution and any feature of the judgment that conflicts with the Constitution cannot, as a matter of public policy, be recognised or enforced in Zimbabwe. The notion of public policy cannot be deployed and insinuated under cover of the common law to circumvent or subvert the fundamental law of the land. Secondly, I consider it to be patently contrary to the public policy of any country, including Zimbabwe, to require its government to act in a manner that is manifestly incompatible with what is constitutionally ordained..³⁰⁹

It is interesting to note that, even though the Zimbabwe High Court refused to enforce the decision of the Tribunal in 2010, in the same year the South African High Court arrived at a different conclusion in *Fick* case.

4.4.1 Fick Cases (SADC Tribunal, North Gauteng High Court, Supreme Court of Appeal and the Constitutional Court of South Africa)

Fick first made an application to the SADC Tribunal (before it was suspended). In this case the Applicants wanted the Tribunal to ask the Summit (of Heads of State or Government) to take appropriate measures in terms of Article 32 (5)³¹⁰ which deals with recalcitrant parties on the basis that Zimbabwe had failed to comply with the Tribunal's decision in the 2007 and 2009 Campbell cases. Zimbabwe had refused to comply through its Minister of Justice who is on the record of having said;

We hereby advise that, henceforth, we will not appear before the Tribunal and neither will we respond to any action or suit that may be instituted or be pending in against

³⁰⁹ M Hansungule "The Suspension Of The SADC Tribunal" 35 *I Strategic Review for Southern Africa*.

³¹⁰ Article 32 of the Protocol on Tribunal addresses the issue of enforcement. According to Zenda (2010) 'it provides that the Tribunal's judgments are enforceable in the national courts in the same way as the foreign judgements may be enforced. States are also directed to take measures to ensure execution of decisions of the Tribunal. In the case of states, if there is a failure to comply with a decision of the Tribunal, the matter must be referred back to the Tribunal, if the Tribunal establishes a failure then the matter will be referred to highest political organ of SADC which is the Summit.'

the Republic of Zimbabwe before the Tribunal. For the same reasons, any decisions that the Tribunal may have made or may make in the future against the republic of Zimbabwe are null and void.³¹¹

The above statement illustrates the hostility exhibited by the Harare government towards the Tribunal following *Campbell*.

In light of this, the SADC Tribunal, in *Fick*, held that,

It is evident that the respondent has not complied with the decision of the Tribunal. We therefore hold that the existence of further acts of non-compliance with the decision of the Tribunal has been established after the Tribunal's decision of June 5, 2009 under which earliest acts of noncompliance have already been reported to the summit. Accordingly, the Tribunal will again report this finding to the summit for its appropriate action.³¹²

After this judgment, *Fick* and others made an application in the North Gauteng High Court of South Africa in which they sought enforcement of the costs order. In this application, they successfully asked the Court to grant an order to facilitate execution against Zimbabwe's property in South Africa.³¹³ An application to serve summons by means of an edictal citation was also granted. Zimbabwe responded through its notice of intention to defend and subsequently withdrew citing its own sovereignty and immunity from the jurisdiction of South African courts.

Zimbabwe appealed in the Supreme Court of South Africa where it contended that it had immunity in South African courts in terms of the Foreign States Immunities Act.³¹⁴ The judge held that by 'expressly submitting itself to the SADC Treaty and Protocol [on tribunal] Zimbabwe waived its immunity.'³¹⁵ These and other issues were subsequently dealt with in the Constitutional Court of South Africa.

In the Constitutional Court of South Africa,³¹⁶ the main issue was 'whether the South African courts have jurisdiction to register and thus facilitate the enforcement of the costs order made by the Tribunal against Zimbabwe.' Zimbabwe argued that the Tribunal did not

³¹¹ JW Chikuhwa *Zimbabwe: The End of The First Republic* (2013)

³¹² *Fick V The Republic Of Zimbabwe SADC T* (2010).

³¹³ *Fick V The Republic Of Zimbabwe*, North Gauteng High Court South Africa. *Neutral* [2013] ZACC 22

³¹⁴ Act 87 of 1981.

³¹⁵ *Fick V The Republic of Zimbabwe* (657/11) [2012] ZASCA 122.

³¹⁶ Case CCT 101/12 [2013] ZACC 22.

have jurisdiction to entertain the dispute that led to the costs order. In other words, the Zimbabwe government argued that the costs order made by the Tribunal was invalid. Zimbabwe also submitted that the High Court of South Africa lacked the jurisdiction to order the registration of the costs order made by the Tribunal. In deciding that South African courts had jurisdiction in this case, the Constitutional Court had to rely on the principles of the common law and held that;

It is not in dispute that the costs order is final and that it was not obtained fraudulently, it does not involve enforcement of revenue law of Zimbabwe and its enforcement is not precluded by the Protection of Business Act the enforcement of the costs order is also not against public policy of which our constitution is an embodiment.³¹⁷

The Court did not dispute the fact that South African statutory law³¹⁸ does not give the court's jurisdiction in such cases hence its resort to the common law.³¹⁹

The South African Constitutional Court decision in *Fick* signifies a big step in human rights jurisprudence. De Wet notes that 'it was the first time since its inception that the Constitutional Court was confronted with the status of a binding international decision within the domestic legal order.'³²⁰ In addition to this, de Wet concurs with the findings of the Court in *Fick* where she argues that 'in accordance with article 32 (3) of the Protocol on the SADC Tribunal, the decisions of the Tribunal are binding upon the parties to the dispute in respect of that particular case and enforceable 'within the territories of states concerned.' "States concerned" implies that although the decision itself was directed only at Zimbabwe

³¹⁷ Paragraph 39 *Fick V Republic Of Zimbabwe CCT 101/12 [2013] ZACC 22*.

³¹⁸ The Enforcement Act Section (2) 1 provides that 'This Act shall apply in respect of judgments given in any country outside the Republic which the Minister has for the purposes of this Act designated by notice in the Gazette.' It is therefore important to note that this provision could not be applied in this case since designation in the gazette was made by the relevant minister.

³¹⁹ See for example Genevieve Jenkins in an article titled 'Was South Africa Vote For the 2014 Tribunal Protocol Unconstitutional?' who submits that South African Constitutional Court developed the common law to ensure that a decision of the SADC Tribunal is enforceable in South Africa. *Fick* also provided that "it is settled law that the rule of law embraces the fundamental right of access to courts". The Court read this right, enshrined in section 34 of the South Africa's Constitution in conjunction with section 233 of the Constitution, which directs courts to choose a reasonable interpretation of legislation consistent with international law over one that is inconsistent. It concluded that the right of access to justice included a right of access to the Tribunal and enforcement of the Tribunal's decisions by domestic courts.' Available at <http://africanlegalcentre.org/c-genevieve-jenkins-was-south-africas-vote-for-the-2014-sadc-tribunal-protocol-unconstitutional/>

³²⁰ E de Wet "The Case Of Government Of The Republic Of Zimbabwe V Louis Karel Fick: A First Step Towards Developing A Doctrine On The Status Of International Judgments Within The Domestic Legal Order" (2014) 17, 1 *Potchefstroom Electronic Law Journal*, 554-565.

other SADC member states have a role to play in its enforcement.’³²¹ This provision therefore made it possible for a decision of the SADC Tribunal to be enforced in any other country in situations where the respondent government has refused to comply with a costs order. It remains to be seen, however, what would happen in situations where the respondent government does not own substantial assets in a country willing to enforce the order.³²²

4.5 *The Suspension of the Tribunal*

Campbell Pvt Ltd v Republic of Zimbabwe and the events that followed signalled the demise of the SADC Tribunal as it was eventually suspended in 2010. On 17 August 2012 in Maputo, Mozambique, the SADC Summit addressed the issue of the suspended SADC Tribunal. The Tribunal was suspended after ‘representations by Zimbabwe that the Tribunal was not properly established and, as such, could not be legally recognised as an institution of SADC.’³²³ The SADC Summit resolved that a New Tribunal should be negotiated and that its mandate should be confined to interpretation of the SADC Treaty and Protocols relating to disputes between Member States.³²⁴ Clearly, the intention here was to do reduce the jurisdiction of the court to interstate petitions only.

The suspension of the Tribunal was a direct response to *Campbell*. The *Campbell* case raised a number of fundamental questions such as, whether the SADC Tribunal has jurisdiction to hear such human rights cases, and whether the plaintiffs had been denied access to domestic courts in violation of the SADC Treaty. Other issues in the case were whether the applicants were entitled to compensation and whether the Zimbabwe government had discriminated the plaintiffs on the basis of race.³²⁵ The aftermath *Campbell* placed into question the issue of the status of the decisions of the Tribunal in municipal courts. The case of *Etheredge v The Minister of State for National Security Responsible for Lands, Land Reform and Resettlement and Another*,³²⁶ dealt with Zimbabwe’s position with regards to the status of the SADC Tribunal in domestic courts. The respondents contended

³²¹Supra note 319.

³²²S Tembo ‘An Analysis Of The SADC Tribunal And The East African Court Of Justice; A Human Rights Perspective’ 2nd issue *University of Kwa-Zulu Natal Students Law Review* 113-129.

³²³M Makonese, 2013, ‘The SADC conundrum- lawyers look to African court for direction’ DR jan/feb 2013;24 [2013] *DEREBUS*.

³²⁴See the SADC website at <http://www.sadc.int/about-sadc/sadc-institutions/tribun/>

³²⁵Similar issues had been placed before the Zimbabwe supreme court in *Mike Campbell (PV T)Ltd e ta l v The Minister of National Security responsible for Land, Land Reform and Resettlement and he Attorney-General. Constitutional Application No. 1 24/06* (unreported case : Supreme Court of Zimbabwe)

³²⁶Suit no 3295/08 (High Court of Zimbabwe).

that, ‘that the applicant was not entitled to the remedies he was seeking as he and other farmers had a similar matter before the SADC Tribunal. In essence, the second respondent contended that by virtue of the principle of *lis pendens*, ‘the High Court of Zimbabwe could not be seized of the matter.’ On this point the Zimbabwe High Court held ‘that the SADC Tribunal Protocol does not establish the Tribunal as a court of superior jurisdiction in the territories of the SADC member states.’³²⁷ This position was later confirmed by the Supreme Court of Zimbabwe in 2010;

The SADC Tribunal has not been domesticated by any municipal [law] and therefore enjoys no legal status in Zimbabwe. I believe the same obtains in all SADC states, that is, there is no right of appeal from the South African Constitutional Court, the Zambian Supreme Court [now the Constitution Court] and the supreme courts of other SADC countries to the SADC Tribunal.³²⁸

Ebobrah notes that according to the judge, ‘Zimbabwean Constitution, which is the supreme law in Zimbabwe, establishes the High Court as a court of superior jurisdiction with inherent jurisdiction over all people and all matters. This jurisdiction had not, according to the judge, been ousted by the SADC Tribunal Protocol or any other statute.’³²⁹ He adds that the decision in *Etheredge* ‘[raises] the question of the nature of the relation between international courts (in this case the SADC Tribunal) and municipal courts (in this case the Zimbabwe High Court) in terms of hierarchy, precedence, and effect of decisions.’³³⁰

In *Mike Campbell Private Ltd V Republic Of Zimbabwe*³³¹ the Tribunal unanimously decided that Article 4 (c) of the SADC Treaty³³² was violated and a majority also found for the applicants in that there existed a violation of Article 6 (2).³³³ The Tribunal found that ‘it is a fundamental requirement of the rule of law that those who are affected by the law be heard before they were deprived of a right, interest or legitimate expectation. It stated that it is settled law that the concept of rule of law embraced at least two fundamental rights,

³²⁷ S T Ebobrah and M J Nkatha “Is the SADC Tribunal under judicial siege in Zimbabwe? Reflections on *Etheredge v Minister of State for National Security Responsible for Lands, Land Reform and Resettlement and Another*” 43 1 (2010) *The Comparative and International Law Journal of Southern Africa* 81-92.

³²⁸ *Commercial Farmers Union v Minister of Lands and Resettlement* Case No SC 81/ 2010; S Tembo “An Analysis Of The SADC Tribunal And The East African Court Of Justice; A Human Rights Perspective” 2nd Issue *University Of KwaZulu Natal Students Law Review* 113-129.

³²⁹ *Supra* note 326.

³³⁰ *Ibid.*

³³¹ SADC (T) Case No. 03/2009.

³³² Article 4(c) sets democracy human rights and rule of law as some of the principles of the SADC Treaty.

³³³ Article 6(2) says that ‘SADC and member states shall not discriminate against any person on grounds of gender, religion, political views, race, ethnic origin, culture and disability.’

namely the right of access to courts and the right to a fair hearing before an individual is deprived of a right.³³⁴ The reasoning of the Tribunal was that land reform programme had breached the SADC Treaty on the basis that the applicants had been denied a right to access to domestic remedies, that the applicants had been racially discriminated coupled with the state's failure to pay compensation.³³⁵ Naldi describes the land reform as violent, arbitrary, capricious and vindictive.³³⁶

The decision in *Campbell* was supposed to dawn a new era of sub-regional human rights protection in Southern Africa. As Chagara notes 'the SADC Tribunal's decision in *Mike Campbell Private Ltd and others* shows the young tribunal's readiness to hold states accountable for breaching their obligations to recognise, promote and protect human rights of individuals on their territories – the foremost tool in the UN's normative architecture for ensuring international peace and security.'³³⁷ The decision had given the citizens of the SADC hope that the sub-regional organisation may have taken a path that pursue human and regional security by putting individual security ahead of state security.

4.5.1 *The legality of the decision to suspend the Tribunal*

The Tribunal was suspended after the Zimbabwe government failed to implement decisions relating to its land reform programme in the case of *Mike Campbell (Pvt) Ltd and Others*.

The argument made for the suspension of the Tribunal was that Zimbabwe had made representations that the 'the Tribunal was not properly established and, as such, could not be legally recognised as an institution of SADC.' This argument was later discredited by the WTIA's findings that the Tribunal was properly established and that its protocol entered into force in accordance with international law.³³⁸ As such, the SADC summit mandated the SADC secretariat to drive a review process. The Secretariat tasked the World Trade Institute Advisors (WTIA) to assess the role, functions and terms of reference of the SADC Tribunal. The WTIA submitted its report for review by the SADC Ministers of Justice who in turn

³³⁴ E De Wet "The Case Of Government Of The Republic Of Zimbabwe V Louis Karel Fick: A First Step Towards Developing A Doctrine On The Status Of International Judgments Within The Domestic Legal Order" (2014) 17, 1 *Potchefstroom Electronic Law Journal*, 554-565.

³³⁵ G J Naldi "Mike Campbell (Pvt) Ltd et al v The Republic of Zimbabwe: Zimbabwe's Land Reform Programme Held in Breach of the SADC Treaty" (2009) 53 2 *Journal of African Law* 305-320.

³³⁶ Ibid.

³³⁷ B Chagara "Introductory Note To Southern African Development Community (Sadc) Tribunal— Mike Campbell (Pvt) Ltd And Others V Republic Of Zimbabwe" 48 3 (2009) *International Legal Materials* 530-533.

³³⁸ <http://www.mikecampbellfoundation.com/page/sadc-tribunal-suspension-implications-for-human-rights>

made recommendations to the SADC extra-ordinary summit in Namibia, May 2011. The summit did not accept the recommendations. Instead, it tasked the ministers of justice to continue with the review process until August 2012. A Summit was held in Mozambique in 2012 where ministers of justice recommended that the Tribunal be reinstated, albeit without a human rights mandate.³³⁹ The summit agreed to negotiate a new Protocol on Tribunal and that the jurisdiction of the Tribunal should be limited to interpretation of the SADC Treaty and protocols relating to disputes between member states.³⁴⁰ As Makonese correctly points out, 'the proposed new tribunal will be an interstate court. Individuals and juristic persons will not have access to the Tribunal, thereby denying SADC citizens access to justice and effective remedies as provided for in international law.'³⁴¹

The decision to suspend the SADC Tribunal prompted the Pan African Lawyers Union and the Southern African Litigation Centre to make a request for an advisory opinion in the African Court on Human Rights. The request was made in terms of Article 4 of the Protocol to the African Charter on Human and People's Rights on the Establishment of the African Court on Human and Peoples Rights which entitles recognised entities to request opinions from the Court on 'any legal matter relating to [the African] Charter [on Human and Peoples Rights] or any other relevant human rights instruments.'³⁴² The applicants alleged that the decision to suspend the Tribunal violates judicial independence, access to justice and the right to effective remedies and the rule of law. The issue placed before the African Court was whether 'the decision by the SADC Summit of Heads of State and Government to suspend the Tribunal and not to reappoint or replace members of the Tribunal whose terms had expired is consistent with the African Charter, the SADC Treaty and the Tribunal Protocol and general principles of rule of law.'³⁴³ In addition, whether 'the decisions of the SADC summits of August 2010 and May 2011 violate institutional independence of the Tribunal and the personal independence of the judges as provided for in the African Charter and the United Nations principles on independence of the judiciary. Further, whether

³³⁹ Final Communiqué of The 32nd Summit of SADC Heads of State And Government Maputo, Mozambique August 18, 2012. Resolution 24 states that 'Summit considered the Report of the Committee of Ministers of Justice/Attorneys General and the observations by the Council of Ministers and resolved that a new Protocol on the Tribunal should be negotiated and that its mandate should be confined to interpretation of the SADC Treaty and Protocols relating to disputes between Member States.

³⁴⁰ M Makonese "The SADC Tribunal Conundrum - Lawyers Look To The African Court For Direction." DR, Jan/Feb 2013:24 [2013] DEREBUS 13.

³⁴¹ Ibid.

³⁴² Article 4 of the Protocol to the African Charter on Human and People's Rights on the Establishment of the African Court on Human and People's Rights.

³⁴³ Supra note 339.

‘SADC’s 18 August 2012 decision violates the right of access to justice and effective remedies as guaranteed in the African Charter on Human and Peoples Rights, the SADC Tribunal Protocol and the United Nations General Principles and Guidelines on the right to a remedy and reparations for victims of gross violation of international human rights law and serious violation of international humanitarian law,³⁴⁴ and finally, whether ‘the decision making process undertaken in the review of the SADC Tribunal jurisdiction are in compliance with the SADC Treaty.’³⁴⁵

The Applicants submitted that the opinion would be ‘necessary to in order to provide direction to the SADC summit and other interested parties on the issue of suspension of the Tribunal as the issue has dragged for too long without indication on whether the issue will ever be settled.’³⁴⁶ The African Court rejected the request for an advisory opinion because a similar matter was being considered by the African Commission.

4.6 The New Protocol: Fundamental Concerns

Having concluded that the SADC Tribunal was illegally suspended, the legality of the New Protocol is also put under scrutiny, particularly because it is a direct result of the suspension. It has been argued by various civil society organisations, human rights activists and lawyers in the SADC region that the New Protocol lacks legality for the reason that the 2000 Protocol did not allow suspension. In addition to this, the suspension and eventual adoption of the New Protocol disregard separation of powers, the rule of law and human rights.

The New SADC Protocol on Tribunal was adopted by the Summit in Victoria Falls, Zimbabwe in 2014. In 2012, the Summit had announced that a protocol for a new tribunal would be negotiated and its jurisdiction would be limited to the adjudication of disputes between states.³⁴⁷ In Victoria Falls, the regional bloc noted that ‘the summit received a report from the committee of ministers of justice and attorneys-general relating to progress on negotiating a new protocol of the SADC Tribunal and adopt the new protocol on the

³⁴⁴Press Release; African Human Rights Court Asked To Rule On The Legality Of The Suspension Of Sadc Tribunal; Pan African Lawyers And Southern African Litigation Centre 26 November 2012 accessed at <http://www.southernafricalitigationcentre.org/2012/11/26/press-release-african-human-rights-court-asked-to-rule-on-legality-of-sadc-tribunals-suspension/> on 09 September 2015. ³⁴⁵Ibid.

³⁴⁶M Makonese "The SADC Tribunal Conundrum - Lawyers Look To The African Court For Direction." DR, Jan/Feb 2013:24 [2013] DEREBUS 13.

³⁴⁷Resolution 24 of the 32nd SADC Summit Communique.

SADC Tribunal.³⁴⁸ The eventual adoption of the New Protocol signalled the demise of the Tribunal. To date the New Protocol has not yet been ratified by the required minimum of 10 SADC member states for it to come into force. The presidents of South Africa, Tanzania, Mozambique, Malawi, Democratic Republic of Congo, Namibia, Lesotho, Zambia and Zimbabwe's Robert Mugabe signed the protocol in Victoria Falls.³⁴⁹ Botswana has not yet signed the New Protocol despite the fact that it was represented at the Victoria Falls Summit. Some have attributed Botswana's actions to its pro human rights stance.

Civil society organisations did not take the adoption of the New Protocol lightly. The Nyasa Times reported that the Coalition for an effective SADC Tribunal held a parallel summit in Botswana on the 14th of August 2015 where it issued a statement on the Tribunal. The Coalition stated that;

In August 2014, contrary to the SADC Treaty, of which article 23 provides that decisions concerning the community and any affected persons or citizens, must be made in consultation with them. The SADC heads of state adopted a new protocol without any consultation. The SADC did not act in accordance with its own treaty amendment procedures.³⁵⁰

In addition to this, it has been contended that, ‘

... the process of abolishing the defunct tribunal and subsequent negotiation and adoption of the new protocol lacked transparency and excluded the citizen's voice contrary to the letter and spirit of the SADC treaty, which commits to ensure maximum involvement of the people and the key stakeholders in the process of regional integration. Only leaders should not worship impunity but rather embrace rule of law which is a basic feature of a democratic society.³⁵¹

The SADC Summit did not only violate its own law but also the principles of good governance and rule of law. The coalition further stated that ‘the disbandment of the old tribunal and the adoption of the new protocol effectively disregard the independence of the judiciary, separation of powers and the rule of law. It also imputes negatively on human

³⁴⁸Resolution 24 of the 32nd SADC Summit Communique.

³⁴⁹A further step after the signing would be for each country to ratify the protocol (in terms of each country's domestic procedures) before it becomes part of the country's domestic law and binding on signatory states.³⁵⁰ ‘Reinstate SADC Tribunal, watchdogs urge African leaders’ Nyasa Times, 15 August 2015 accessed at <http://www.nyasatimes.com/2015/08/15/reinstate-sadc-tribunal-watchdogs-urge-african-leaders/>³⁵¹ Ibid.

rights and business confidence across the region.³⁵² Some scholars have argued that the development ‘typifies the proverbial greediness of slaughtering the goose that lays golden eggs.’

4.6.1 Specific provisions

The Preamble of the New Protocol specifies that it is a result of ‘a review of the role, responsibilities and terms of reference of the Southern African Development Community (SADC) Tribunal.’³⁵³ Of particular importance is Article 33 of the New Protocol which ousts the jurisdiction of the Tribunal in relation to individual petitions. Article 33 of the Protocol states that, ‘the Tribunal shall have jurisdiction on the interpretation of the SADC Treaty and protocols relating to disputes between member states.’³⁵⁴ Commenting on this provision, Chenga says, ‘under international law, the Tribunal was considered an international court just like the European Court of Justice or the East African Court of Justice.’³⁵⁵ He adds on that ‘the [C]ourt was [initially] created to consider disputes between member states, individuals, organisations or institutions, staff of SADC Secretariat and the community and SADC.’³⁵⁶ The omission of individual petitions in Article 33 has several human rights implications.

4.6.2 Implications of Article 33 on Human Rights

The decision to suspend the Tribunal and subsequent adoption of a New Protocol on Tribunal has several implications. It has been described by Ben Freeth of the SADC Tribunal Rights Watch as a ‘devastating blow to the rule of law in the region because it denies individual people access to justice when they have no legal recourse in their own

³⁵² Ibid; see also the Trade Law Centre’s G Erasmus who notes that ‘... firms (which are the actual traders), service providers, business people and investors are in clear need for the protection of their rights’ also to illustrate the void left by the Tribunal in trade Erasmus says ‘in the meantime the implementation of the SADC FTA (which is premised on objective rules such as the elimination of tariffs and non-tariff barriers) is directly affected. The system cannot function as originally planned. At the moment there are serious unresolved legal issues as a result of “surcharges” and new duties imposed on mainly South African goods imported into Zimbabwe and Tanzania. These measures are prima facie unlawful under Articles 3 and 4 of the SADC Trade Protocol but cannot be ruled upon by an independent judicial forum. National courts do not have jurisdiction over foreign governments in these cases.’ See <http://www.tralac.org/discussions/article/5572-does-it-matter-whether-sadc-has-a-tribunal.html>.

³⁵³ Protocol on The Tribunal In The Southern African Development Community 2014. ³⁵⁴ Ibid art. 33

³⁵⁵ Nelson Chenga ‘Southern Africa: SADC Tribunal Downgraded’ available at <http://allafrica.com/stories/201508270542.html> (Accessed;01 September 2015). ³⁵⁶ Ibid.

countries.³⁵⁷ This means that citizens of Southern Africa will not be able to hold their leaders accountable for human rights violations in a sub- regional court. The Southern Africa Litigation Centre contends that leaders are known to abuse their power.³⁵⁸ Abuse of power can translate into human rights violation. In addition, domestic courts are not always independent and impartial. In the same vein, courts are sometimes too scared to take up cases against governments for fear of several repercussions. Furthermore, the SADC Tribunal ‘[provided] an extra layer of protection of human rights’ and the New Protocol will deprive people of a competent sub-regional Tribunal for ‘an effective remedy for attaining an effective remedy against the violation of their rights when national courts are unwilling or unable to help.’³⁵⁹

Alienation of the right to individual petitions dealt a serious blow to prospects for human rights and fundamental freedoms in Southern Africa. De Vos points out that;

The rule of law can be protected only if individuals have access to an independent body, such as a court of law, if their governments infringe their rights. Following the example of the European Union, the SADC Tribunal was established not only to adjudicate disputes concerning economic integration and the relations between states *inter se* and other actors within the SADC, but also claims brought by individuals alleging violations of the rule of law and human rights by states.³⁶⁰

Thus, the move to suspend and eventually remove individuals’ access to the courts is seen as retrogressive³⁶¹. Instead of improving the right to individual petitions or right to access to courts, the Tribunal is moving in a backward motion.³⁶²

South Africa, has not been spared of the criticism for signing the New Protocol. The plan by the South African government to ratify the New Protocol has been met with criticism from the civil society.³⁶³ The Law Society of South Africa (LSSA) expressed its displeasure,

³⁵⁷ <http://www.mikecampbellfoundation.com/page/sadc-tribunal-suspension-implications-for-human-rights>³⁵⁸ Infra 358.

³⁵⁹ Southern African litigation Centre ‘SADC Tribunal Petition’ available at <http://www.southernafricalitigationcentre.org/2015/05/11/sadc-tribunal-petition/> (Accessed; 22 August 2015)

³⁶⁰ Pierre De Vos ‘UCT Faculty of Law Statement on Suspension of The Tribunal’ September 19th

Constitutionally Speaking available at <http://constitutionallyspeaking.co.za/2012/09/19/>.

³⁶¹ SADC’s actions runs counter to the recent trends of improved individual access to international courts.

³⁶² Ibid, South African Litigation Centre founding affidavit.

³⁶³ The Protocol will only become law in South Africa once it is ratified. ‘In South Africa the ratification process requires that the state law advisors at the department of justice and constitutional development and department of international relations and corporation first confirm that the agreement complies with domestic and international law. Thereafter the agreement must be approved by parliament.’ C. Genevieve Jenkins ‘Was South Africa’s vote for the 2014 SADC Tribunal Protocol unconstitutional?’ *African Legal Centre* available at

‘Pretoria [South African government] are unconstitutional and it has asked the High Court to declare as invalid the actions by President Jacob Zuma and the ministers of justice and of international relations, to support, vote for and sign documents related to the planned new tribunal.’³⁶⁴ Rickard adds on that ‘essentially the problem with the planned court, according to the LSSA, is that it replaces a tribunal which accepted matters from both states and individuals. By precluding citizens from accessing the New Court, the Protocol reduces the rights of citizens as guaranteed in the constitution — and this without any public consultation.’³⁶⁵ The need for a court that allows individuals access is illustrated by the fact that before its suspension, the Court had received 30 individual petitions and 24 of them were finalised before suspension.³⁶⁶ In his founding affidavit, the Law Society of South Africa’s Chairperson alleged that the suspension of the Tribunal, failure to appoint judges and a the voting and signing and attempt to ratify the 2014 Protocol is unconstitutional on the basis that it deprives the right of South African citizens to access the Tribunal in terms of the SADC Treaty.³⁶⁷ The LSSA contended that South Africa action, the president in particular, by signing the protocol that excludes individual petitions, is a violation of the right to access to courts.

On the 18th of August 2014, the SADC Lawyers Association (SADCLA) wrote to the President of the Republic of Zimbabwe and Chairperson of the SADC President Robert Mugabe expressing its concerns over the dissolution of the Tribunal and the signing of the 2014 Protocol and the fact that it ‘bars SADC citizens from accessing the court.’ In this letter the SADCLA cite several inconsistencies in the manner in which the New Protocol

<http://africanlegalcentre.org/2015/05/11/c-genevieve-jenkins-was-south-africas-vote-for-the-2014-sadc-tribunal-protocol-unconstitutional/> (Accessed 10 October 2015). See also the case *Glenister v President of the Republic of South Africa and others* CCT 48/10 [2011] ZACC 6; section 231 of the Constitution of south Africa, 1996.

³⁶⁴ Carmel Rickard ‘Mooted SADC court slammed as ‘unconstitutional’ Outcry over SA’s attempts to join other governments in establishing a new regional court that ‘disregards individual citizens’ *Rand Daily Mail* 05 May 2015.

³⁶⁵ See for example the Law Society of South Africa founding affidavit available at <http://www.lssa.org.za/upload/LSSA%20Founding%20Affidavit%20by%20Max%20Boqwana%20re%20SADC%20Tribunal.pdf> and LSSA launches court bid against the President and ministers to stop ratification of 2014 SADC Protocol on SADC Tribunal De Rebus 1st June 2015 Available at <http://www.derebus.org.za/lssa-launches-court-bid-against-the-president-and-ministers-to-stop-ratification-of-2014-sadc-protocol-on-sadc-tribunal/> accessed on 24 August 2015.

³⁶⁶ Statement Of The Participants In A Round Table On The Restoration Of The SADC Tribunal Held At Centre For Human Rights, Faculty Of Law, University Of Pretoria 28 and 29 AUGUST 2014 available at http://www.kas.de/wf/doc/kas_38707-1522-2-30.pdf?140922094447 accessed on 31 August 2015 p1

³⁶⁷ Paragraph 11 of the Applicants’ founding affidavit in *Re The Law Society of South Africa V President of the Republic of South Africa And Others* in High Court of South Africa (Gauteng Division).

was adopted such as lack of consultation with critical stakeholders including civil society. The University of Cape Town echoes the same concerns;

By this measure, SADC has blocked a potentially effective mechanism for the protection of human rights, because it has removed the last opportunity which individuals in the region had to protect themselves against abuse by their own governments. It has also limited the possibility of linking sub-regional economic integration, democracy, the rule of law and human rights in a judicial context. This decision rejects the global movement towards increased accountability for governments, ignores the advice of a review panel which SADC itself commissioned, undermines the value system of the SADC treaty, and shows a disgraceful contempt towards the citizens of the SADC region.³⁶⁸

Clearly, a number of concerns surrounding the adoption of the New Protocol have been made. It remains, however, to be seen whether the heads of state are going to take heed of these calls and reinstate the Tribunal in its old form, if not better.

4.6.2 Was a New Protocol Necessary?

No reasons, legal or political, for the suspension of the Tribunal and the adoption of the New Protocol were brought to the public's attention. This places substantive difficulties in attempts to determine whether the alienation of the right to individual petitions in the SADC Tribunal was a necessary evil. It is crystal clear that many criticisms have been levelled against the decision to adopt a new protocol, hence the need to discuss the circumstances surrounding the same.

The point of departure would be setting the record straight that the SADC Summit is a political organ and its decisions are influenced by politics. Scholars have noted, with concern that '[often] no reasons are given for the decisions that the summit takes...' The likelihood, therefore, is that the decision to adopt a new protocol was reached as a matter of policy as opposed to legal reasoning that, logically, could have applied. A Regional colloquium held in Pretoria in March 2013, 'looked at the reasons that may have led to the suspension of the Tribunal...' The colloquium decided that there were several reasons that led to the demise of the Tribunal. It was concluded that;

³⁶⁸Pierre De Vos 'UCT Faculty Of Law Statement On Suspension Of The Tribunal' September 19th 2012 *Constitutionally Speaking* available at <http://constitutionallyspeaking.co.za/2012/09/19/>.

- The Tribunal’s mandate was presumably a threat to the regimes in power.
- There was a belief that the SADC tribunal jeopardized the sovereignty of member states
- There was a clash between the socio-political dynamics and the legal obligations of various countries
- There was a dichotomous understanding of the purpose of the Tribunal between political leaders and citizens of the SADC region
- The fact that the orders of the Tribunal were not effectively enforced
- The procedures of the Tribunal itself were complicated and unclear
- The Tribunal’s decisions have not been tested in any domestic jurisdiction in terms of enforcement at national level
- The lack of funding as a threat to the efficient administrative function of the Tribunal
- The lack of strong political will to have an effective tribunal
- Adverse political interference in the Tribunal’s operations
- Member states undermining the jurisdiction of the Tribunal.³⁶⁹

It has been mentioned before that the principle of state sovereignty always present itself as a challenge when it comes to international human rights. More often, states bind themselves to international human instruments and only backtrack by raising state sovereignty when a judgment is passed against them.³⁷⁰ Muchabaiwa concurs with this assertion;

If member states do not want SADC to intervene when negative developments happen in their countries, they will simply put forward the argument of sovereignty. Unfortunately, abuse of the principle of sovereignty tends to negate regionalism. The challenge, looking ahead, is to strike a balance between sovereignty and regionalism lest member states choose to ignore, undermine or act contrary to regional commitments. In view of the potential and already apparent negative impacts, it is about time SADC member states start an honest dialogue on the challenges of solidarity, regionalism, unaccountability of member states and the politics of sovereignty.³⁷¹

Zimbabwe can be singled out as the main culprit in the case of the Tribunal and the resultant suspension. Natham notes that ‘the most dramatic manifestations of the sovereignty problem

³⁶⁹ Report on “Whither the SADC Tribunal” *Regional Colloquium on the SADC Tribunal* held at Protea Parktonian Hotel From 12 to 13 March 2013; Johannesburg.

³⁷⁰ M Mutua ‘Standard Setting In Human Rights; Critique And Prognosis’ 29 (2007) *African Human Rights Journal* 547-630.

³⁷¹ ‘Regionalism, sovereignty threaten SADC’ *Newsday Zimbabwe* 29 June 2010 accessed at <https://www.newsday.co.zw/2010/06/29/2010-06-29-regionalism-sovereignty-threaten-sadc/> on 09 September 2015.

have been Harare's notorious defiance of the SADC Tribunal...³⁷² The fact that the Summit also tolerated that defiance shows that member states were simply being cautious of setting a precedence of regional justice prevailing over state sovereignty. The 2000 Protocol's provisions on enforcement and execution of the judgments show that the member states had subordinated their sovereignty to the Tribunal.³⁷³ Natham further argues that 'serving as the judicial arm of the organization, it [the Tribunal] has [had] potential to function like the ECJ as a supranational mechanism and override national sovereignty.'³⁷⁴ The summit was therefore not prepared to let the Tribunal assume such a powerful role in the region. This is evidenced by how President Mugabe ridiculed the Tribunal on 23 August 2010 when he said

'we [the heads of state] are the creators of this monster and we said we thought we had created an animal which was proper but no, we created a monster.' There is no way the Tribunal could have survived in its original state in an environment where heads of state are at loggerheads with it.

Looking at the creation and history of the Tribunal one realizes that there long existed lack of sincerity amongst the founding members. It took more than a decade for the Tribunal to be properly constituted and start functioning. Others argue that delays are not uncommon in the establishment of supranational bodies. However, in the case of the SADC the delay was a result of fear of diminished state sovereignty in the wake of principles of good governance and rule of law for which the Tribunal is founded. Borzel and Hullen submit that 'the SADC executive established the Tribunal mainly in order to maintain SADC's legitimacy in the eyes of international donors and investors, especially the EU.'³⁷⁵ It can be depicted that the Tribunal was created for an ulterior motive hence it was bound to fail at one point or the other.

In addition to this, the Tribunal appears to represent compromised interests of the donors, the EU in particular, who pushed for human rights as evidenced by the inclusion of individual petitions in the 2000 Protocol and the sovereignty preserving interests of member states as evidence by unclear enforcement provisions.³⁷⁶ Borzel and Hullen make an interesting observation that when the Tribunal was created, the Summit did not perceive it

³⁷²L. Natham *Community Of Insecurity; SADC's Struggle For Peace And Security In Southern Africa* (2012) 113.

³⁷³Ibid, 113.

³⁷⁴Ibid.

³⁷⁵TA Borzel and VV Hullen *Governance Transfer By Regional Organizations; Patching Together A Global Script* (2015)

³⁷⁶Ibid, 100.

as a threat to sovereignty because ‘its jurisdiction in the realm of human rights, democracy, and rule of law had not yet been explicitly established.’³⁷⁷

The other challenges faced by the Tribunal that may have led to its suspension are the fact that the judges were not permanent employees of the Tribunal and that it lacked adequate funding. When terms of office of other judges expired, no appointments were made. This meant the Tribunal could not sit or receive any cases because it lacked quorum. Since the court was not initially created as a human rights court, extending to include human rights would be burdensome since it had insufficient resources. For them (the Summit), individual petitions would have strained the already scarce resources at the court’s disposal.³⁷⁸ It should be noted here that since its operations between 2007 and 2010 the court received thirty individual petitions,³⁷⁹ and may have been too big a load for the Tribunal such that the Summit found it necessary to reduce it to an interstate court. Just like in any other regional system, states rarely litigate against each other; this essentially means the court’s operation (if reinstated) will be next to zero.³⁸⁰

From the Summit’s point of view, the SADC Tribunal’s human rights jurisdiction was an unnecessary duplication of the work of the African Court of Human Rights. In the absence of the Tribunal, the SADC citizens could still petition the African Court. If this argument is anything to go by, the SADC Heads of States overlooked the issues to do with the accessibility of the African Court. This is the same reason why other sub-regional courts are flourishing as human rights courts because they appreciate the accessibility issues associated with the African Court.

4.7 Conclusion

The SADC Tribunal is an indispensable institution in the SADC region. It is important for both the purpose for which it was established, that is, as an institution cardinal in the integration process and the mandate it adopted in the preservation of rule of law and good

³⁷⁷ Ibid.

³⁷⁸ See for example the problems associated with the growing number of individual petitions in the European Court of Human Rights.

³⁷⁹ Statement Of The Participants In A Round Table On The Restoration Of The SADC Tribunal Held At Centre For Human Rights, Faculty Of Law, University Of Pretoria 28 and 29 AUGUST 2014 available at http://www.kas.de/wf/doc/kas_38707-1522-2-30.pdf?140922094447 accessed on 31 August 2015 1.

³⁸⁰ See for example Genevieve Jenkins, *supra* note, who supports this assertion by saying ‘because states already have channels by which to resolve interstate concerns, many commentators believe it is unlikely that the Tribunal will receive any cases if it does not receive cases from individuals.’

governance. The Tribunal had the liberty to develop its own jurisprudence, and did so by interpreting the SADC Treaty and various other protocols thereby affording itself a human rights jurisdiction. It is the exercise of this liberty that was met with resistance by Zimbabwe leading to the suspension and eventual adoption of the New Protocol.

The demise of the Tribunal is directly linked to the decision in *Campbell* in which the Tribunal ruled that it had a human rights jurisdiction and that there was no need for a separate protocol on human rights in the region. The status of decisions of international courts and tribunals was put to test both in Zimbabwe and the neighbouring South Africa. In Zimbabwe, failed attempts were made to have the decision in *Campbell* registered in the domestic courts, and in South Africa, Fick successfully applied for a writ of execution against Zimbabwe in respect of the cost order in *Campbell*. The latter case was, perhaps, the closest we can get to enforcement of the Tribunal decisions in domestic courts given the hostile relationship between SADC member states and the Tribunal. The decision to strip the Tribunal of its human rights jurisdiction and reduce it to an interstate dispute adjudication body, as contemplated in the 2014 Protocol on Tribunal, is a manifestation of the hostility that exists towards the Tribunal. It has been shown that with the adoption of the New Protocol, the individual is left in a very precarious position and prospects for human rights are diminishing unless drastic measures are taken to save the Tribunal. The only hope of saving the Tribunal currently lies in the hands of the member states that have not yet signed the protocol and this only remains a hope because none of the member states have yet furnished reasons as to why they have not signed the protocol and chances are that they can decide to sign it any time. The duty therefore lies with human rights activists and civil society organisations continue lobbying against the signing and ratification of the New Protocol. The Law Society of South Africa, the South African Litigation Centre has been at the forefront of campaign against the signing of the New Protocol.

It has been argued that the new Protocol is a product of an illegitimate process, and therefore should be rejected in its entirety. Save for the obvious fact that the summit accused the Tribunal of overstepping its mandate; no justification whatsoever was provided for the suspension and adoption of the new protocol hence one cannot substantively examine the legal or policy arguments for this action.

Ironically, many of the states and commentators who called for the suspension and removal of individual petitions in the Tribunal are the ones calling for the establishment of an

African ICC.³⁸¹ Surely, if resources were a factor that led to the demise of the Tribunal, why would they need to create a new court? President Mugabe of Zimbabwe called for Africa's own International Criminal Court after Zimbabwe fellow SADC member country, South Africa, foiled attempts to have Al Omar Bashir arrested in that country in 2015.³⁸² These are some of the clear indicators of how solidarity amongst African states men has prevailed over human rights and justice.

³⁸¹ For more information on the African International Criminal Court see Ademola Abass, 'The Proposed International Criminal Jurisdiction for the African Court: Some Problematic Aspects' (2013) *Netherlands International Law Review*. See also Protocol on the Statute of the African Court of Justice and Human Rights.

³⁸² Jerome Starkey 'Mugabe calls for Africa ICC' *The Times* 23 June 2015 available at <http://www.thetimes.co.uk/tto/news/world/africa/article4477111.ece>.

Chapter 5

THE HUMAN RIGHTS JURISDICTION OF THE EAST AFRICAN COURT OF JUSTICE

5.1 Introduction

The East African Court of Justice (EACJ) is a sub-regional court similar to the SADC Tribunal. A number of factors make the EACJ, together with the SADC Tribunal, fundamentally unique. Just like the SADC Tribunal the EACJ is a relatively new Court and is still evolving and developing its jurisprudence. As a result, the interpretation of its jurisdiction in human rights cases has not been easy. However, as compared to the SADC Tribunal, the EACJ has not faced major resistance from the political organs of the East African Community. The East African Court of Justice was established without a human rights jurisdiction. As a normative principle in the 'new regionalism',³⁸³ human rights are cardinal to the integration agenda.³⁸⁴ The East African Court acknowledged this by its interpretation of the EAC Treaty in such a manner that it derived its human rights competence from the principles of rule of law, good governance and democracy. This interpretation draws to the debate as to whether in the absence of a protocol extending the jurisdiction of the Court as contemplated in the EAC Treaty; the Court has a human rights jurisdiction? In this chapter, it will be argued that the Court was correct in affording itself a human rights competence. The importance of having an express human rights jurisdiction through the adoption of a protocol extending the jurisdiction³⁸⁵ will be acknowledged. In the same vein, it will be argued that even though it is always difficult for the Court to receive cases involving violations of human rights, the Court's competence to interpret the African

³⁸³New regionalism is characterized by 'the revival of old international organizations, the formation of new ones and the deepening of the existing ones.' (Lesley Blaauw "Transcending State-Centrism: New Regionalism and the Future of Southern African Regional Integration" Phd Thesis, Rhodes University (2007) 1. see also M Lee "Regionalism In Africa : A Part Of Problem Or A Part Of Solution" (2002) 9 (special issue) *Polis / R.C.S.P. / C.P.S.R. (Canadian Journal Of Political Science)*)

³⁸⁴Regional integration in the East African community was premised around the idea of formation of a political federation. As Booth et al would put it "Since the East African Community (EAC) Treaty of 1999 and the formal launching of the new Community in 2001, the pace has been quickening. A process creating a free trade area and customs union between Kenya, Tanzania and Uganda was begun in January 2005, and negotiations are now starting to establish a full common market between the three countries plus Rwanda and Burundi by 2010. Meanwhile, discussions are under way with a view to 'fast tracking' the final component of the integration process, political federation." Booth et al 'East African integration: How can it contribute to East African development?' 2007 Briefing available at <http://www.odi.org/sites/odi.org.uk/files/odi-assets/publications-opinion-files/126.pdf> (Accessed 02 December 2015).

³⁸⁵As contemplated in Article 27 of the East Africa Community Treaty..

Charter affords it an avenue to adjudicate on specific violations of human rights without facing the hurdle of interpreting the fundamental principles of the EAC Treaty. Consequently, the existence of concurrent jurisdiction in the East African region has made interpretation of the Court's jurisdiction difficult. Finally, it will be argued that the EAC member states' fear of a powerful court, which may interfere with their sovereignty, has made the interpretation of human rights difficult as evidenced by the delay in extending the jurisdiction of the Court.

5.2 *The East African Court of Justice: A Brief Background*

The East African Court of Justice (EACJ) was established as a disputes resolution body of the East African Community in 1999.³⁸⁶ Kenya, Uganda and Tanzania signed the East African Community Treaty which established the East African Community in 1999. This was not the first time the East African region created a regional community. In the early 1900s the region had an East African Community, established by the former colonial powers, of course, for reasons different from the present regional system. The colonial EAC collapsed in 1977.³⁸⁷ Just like the present day EAC, the colonial EAC had its own Court of Appeal for the East African Community established in 1909.³⁸⁸ During the colonial period the Court was originally called 'His Britannic Majesty' Court of Appeal for Eastern Africa when it was established in 1902 by the Order in Council.³⁸⁹ The Court had both criminal and civil competence and exercised territorial jurisdiction over Aden, Kenya, Somalia, Seychelles, Tanganyika, Uganda, and Zanzibar.³⁹⁰ The post-colonial East African Community (EAC) was formed as an implementation of regional integration agenda. Oluoch notes that '... it is only through economic and political co-operation that the small

³⁸⁶See LG Francesch *The African Human Rights Judicial System; Streamlining Structures And Domestication Mechanisms Viewed From The Foreign Affairs Power Perspective* (2014) 187.

³⁸⁷B Walsh "Human Security In East Africa: The EAC's Illusive Quest For Inclusive Citizenship." (2015) 37. (1) *Strategic Review for Southern Africa*. See also O. C Ruppel "Regional Economic Communities And Human Rights In East And Southern Africa". 306 Accessed at http://www.kas.de/upload/auslandshomepages/namibia/Human_Rights_in_Africa/9_Ruppel.pdf.

³⁸⁸Overview of The East African Court of Justice By Justice Harold R. Nsekela President, East African Court Of Justice; Paper for Presentation During the Sensitisation Workshop on the Role of the EACJ in the EAC Integration, Imperial Royale Hotel, Kampala, Uganda, 1st – 2nd November, 2011.

³⁸⁹A Possi "The East African Court of Justice; Towards Effective Protection of Human Rights In The East African Community". (2013) 17 *Max Planck Yearbook of United Nations Law*, 173-195, See Also B Oibhawo. *Imperial Justice; Africans In Empire's Court* (2013).

³⁹⁰A Possi "The East African Court of Justice; Towards Effective Protection of Human Rights In The East African Community". (2013) 17 *Max Planck Yearbook of United Nations Law*; see also OVERVIEW OF The East African Court of Justice By Justice Harold R. Nsekela President, East African Court of Justice Paper for Presentation During the Sensitisation Workshop on the Role of the EACJ in the EAC Integration, Imperial Royale Hotel, Kampala, Uganda, 1st – 2nd November, 2011.

under developed economies of African countries have a chance to survive in the rough waters of globalization.³⁹¹ It is for this reason that the EAC was formed. Human rights were from the onset not part of the regional integration agenda. Welch cited by Ebobrah notes that ‘human rights issue was too political and could be used as a ‘pretext for intervening in their countries’ internal affairs hence it was argued that the treatment of human rights more appropriately belonged in another international fora.’³⁹² As will be shown later, human rights turned out to be an integral part of the integration process at regional and sub-regional level.

The 1999 Treaty established the East African Court of Justice (EACJ), the Summit, the Council, Coordinating Committee, Sectoral Committees, the East African Community Legislative Assembly (EALA) and the Secretariat.³⁹³ The Court was established as an adjudication body with perhaps a much broader jurisdiction than that of the SADC Tribunal discussed previously. The Court is divided into two, the court of first instance and the appellate division. The mandate of the Court is to ‘ensure adherence to the law in the interpretation and application of and compliance with the treaty.’³⁹⁴ The Court became operational on November 30 2001 and received its first case in December 2005.

5.3 Human Rights Jurisdiction of the East African Court of Justice

Perhaps the most interesting aspect of the EACJ is its competence in human rights matters. Technically, the Court was established without a human rights mandate. The court’s jurisdiction’s is confined to the interpretation of the treaty. The first instance court has an original jurisdiction and its decisions can be appealed against in the appellate division.³⁹⁵

The Court is competent to receive disputes between the community and its employees arising out of the terms and conditions of their employment and or the application and interpretation of the community’s rules and regulations or terms and conditions of service.³⁹⁶ The Court may also have jurisdiction under arbitration clauses in contracts or agreements between parties to a dispute. For instance the ‘Court may hear and determine any matter arising from an arbitration clause contained in any contract or agreement which

³⁹¹L O W Oluoch “Legitimacy of the East African Community”.(2009) 53 (2) *Journal of African Law*. 194-221
³⁹²S T. Ebobrah “Litigating Human Rights Before Sub-Regional Courts In Africa: Prospects And Challenges”. (2009) 17 (1) *African Journal of International and Comparative Law* 79-101.

³⁹³Article 9(1) of the EAC Treaty 1999.

³⁹⁴See article 23 of the EAC Treaty 1999.

³⁹⁵Initially the Court had had one division; the jurisdiction was subsequently extended only to include an appellate jurisdiction.

³⁹⁶Article 31 of the EAC Treaty 1999.

confers jurisdiction on it, where either the community or any of its institutions is a party.³⁹⁷ The Court also has jurisdiction over disputes arising between Partner States where a Partner State has submitted a dispute to it under a special agreement.³⁹⁸ The Court exercises advisory jurisdiction to the Summit, Council or Partner States on any question of law arising from the treaty which affect the community.³⁹⁹

The question of whether the Court has a substantive human rights jurisdiction has always been contentious. There has not been consensus amongst scholars on this issue. Whilst Ruppel argues that the court lacks a human rights jurisdiction,⁴⁰⁰ Viljoen argues that there is an implied human rights jurisdiction from the reference to human rights in the Treaty and that the court has already exercised competence in human rights cases.⁴⁰¹ Viljoen further argues that, the ‘current EAC law does not foreclose individual referrals on the basis of human rights of the residents.’⁴⁰² It should be noted that the protocol to extend the jurisdiction of the court to human rights has not yet been adopted and operationalized. In terms of the EAC Treaty, ‘the court shall have such other original, appellate human rights and other jurisdiction as will be determined ... at a suitable subsequent date.’⁴⁰³ Ebobrah adds on that, ‘it has been argued that the court has no jurisdiction where infringements that occur relate for example to human rights or other individual rights of the residents.’⁴⁰⁴ As a result, the East African Community awaits to see substantive progress to this end. Even though the human rights jurisdiction of the court is not as clear and broad as that of the Economic Community of West African States’ Community Court⁴⁰⁵ the EACJ ‘has a very progressive human rights judgment to its credit in the case of *Katabazi v the Secretary*

³⁹⁷ In terms of Art 32 Arbitration Clauses and Special Agreements The Court shall have jurisdiction to hear and determine any matter: (a) arising from an arbitration clause contained in a contract or agreement which confers such jurisdiction to which the Community or any of its institutions is a party; or (b) arising from a dispute between the Partner States regarding this Treaty if the dispute is submitted to it under a special agreement between the Partner States concerned; or (c) arising from an arbitration clause contained in a commercial contract or agreement in which the parties have conferred jurisdiction on the Court.³⁹⁸ See Article 32 of the EAC Treaty.

³⁹⁹ Article 36(1) of the EAC Treaty.

⁴⁰⁰ OC Ruppel “Regional Economic Communities And Human Rights In East And Southern Africa”. 306 Available at http://www.kas.de/upload/auslandshomepages/namibia/Human_Rights_in_Africa/9_Ruppel.pdf (accessed on 30 September 2015).

⁴⁰¹ F Viljoen *International Human Rights Law In Africa* (2007).

⁴⁰² F Viljoen 2007 cited by Ebobrah “Litigating Human Rights Before Sub-Regional Courts In Africa: Prospects And Challenges”. (2009) 17 (1) *African Journal of International and Comparative Law*. 81

⁴⁰³ Article 27(2) of the EAC Treaty.

⁴⁰⁴ S T Ebobrah “Litigating Human Rights Before Sub-Regional Courts In Africa: Prospects And Challenges”. (2009) 17 (1) *African Journal of International and Comparative Law* 81.

⁴⁰⁵ K J Alter *et al* “A New International Human Rights Court for West Africa: The ECOWAS Community Court of Justice” (2013) 107 *American Journal of International Law* 738.

*General of the EAC.*⁴⁰⁶ Explicit human rights jurisdiction of the [EACJ] has been ‘courageous enough to ensure that basic rights of individuals under the treaty are respected.’⁴⁰⁷ The East African Court however broke a new ground in the case of *Katabazi* which afforded the Court an implied human rights mandate using a similar approach as that of *Campbell* in the SADC Tribunal.

5.4 *Katabazi v Secretary General of the East African Community*

The dictum in *Katabazi* signalled the Court’s and the Community’s commitment to human rights in the absence of express mandate in the Treaty. The facts in *Katabazi* were simple. Fourteen applicants were detained on treason charges in 2004. On 16 November 2006, the High Court of Uganda granted them bail. However, state security details prevented the applicants from leaving the court. On 24 November 2006, the applicants were convicted by a General Court Martial on additional charges of unlawful possession of firearms and terrorism. Despite the fact that the Ugandan Constitutional Court ruled that the security personnel’s interference was unconstitutional, the Ugandan government allowed the applicants to remain in jail. The applicants complained to the EACJ that the Ugandan government and the EAC were violating the rule of law, thus violating the EAC Treaty. The applicants argued the invasion of the High Court premises by armed men to prevent the enforcement of the Court’s decision granting bail, and their re-arrest and incarceration constitute an infringement of the Treaty, and that the Secretary General of the East African Community was required to have investigated this violation.⁴⁰⁸ What is interesting is that *Katabazi* was clearly a case of human rights for which the literal interpretation of the EAC Treaty did not provide for the Court to receive.

On that note, the Court demonstrated boldness and creativity; it construed Article 27(1) in such a manner that affords it a human rights jurisdiction. The Court accepted that the concept of human dignity in appropriate circumstances is intrinsically linked to human

⁴⁰⁶*Katabazi v Secretary General of the East African Community* (2007) AHRLR 119 (EAC 2007).

⁴⁰⁷ The SADC Tribunal Keynote Address By His Excellency Justice Ariranga Govindasamy Pillay President Of The SADC Tribunal On The Occasion Of The Book Launch On “Monitoring Regional Integration In Southern Africa Year Book Volume 8, 2008” 20th April, 2009- Kalahari Sands Hotel, Moringa Room, Windhoek Namibia http://www.kas.de/wf/doc/kas_16846-1522-1-30.pdf?090619125513 (Accessed: 02 December 2015).

⁴⁰⁸Supra note 405.

rights. The Court conceded that it does not have an express human rights mandate but it was equally competent to decide on matters that fall under Article 27(1).⁴⁰⁹ Gathii notes

... the EACJ exemplifies a new trend in African regional human rights enforcement. Rather than serving as a tribunal to resolve trade disputes, as envisaged by its original designers, the court has evolved into one that seeks to hold member governments accountable for violations of human rights and to promote good governance and the rule of law.⁴¹⁰

This aided to the raging debate on whether Regional Economic Community (REC) courts were competent to hear human rights issues in the absence of express provisions in their respective protocols. The EACJ has thus demonstrated that this is possible. Gathii acknowledges the increasing role that is being played by the EACJ in human rights where he says;

The EACJ's growing human rights case law is part of a new form of rights-based legal mobilization that must be seen in the shifting normative context in which trade agreements include human rights in their preambles. This mobilization by lawyers, legal groups, and political actors has allowed courts to become new forums for political struggle and the vindication of rights claims.⁴¹¹

Just like their Southern African counterparts, the EAC member states view the move by the Court to interpret the Treaty in a manner that affords it human rights jurisdiction as overstepping its mandate and a 'subversion of their sovereignty.'⁴¹² Further,

They believe that the [C]ourt's human rights decisions are creating new understandings of legality to which the states do not subscribe at home. These states are resisting allowing the court to conform their domestic affairs to international understandings of legality. In short, EAC states did not sign EAC Treaties as evidence of their commitments to respect human rights; the EACJ is dragging them kicking and screaming towards keeping those commitments.⁴¹³

⁴⁰⁹S Tembo "An Analysis Of The SADC Tribunal And The East African Court Of Justice; A Human Rights Perspective" 2nd issue *University Of KwaZulu Natal Students Law Review* 113-129.

⁴¹⁰J Gathii "Mission Creep or a Search for Relevance: The East African Court of Justice's Human Rights Strategy" (2014) *Forthcoming 24th Duke Journal of International Comparative Law*.

⁴¹¹*Ibid*.

⁴¹²*Ibid* at 251.

⁴¹³*Ibid* at 252.

The Court exercised what Ebobrah describes as a ‘derivative human rights competence’ under the EAC Treaty.⁴¹⁴ Therefore, it can be said that the Court in *Katabazi* took an activist posture in acquiring a human rights competence. The Court explicitly stated that ‘even though it would not assume jurisdiction on human rights disputes it would also not abdicate from its jurisdiction of interpretation under article 27(1) merely because the reference includes allegations of human rights violation.’⁴¹⁵ The East African Court continues to receive and decide on human rights cases despite the fact that the legal framework extending the jurisdiction of the Court has not yet been adopted. This strategy taken by the Court was however not free of criticism. Ebobrah submits that even the Court’s decision may be interpreted as judicial activism which translates into judicial writing ‘this decision provides the platform for future litigation of human rights before the court...’⁴¹⁶ Ultimately, human rights cases are admissible before the EACJ if it is shown that the respondent’s conduct violating human rights also violate the EAC Treaty. Gathii contends that the Court now plays a crucial role as a human rights court than it is a customs union or common market adjudication body.⁴¹⁷

Summarily, it can be said that the *Katabazi* decision in respect of human rights jurisdiction is now settled law. As will be shown later, the member states neither suspended nor reviewed the jurisdiction of the Court. Neither did they openly condemn the decision.⁴¹⁸

This stands in sharp contrast to what transpired in the SADC Tribunal.⁴¹⁹

5.4.1 Personal jurisdiction of the court.

It has been submitted in previous chapters that the right to individual petitions goes to the core of international human rights protection. The East African Community allows for individual direct access to the Court. As envisaged in Article 30, ‘any person who is

⁴¹⁴ S.T. Ebobrah “Litigating Human Rights before Sub-regional Courts in Africa: Prospects and Challenges” (2009) 17 *RADIC* 82.

⁴¹⁵ The Role Of National Courts And Regional Courts In Protecting Human Rights And Developing Human Rights Jurisprudence Paper For Presentation By Hon. Justice Harold R. Nsekela Justice of Appeal, Court of Appeal, Tanzania and President East African Court of Justice; A Paper for Presentation during the EAMJA Annual Conference and General Meeting, 17th - 22nd May 2010, at Ngurdoto Mountain Lodge, Arusha, Tanzania 7.

⁴¹⁶ S T Ebobrah “Litigating Human Rights Before Sub-Regional Courts In Africa: Prospects And Challenges”. (2009) 17 (1) *African Journal of International and Comparative Law* 82.

⁴¹⁷ *Supra* note 409 at 252-253.

⁴¹⁸ Alter *et al.* “Backlash Against International Courts in West, East and Southern Africa: Causes and Consequences.”

http://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=6140&context=faculty_scholarship (Accessed; 13 October 2015).

⁴¹⁹ This point will be discussed in detail in the following chapter.

resident in a partner state may refer for determination by the Court the legality of any Act, regulation, directive, decision or action of a partner state or an institution of the community on the grounds that such Act, regulation, directive, decision or action is unlawful or is an infringement of the provisions of the Treaty. Perhaps the most interesting feature of the EACJ is that the Treaty is silent on the need for individuals to exhaust domestic remedies before approaching the Court. The only procedural requirement that litigants have to comply with is that the petition be filed with the Court within two months of the decision or action complained of.⁴²⁰ The absence of the domestic remedies requirement makes the Court easily accessible and has a direct bearing on giving effect to the right to individual petitions and human rights. Be that as it may, individual access coupled with an express human rights competence will take the EACJ to greater heights in as far as human rights protection is concerned.

5.5 Human Rights Legal Framework; Pertinent Issues

Article 27(2) of the Treaty indicates that the member states of the community intended to develop its jurisdiction in phases.⁴²¹ Substantive human rights jurisdiction is one of the features that the community sought to add on to the mandate of the EACJ. The drafters of the treaty would not have included article 27(2) had they intended the provision to remain inoperative. Surely, they were aware that the principle of governance and rule of law would only be effective if the Court had a human rights jurisdiction. Thus the decision of extending the jurisdiction of the Court to include appellate and human rights jurisdiction was taken in November 2004.⁴²² The slow pace at which the extension of the jurisdiction is happening ‘denies the Court opportunity to play a very important role in addressing the violations of human rights in East Africa at regional level.’⁴²³ The EACJ is on the record of having expressed its concern over the slow adoption of a legal framework extending the jurisdiction. The Court said,

...it has taken over six years since the consultative process on the draft protocol began after adoption of the draft but the outcome of that process is yet to be made manifest

⁴²⁰ Article 30 (2).

⁴²¹ The court was operate without a human rights jurisdiction initially then in terms of Article 27 (2) the human rights jurisdiction ‘would’ be conferred on a future date as be determined by the member states.

⁴²² The East African Court of Justice: Ten Years Of Operation (Achievements And Challenges) Dr. John Eudes Ruhangisa Registrar, East African Court of Justice A Paper for Presentation During the Sensitisation Workshop on the Role of the EACJ in the EAC Integration, Imperial Royale Hotel, Kampala, Uganda, 1st – 2nd November, 2011 26.

⁴²³ Ibid at 26.

notwithstanding acknowledgment by sectoral council way back in 2004 that in the view of the growing scope of the community's integration process, the jurisdiction of the EACJ ought to be extended ... the delay of the council of ministers has a negative effect on good governance, democracy, rule of law and human rights in East Africa.⁴²⁴

On the 26th of June 2012 the EAC Council of Ministers held its 25th extraordinary meeting where discussions on the extension of the jurisdiction of the Court topped the agenda. A communique issued by the EAC communications office stated that;

The move to extend the EACJ's jurisdiction follows a directive by the 10th Extraordinary Meeting of the EAC Summit of Heads of State held in Arusha 28 April 2012 that noted the need to look into the matter of extending this jurisdiction to cover, among others, crimes against humanity. At their April meeting, the EAC Heads of State welcomed a Resolution by the East African Legislative Assembly (EALA) for expediting amendment of the EAC Treaty to extend jurisdiction of the EACJ or the conclusion of the protocol on this matter and consequently directed the Council of Ministers to see to its implementation and to report to an extraordinary Summit that would be convened thereafter. The Council is therefore expected to propose amendments to Article 27(2) of the Treaty to grant the Court original and appellate human rights jurisdiction and jurisdiction over crimes against humanity covering both state and individual responsibility.⁴²⁵

The present state is worrisome to human rights practitioners and other stakeholders who have been advocating for the adoption of the protocol extending the jurisdiction to human rights.

5.6 Other Human Rights Developments

Even though there has been slow progress in the adoption of a human rights framework in the region, all hope is not lost; the East African Legislative Assembly (EALA) passed a new Human Rights Bill in 2012.⁴²⁶ 'The passing of the EAC human rights bill in 2012 renewed the optimism of expanding the EACJ's jurisdiction to adjudicate human rights disputes in the near future. The bill intends to protect human and people's rights in the region and makes reference to various international instruments such as the African Charter and the

⁴²⁴ *Sitenda Sebalu v Secretary General of the EAC and Others* REFERENCE No. 1 OF 2010

⁴²⁵ Communication available at http://www.eac.int/index.php?option=com_content&view=article&id=1038:council-of-ministers-to-discuss-extended-jurisdiction-for-eacj&catid=146:press-releases&Itemid=194 (accessed on 21 September 2015).

⁴²⁶ The bill was passed by the EAC Legislative Assembly in April 2012 and it is waiting to be assented to by the EAC Summit.

United Nations Charter as normative standards for the protection of human rights.⁴²⁷ When the bill is finally passed in the EAC, it is likely to create a human rights standard for the region. Possi submits that, if the bill is finally endorsed, it will be a step towards the extension of the mandate of the EACJ with a human rights jurisdiction. It should be noted that even though it may be necessary for the region to have a codified human rights instrument, particularly one that confers human rights jurisdiction on the Court, the very nature of the norms and standards set in the EAC Treaty is that which seeks to promote and protect human rights by its mere reference to the African Charter on Human and People's Rights.⁴²⁸

On a similar note, recent developments indicate that it may also be possible to litigate human rights in the EACJ using the provisions of the African Charter. In the case of *Democratic Party v Secretary General of the East African Community and Others*⁴²⁹, the court was faced with a question of 'whether the signing of the protocol to the African Charter on Human and People's Rights on the Establishment of the Court on Human and People's Rights creates an obligation on the states to sign the special declaration found in article 5 (3) and article 34 (6) of the Protocol on African Court that allows individuals and NGOs with observer status direct access to the African Court.'⁴³⁰ The Appellate Division of the EACJ found that whilst it was able to consider potential violations of the African Charter and the African Court Protocol under the premise of the East African Community Treaty ("EAC Treaty"), the wording of Article 5 (3) and Article 34 (6) of the African Court Protocol contain no requirement on a member state who has signed the Protocol to also sign the Special Declaration. The significance of this decision is that it shows that the EACJ is competent to interpret the provisions of the Charter under the premise of the EAC Treaty. This provides litigants with another avenue to take human rights cases to the Court by alleging violation of provisions of the African Charter. This case was an appeal against the findings of the Court of first instance. The appellants disputed the findings of the Court *a quo* that '[EACJ] had no jurisdiction to interpret African Charter, African Court Protocol and other relevant international instruments which the member states were party to.'⁴³¹

Thus, the appellate division overruled the decision of the Court *a quo* thereby clarifying that

⁴²⁷ A Possi "The East African Court of Justice; Towards Effective Protection of Human Rights In The East African Community". (2013) 17 *Max Planck Yearbook of United Nations Law*.

⁴²⁸ Ibid.

⁴²⁹ APPEAL NO. 1 OF 2014; read also Reference No. 2 of 2012.

⁴³⁰ *Democratic Party v Secretary General of the East African Community and Others* APPEAL NO. 1 OF 2014.

⁴³¹ Ibid.

it had jurisdiction to interpret the African Charter. The Appellant's submission was that the member states are signatories to the African Charter and the EAC Treaty, the EAC Treaty has several provisions that create obligations on member states to protect human rights according to the African Charter. Therefore, the First Instance Division erred in deciding it had jurisdiction to consider application of the EAC Treaty but not provisions of the African Charter. The Appellants further based their argument on the findings in *Katabazi* that the Court had jurisdiction over principles of rule of law and human rights.⁴³²

The Court stated that in view of Articles 23, 27 and 30 of the EAC Treaty, if a matter involves the interpretation and application of the provision of the EAC Treaty, it clearly falls within the jurisdiction of the EACJ. The Court thus found that the failure or delay in depositing the special declaration was not only an infringement of the Charter but also of the EAC Treaty. The findings in the Democratic Party case therefore serve as both a new avenue for a human rights jurisdiction and a reinforcement of the interpretation in *Katabazi*.

5.7 Jurisdictional Relationship with Other Judicial Institutions

5.7.1 Concurrent Jurisdiction

The multiplicity of dispute settlement mechanisms in the region is likely to be problematic for the Court in the near future especially in dealing with human rights cases. The East African Court of Justice has concurrent jurisdiction with other courts including national courts. This is a result of the surge in the number of international and regional tribunals. Sometimes the jurisdictions are not only concurrent, but also competing and conflicting. Human rights issues have been at the centre of jurisdiction the East Africa hence the need to analyse the concurrent jurisdictions that exist in the region. Ruppel warns that 'the issue of conflicting jurisdiction of the courts on the African continent will become a prominent one with specific importance in cases involving violations of human rights...'⁴³³ Having several courts with a concurrent jurisdiction creates room for forum shopping. 'A brief examination of these treaties... clearly indicate the existence of a rich zone of overlap, potential competition and possible complementarity.'⁴³⁴ In addition, 'presents rich possibilities of

⁴³²*Katabazi v Secretary General of the East African Community* (2007) AHRLR 119 (EAC 2007).

⁴³³OC Ruppel "Regional Economic Communities And Human Rights In East And Southern Africa". 306 Available at http://www.kas.de/upload/auslandshomepages/namibia/Human_Rights_in_Africa/9_Ruppel.pdf (accessed on 30 September 2015)

⁴³⁴Odinkulu (year) cited by T F Yerima "Comparative Evaluation of the Challenges of African Regional Human Rights Courts". (2011) 4 (2) *Journal of Politics and Law*.

forum shopping in the enforcement of human rights standards in Africa.⁴³⁵ Petitioners may choose which court to submit their cases and in so doing they choose a court in which they are likely to get a favourable decision. It should be noted that there is no rule in international law that compels courts to decline a case on the basis that another forum has competence in the same case.⁴³⁶

The issue of concurrent jurisdiction with domestic courts in the EAC is a critical one. Article 33(2) appears to envisage that, a national court, in determining a case before it may interpret and apply the provisions of the EAC Treaty. In *Peter Anyang' Nyong'o and 10 others and the Attorney General of Kenya and 2 others* and *Abdirahim Haitha Abdi and 11 others*⁴³⁷ the Court argued that 'such envisaged interpretation... can only be incidental.'⁴³⁸

The Court in the case of *The East African Law Society and 4 Others V The Attorney General of Kenya and 3 Others*⁴³⁹ observed that '[b]y the provisions under Articles 23, 33(2) and 34, the Treaty established the principle of overall supremacy of the Court over the interpretation and application of the Treaty, to ensure harmony and certainly (*sic*).'⁴⁴⁰ Nsekela however argues that;

[t]he new (a) proviso to Article 27; and (b) paragraph (3) of Article 30, [h]ave the effect of compromising that principle and/or of contradicting the main provision. It should be appreciated that the question of what "the Treaty reserves for an institution of a Partner State" is a provision of the Treaty and a matter that ought to be determined harmoniously and with certainly (*sic*). If left as amended the provisions are likely to lead to conflicting interpretations of the Treaty by national courts of the Partner States.⁴⁴⁰

The Court in *Peter Anyang' Nyong'o and 10 others and the Attorney General of Kenya and 2 others* and *Abdirahim Haitha Abdi and 11 others* highlighted that 'the purpose of these provisions is to ensure uniform interpretation and avoid possible conflicting decisions and

⁴³⁵Ibid at 124.

⁴³⁶OC Ruppel "Regional Economic Communities And Human Rights In East And Southern Africa". 283 Available at http://www.kas.de/upload/auslandshomepages/namibia/Human_Rights_in_Africa/9_Ruppel.pdf (accessed on 30 September 2015)

⁴³⁷Reference No. 1 of 2006

⁴³⁸Ibid

⁴³⁹Reference No. 3 of 2007

⁴⁴⁰Infra.

uncertainty in the interpretation of the same provisions of the treaty.’ Nsekela’s argument in this regard is that the Treaty provisions should be made clearer to avoid uncertainty.⁴⁴¹

Harold Nsekela notes the existence of concurrent jurisdiction in the East African region.⁴⁴² Dispute resolution mechanisms such as article 41(9) and ‘other parallel dispute resolution mechanisms (national courts and quasi-judicial bodies) are being established. For instance, Article 41(2) of the EAC Customs Union Protocol that deals with dispute settlement establishes committees to handle disputes arising out of the Protocol and gives these committees finality in determining the disputes.’⁴⁴³ The Treaty gives the Court the power to interpret the Treaty and community laws. Ruhangisa is of the view that existence of such concurrent, parallel and overlapping jurisdiction may ‘limit the Court’s action.’ Judicial and semi judicial bodies established by the African Union whose members include those states that are members of the EAC are notable examples of those bodies with concurrent jurisdiction with the EACJ. Having concurrent jurisdictions may result in forum shopping.⁴⁴⁴ It also has the effect of causing duplication or multiplication of proceedings before different forums. An illustration of this forum shopping may be that of when ‘Democratic Republic of Congo instituted almost at the same time a suit against the Republic of Burundi, Rwanda and Uganda before the International Court of Justice and the African Commission.’⁴⁴⁵

The East African Court of Justice, just like any other sub-regional court, has concurrent jurisdiction with the African Court of Human Rights. Komakech notes that ‘reference to the African Charter by RECs in their constitutive documents is indicative of their willingness to apply the Charter’s provisions as the standards guiding aspects of human rights in the integration process...’⁴⁴⁶ The concurrent jurisdiction with the African Court is in respect of both individual and interstate cases. This is because the EACJ, just like the African Court has provisions for both individual and interstate petitions. Some, however, argue that the multiplicity of courts ‘also help address the limited individual access to the African Court

⁴⁴¹ “Overview Of The East African Court Of Justice” By Justice Harold R. Nsekela President, East African Court Of Justice; A Paper for Presentation During the Sensitisation Workshop on the Role of the EACJ in the EAC Integration, Imperial Royale Hotel, Kampala, Uganda, 1st – 2nd November, 2011.

⁴⁴² Ibid.

⁴⁴³ Ibid.

⁴⁴⁴ J Ruhangisa “Parallel jurisdiction of courts: the view from the EACJ”. (2010) *Commonwealth Law Bulletin*.

⁴⁴⁵ Ibid at 581.

⁴⁴⁶ HK Komakech “The Role Of The East African Court Of Justice In The Promotion, Protection And Enforcement Of Human Rights In Uganda” (2012) (LLM dissertation) University Of Pretoria, Centre For Human Rights, Faculty of Law 35.

which rests on declaration by a state under article 34 (6) of the protocol to the African Court to allow individual access.

Conversely, the African Court and African Commission themselves are established in a way that allows for forum shopping. Komakech cites Murungi and Gallinet who ‘advance the view that since the African Commission is silent on admissibility of matters pending before RECs courts, it allows for ‘forum shopping’ a situation making it possible to have cases before the RECs and African Commission or the African Court concurrently.’⁴⁴⁷ They add on that ‘if unsuccessful litigants at RECs (sub regional) fora allowed seizing the African Court, it would amount to establishing the African Court as an appellate institution of sorts contrary to its mandate.’⁴⁴⁸

It should be stressed that there are a number of advantages that existence of concurrent jurisdictions offer to human rights litigants. Among others, concurrent jurisdiction helps in the ‘development of international legal norms and enhanced access to justice for individuals, states and other entities.’⁴⁴⁹

5.8 The Draft Protocol Extending Jurisdiction of the Court

Despite concerns over the slow progress in the adoption of the protocol extending the jurisdiction of the Court, scholars have noted that the draft protocol, if adopted as it is, will go a long way in the promotion and protection of human rights.⁴⁵⁰ The draft protocol expressly indicates that the Court will have a human rights mandate and if adopted, it will put an end to the raging debates on the human rights jurisdiction of the Court. With regards to personal jurisdiction the protocol makes provision for individual access to the Court. It specifies that states undertake not to interfere with this right and it also recognises the access of all parties recognised by the EAC Treaty.

The draft protocol has already been subject to litigation. The secretary general of the East African Community has been taken to court over the slow progress in the adoption of the protocol extending the jurisdiction of the Court. The case of *Sitenda Sebalu v Secretary General*⁴⁵¹ in the first instance division dealt with the claimant’s argument that the council’s

⁴⁴⁷Ibid at 34.

⁴⁴⁸Ibid.

⁴⁴⁹“Issues of Concurrent Jurisdiction” Report of the 2012 Brandeis Institute for International Judges

⁴⁵⁰See for example S Bossa Protocol Towards a Protocol Extending the Jurisdiction of the East African Court of Justice (2006) 4 (1) *East African Journal for Human Rights and Democracy*.

⁴⁵¹ Ref. No. 1 of 2010 (First Instance Div. June 30, 2011), available at <http://eacj.huriweb.org/wp-content/uploads/2012/11/No-1-of-2010.pdf>.

failure to extend the jurisdiction of the Court since 2004, was a violation of the article 6 , article 7(2) and article 8(1)(c) of the EAC treaty. ‘...the Applicant’s main complaint was that, although Article 27(2) of the Treaty provides for conferment on the EACJ, such other original, appellate, human rights and other jurisdiction as will be determined by the Council at a suitable subsequent date, none of those additional limbs of jurisdiction had been conferred on the EACJ by the Council yet.’⁴⁵² As such, the applicant held a legitimate expectation in respect of this provision.

The claimant further alleged that Uganda had failed to make comments on the draft protocol and that such failure was a clear violation of the treaty. In respect of the first argument, the Court held that the delay in extending the jurisdiction of the EACJ not only holds back and frustrates the conclusion of the Protocol but also jeopardizes the achievement of the objectives and implementation of the Treaty and amounts to an infringement of Article 8 (1) (c) and contravenes the principles of good governance as stipulated by Article 6 of the Treaty.’⁴⁵³

The Draft Protocol was subsequently adopted after the Court had ruled that ‘... a quick action should be taken by the East African Community in order to operationalise the extended jurisdiction of the East African Court Justice.’⁴⁵⁴ The operationalised protocol on extended jurisdiction however human rights jurisdiction was excluded therefrom and only dealt with the appellate jurisdiction of the Court.

5.8 Post Katabazi Developments

It should be stated from the outset that as a result of its judicial activism, the EACJ faced a number of challenges and particularly opposition from states especially in respect of human rights cases. Gathii notes that ‘the EAC member states however, perceive the EACJ’s self-proclaimed human rights jurisdiction as a subversion of their sovereignty. They believe that the Court’s human rights decisions are creating new understandings of legality to which states do not subscribe at home.’⁴⁵⁵ In Africa, human rights decisions by courts have often been faced with utter contempt from member states. More often, states that oppose human rights cases in international courts and tribunals either contest the human rights jurisdiction

⁴⁵² *Sitenda Sebalu v Secretary General of the EAC and Others* REFERENCE No. 1 OF 2010 at para 5

⁴⁵³ *Ibid* at para 56.

⁴⁵⁴ *Sitenda Sebalu v Secretary General of the EAC and Others* REFERENCE NO. 8 OF 2012.

⁴⁵⁵ J Gathii “Mission Creep or a Search for Relevance: The East African Court of Justice's Human Rights Strategy” (2014) *Forthcoming 24th Duke Journal of International Comparative Law* 251-252.

of the court or claim that the excise of jurisdiction trammels upon their sovereignty. And this has developed into a culture. As Gathii notes, ‘these states are resisting allowing the court to conform their domestic affairs to international understandings of legality.’⁴⁵⁶

The EACJ should however be credited for standing strong with its decision in *Katabazi*. What is notable is the fact that after *Katabazi* was handed down, the Court continued to receive human rights cases and it has not abdicated from the duty it assumed in *Katabazi*. The Court had the opportunity to reiterate its duty to interpret the relevant provisions of the treaty particularly those that oblige states to adhere to the principles of good governance, rule of law and human rights in the case of *Rugumba V Secretary General of The East African Community*.⁴⁵⁷ The applicant had been held ‘incommunicado’ without trial for five years in Rwanda. In this case, the Rwandan government contested the jurisdiction of the Court. The Court held that, ‘to not determine whether Rwanda had violated the Articles 6(d) and 7(2) of the treaty would be a dereliction of its duty under article 27(1) of the treaty.’⁴⁵⁸

In addition to this, the Kenyan government also contested jurisdiction of the Court in the case of *Independent Medical Legal Unit V Attorney General of Kenya*. In rejecting the challenge, the Court held that, ‘...as long as allegations brought before the Court involve an interpretation of the treaty, their relation to violations of human rights does not preclude jurisdiction.’⁴⁵⁹

Another landmark case in the EAC that caused unprecedented outrage amongst member states in the region is that of *Nyong’o*.⁴⁶⁰ In this case the Kenyan government and the council argued that the EACJ had overstepped its mandate. The events that followed *Nyong’o* prompted the 2006 amendments which were later contested in the case of *East African Law Society*. The amendments limited the jurisdiction of the Court ‘so as not to apply to ‘jurisdiction conferred by the treaty on organs of the partner states.’⁴⁶¹ This shows that there exists a profound mistrust between the Court and the Partner States. The Partner States have taken a cautious approach to their dealing with the Court and have always feared that a minor slip up would see the Court threatening their sovereignty.

⁴⁵⁶ J Gathii “Mission Creep or a Search for Relevance: The East African Court of Justice's Human Rights Strategy” (2014) *Forthcoming 24th Duke Journal of International Comparative Law* 251-252.

⁴⁵⁷ Ref. No. 8 of 2010 available at <http://eacj.huriweb.org/wp-content/uploads/2012/11/Plaxeda-Rugumba2010-8-judgment-2011.pdf>.

⁴⁵⁸ Supra note 455, 258.

⁴⁵⁹ Ibid at 252- 258.

⁴⁶⁰ *Peter Anyang’ Nyongo and 10 others and the Attorney General of Kenya and 2 others and Abdirahim Haitha Abdi and 11 others Reference No. 1 of 2006.*

⁴⁶¹ J Gathii “Mission Creep or a Search for Relevance: The East African Court of Justice's Human Rights Strategy” (2014) *Forthcoming 24th Duke Journal of International Comparative Law* 268.

Despite various acts by member states that could threaten the independence and even the existence of the Court, the judges have asserted themselves as courageous. This signifies institutional independence and resilience in the face of political pressure. This will be further discussed in comparison to the SADC /tribunal in the following chapter.

The East African Court of Justice received another human rights claim in the case of *Arivizia and Another v the Attorney General of Kenya and others*.⁴⁶² The issue in this case was whether the referendum and adoption of a new constitution in Kenya violated the EAC Treaty. The claimants cited violation of Articles 5(1), 6(c) and (d), 7(2), 8(1)(c), 27(1) and 29 of the East African Treaty in addition to allegations of a violation of Articles 1, 3, 7(1) of the African Charter. In this case, Kenya again challenged the Court's competence to receive this case. Kenya contended that the subject matter was not within the scope of the power conferred to the Court by Article 27(1) of the EAC Treaty. The court rejected this contention, arguing that it could 'hear a claim brought by residents of the East African Community alleging that a partner state has committed acts that violate provisions of the Treaty.'

The significance of this case is that even though the claim was brought on the basis of the African Charter, the Court claimed jurisdiction regardless of the fact that the EAC Treaty confers no express human rights mandate on the Court. According to Ebobrah, 'a fundamental question that the Court would have to face is whether under its present statement of competence, it can exercise jurisdiction over such African Charter based claims.'⁴⁶³

5.9 Enforcement of Decisions In The EACJ

Just like any other regional or sub-regional human rights system, the EAC does not have enforcement mechanisms of its own. This makes enforcement of these supranational judicial bodies problematic. This is, particularly, so because enforcement entirely rests on the co-operation of the states. In most cases states that happen to be the judgment debtors are called upon to enforce decisions held against them. This factor, coupled with the notion of state sovereignty, has made enforcement at international level difficult. Political organs of the RECs therefore have a duty to exert political pressure where enforcement is met with

⁴⁶² *Peter Anyang' Nyongo and 10 others and the Attorney General of Kenya and 2 others and Abdirahim Haitha Abdi and 11 others* Reference No. 1 of 2006.

⁴⁶³ S T Ebobrah "Human Rights Developments In African Sub-Regional Economic Communities During 2010". (2011) 1 *African Human Rights Law Journal* 216-250.

resistance by a state party. ‘EAC Treaty saddles its partner states with the duty of implementing the judgments of the Court.’⁴⁶⁴ The EACJ’s judgment of a pecuniary nature is governed by the rules of civil procedure of the state in which it is to be executed.⁴⁶⁵ Other regional courts apply the same rule. The American Convention provides that, ‘part of the judgement that stipulates partly compensatory damages may be executed in accordance with domestic procedures governing execution of judgments against the state.’⁴⁶⁶ There has not been an issue to do with non-compliance, so far states have complied with decisions of the Court, starting with the *Nyong’o*⁴⁶⁷ case.

However, lack of an enforcement mechanism in the EAC presents itself as an institutional fault line which can be exploited any time. The continuous presence of article 27(2) will make it even worse to enforce human rights decisions of the EACJ as the state parties may contest it on the basis of lack of enforcement jurisdiction.

5.10 Conclusion

The East African Court of Justice has a broad jurisdiction. It is clear that the drafters of the EAC treaty intended to establish a court with a jurisdiction in human rights matters. It can be said that the founding fathers of the EAC treaty did not want to prematurely confer human rights jurisdiction on the Court. However, the slow progress made in the extension of the jurisdiction to human rights brings the sincerity and commitment of member states to human rights realisation into question. It has been observed that more often than not the respondent governments aver human rights jurisdiction competence of the in their pleadings. This indicates the fact that states are still unwilling to have a court with broader human rights jurisdiction as they view such a jurisdiction as likely to trammel on their sovereignty. These and others are signs of resistance that continue to haunt regional human rights aspirations. However, the EAC has made much progress in the area of human rights as compared to the SADC Tribunal. Even though states are not always happy with the human rights jurisprudence of the region, they have not done much to threaten its continued existence. For comparative purposes with other sub-regional courts, the reactions of the

⁴⁶⁴ S T Ebobrah “Human Rights Developments In Sub-Regional Courts In Africa During 2008” (2009) 1 *African Human Rights Law Journal* 312-335, 371.

⁴⁶⁵ Rule 72(2) EACJ user guide at 25.

⁴⁶⁶ American Convention cited by T F Yerima “Comparative Evaluation of the Challenges of African Regional Human Rights Courts” (2011) 4 (2) *Journal of Politics and Law*.

⁴⁶⁷ *Peter Anyang’ Nyong’o and 10 others and the Attorney General of Kenya and 2 others and Abdirahim Haitha Abdi and 11 others* Reference No. 1 of 2006.

partner states to some of the landmark decisions of the Court involving human rights will be discussed in the following chapter. In this regard, it will be submitted that the judges' judicial activism was not well received by States in both the EAC and the SADC.

Chapter 6

CONCLUSIONS AND RECOMMENDATIONS

6.1 Introduction

The previous chapters have shown that the human rights decisions taken by the two sub-regional courts were not always welcome. The varied responses to these decisions need to be examined and a reasonable explanation to the variation be offered. As some scholars would put it, the idea of human rights realisation at sub-regional level is still new, it is only natural that it faces resistance.⁴⁶⁸ In an attempt to critically analyse the implications of the conferment of human rights jurisdiction, by courts, on the East African Court of Justice and the SADC Tribunal, it is important to stress the fact that such jurisdiction is indispensable in REC courts. It will be argued that even though both of these courts were established without a human rights mandate, conferment of this jurisdiction was rationally connected to the broad mandate of both courts. Further, even though the two courts delivered judgments that extended their jurisdiction in a similar fashion, they faced different reactions in their respective regions. Whereas the decision in the SADC Tribunal was met with resistance from the respondent government, the EACJ decision was not openly resisted.⁴⁶⁹ This gives rise to the need to examine the political backgrounds of each case and determine whether the judges could have foreseen the member states' reaction and could have avoided it. Alter *et al* argues that rationalists would expect the judges to have anticipated and avoided negative political responses.⁴⁷⁰ They add on that 'the judges... could readily anticipate that their rulings would provoke a heated governmental reaction. Yet they issued their controversial rulings even when it was clear that governments stood ready to respond with court curbing plans.' In this regard, it recommended that tactical adjudication could have worked in favour of the SADC Tribunal. A broader perspective on human rights and political reactions

⁴⁶⁸ See S T. 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) University of Pretoria LLD Thesis 29.

⁴⁶⁹ This refers to the decisions in *Campbell V Republic of Zimbabwe* and *Katabazi v Secretary General of the East African Community* that saw the Courts offering the first human rights jurisdiction of the respective courts.

⁴⁷⁰ Alter *et al*. "Backlash Against International Courts in West, East and Southern Africa: Causes and Consequences." http://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=6140&context=faculty_scholarship (Accessed; 13 October 2015) .

will be given using an example from ECOWAS Community Court of Justice (ECCJ).⁴⁷¹
Conclusions and recommendation will made.

6.1.1 The SADC Tribunal and East African Court of Justice

It is acknowledged that, unlike the African Court of Human Rights, European Court of Human Rights, Inter- American Court and ECOWAS Court,⁴⁷² the SADC Tribunal and EACJ are not originally human rights courts.⁴⁷³ The courts were created as disputes adjudication forums in pursuit of the economic integration agenda. Helfer concurs with this point in that ‘the sub-regional courts in West, East and Southern Africa, share a number of similarities, they were not created to hear cases alleging violations of international human rights law.’⁴⁷⁴ Adding that, ‘instead they were tasked with improving the enforcement of each integration project’s founding legal instruments.’⁴⁷⁵ Murungi states that RECs have introduced a new regime of human rights protection. However, she is sceptical of their commitment to human rights since they are more focused on economic integration.⁴⁷⁶

It has been argued elsewhere in this study that human rights protection became an incident of the integration agenda.⁴⁷⁷ On this note, Ebobrah submits that ‘human rights presence at all integration levels cannot be ignored.’⁴⁷⁸ Sub-regional economic communities’ texts refer to human rights, in some instances tacitly.⁴⁷⁹ Musungu notes that ‘at the textual level, it is fair to conclude that the African economic groupings tacitly recognise human and peoples

⁴⁷¹ Alter *et al.* “Backlash Against International Courts in West, East and Southern Africa: Causes and Consequences.” http://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=6140&context=faculty_scholarship (Accessed; 13 October 2015).

⁴⁷² ECOWAS community has express human rights provisions in its legal instruments in particular the 2005 Supplementary Protocol.

⁴⁷³ F Viljoen *International Human Rights Law in Africa* (2012) 481.

⁴⁷⁴ L R. Helfer “Sub-regional Courts in Africa: Litigating the Hybrid Right to Freedom of Movement” (2015) 32 *iCourts Working Paper Series 4*.
http://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=6208&context=faculty_scholarship (Accessed; 30 October 2015).

⁴⁷⁵ Ibid.

http://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=6208&context=faculty_scholarship (Accessed; 30 October 2015).

⁴⁷⁶ L N Murungi (2009), ‘Revisiting the role of sub-regional courts in the protection of Human rights in Africa’ unpublished LLM thesis, University of Pretoria.

⁴⁷⁷ S T. 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) University of Pretoria LLD Thesis.

⁴⁷⁸ Ibid.

⁴⁷⁹ See SF Musungu “Economic Integration And Human Rights In Africa; A Comment On Conceptual Linkages” (2003) 3 *African Human Rights Law Journal* 92.

rights as conceptualised in the African Charter.⁴⁸⁰ Ali also attributes the ‘derived’ human rights jurisdiction to the regional integration system by stating that ‘RECs serve as the building blocks for economic integration of Africa. Whilst pursuing these goals, they recognise the enhanced role of human rights, inter alia, as a means to their economic development.’⁴⁸¹ It is without doubt that the founding fathers of these regional systems deliberately excluded human rights at the time, opting, instead, in the case of the EACJ, to include human rights at a suitable future date.⁴⁸² The reason for the omission of the human rights jurisdiction was the fear that the issue was too political.⁴⁸³ Perhaps this was a good decision at the time given that Africa was coming out of a multitude of civil wars and the general political instability at the time would have made economic integration difficult.

However, this exclusion did not stop the respective courts from broadly interpreting the provisions of their original instruments. Helfer notes that ‘for the EACJ and SADC Tribunal, the shift to human rights occurred via expansive interpretations of the integration treaties, principles and objectives clauses adopted by the sub-regional judges in response to advocacy by law societies and private litigants.’⁴⁸⁴ As a result, the EACJ and the SADC Tribunal became competent to receive human rights cases

Having concluded that human rights protection and promotion is an indispensable feature of regionalism and economic integration, it is necessary to discuss the different reactions of the member states in the two regions. This can be done by means of looking at both legal and political factors that were at play in both regions. Whilst in the SADC region, the decision in *Campbell*⁴⁸⁵ led to the demise of the Tribunal; the EACJ’s decision in *Katabazi*⁴⁸⁶ did not

⁴⁸⁰ Ibid at 93.

⁴⁸¹ A J Ali “The Admissibility Of Sub-regional Courts’ Decisions Before The African Commission Or African Court” (2012) 6 (2) *Mizan Law Review* 242.

⁴⁸² Article 27 (2) of the EAC Treaty.

⁴⁸³ Ecowas Community Court was established in terms of articles 5 and 15 of the Revised ECOWAS Treaty.

Other Community laws applicable to the Court are ‘Protocol A/P1/7/91 of 6 July 1991, Supplementary Protocol A/SP.1/01/05 of 19 January 2005, Supplementary Protocol A/SP.2/06/06 of 14 June 2006, Regulation of 3 June 2002, and Supplementary Regulation C/REG.2/06/06 of 13 June 2006.’ See

http://www.courtecowas.org/site2012/index.php?option=com_content&view=article&id=2&Itemid=5.

⁴⁸⁴ L R. Helfer “Sub-regional Courts in Africa: Litigating the Hybrid Right to Freedom of Movement” (2015) 32 *iCourts Working Paper Series* 4.

http://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=6208&context=faculty_scholarship (Accessed; 30 October 2015).

⁴⁸⁵ *Mike Campbell Private Ltd V Republic Of Zimbabwe* SADC (T) Case No. 2/2007.

⁴⁸⁶ *Katabazi v Secretary General of the East African Community* (2007) AHRLR 119 (EAC 2007).

lead to any serious backlashes against the Court. The only notable backlash against the EACJ was a result of the *Nyongo*⁴⁸⁷ case and was not linked to human rights jurisdiction.

Before *Katabazi*⁴⁸⁸ was heard, the EACJ decision in *Nyongo*⁴⁸⁹ had caused problems for the Court and had threatened its continued existence. Even though *Nyongo* was not a human rights case, the reaction of Kenya to the decision is worth noting. The Court showed resilience as the judges stood strong in the face of a significant backlash. This probably explains why the Court was bold enough to deliver the judgment in *Katabazi* barely two years after *Nyongo*.⁴⁹⁰ Kenya was infuriated by the decision in *Nyongo* (interim) as it viewed it as an ‘unwelcome interference in a sensitive domestic political dispute, and, even worse taking the opposition’s side.’⁴⁹¹ In addition to that, the Court’s ruling was viewed as undermining the country’s sovereignty. In its campaign against the Court, Kenya went so far as to try and recall two Kenyan judges from the EACJ bench. Scholars have noted that ‘by removing the judges from the *Nyongo* case, the government hoped to avoid an adverse ruling on the merits that would solidify the opposition’s influence in the EALA.’⁴⁹² Even though Kenya was not successful in its criticism of the Court, it managed to force important amendments to the EAC Treaty which included the establishment of the appellate division and setting up the two month time limit for natural and legal persons who wish to register their complaints with the Court challenging states on the basis of any violation of the EAC Treaty. There is a striking similarity between Kenya’s actions and that of member states in the SADC. They both sought to place limitations of the operation of individual petitions. SADC ultimately scratched the individual petitions system. Both actions in the EAC and SADC stand in sharp contrast to the recent international practice that ‘... the vast majority

⁴⁸⁷ *Peter Anyang’ Nyongo and 10 others and the Attorney General of Kenya and 2 others and Abdirahim Haitha Abdi and 11 others* Reference No. 1 of 2006.

⁴⁸⁸ AHRLR 119 (EAC) 2007.

⁴⁸⁹ Reference No. 1 of 2006.

⁴⁹⁰ Ibid.

⁴⁹¹ L R. Helfer “Sub-regional Courts in Africa: Litigating the Hybrid Right to Freedom of Movement” (2015)

32 *iCourts Working Paper Series 4*.

http://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=6208&context=faculty_scholarship (Accessed; 30 October 2015).

⁴⁹² Alter *et al.* “Backlash Against International Courts in West, East and Southern Africa: Causes and Consequences” 13.

http://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=6140&context=faculty_scholarship (Accessed; 13 October 2015).

of state approved revisions of ICs founding treaties have expanded the Courts' jurisdiction and access rules rather than overturning disfavoured decisions or sanctioning judges.⁴⁹³

The fact that *Katabazi* was decided after the Court had already started developing its jurisprudence and that it had already been tried and tested possibly explains its bold character when it delivered the judgment. The judgment in *Katabazi* has been described by scholars as 'a strikingly bold conclusion given the treaty's explicit statement that the member states would confer such jurisdiction via a yet to be concluded protocol.' In contrast, the SADC Tribunal received the Campbell case as one of its first few cases. At that time the Tribunal had not developed its jurisprudence in such a manner that it could skilfully navigate through the extra-legal implications of its decision.

6.1.2 *The differences between Campbell and Katabazi*

The different reactions in the two cases are attributed to the timing, and the subject matter. The EACJ received the case of *Katabazi* at a time when it had already started developing its jurisprudence and having previously handed down some landmark decisions in the cases of *Nyong'o*. The SADC Tribunal on the other hand was faced with *Campbell* when it was still to find legitimacy within the political structures of the SADC since it had no precedence of a decision of such a magnitude. Oppong notes that 'in *Mike Campbell*, the Southern African Development Community (SADC) Tribunal was confronted for the first time with a challenge to a major and controversial national policy: Zimbabwe's agricultural reform.'⁴⁹⁴ Therefore, it suffices to say that, whilst still in its infancy, the Tribunal was faced with a big case that it could not have dealt with without evoking emotions. As a result the Tribunal's decision did not garner the support of the political organ of the SADC. As will be shown below, courts are more likely to face political opposition if they decide politically sensitive issues.⁴⁹⁵ Had the Tribunal ruled against the applicants, it was likely to face another

⁴⁹³ Alter *et al.* "Backlash Against International Courts in West, East and Southern Africa: Causes and Consequences." 13. http://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=6140&context=faculty_scholarship (Accessed; 13 October 2015)

⁴⁹⁴ F Oppong "Enforcing Judgments of the SADC Tribunal in Domestic Courts" 2010 *Monitoring Regional Integration in Southern Africa Yearbook* 115.

⁴⁹⁵ On the whole, the failure by SADC leaders to intervene in Zimbabwe can be attributed to, according to Palloti *infra* note 497, '...the history of political antagonism among Southern African governments and by SADC's inability to draw a distinction between respect for human rights and the promotion of neoliberal strategy of economic development.'

backlash from the international community, especially the west, the civil society and human rights organisations.

The different reactions may also be explained by the nature of the subject matter in both cases. To begin with, the litigation in *Campbell* drew the world's attention to the SADC Tribunal and the land reform process in Zimbabwe. One of the key issues was whether the land reform was racially discriminatory. An affirmative decision on this issue was likely to evoke emotions in the Zimbabwean political circles with the most influential opposition party and human rights groups likely to support the decision and the ruling Zanu Pf party contesting it.⁴⁹⁶ The issue of land holds a significant ideological importance in the Southern African region.⁴⁹⁷ Given the facts and the background of the land reform discussed in previous chapters, as well as the political situation in Zimbabwe at the time, it was obvious that the Zimbabwe government was not going to accept nothing short of victory in this case as anything to the contrary would be seen as a reversal of the land reform and a sign of a politically weakening Zanu Pf regime. In Zimbabwe, the land reform is viewed as one of the gains of the liberation struggle and a symbol of sovereignty that should be guarded jealously. Given that the land reform had earned Zimbabwe economic sanctions and international isolation, the Zimbabwe government was not prepared to back track on its land policy. For this reason national pride was at stake.

In addition to that, the issue of land is politically sensitive in most SADC countries; hence no member state was prepared to openly support the Tribunal's decision in *Campbell*.⁴⁹⁸ Pallotti notes that '[t]his outcome has often been explained in the academic literature as a

⁴⁹⁶ Zimbabwe President Robert Mugabe openly rejected the SADC Tribunal's judgment and authority. At an 85th birthday rally, he was quoted saying, "Land distribution will continue. It will not stop. The few remaining white farmers should quickly vacate their farms as they have no place there. ... Our land issues are not subject to the SADC tribunal." See http://www.pbs.org/pov/mugabe/campbell_zimbabwe_case_documents.php

⁴⁹⁷ Hulse notes that in South Africa 'at the end of apartheid in 1994, white South Africans owned 87 percent of the land despite representing less than 10 percent of the population.' And according to Hulse this explains why South Africa's ANC Government did not denounce Zimbabwe's land reform and '... condemnation of Mugabe's land reform programme, however illegal under the principles of international law, might provide a match that ignites the sea of oil and results in the conservative leadership of the ANC being unseated by the youthful, radical element of the party which has professed support for the Zimbabwe-style fast tracking of the land reform programme.' (M Hulse "Silencing A Supranational Court; The Rise And Fall Of The SADC Tribunal" (2012) (accessed 30 November 2015)) <http://www.e-ir.info/2012/10/25/silencing-a-supranational-court-the-rise-and-fall-of-the-sadc-tribunal/>

⁴⁹⁸ "Political divisions among the SADC governments (Angola, in particular, that had militarily intervened with Zimbabwe and Namibia in the DRC, backed Mugabe within SADC, while Botswana criticised the FTLRP for its negative effects on the entire region), the sensitivity of the land issue across Southern Africa, and Mugabe's determination to avoid any foreign interference in the internal affairs of Zimbabwe made the search for a solution to the crisis in Zimbabwe a very difficult and sensitive issue for SADC." A Pallotti "Human Rights And Regional Cooperation In Africa: SADC And The Crisis In Zimbabwe" (2013) 35 (1) *Strategic Review for Southern Africa* 32.

consequence of African leaders' reluctance to openly criticise their fellow heads of state and set a dangerous precedent that could later backfire on them.'⁴⁹⁹ Given South Africa's status as a regional economic force, it could have exerted pressure on Zimbabwe to enforce the judgment or simply defend the Tribunal. It would be logical to say that South Africa did not want to evoke emotions at home by supporting a judgment that may be interpreted to have been against expropriation of land. South Africa's direct involvement in the whole enforcement of the Tribunal's decision saga was through its judicial arm, in *Fick*, for which no blame can be imputed on its political arms.

On the other hand the EACJ did not face any significant backlashes owing to the nature of the subject matter in *Katabazi*. *Katabazi* was a case of unlawful detention for which the domestic courts had already ruled in favour of the detainees. There were no issues of national policy involved but outright human rights violations. The issue in this case involved violation of first generation rights with no far reaching consequences on national policy.

There is therefore a need to determine whether the Tribunal could have avoided the backlash. Faced with such a politically sensitive case the Tribunal could have survived by adjudicating in the matter tactfully.

6.4 Broader Perspective

Another sub-regional court, strikingly similar to the SADC Tribunal and the EACJ was also not spared any backlashes in its region. The ECOWAS community adopted a supplementary protocol in 2005 to extend the jurisdiction of the Court to human rights cases.⁵⁰⁰ Since then, the Court has been receiving human rights cases. Articles 3 and 4 of the Protocol provide for direct access by individuals and that there is no need to exhaust domestic remedies.⁵⁰¹

⁴⁹⁹ A Pallotti "Human Rights And Regional Cooperation In Africa: SADC And The Crisis In Zimbabwe" (2013) 35 (1) *Strategic Review for Southern Africa* 18.

⁵⁰⁰ It should be noted that the ECOWAS Court's adoption of a human rights jurisdiction stands in sharp contrast to the other regional courts. Helfer et al, *Supra* note 473, 3 notes that 'the ECCJ's transformation illustrates how an existing international institution can be redeployed for new purposes. One interesting aspect of this transformation is how the judges themselves contributed to the expansion of their mandate. Most scholars expect international courts to engage in expansive judicial law making to increase their power and the reach of international law. ECCJ judges did not follow this strategy, rejecting an opportunity to expand their jurisdiction and access rules. Instead, they embarked on an extra-judicial campaign to redesign the Court. They travelled across West Africa on outreach missions and speaking engagements to build support among local bar associations, human rights groups, and government officials. This strategy culminated in the adoption of the 2005 Supplementary Protocol, a treaty that endorsed the redeployment of the ECCJ as a human rights tribunal.'

⁵⁰¹ See Helfer, *Supra* note 473, who notes that the court 'gave private litigants direct access to the court, granted broad discretion to the judges to interpret and apply international human rights law.'

However, these provisions are not free of controversy. As is now the ‘norm’, states have always contested this jurisdiction and also raised state sovereignty to oust the Court’s jurisdiction.⁵⁰² Ebobrah acknowledges that following the principle of sovereignty international law recognises that states are at liberty to act and exercise power widely in so far as such is within the ambits of international law.’⁵⁰³ In the ECOWAS the Gambia has been at the fore front as it contested two cases against it in 2008 and 2009. As such, Gambia in both cases unleashed severe backlashes against the Court. Given the nature of international law in sub-regional communities in Africa, one has to ask the question as to ‘whether those institutions are competent to exercise powers in the realm of human rights.’⁵⁰⁴ Bearing in mind that the intention is to explore how the Court avoided being affected by these backlashes, the two cases involving Gambia and its responses to both of them shall be discussed.

6.5.1 *Manneh V the Gambia*

The first case that attracted the wrath of Gambia and became a subject of much debate in the ECOWAS was that of *Manneh v the Gambia*.⁵⁰⁵ In this case the applicant was a Gambian journalist who had been arrested, detained and tortured for publishing news articles critical of the Gambian government.⁵⁰⁶ According to Ali, Gambian officials did not give reasons for his arrest.⁵⁰⁷ An application was made to the ECCJ alleging violations of ‘Articles 4, 5, 6

⁵⁰²See F Viljoen *International Human Rights Law In Africa* (2012) 499 , who observes that ‘ in all three RECs under discussion, a state at the receiving end of an unfavorable decision responded by questioning the legitimacy of the court, and advocated for institutional reform to weaken the fledging human rights system.

⁵⁰³ S T. 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) University of Pretoria LLD Thesis

⁵⁰⁴ Ibid at 32.

⁵⁰⁵ *Manneh v The Gambia* (2008) AHRLR 171 (ECOWAS 2008)/ *Manneh v the Gambia*, Unreported Suit No ECW/CCJ/APP/04/07.

⁵⁰⁶ Alter *et al.* “Backlash Against International Courts in West, East and Southern Africa: Causes and Consequences.”

http://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=6140&context=faculty_scholarship (Accessed; 13 October 2015)

⁵⁰⁷ J Ali “The Admissibility Of Sub-regional Courts’ Decisions Before The African Commission Or African Court” (2012) 6 (2) *Mizan Law Review* 246.

and 7 of the African Charter.’⁵⁰⁸ The Gambia ignored numerous calls for it to file its appearance to defend or to appear in court.⁵⁰⁹ The plaintiff sought;

(a) A declaration that his arrest by the National Intelligence Agency of The Gambia at the premises of *The Daily Observer* in Banjul on 11 July, 2006, is illegal and unlawful as it violates article 6 of the African Charter on Human and Peoples’ Rights which guarantees his human right to personal liberty.

(b) A declaration that his detention on 11 July 2006, and his continual detention since then without trial is unlawful and a violation of his right as guaranteed by articles 4, 5 and 7 of the African Charter on Human and Peoples’ Rights.

(c) An order mandating the defendant and/or its agents to immediately release the plaintiff from custody.

(d) US\$ 5 000 000 (five million United States dollars) being compensation for the violation of the applicant’s human rights to dignity, liberty and fair hearing.⁵¹⁰

In 2008, the Court found Gambia responsible for torture and other human rights abuses thereby ordering the government to release *Manneh* from detention and was also ordered to pay him \$100 000.⁵¹¹ The Gambia was put under pressure by international organisations and other governments that demanded its full compliance with the Court’s judgment.⁵¹² According to Alter et al, ‘officials announced that the Gambia was “aggrieved” by the *Manneh* judgment and would “set the political process in motion to take the matter to the next level and the decision set aside.”’⁵¹³ Gambia’s failure to respond to the allegations and to defend itself was a clear demonstration of its unwillingness to be bound by the Court’s decision or subjecting itself to the Court’s processes. By this conduct, it hoped to delegitimize any decision made by the Court in this respect.

⁵⁰⁸ A J Ali “The Admissibility Of Sub-regional Courts’ Decisions Before The African Commission Or African Court” (2012) 6 (2) *Mizan Law Review* 246 ; *Manneh v the Gambia*, supra note 504.

⁵⁰⁹ In this case the Gambia failed to respond to numerous calls to make its defence pleadings after being served through its high commissioner in Nigeria. (See *Manneh v the Gambia*, supra note para 4; See also Viljoen, 2012. 499.

⁵¹⁰ *Manneh v the Gambia* para 3

⁵¹¹ Ibid.

⁵¹² Alter et al. “Backlash Against International Courts in West, East and Southern Africa: Causes and Consequences.” 5

http://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=6140&context=faculty_scholarship (Accessed; 13 October 2015)

⁵¹³ Alter et al. “Backlash Against International Courts in West, East and Southern Africa: Causes and Consequences.” 6

http://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=6140&context=faculty_scholarship (Accessed; 13 October 2015).

6.5.2 *Musa Sadyikhan v The Gambia*

The second case, *Musa Sadyikhan v The Gambia*⁵¹⁴ involved another journalist who was detained and tortured by the Gambian government who launched his suit from exile. This time, the Gambia responded and challenged the jurisdiction of the Court and also raised sovereignty as its defence.⁵¹⁵ In June 2009 a judgment in favour of the applicant was handed down. The Gambia reacted swiftly to this decision in September 2009 by requesting a revision of the 2005 protocol. In addition, it drafted a supplementary protocol effectively altering the jurisdiction of the Court's access rules.⁵¹⁶ Gambia also 'sought an amendment to the "Revised ECOWAS Treaty" to create an appeals procedure for all decisions of the Community Court.'⁵¹⁷ A consortium of 11 civil society organisations denounced these recommendations and member states also unanimously rejected the Gambian challenge. Following this, '... the ECOWAS Court has continued to develop its human rights jurisprudence, albeit in manner suggesting that it is aware of the political limits of its authority and serious challenges of securing compliance with its judgments.'⁵¹⁸ Therefore the backlashes by Gambia did 'not yield any concrete results.'⁵¹⁹

Whereas other sub-regional courts have succumbed to the pressure exerted by some sects to either limit the individual access or restrict human rights jurisdiction, the ECOWAS Court emerged stronger from the backlash directed against it by Gambia. Alter et al notes that '...West African governments have responded to plausible critiques of the ECCJ by strengthening the court's independence.' These scholars single out the establishment of the

⁵¹⁴ *Musa Sadyikhan v The Gambia* Suit No. ECW/CCJ/APP/11/07 judgment ECW/CCJ/JUD/08/10 in this case the plaintiff sought relief for 'violation of his human right to personal liberty and dignity of his person and fair hearing guaranteed by Articles 1, 5, 6 and 7 of the African Charter On Human And Peoples Rights (ACHPR).' Para 2.

⁵¹⁵ The Gambian government's defense was a complete denial of the plaintiff's averments. It tendered complete ignorance of the facts in question and knowledge whatsoever of any coup plot against it as published by the plaintiff's newspaper.

⁵¹⁶ Some of the key adjustments made by Gambia in this respect as noted by Alter, Supra note 512, were '(a) that with respect to human rights cases, the Court should only have jurisdiction in respect of international instruments ratified by the respondent country; (b) also in human rights cases, the ECOWAS Court's jurisdiction should be made subject to the exhaustion of domestic remedies; (c) cases should only be admissible if instituted not later than 12 months after the exhaustion of local remedies; (d) cases should not be anonymous; and (e) the court should not hear cases that are before other international mechanisms of settlement.'

⁵¹⁷ Supra note 512, 7.

⁵¹⁸ Ibid.

⁵¹⁹ F Viljoen *International Human Rights Law In Africa* (2012) 499.

ECOWAS Judicial Council⁵²⁰ which depoliticizes the appointment of judges as one of the direct results of the Gambian backlash.⁵²¹ In addition they point to the fact the ECOWAS community rejected Gambia's initiative to restrict the Court's human rights jurisdiction.⁵²²

6.5 Avoiding Backlashes

Given the reality that sub-regional courts in Africa usually suffer setbacks whenever they deliver politically sensitive decisions, it is necessary to turn to recommend a theory of adjudication that may help avoid similar backlashes in the future. Often, these sub-regional courts, when they pass human rights judgments, find themselves unpopular in political circles, which pose a serious threat to their institutional security.⁵²³ Some may attribute the backlashes discussed to a number of factors *inter alia*; the general fear amongst States that human rights may be used as a pretext for interfering with their political sovereignty. There is, however, need to look at ways in which the courts found themselves imposing a threat to national politics in their adjudication processes of politically sensitive matters. The argument made here is that the backlashes against the courts especially in the SADC region as a result of the judgment in Campbell could have been avoided by means of tactical adjudication. One may be quick to question the applicability of tactical adjudication in international courts; hence, it is necessary to turn to a comprehensive discussion of the theory of tactical adjudication.

6.5.1 What is Tactical Adjudication?

Theunis Roux refers to the strategies adopted by South African Constitutional Court in its pursuit of the 'overriding goal of ensuring the establishment of constitutional democracy' as tactical adjudication.⁵²⁴ Roux submits that the strategies have enabled South African Constitution Court to stay in 'business long enough to give meaningful effect to constitutional rights.'⁵²⁵ It should be noted that Roux clearly puts it on record that tactical

⁵²⁰The ECOWAS Judicial Council is responsible for the recruitment of judges and is also responsible for the restructuring of the court.

⁵²¹Alter *et al* "A New International Human Rights Court for West Africa: The ECOWAS Community Court of Justice" (2013) 107 *American Journal of International Law* 4.

⁵²²Ibid at 4.

⁵²³According to Roux "institutional security," is understood ... to mean the CCSA's capacity to survive political attacks on its independence.' (T Roux "Principle and pragmatism on the Constitutional Court of South Africa" (2009) 7 (1) *International Journal of Constitutional Law*. 4.

⁵²⁴T Roux 'Tactical adjudication: How the Constitutional Court of South Africa survived its first decade' <http://www.saifac.org.za/docs/2007/Tactical%20Adjudication.pdf> (accessed 14 March 2013)

⁵²⁵Ibid at 12.

adjudication is ‘not meant to exclude consideration of more detailed techniques of legal reasoning such as deduction from clear rules, distinguishing cases on their facts, policy reasoning, and so on.’⁵²⁶ Therefore, the same speaks of its application in international courts and tribunals.

Tactical adjudication involves the use of five strategies. These are a) the use of doctrinally redundant language to set the tone of a judgment, b) a preference of formulaic tests over substantive moral reasoning, c) the conversion of conceptual tests into discretionary standards, d) interpreting the constitutional text so as to ensure pragmatic outcomes and e) framing certain issues as political questions to avoid deciding them.⁵²⁷

6.5.2 Tactical adjudication in practice

For purposes here, two strategies will be discussed in detail. The use of doctrinally redundant language to set the tone of a judgment and framing certain issues as political questions to avoid deciding them can be directly applied in regional and sub-regional human rights courts. The remaining three strategies will be discussed briefly to illustrate the relevance of tactical adjudication.

The use of doctrinally redundant language is explained by Roux as meant to draw ‘an artificial distinction between strictly legal language (everything to do with the articulation of the rule) and other scene setting language that courts use to frame their decisions.’⁵²⁸ In such a scenario the tone and register of the judgment is used to justify the outcome.⁵²⁹ It should be noted that this can be a time consuming exercise that is mostly appropriate for courts with a relatively small case load. Thus Roux uses examples from the jurisprudence of the South African Constitutional Court. This scholar notes that one of the reasons why the South African Constitutional Court uses this strategy is because it is still in the stage of democratic consolidation and that the Court understands its institutional role in this.⁵³⁰ The adoption of the strategy has been made possible by the fact that the Court is aware of the

⁵²⁶Ibid.

⁵²⁷Ibid.

⁵²⁸Ibid at 13.

⁵²⁹Ibid at 13.

⁵³⁰It has been argued that the SADC Tribunal met its death prematurely at a time when it was supposed to begin to play its active role in fostering a culture of human rights, democracy and rule of law in the region. Given the civil unrests and disputed election outcomes, one cannot be entirely proud of the region’s human rights record, therefore the Tribunal was meant to consolidate the principles of democracy.

delicacy of its position.⁵³¹ One of the key features of this strategy is manifest in the Court's '...repeated attempts to align itself with the political branches' transformation efforts.'⁵³²

According to Roux this is done by starting off a judgment by endorsing the policies being pursued but still go on to find against the State;

The CCSA [Constitutional Court of South Africa] will, for example, quite often begin a judgment in which it ultimately finds against the state by indicating its general agreement with the policy being pursued. In other cases, when finding in favour of the state, it will resoundingly endorse the policy in question, often going quite far beyond what is necessary for purposes of making its decision.⁵³³

This is done by using 'rhetoric craftsmanship' which is 'the careful unpacking of a decision so as to make it more palatable to those who must obey it.'⁵³⁴ This strategy, according to Roux, was used by the South African Constitutional Court in *Minister of Health and others v Treatment Action Campaign and others* (TAC) case.⁵³⁵ The Court in this case laid out a redundant passage in its opening paragraph.⁵³⁶ Roux observes that even though this paragraph does not carry any legal meaning, it was strategically necessary.⁵³⁷ It can also be added that these redundant passages are used as means of navigation into deep political matters through structured reasoning. These may also be used to lighten up the atmosphere and diffuse the tension that is likely to emanate from the judgment.

The other strategy that South African courts have adopted is 'framing certain issues as political questions to avoid deciding them.' Roux discusses this strategy extensively. This scholar uses an example of how the Court in the case of *President of the Republic of South*

⁵³¹The South African Constitutional Court has often been caught in situations where it has to protect minority rights which makes it unpopular with the majority for example in cases such as *S v Makwanyane and Another* (CCT3/94) [1995] ZACC 3; 1995 (6) BCLR 665; 1995 (3) SA 391; [1996] 2 CHRLD 164; 1995 (2) SACR 1 (6 June 1995) where the court ruled against the death penalty despite the fact that the majority in South Africa supported the death penalty.

⁵³²Supra note 528, 13.

⁵³³Ibid.

⁵³⁴Ibid at 14.

⁵³⁵*Minister of Health and others v Treatment Action Campaign and others* (No 2) (CCT8/02) [2002] ZACC 15; 2002 (5) SA 721; 2002 (10) BCLR 1033 (5 July 2002)

⁵³⁶See *Minister of Health and others v Treatment Action Campaign and others* (No 2) 2002 (5) SA 721 (CC) para 1. 'The HIV/AIDS pandemic in South Africa has been described as 'an incomprehensible calamity' and 'the most important challenge facing South Africa since the birth of our new democracy' and government's fight against 'this scourge' as 'a top priority'. It has claimed millions of lives, inflicting pain and grief, causing fear and uncertainty, and threatening the economy'. These are not the words of alarmists but are taken from a Department of Health publication in 2000 and a ministerial foreword to an earlier publication.'

⁵³⁷T Roux "Tactical Adjudication: How the Constitutional Court of South Africa Survived its First Decade" <http://www.saifac.org.za/docs/2007/Tactical%20Adjudication.pdf>. 14

*Africa and others v South African Rugby Football Union*⁵³⁸ (SARFU) adopted this strategy in determination of the matter before it. In *SARFU*, the Court held that ‘one of its functions was to exercise exclusive jurisdiction ‘in a number of crucial political areas ... in respect of issues which would inevitably have important political consequences.’⁵³⁹ However, the Court has been tactful in its discharge of this exclusive mandate. For example, the Court in *Ferreira v Levin NO*⁵⁴⁰ held that ‘Whether or not there should be regulation and redistribution is essentially a political question which falls within the domain of the Legislature and not the Court.’⁵⁴¹ This decision highlights the court’s awareness of its precarious position hence sifting through those that do not fall within its ambit and treating them as such. In the same vein, the Court refused to adjudicate in the case of *UDM V President of RSA*⁵⁴² by stressing that the political question was of no concern to the Court. Therefore, by using this strategy, the Court finds itself adjudicating in some political matters and declining to do in others so as to ensure its institutional security by avoiding direct conflicts with political branches.

As a result of these and other strategies, the South African Constitutional Court, ‘though lacking in public support, ... today [it] finds itself in a position of relative institutional security.’⁵⁴³ More often, the Court find itself adjudicating in politically sensitive matters and still decide against the State despite the possible threats it is likely to face from state institutions. For example, Roux notes that ‘...the African National Congress (ANC) has periodically criticized the judiciary but it has not, as yet, threatened to close the CCSA down despite several significant policy reversals.’⁵⁴⁴ Russell sums up Roux’s discussion;

[T]he CCSA is best positioned to rule independently and provide legally legitimate reasons for its opinions when it has political support from either the public or the ruling party. Hence

⁵³⁸ *President of the Republic of South Africa and others v South African Rugby Football Union* 1999 (4) SA 147 (CC).

⁵³⁹ See Roux, *Supra* note 536, 27 and see also *President the RSA v SARFU* 1999 (4) SA 147 (CC) para 72-73

⁵⁴⁰ *Ferreira NO v Levin NO* 1996 (1) SA 984 (CC).

⁵⁴¹ *Supra* note 536, 27.

⁵⁴² See *United Democratic Movement V President of RSA* 2003 (1) SA 495 (CC), para 11.

⁵⁴³ T Roux “Principle and pragmatism on the Constitutional Court of South Africa” (2009) 7 (1) *International Journal of Constitutional Law* 106.

⁵⁴⁴ T Roux “Principle and Pragmatism on the Constitutional Court of South Africa” (2009) 7 (1) *International Journal of Constitutional Law* 107.

it was able to make unpopular decisions with no threat to its institutional independence, in part because it had support from ANC elites, for example on the death penalty.⁵⁴⁵

Sub-regional courts often find themselves in a similar precarious position. On the one hand, they are created by States, for which they serve; on the other they have a duty to ensure good governance which means they are more likely to come into conflict with the very states that established them. This is the same situation that the South African Constitutional Court finds itself in which makes it an ideal candidate for illustrating the application of tactical adjudication. It has been shown above that almost all the sub-regional courts with a human rights mandate have at least once come into conflict with the political organs or branches. The backlashes discussed above are a clear indication of the fact that sub-regional courts need to entrench their institutional security. In some instances, the backlashes did not yield any significant results but in others they did.

The preference for formulaic tests over substantive moral reasoning has also been used by the CCSA as one of its tactical adjudication strategies. Roux submits that ‘in case after case, faced with the duty to give meaning to a hitherto unelaborated constitutional right- to fit the right into the grand constitutional design- the CCSA has eschewed substantive moral reasoning in favour of casuistry or articulation of formulaic tests.’⁵⁴⁶ In addition to that, the Court also uses the ‘conversion of conceptual tests into discretionary standards.’ This strategy allows the Court to ‘consider all possible challenges... without... pre-committing it to any particular position on the range of controversial questions that could potentially come before it.’⁵⁴⁷ Finally, tactical adjudication entails interpreting the constitutional text as to ensure pragmatic outcomes. This is when a court refuses to give a moral reading of the law, but rather interprets it in a way that ensures pragmatic outcomes.⁵⁴⁸

6.5.3 Application to the SADC Tribunal

In the SADC Tribunal, Zimbabwe’s reaction to the decision in *Campbell* resulted in its suspension followed by adoption of a New Protocol. It has been shown above that the issues

⁵⁴⁵ Roux cited by K Russell “Political and Constitutional Futures for Land Reform in South Africa” <http://www.landdivided2013.org.za/sites/default/files/March%202013%20PLAAS%20Conference%20Paper%20Kevin%20Russell.pdf> (Accessed; 20 October 2015).

⁵⁴⁶ T Roux “ Tactical Adjudication: How the Constitutional Court of South Africa Survived its First Decade” <http://www.saifac.org.za/docs/2007/Tactical%20Adjudication.pdf> 17.

⁵⁴⁷ Ibid.

⁵⁴⁸ T Roux “ Tactical Adjudication: How the Constitutional Court of South Africa Survived its First Decade” <http://www.saifac.org.za/docs/2007/Tactical%20Adjudication.pdf> 22

in *Campbell* were politically sensitive and were likely to yield political responses in almost all SADC countries. Rationalists would argue the judges should have foreseen this possibility. This is not to say the decision in *Campbell* was flawed or that the court should have decided otherwise. Had the Court, in *Campbell* used tactical adjudication, the political response would have been different. For example, the Court could have done much better by looking at the rationale behind the land reform, or it could have supported the land reform itself and go on to denounce the manner in which Zimbabwe had carried out its processes.

The SADC Tribunal's position was similar to that of the South African Constitutional Court in its early stages. Just like the Tribunal, the CCSA was faced with the task of ushering in a new constitutional order but in so doing it had to make sure it deals with political matters in such a manner that stays in 'business long enough to give meaningful effect to constitutional rights. It is apparent that the Tribunal, new as it was, its position was precarious; it received *Campbell* whilst it was still establishing itself as a regional judicial body. It had a duty to adjudicate in a manner that ensures that it stays in business long enough to give meaningful effect to the provisions of the SADC Treaty. The SADC Tribunal could have devised a way to avoid confronting political branches and whilst at the same time protecting the human rights as contemplated in the SADC Treaty. The judges could have been masterful, drawing from the CCSA, they could have used doctrinal redundancy in such a way that no one disagrees with any party of the judgment thereof. This could have been achieved by reiterating the importance of human rights in the region, the importance of the sub-regional judicial organ and tying up the heads of the state and government to their own words during the drafting of the SADC Treaty.

6.7 General conclusions

It has been shown that the importance of sub-regional human rights mechanisms cannot be ignored. Sub-regional human rights courts bring international justice close to victims in their respective regions. However, there is a debate surrounding the acquisition of human rights jurisdiction by the SADC Tribunal and the East African Court of Justice through broad purposive interpretation of their respective treaties. Many scholars however agree that the judges correctly afforded human rights jurisdiction to both courts. They argue that human rights jurisdiction is an incident of the principles rule of law, democracy and good governance which find meaning within the ambit of both treaties. The cases of *Mike Campbell v The Republic of Zimbabwe*, in the SADC Tribunal, and *Katabazi v The*

Secretary General of the EAC, in the EACJ resulted in the conferment of human rights jurisdiction on both courts.

What is interesting here is the variation in the responses by the political arms of both the EACJ and the SADC Tribunal to these decisions. Whereas the decision in *Katabazi* was generally accepted, the decision in *Campbell* was met with hostility from the SADC heads of states and government, which led to its eventual suspension in 2010. This variation was explained by looking at the notable differences in nature of the human rights jurisdiction, the subject matter and the timing between the EACJ and SADC Tribunal cases. For illustrative purposes, backlashes on human rights decisions of other sub-regional courts such as the ECOWAS Community Court were also discussed.

The *Campbell* and the *Katabazi* cases gave rise to a number of pertinent questions in international human rights law. The first question was whether the two sub regional courts have a human rights jurisdiction in the absence of a human rights protocol in the SADC Tribunal, and in the absence of a protocol extending the jurisdiction of the EACJ as contemplated by the EAC Treaty. The other question is whether the suspension and non-compliance with the Tribunal's judgment was a digression on the mandate of a legally constituted sub -regional human rights body. In this regard, an enquiry into whether the suspension of the SADC Tribunal and eventual adoption of a New Protocol were legal was made. Lastly, the question as to whether the reaction in *Campbell* could have been avoided was addressed.

In addition to the above, other incidental issues include the existence of concurrent jurisdiction in the EACJ and concerns around the slow adoption of the Protocol extending the jurisdiction of the court to human rights

6.8 Main findings

It has been observed that the judges in both the SADC Tribunal and the EACJ correctly afforded the courts a human rights jurisdiction. Since human rights have increasingly become integral in regional and sub-regional systems, it would logically follow, therefore, that the courts be competent to receive human rights cases. It has been observed by various scholars that respect for human rights is cardinal to the human rights system. The world has evolved into a global village where there is intimacy, interdependence and an unprecedented

movement of people. This necessitates the need to have a regional or sub regional standard for the observance of human rights.

In addition to this, it has been argued that the SADC and EAC Treaties refer to the observance of rule of law, democracy and rule of law. These guiding principles, if interpreted broadly, confer human rights jurisdiction on the courts. It therefore suffices to say that the courts have a human rights jurisdiction.

This study has shown that even though the two courts were similar in a number of ways, they received different reactions from the heads of states and government. These differences have been attributed to the nature of the cases themselves. It has been observed that the case of *Campbell v Zimbabwe* involved the issue of land, the case put to test Zimbabwe's national policy of land reform judged against the standards of human rights which made it a highly sensitive case. On the other hand the case of *Katabazi* was an unlawful detention case; it was not a challenge on any issue of national policy. Therefore, the respondents could readily accept the decision of the Court.

Another notable difference between the two cases was the timing. It has been observed that the SADC Tribunal received *Campbell* whilst it was still in its infancy. It had not developed its jurisprudence and had not then acquired institutional security. *Campbell* was therefore too big a case for a new tribunal. The East African Court received *Katabazi* at a time when it had already received similar big cases even though they did not involve human rights. It had therefore established itself as a sub-regional legal institution to reckon with.

Given the broad discussion around whether the suspension of the SADC Tribunal was legal, it can be concluded that the suspension and the adoption of the New Protocol were illegal for the reason that the SADC Treaty does not provide for suspension of the Tribunal. It can also be concluded that the new protocol simply aims to prevent individuals from accessing the Tribunal. This is a clear violation of the right to access to courts.

In respect of the protocol extending the jurisdiction of the EACJ, the slow progress made towards its adoption is a cause for concern and places the sincerity of the political organs of the region in doubt.

The existence of other courts with concurrent jurisdiction is also a cause for concern because of the possibility of forum shopping.⁵⁴⁹ However, the existence of concurrent jurisdiction has helped litigants who face procedural obstacles in the EACJ to litigate in other courts with parallel jurisdiction with the EACJ.

In addition to the above, this work has explored the different reactions to the Courts' decisions in the two cases; thus the need to determine whether these reactions could have been avoided. It has been suggested that it is possible that the SADC Tribunal found itself in this predicament because it did not adjudicate tactfully. Examples of tactical adjudication were drawn from the writings of Theunis Roux.⁵⁵⁰ It has been observed that the SADC Tribunal was a new court in need of maintaining institutional security and legitimacy as a regional judicial body. In the discharge of its duty of consolidating democracy in the region, the Tribunal was likely to face political questions that needed to be addressed in a manner that avoids direct confrontation with the political arms of SADC. Campbell was one such case; thus the need to tactfully adjudicate so as to ensure its own survival.

6.9 Recommendations

- Given the findings stated above, it is important to turn to the necessary recommendations that can be made.
- The SADC Tribunal must be reinstated as a human rights body with human rights jurisdiction and accessible by individuals. The New Protocol on Tribunal should consequently be rejected in its entirety. However, in order to avoid abuse of the process, should individual petitions be restored, the procedural requirement of exhaustion of domestic remedies should be applied strictly.
- The protocol to extend the jurisdiction of the EACJ to human rights should be adopted in order to clarify the human rights jurisdiction of the Court.
- It is also recommended that in future cases, regional and sub-regional Courts, that find themselves in a similar position as that of the SADC Tribunal, should consider using tactical adjudication to avoid possible backlashes against them.
- Lastly, it is recommended an entrenched enforcement mechanisms be established in order to avoid non-compliance.

⁵⁴⁹ It has been highlighted before that the EACJ has concurrent jurisdiction with several other courts.

⁵⁵⁰ See Theunis Roux “ Tactical Adjudication: How the Constitutional Court of South Africa Survived its First Decade” and Theunis Roux “ Principle and Pragmatism on the Constitutional Court of South Africa.”

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