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COMPLIANCE WITH SUB-REGIONAL COURTS JUDGMENTS IN SADC
IN THE CONTEXT OF REGIONAL INTEGRATION IN AFRICA

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by

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Declaration

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Smadala

Sithembele Madala

Abstract

Existing research on the Southern African Development Community (SADC) Tribunal focuses mainly on how it has interpreted its human rights jurisdiction. Extant research on the SADC occasionally notes that Zimbabwe has not complied with all the SADC Tribunal judgments issued against it, but without any detailed analysis of the actual role of the tribunal and the contributions of its decisions to human rights protection and the rule of law. Consequently, based on non-compliance with tribunal decisions by Zimbabwe, some scholars have erroneously concluded that the tribunal is ineffective. The proponents of this view theorise that the SADC Tribunal can only be effective if its judgments are complied with or if a strong enforcement system supports its judgments. Contrary to these claims, however, a growing body of literature on international adjudication shows that international courts (ICs) are important beyond measures of state compliance. Furthermore, like many ICs, the SADC Tribunal depends on the member states and SADC Summit for enforcement and compliance with its judgments. The SADC Tribunal constitutive instruments make it difficult to enforce SADC Tribunal.

Another structural problem that is the fact that even when ICs interpret a coherent set of treaties, unlike a national legislator that can go back and amend the law and override the court's interpretation, it is more cumbersome or even impossible to amend the treaty that the IC interpreted especially if enough number of the parties like the court's interpretation. This is structural.

Moreover, the court had a slow institutional setup which suggests that it was never intended to function as a supranational court but to act as an advisory organ to the SADC by giving advisory opinions on contentious disputes. This also explains why the SADC Summit is the final arbiter and principal organ with the power to enforce tribunal judgments against recalcitrant state. The other structural problem facing an international court such as the SADC Tribunal is that even if interpret coherent set of treaties, it cannot amend domestic laws or override domestic courts interpretation since SADC Treaty and Tribunal Protocol does not create supranational legal system and supranational courts such as the European Court of Justice (ECJ) which has the power to override domestic laws and domestic court judgments that violate fundamental European Union (EU) laws. Therefore, the challenge with enforcement of tribunal judgments is structural and cannot be blamed on the tribunal.

This thesis aims to evaluate the benefits and legal value of the SADC Tribunal beyond state compliance measures. It identifies and evaluates the multiple roles and functions of the tribunal, examines how it has performed these roles and assesses whether it has achieved its goals. This by no means suggests that compliance with the SADC Tribunal judgments is not essential. Rather, the thesis demonstrates that compliance is of limited use in explaining the tribunal's utility and importance. The research adopts goal-based and institutional design approaches to measure the utility of the SADC Tribunal by focusing on the institutional design of ICs and the multiple roles they perform to measure their institutional effectiveness. Drawing heavily on these approaches, the thesis concludes that the SADC Tribunal has performed its roles successfully owing to its institutional design, *ratione materiae* (subject matter jurisdiction) and jurisdiction *ratione personae* (personal jurisdiction). As an institution, the SADC Tribunal has achieved its intermediate goals of treaty interpretation and settlement of disputes. Beyond the intermediate goals set up by the SADC Tribunal's creators, this thesis showed the tribunal had achieved its ultimate goals of promoting human rights jurisprudence and developing SADC legal norms. Therefore, the SADC Tribunal has proven itself as an effective judicial institution that is ready to settle disputes between disputing parties. The prospects and potential of the SADC Tribunal should serve as a continuous incentive for reinstatement to its initial jurisdiction.

These findings require some qualification, namely, as shown later in this research, that this does not mean that the SADC Tribunal decisions had significant impact at the domestic level. Rather, the evidence from this study indicates that the tribunal decisions had only marginal impact at the domestic level. This suggests that more effort must be made to mobilise civil society — including lawyers, human rights activists and domestic judges — to support the work of the SADC Tribunal. The evidence from this study intimates that it is through the efforts of such actors that tribunal judgments can have transformative impact in domestic courts.

List of abbreviations

CJEU	Court of Justice of the European Union
EAC	East African Community
EACJ	East African Court of Justice
EALA	East African Legislative Assembly
ECJ	European Court of Justice
ECCJ	ECOWAS Court of Justice
ECOWAS	Economic Community of West African States
EC	European Commission
EEC	European Economic Community
HRTs	Human Rights Tribunals
ICs	International courts
ICJ	International Court of Justice
ITAA	International Trade Administration Act
PCIJ	Permanent Court of International Justice
REC	Regional economic community
SADC	Southern African Development Community
SADCC	Southern African Development Coordination Conference
SACU	Southern African Customs Union
SCA	Supreme Court of Appeal
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union
TWAIL	Third World Approaches to International Law
VCLT	Vienna Convention on the Law of Treaties

Dedication

This thesis is dedicated to my late mom, Thobeka Evilyn Madala, my sister Sindiswa Madala and my daughter Olumiyo.

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Table of Contents

Declaration.....	i
Abstract	ii
List of abbreviations.....	iv
Dedication.....	v
Acknowledgement.....	vi
CHAPTER 1: INTRODUCTION.....	1
1.1 Background to the study.....	4
1.1.1 The multiplication of international courts (ICs) and tribunals.....	13
1.1.2 Compulsory jurisdiction of ICs.....	17
1.1.3 Broad-based jurisdiction of ICs.....	21
1.1.4 The legitimacy of ICs and tribunals.....	22
1.1.5 Lack of research on international adjudication.....	30
1.2 Problem statement.....	31
1.3 Research question.....	33
1.4 Research methodology.....	33
1.5 Purpose of the study.....	34
1.6 Significance of the study.....	34
1.7 Limitations of the study.....	35
1.8 Definition of key terms.....	35
1.8.1 Compliance.....	35
1.8.2 Enforcement.....	36
1.8.3 Effectiveness.....	38
1.9 Overview of chapters.....	38
1.10 Conclusion.....	40
CHAPTER 2: ROLE OF INTERNATIONAL COURTS IN INTERNATIONAL RELATIONS AND GLOBAL GOVERNANCE.....	42
2.1 Introduction.....	42
2.2 History of international law.....	43
2.3 Definition of international law.....	50
2.4 Is international law really law?.....	52
2.5 Theories of compliance with international law.....	58
2.5.1 Rational choice theories.....	58
2.5.2 Constructivist theories.....	61
2.6 Criticism of state compliance theories.....	64

2.7	Evaluating the performance of ICs and tribunals.....	68
2.7.1	Compliance rate approach	68
2.7.2	Effectiveness	71
2.7.3	Institutional design approach.....	73
2.7.4	Goal-based approach	76
2.7.5	Impact	77
2.7.6	Africa’s ICs as venues for political, legal and social change	79
2.8	Conclusion	83
CHAPTER 3: THE SADC LEGAL AND INSTITUTIONAL FRAMEWORK		85
3.1	Introduction	85
3.2	History of the SADC.....	86
3.3	SADC Tribunal.....	88
3.3.1	Establishment of the SADC Tribunal	88
3.3.2	Composition of SADC Tribunal	89
3.3.3	Jurisdiction of the SADC Tribunal.....	92
3.4	Mechanisms for enforcing SADC Tribunal judgments	94
3.4.1	Enforcement via the SADC member states.....	98
3.4.2	Enforcement by reference to the SADC Summit	102
3.5	Status of SADC community laws before domestic laws.....	106
3.6	Jurisprudence of SADC tribunal.....	108
	(i) <i>Mike Campbell (Pvt) Ltd v The Republic of Zimbabwe — Interim ruling</i>	108
	(ii) <i>Mike Campbell (Pvt) Ltd & others v The Republic of Zimbabwe — main case</i>	110
	(iii) <i>Tembani v Zimbabwe</i>	115
	(iv) <i>Gondo & others v Zimbabwe</i>	116
	(v) <i>Bach’s Transport Pty Ltd v The Democratic Republic of Congo</i>	117
3.7	Contributions of the SADC Tribunal	118
3.7.1	Contribution of the SADC Tribunal to dispute settlement.....	119
3.7.2	Contribution of the SADC Tribunal to the interpretation and development of international human rights	120
3.7.3	Contribution of the SADC Tribunal towards access to international justice.....	122
3.8	Interpretation of SADC laws and SADC Tribunal judgments by domestic courts	124
	(i) <i>Gramara (Private) Ltd & others v Government of Zimbabwe & others</i>	124
	(ii) <i>Etheredge v The Minister of State for National Security Responsible for Lands, Land Reform and Resettlement & another</i>	127
	(iii) <i>Southern Trading Company (PTY) Limited v Minister for Agriculture and Cooperatives</i>	128
	(iv) <i>Progress Office Machines CC v South African Revenue Services & others</i>	130

(v) <i>Government of the Republic of Zimbabwe v Fick & others</i>	131
(vi) <i>Trustees for the time being of the Burmilla Trust & another v President of the RSA & another</i>	133
(vii) <i>Von Abo v President of the Republic of South Africa</i>	135
3.9 Conclusion	136
CHAPTER 4: LESSONS FROM THE EUROPEAN COURT OF JUSTICE (ECJ) ON REGIONAL INTEGRATION	
139	
4.1 Introduction	139
4.2 Foundation of the European Union (EU) integration model.....	140
4.3 EU legal values.....	144
4.4 Court of Justice of the European Union (CJEU).....	147
4.5 Legal status of EU law	149
4.5.1 Direct effect of EU law	149
4.5.2 The supremacy of EU law.....	152
4.6 Interpretation of EU law by domestic courts.....	155
4.7 Infringement proceedings.....	159
4.8 The sanctioning procedure	162
4.9 Conclusion	163
CHAPTER 5: THE EAST AFRICAN COMMUNITY (EAC) INTEGRATION PROCESS: LESSONS FROM THE	
EAST AFRICAN COURT OF JUSTICE (EACJ).....	
166	
5.1 Introduction	166
5.2 Historical background of the EAC.....	167
5.3 East African Court of Justice (EACJ).....	168
5.3.1 Jurisdiction of the EACJ	168
5.3.2 Composition of the EACJ	172
5.4 Nature of EAC law	175
5.4.1 Direct applicability of EAC law	177
5.4.2 Direct effect of EAC law	181
5.4.3 Supremacy of EAC law.....	183
5.5 Is the EAC law an autonomous legal order?	188
5.6 The effect of EAC law on the national legal order	190
5.6.1 Interpretation of the EAC Treaty by domestic courts	192
5.6.2 Impact of EACJ judgments	194
5.7 Conclusion	199
CHAPTER 6: FINDINGS AND RECOMMENDATIONS.....	
201	
6.1. Introduction	201

6.1.1. Roles of Community Courts and Tribunal: A comparative study.....	201
6.2 Findings and Recommendations.....	204
6.3 Chapter summary.....	204
6.3 Summary of the findings.....	206
6.4 Recommendations.....	211
6.5 Contribution of the study.....	217
6.6 Future research.....	217
CHAPTER 7: THESIS CONCLUSION.....	219
BIBLIOGRAPHY.....	224

CHAPTER 1: INTRODUCTION

Existing research on the Southern African Development Community (SADC) Tribunal focuses on its human rights jurisprudence, mainly on how it has interpreted its human rights jurisdiction. Extant research on the SADC occasionally notes that Zimbabwe has not complied with all the SADC Tribunal judgments against it, but without any detailed analysis of the actual role of the tribunal and the contributions of its decisions to human rights protection and the international rule of law.¹ Consequently, some scholars assume that the SADC Tribunal is ineffective owing to non-compliance with its judgment and inadequate enforcement mechanisms.² For instance, some scholars have characterised the SADC Tribunal as a ‘paper tiger that needs to be equipped with teeth’ or as a ‘tiger without teeth’ on the basis that it cannot compel the SADC member states to comply with its rulings since it relies on the SADC member states and the SADC Summit for enforcement of and compliance with its judgments.³ Like many other ICs, the SADC Tribunal depends on the SADC member states and SADC Summit for enforcement and compliance with its judgments.⁴ The SADC Tribunal constitutive instruments make it difficult to enforce SADC Tribunal.⁵ Another structural problem is the fact that even when ICs interpret a coherent set of treaties, unlike a national legislator that can go back and amend the law and override the court’s interpretation, it is more cumbersome or even

¹ Nkhata ‘The Role of Regional Economic Communities in Protecting and Promoting Human Rights in Africa: Reflecting on the Human Rights Mandate of the Tribunal of the Southern African Development Community’ (2012) *African J of Intl and Comp L* 87-109 at 87 <https://doi.org/10.3366/ajicl.2012.0022>; Admark Moyo ‘Defending human rights and the rule of law by the SADC Tribunal: Campbell and beyond’ (2009) *African Human Rights Law Journal* at 9 <https://hdl.handle.net/10520/EJC52146>; Solomon T Eboerah ‘Litigating Human Rights before Sub-Regional Courts in Africa: Prospects and Challenges’ (2009) 17 (1) *African Journal of International and Comparative Law*; Lucyline Nkatha Murungi and Jacqui Gallinetti ‘The Role of Sub-Regional Courts in the African Human Rights System international journal on human rights’ (2010) 7 (13) *Sur International Journal on Human Rights* at 119.

² Carlson, Kerstin Bree *The Justice Laboratory: International Law in Africa* (2022) Brookings Institution Press. at 102; Lonias Ndlovu ‘Following the NAFTA Star: SADC Land Reform and Investment Protection after the Campbell Litigation’ (2011) 15 (59) *Law Democracy & Dev*; Werner Scholtz and Gerrit Ferreira ‘Much Ado About Nothing? The SADC Tribunal’s Quest for the Rule of Law Pursuant to Regional Integration’ (2011) *Max-Planck-Institut für ausländisches öffentliches Recht und Völkerrecht*; Oliver C. Ruppel and Francois-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) Vol 8. Moses Retselisitsoe Phooko *The SADC Tribunal: Its jurisdiction, enforcement of its judgments and the sovereignty of its Member States* (unpublished LLD thesis, University of South Africa, 2016) at 20.

³ Ibid.

⁴ See Article 94 of the United Nations Charter. See also Article 260(2) of the Treaty on the Functioning of the European Union TFEU.

⁵ See Article 6 of the SADC Treaty and Article 32 of the SADC Tribunal Protocol.

impossible to amend the treaty that the IC interpreted especially if enough number of the parties like the court's interpretation. Moreover, as shown in section 3.3.1, the court had a slow institutional setup which suggests that it was never intended to function as a supranational court but to act as an advisory organ to the SADC by giving advisory opinions on contentious disputes. This also explains why the SADC Summit is the principal is the final arbiter and principal organ with the power to enforce tribunal judgments against recalcitrant state. The other structural problem facing an international court such as the SADC Tribunal is that even if interpret coherent set of treaties, it cannot amend domestic laws or override domestic courts interpretation since SADC Treaty and Tribunal Protocol does not create supranational legal system and supranational courts such as the European Court of Justice which has the power to override domestic laws and domestic court judgments that violate fundamental European Union (EU) laws.⁶ Therefore, the challenge with enforcement of tribunal judgments is structural and cannot be blamed on the tribunal.

Compliance is understood as the process of giving effect to the SADC Tribunal judgment by the SADC member states. At the same time, enforcement is the process or any action, legal or extra-legal, taken against any SADC member states by the SADC Summit or another SADC member state to ensure the implementation of the SADC Tribunal decisions.⁷ The narrow focus on the SADC Tribunal enforcement mechanisms and judgment compliance proves that much of the scholarship on the SADC Tribunal ignores the role and actual impact of the SADC Tribunal and its jurisprudence on actors other than the SADC member states. As will be shown, scholars are only now beginning to analyse the impact of SADC Tribunal decisions on domestic courts of SADC member states.⁸

Against this background, the present research highlights the problem of evaluating the utility of the SADC Tribunal through compliance measures. The study aims not to dismiss the importance of these compliance measures, but instead, to show that they are limited in assessing the relevance of the SADC Tribunal. It does so by combining an institutional design

⁶ See Chapter 4, section 4.5.

⁷ See Chapter 1, section 1.4.

⁸ Bonolo Ramadi Dinokatopila 'The Impact of Regional and Sub-regional Courts and Tribunals on Constitutional Adjudication in Africa' in Charles M Fombad *Constitutional Adjudication in Africa* Oxford University Press (2017). See also Mia Swart 'Can Regional and Sub-Regional African Courts Strengthen the Rule of Law in Africa? Questions of Impact and Enforcement' in *Shielding Humanity: Essays in International Law in Honour of Judge Abdul G. Koroma* ch 30 704–725). doi 10.1163/9789004293137025.

approach with a goal-based approach to examine the effectiveness of the SADC Tribunal.⁹ The institutional design approach focuses on the institutional design of international courts (ICs) and the multiple roles they perform to measure their own institutional effectiveness.¹⁰ On the other hand, the goal-based approach focuses on the specific goals of each court.¹¹ This approach is concerned with the outcomes courts produce and the processes they follow when they issue their judgments.¹² Drawing from these two approaches, this thesis shows that the SADC Tribunal has performed its roles well and achieved its ultimate and intermediate goals. Its success is partly due to its institutional design, *ratione materiae* (subject matter jurisdiction) and jurisdiction *ratione personae* (personal jurisdiction).¹³ It is hoped that the discussion about the SADC Tribunal will inspire the SADC leaders to restore it to its initial format by allowing individual access before the tribunal. The next section offers a general background to the SADC Tribunal and an overview of recent international law and adjudication developments, acknowledging the problem of enforcement and compliance facing the SADC Tribunal and ICs in general. Further, it briefly discusses the importance of compliance and draws attention to the problem of excessive focus on compliance measures.

⁹ See the discussion in section 2.6.3. and 2.6.4.

¹⁰ Armin von Bogdandy and Ingo Venzke *In Whose Name? A Public Law Theory of International Adjudication* (2014); Yuval Shany 'No Longer a Weak Department of Power? Reflections on the Emergence of a New International Judiciary' (2009) 20 (1) *The European Journal of International Law* 73–91 <http://ssrn.com/abstract=1389121>. Shelton, Dinah 'Form, Function, and the Powers of International Courts' (2009) 9 (2) *Chicago Journal of International Law* Article 8. Available at <https://chicagounbound.uchicago.edu/cjil/vol9/iss2/8>. Karen J Alter 'The multiple roles of international courts and tribunals: enforcement, dispute settlement, constitutional and administrative review' in Jeffrey L. Dunoff and Mark A. Pollack Cambridge University Press (2013) *Interdisciplinary Perspectives on International Law and International Relations the state of the art*.

¹¹ Yuval Shany *Assessing the Effectiveness of International Courts* Oxford University Press (2014) at 15. See also Theresa Squatrito, Oran R Young, Andreas Follesdal and Geir Ulfstein *A Framework for Evaluating the Performance of International Courts and Tribunals* Cambridge University Press (2018) at 5–6.

¹² Cited in Squatrito et al op cit note 10 at 6.

¹³ In terms of the *ratione materiae* (subject-matter jurisdiction), ICs may only adjudicate cases that raise those factual and legal questions which the founding instruments have defined and/or that one or more of the parties have agreed to refer to adjudication. In other words, it defines the substantive reach of ICs. By contrast, in jurisdiction *ratione personae*, ICs are competent to hear cases only when brought by specific parties against certain other parties subject to certain conditions. See Yuval Shany 'Jurisdiction and Admissibility' in Cesare PR Romano, Karen J Alter, and Yuval Shany *The Oxford Handbook of International Adjudication* Oxford University Press (2014) at 787–8.

1.1 Background to the study

The (old SADC Tribunal) was established in 2005 as a judicial institution of the SADC under Article 9 of the SADC Treaty.¹⁴ The Summit of Heads of State appointed the members of the tribunal in Gaborone, Botswana, on 18 August 2005.¹⁵ Despite the tribunal having been established under the 1992 SADC Treaty, it only became operational in 2005 and received its first case around 2007.¹⁶ Since the establishment of the old SADC Tribunal, several cases were referred to it, most of which were brought against the Zimbabwean government.¹⁷ Among these disputes were eight cases concerning Zimbabwe's agricultural land expropriation policy.¹⁸ The old SADC Tribunal received about thirty applications brought by individuals and issued approximately fifteen judgments before its suspension in 2011.¹⁹ The suspension of the tribunal followed its ruling against the Republic of Zimbabwe's land expropriation policy, which it held was against the principles of human rights, the rule of law and non-discrimination and, therefore, in violation of the SADC Treaty.²⁰

It is generally accepted that Zimbabwe has yet to comply with all SADC Tribunal judgments. The Zimbabwean government refused to comply with SADC Tribunal decisions because the Tribunal lacked jurisdiction, arguing that the protocol was not binding upon it.²¹ Commenting on the problem of lack of enforcement and non-compliance with the SADC Tribunal judgments, Justice Pillay observes that

¹⁴ See Article 9(g) of the SADC Treaty 1992.

¹⁵ Cited in Oliver C. Ruppel and Francois-X. Bangamwabo *The SADC Tribunal: a legal analysis of its mandate and role in regional integration* at 1.

¹⁶ Brian Sang Yk Friends, Persons, Citizens: Comparative Perspectives on Locus Standi and the Access of Private Applicants to Sub-Regional Trade Judiciaries in Africa (2011) 13 (355) *Or. Rev. Int'l L.* at 360.

¹⁷ Erika De Wet 'The rise and fall of the Tribunal of the Southern African Development Community: Implications for Dispute Settlement in Southern Africa' (2013) *ICSID Review* at 3–4. See also Precious N Ndlovu 'Campbell v Republic of Zimbabwe: A moment of truth for the SADC Tribunal' *SADC Law Journal* (2011) 1 at 64.

¹⁸ *Ibid.*

¹⁹ Erasmus, G *The South African Constitutional Court annuls decision on SADC Tribunal: What are the Implications?* tralac Working Paper No. S19WP01/2019 at 7. See also Michelo Hansungule 'The suspension of the SADC Tribunal' 35 (1) *Strategic Review for Southern Africa*. See also Gerhard Erasmus 'The SADC Tribunal ... and its demise' in Gerhard Erasmus, Trudi Hartzenberg, Creck Buyonge Mirito & Dawid van Wyk *African Trade and Integration: Law, Practice and the Courts* (2022) at 138.

²⁰ *Ibid.*

²¹ *Campbell v Republic of Zimbabwe* (Contempt of Court Ruling), Case No SADC (T) 03/2009 (5 June 2009).

the SADC Tribunal can significantly contribute to regional integration if its decisions are properly enforced at the national level and if they serve as guidelines for national Courts when deciding on questions that might also be relevant at the national level.²²

Nyman-Metcalf and Papageorgiou emphasise that enforcing the court's judgments is critical to any effective judicial system, whether in domestic or ICs.²³ In their view, when courts' decisions are not enforced and respected, it is very likely that the decisions will be undermined along with the political systems existing within the state.²⁴ This is particularly relevant for regional integration systems, where a lack of enforcement may lead to questioning the organisation's legitimacy.²⁵ The main concern with judicial bodies, particularly those with an international character such as the SADC Tribunal, is whether member states will comply with their decisions.²⁶ These fears emanate from the fact that the court is aware that it is limited when giving remedial orders against powerful governments since it has no jurisdictional competence outside the mechanisms provided by the founding treaty to ensure compliance with its decisions.²⁷ Accordingly, enforcement of judgments is one of the key factors for ensuring the credibility of a whole judicial system.²⁸ In short, the credibility of the human rights protection system greatly depends on enforcing a court's judgment.²⁹ For these reasons, the complete execution of judgments helps to enhance the court's prestige and the effectiveness of its action. It has the effect of limiting the number of applications submitted to it.³⁰

From the perspective of individuals, plaintiffs are more concerned with enforcing the subsequent judgment.³¹ Consequently, they care less about the principles of law applied to

²² HE Justice Ariranga Govindasamy Pillay speech during the launch of 'Monitoring Regional Integration in Southern Africa Yearbook Volume 8, 2008' in MCC Mkandawire *The SADC Tribunal perspective on enforcement of judgments: state support and cooperation* Bulletin, 36:3, 567–573, available at <http://dx.doi.org/10.1080/03050718.2010.500852> at 570.

²³ Katrin Nyman-Metcalf and Ioannis Papageorgiou 'Why should we obey you? Enhancing implementation of rulings by regional courts' (2017) 1 *African Human Rights Yearbook* at 183.

²⁴ Ibid.

²⁵ Ibid.

²⁶ Tarisai Mutangi *Executing judgments of the SADC Tribunal rendered under its human rights related jurisdiction by utilising the foreign judgments (registration and enforcement) procedure: Prospects and Challenges* (10 August 2011) available at <http://dx.doi.org/10.2139/ssrn.1907891> at 6.

²⁷ Ibid.

²⁸ Élisabeth Lambert Abdelgawad 'The enforcement of ECtHR Judgments' in András Jakab and Dimitry Kochenov *The Enforcement of EU law and values-ensuring Member States' compliance* (2017) at 326.

²⁹ Ibid.

³⁰ Ibid.

³¹ Richard Frimpong Oppong and Lisa C. Niro: 'Enforcing Judgments of International Courts in National Courts' (2014) 5 *Journal of International Dispute Settlement* at 345–6. doi: 10.1093/jnlids/idt028.

adjudicate their dispute.³² They are more concerned with the judgment itself as a remedy and the material value of such judgment or remedy.³³ For these reasons, enforcement of court judgments is vital for individuals and critical for the court's legitimacy since the authority of the court depends on the enforcement of its judgments. Furthermore, although individuals may experience and suffer from non-compliance with IC rulings, particularly victims of human rights, the consequences of non-compliance with court rulings go beyond individual circumstances.³⁴ Although non-compliance with court rulings is a violation of treaty obligations, the refusal by states to comply with judicial decisions reduces judgments issued by courts to 'victory without justice for victims, the creation of impotent/ineffective judicial institutions, as well as the reversal of the gains of the international justice agenda'.³⁵

In sharp contrast, Duffy suggests that there is a general tendency to view litigation through an extremely limited frame.³⁶ Accordingly, the tendency is sometimes to focus on what happens inside the courtroom, or on the pleadings — or the focus may be on judgment day, viewed as the conclusion of the litigation process, in which justice will be served.³⁷ In terms of this narrow and static view, successful lawyers and clients are seen on the steps of the court after judgment has been given, celebrating the court ruling.³⁸ However, the positive impact of litigation or court decisions goes beyond winning or losing a case. Therefore, there is a need to move away from the steps of the courtroom on judgment day.³⁹ This is because what happens outside the court may be more important than what happens in the courtroom, or than the court judgment itself.⁴⁰ This conclusion is congruent with the work of Gathii, who argues that the goals of activists and litigants litigating before African ICs extends beyond merely seeking victory or loss.⁴¹ Accordingly, they view litigation in an IC as politically and legally subversive

³² Ibid at 346.

³³ Ibid.

³⁴ Swikani Ncube: 'Access to international justice in Africa: the conundrum of states' non-compliance with judicial decisions' (2017) *CILSA* 395 at 404.

³⁵ Ibid.

³⁶ Helen Duffy *Strategic Human Rights Litigation: Understanding and Maximising Impact* (2018) at 37.

³⁷ Ibid.

³⁸ Ibid.

³⁹ Ibid at 44.

⁴⁰ Ibid.

⁴¹ James Thuo Gathii 'Introduction The Performance of Africa's International Courts' in James Thuo Gathii *The Performance of Africa's International Courts: Using Litigation for Political, Legal, and Social Change* (2020) at 20.

since they are mindful that states consider being sued in ICs as undermining their sovereignty.⁴² Therefore, filing cases before Africa's ICs, winning cases or ensuring compliance is one but not the ultimate goal of those filing cases before these courts.⁴³ Litigants and activists who continuously file cases relating to human rights in ICs do not have the ultimate goal of ensuring governments comply with these particular decisions.⁴⁴

In view of the fact that victory is not the only ultimate goal of litigation, activists and litigants use defeat as an opportunity to organise their supporters, encourage fundraising including raising these defeats as sign of systemic state oppression.⁴⁵ On the whole, legal defeats may serve a similar purpose to legal victories.⁴⁶ As noted by Duffy, a losing case that exposes injustices and promotes further action may, in the end, be transformative.⁴⁷ Hence, there is a need to rethink success in human rights litigation.⁴⁸ In order to understand more accurately the importance of human rights litigation, Duffy contends that it is important to take into account its impact on victims, survivors and their families and communities, on perpetrators and institutions, on the law and public policy, on attitudes, discourse, behaviour, and on fundamental principles such as rule of law and democracy.⁴⁹ For Duffy, there can definitely be 'success without victory' since lost cases can also have their own influence by contributing to longer-term change.⁵⁰

Current research shows that although the suspension and subsequent disbandment of the SADC Tribunal and the limitation of its jurisdiction was a significant setback for activist litigants who use African ICs, it was followed by activism in a number of forums to challenge the disbandment.⁵¹ The suspension of the tribunal has allowed activists to voice their

⁴² Ibid.

⁴³ Ibid at 22.

⁴⁴ Ibid at 23.

⁴⁵ Ibid at 25–26.

⁴⁶ Ibid at 26.

⁴⁷ Cited in Duffy op cit note 35 at 37.

⁴⁸ Ibid.

⁴⁹ Ibid at 37–38.

⁵⁰ Ibid at 271–272.

⁵¹ Cited in Gathii op cit note 40 at 26. For more discussion on the SADC Tribunal revival attempts, see Erika de Wet 'The controversial role of litigation in the struggle to revive individual access to the Tribunal of the Southern African Development Community' *International Organizations Law Review* (2020) at 1–33; Peter Brett *Human Rights and the Judicialisation of African Politics* (2019) at 150; Phooko 'Has the SADC Tribunal been Salvaged by the South African Constitutional Court and the Tanzanian High Court?' (2020) 34 *Spec Juris* at 174. Phooko & Nyathi 'The revival of the SADC Tribunal by South African courts: A contextual analysis of the decision of the Constitutional Court of South Africa' (2019) *De Jure Law Journal* at 415–432. doi.org/10.17159/2225-

dissatisfaction not only in respect of the government of Zimbabwe, but also against the SADC as an international institution.⁵² As a result, the suspension and disbandment of the SADC Tribunal offered an opportunity to mobilise popular support for the revival of the SADC Tribunal to its initial jurisdiction.⁵³ It was through this activism and political pressure that the South African government was forced to withdraw its signature from the new 2014 SADC protocol that removed individual access.⁵⁴ Furthermore, the disbandment of the SADC Tribunal has allowed domestic South African courts to find creative ways to enforce the SADC Tribunal decisions, despite the former not being designated in terms of rules of recognition and enforcement of foreign judgments.⁵⁵ It has also mobilised new constituencies who found creative ways to enforce its judgment in other international and domestic forums.⁵⁶ Therefore, it is clear that the utility and legal value of the SADC Tribunal does not lie simply in its ability to remedy the thousands of violations in SADC region.⁵⁷ In summary, measuring the performance of ICs according to compliance or enforcement ignores how the litigation process shapes the development of the law.⁵⁸ Importantly, it overlooks how such court cases can help to frame political and legal mobilisation outside the courtroom.⁵⁹

While early studies suggested that enforcement and compliance with court judgments are essential for IC effectiveness and legitimacy, current research suggests that too much focus on compliance with court judgments ignores other important aspects of court effectiveness, such as the impact of the court decision on other actors not bound by a particular court decision.⁶⁰

7160/2019/v52a21. See also *Law Society of South Africa & others v President of the Republic of South Africa & others* (CCT67/18) [2018] ZACC 51; 2019 (3) BCLR 329 (CC); 2019 (3) SA 30 (CC); *Tanganyika Law Society versus Ministry of Foreign Affairs and International Cooperation of the United Republic of Tanzania and the Attorney General of the United Republic of Tanzania* Case No. 23 of 2014 (Judgment delivered on 6 June 2019).

⁵² Cited in Gathii op cit note 40 at 26.

⁵³ *Ibid.*

⁵⁴ *Ibid* at 27.

⁵⁵ *Ibid* at 27–28.

⁵⁶ *Ibid* at 28.

⁵⁷ *Ibid.*

⁵⁸ *Ibid* at 28–29.

⁵⁹ *Ibid.*

⁶⁰ See Alexandra Huneus ‘Compliance with Judgments and Decisions’ in Cesare PR Romano, Karen J Alter, and Yuval Shany *The Oxford Handbook of International Adjudication* (2014) at 439; Cited in Yuval Shany *Assessing the Effectiveness of International Courts* (2014) at 118; Yuval Shany ‘Compliance with decisions of international courts as indicative of their effectiveness: a goal-based analysis’ in James Crawford and Sarah Nouwen *Select Proceedings Of The European Society Of International Law Third Volume International Law 1989–2010: A Performance Appraisal Cambridge, 2–4 September 2010* (2012) at 240–241; Victor Ayeni ‘Beyond Compliance Do Decisions of Regional Human Rights Tribunals in Africa Make a Difference?’ in Aderomola Adeola *Compliance with International Human Rights Law in Africa* (2022) 35–71 at 38; Cited in James Thuo Gathii

More importantly, they overlook the multiple roles and functions that ICs perform other than law enforcement.⁶¹ Notably, excessive focus on compliance with court judgments ignores the broader set of goals that the ICs have been established by their creators to achieve.⁶² Above all, compliance measures ignore the importance of litigation.⁶³ Court decisions can act as the experiences of an individual or group, leading to recognition of the wrongdoing committed against them and serving as a type of acknowledgement.⁶⁴ Litigation can also provide victims with a voice, allowing them to be heard, accuse and explain, and for others to acknowledge suffering, wrongs and responsibility.⁶⁵ Litigation may also act or lead to an institutional recognition of responsibility.⁶⁶ This normally happens where there has been a political transition, such that a state ‘apologises’ on behalf of a previous government.⁶⁷ Litigation may also have a profound impact on victims themselves, who later become activists or supporters of other victims in order to assist them to claim their rights.⁶⁸ The preferred approach of the present study is the broader view, which accepts that activists and litigants file cases for a number of reasons other than to obtain a successful judgment and ensure judgment compliance.

The overly focus on coerced enforcement and compliance measures also ignores the fact that sometimes the losing party (usually the state) may voluntarily comply with IC judgment because it either understand what the judgment requires it to do or voluntarily comply to protect its reputation since it is generally accepted that there are reputational costs associated with non-compliance with ICs judgments.⁶⁹ Alter observe that losing a case may generate costs in the form of legal fees for the losing party, restorative remedies, punitive sanctions, and reputational

Introduction: *The Performance of Africa’s International Courts* at 4; Frans Viljoen & Victor Ayeni ‘A comparison of state compliance with reparation orders by regional and sub-regional human rights tribunals in Africa: case studies of Nigeria, The Gambia, Tanzania, Uganda and Zimbabwe’ (2022) 26 (9) *The International Journal of Human Rights* at 1659. Available at <https://doi.org/10.1080/13642987.2022.2057953>.

⁶¹ See the discussion in Chapter 2, section 2.6.

⁶² As above.

⁶³ Cited in Duffy op cit note 35 at 50.

⁶⁴ Ibid at 51.

⁶⁵ Ibid at 58.

⁶⁶ Ibid.

⁶⁷ Ibid.

⁶⁸ Ibid at 59.

⁶⁹ Chiara Giorgetti ‘What happens after a judgment is given? Judgment compliance and the performance of international courts and tribunals’ in Theresa Squatrito, Oran R. Young, Andreas Follesdal, and Geir Ulfstein *A Framework for Evaluating the Performance of International Courts and Tribunals* (2018) at 345. Andrew T. Guzman *How International Law Works A Rational Choice Theory* Oxford University Press, 2008 at 34.

costs since most IC rulings are public.⁷⁰ As observed by Guzman, states are concerned about reputational costs of non-compliance and obey international law and enforce international courts judgments to protect their reputation as reliable partners.⁷¹ The reputational costs of noncompliance motivate or encourages compliance with ICs rulings.⁷² When an IC judgment is delivered, it becomes more crucial to states to seen as following IC decision to preserve their international image and reputation and thus have access to trade and investment.⁷³ Hillebrecht argues that one of the reasons why states may comply with an adverse court judgment is because compliance allows states to show their commitment to human rights and build a reputation for compliance with human rights and international law in general.⁷⁴ Accordingly, the ruling political class can use a reputation for respecting human rights and the rule of law as important source of political legitimacy.⁷⁵ For instance, Colombia, with its weak domestic political institutions and poor human rights record, has a strong motivation to use compliance with the IACtHR's decisions to show a commitment to human rights and improve its international reputation.⁷⁶

Gathii observe that by pushing ICs to make adverse rulings against a government's wishes, these courts increase the costs of noncompliance for the defendant state that is being sued.⁷⁷ Thus, litigation has the potential to raise costs because of the reputational costs involved in naming and shaming governments for rights violations including the time and resources that governments must spend to defend themselves in these ICs.⁷⁸ However, Gathii does recognise that some governments may not care about reputational costs because the stakes raised by a certain case may move beyond the issue of reputational costs that may be suffered by a particular government.⁷⁹ Gathii's edited book studies demonstrate that in the context of Africa's ICs, there is insufficient evidence supporting the theory that ICs cases are either filed

⁷⁰ Alter Karen J *The New Terrain of International Law: Courts, Politics, Rights* (2014) Princeton University Press at 82.

⁷¹ Cited in Andrew T. Guzman op cit note 68 at 34.

⁷² Cited in Chiara Giorgetti op cit note 68 at 348.

⁷³ Ibid.

⁷⁴ Hillebrecht Courtney *The Domestic Politics and International Human Rights Tribunals: The Problem of Compliance* (2014) Cambridge University Press pp 3-76.

⁷⁵ Ibid.

⁷⁶ Ibid.

⁷⁷ Cited in James Thuo Gathii 'Introduction The Performance of Africa's International Courts' at 22.

⁷⁸ Ibid.

⁷⁹ Ibid.

to raise reputational costs or that African states calculate the cost of non-compliance when faced with a decision of an ICs.⁸⁰ However, empirical research from Ordor demonstrate that there is strong evidence that states comply with East African Court of Justice (EACJ) and the ECOWAS Court of Justice judgments to protect their reputation at the international level because no states wants to be seen violation their international obligations.⁸¹

On the other hand, successful compliance also depends on the type of remedies that are available to courts.⁸² In particular, the less onerous the remedies issued are, the more likely it is for the losing party to comply with the decision of the court.⁸³ For Giorgetti, one of the elements that could encourage compliance is the type of decision that the court delivers.⁸⁴ Accordingly, courts may use different methods to make a substantive judgment a low-cost decision for the losing party.⁸⁵ Thus, if the losing party perceive the substantive part of the judgment as reasonable, understandable and that the court took note of its arguments, it becomes easier to comply.⁸⁶ For instance, a court can induce low resistance in a judgment by using a language that support or accept some of the arguments advanced by the losing party, therefore showing a sympathetic view.⁸⁷ The WTO Appellate Body (AB) has used this method in the US-Shrimp case.⁸⁸ As observe by Gerstetter, a court judgment that is viewed as unjust or inappropriate or inconsistent with the law is likely to ignored or rejected by its constituencies such as the parties to a case, other actors using ICs, legal practitioners and academics, or the wider public.⁸⁹ Similarly, a court decision that is poorly reasoned, refers to arguments that are irrelevant, or is contradictory, is also likely to be ignored or rejected.⁹⁰ Consequently, a court's judicial style is crucial for legitimising court decisions.⁹¹ Incidentally, the use of separate

⁸⁰ Ibid.

⁸¹ Ada Ordor Advancing the Role of Regional Courts for Regional Integration in Africa: A Study of the East African Court of Justice and the ECOWAS Court of Justice 2018) 45 (2) *The African Review* (Special Issue December 2018) 63–81.

⁸² Cited in Chiara Giorgetti op cit note 68 at 345.

⁸³ Ibid.

⁸⁴ Ibid.

⁸⁵ Ibid.

⁸⁶ Ibid.

⁸⁷ Ibid.

⁸⁸ Ibid.

⁸⁹ Christiane Gerstetter Substance and Style—How the WTO Adjudicators Legitimize their Decisions in Andreas Follesdal and Geir Ulfstein *The Judicialization of International Law A Mixed Blessing?* Oxford University Press 2018.

⁹⁰ Ibid.

⁹¹ Ibid.

opinions demonstrate meticulousness, that the majority has covered multiple perspectives and overcame criticisms.⁹² Separate opinions mean the court does not completely dismiss the arguments of the losing party.⁹³ They allow their arguments to be recognised or given thorough attention, which may provide a future way forward or explain why their arguments were successful or unsuccessful.⁹⁴ The losing party to the dispute may be satisfied by the fact that it at least managed to convince some members of the court with its reasoning.⁹⁵

As argued above, enforcement of and compliance with ICs judgments is necessary since respect for courts is partly dependent on enforcement and compliance with court rulings. Furthermore, compliance with court decisions is vital for respect for the rule of law; non-compliance with ICs judgments undermines the international rule of law. However, it must be noted that ICs perform many other roles other than law compliance. Therefore, while they may perform poorly in law or judgment compliance, ICs may perform well in other areas such as treaty interpretation and development of international norms. Hence, there is a need to move beyond compliance measures without necessarily negating their importance when evaluating the value of ICs such as the SADC Tribunal.

The following subsection discusses the nature, value and challenges around international adjudication. It highlights the multiplication of ICs and tribunals and other attendant issues to provide a contextual background to studying international adjudication. Two changes in international law are highlighted, namely the rise of non-state actors such as individuals and non-governmental organisations (NGOs) as subjects of international law, and the increasing number of new ICs with compulsory jurisdiction. The implications of these changes for understanding the role of ICs, including the SADC Tribunal, are then discussed.

⁹² David Yuratich Towards separate opinions at the Court of Justice of the European Union Lessons in deliberative democracy from the International Court of Justice and elsewhere in Kent, Skoutaris and Trinidad *The Future of International Courts Regional, Institutional and Procedural Challenges* Routledge (2019) at 209.

⁹³ Ibid at 211.

⁹⁴ Ibid.

⁹⁵ Ingo Venzke Antinomies and Change in International Dispute Settlement: An Exercise in Comparative Procedural Law in Rüdiger Wolfrum *International Dispute Settlement: Room for Innovations?* Springer 2012 at 255.

1.1.1 The multiplication of international courts (ICs) and tribunals

The international legal system, including courts and tribunals, is undergoing significant transformation based on factors such as globalisation, protection of the environment and individuals beyond single state boundaries.⁹⁶ Given the increasing problems of globalisation, several ICs and tribunals are being established to resolve disputes that concern the global community.⁹⁷ Commenting on these developments, Helfer and Alter observe an increase in the judicialisation of international law in the last decade.⁹⁸ In 1989, there were six permanent ICs,⁹⁹ while currently, there are at least 24 permanent ICs in existence.¹⁰⁰ From an African perspective, at least nine new-style ICs are empowered with compulsory jurisdiction to decide individual cases.¹⁰¹ The disbanded SADC Tribunal was one of these new courts. African regional blocs have created more ICs than any other regional organisation and all African countries are under the jurisdiction of at least one IC.¹⁰²

The judicialisation and adjudication of international law is particularly widespread in the field of human rights litigation.¹⁰³ It should be noted that human rights litigation is no longer limited to courts and bodies with human rights mandate.¹⁰⁴ Consequently, regional courts and ICs such as the International Court of Justice (ICJ) and the European Court of Justice (ECJ) are increasingly assuming human rights jurisdiction despite lack of an express mandate to do so.¹⁰⁵ The proliferation of ICs and tribunals has made it possible for states to settle their disputes peacefully through legal means, to attain legitimation through compliance assessment by an

⁹⁶ Angela Del Vecchio 'Globalization and its effect on International Courts and Tribunals' (2006) 5 *The Law and Practice of International Courts and Tribunals* 1–11.

⁹⁷ *Ibid.*

⁹⁸ Laurence R. Helfer; Karen J Alter, 'Legitimacy and Lawmaking: A Tale of Three International Courts' (2013) 14 *Theoretical Inq. L.* at 480.

⁹⁹ Karen J Alter 'The Multiplication of International Courts and Tribunals After the End of the Cold War' in Cesare PR Romano, Karen J Alter, and Yuval Shany *The Oxford Handbook of International Adjudication* Oxford University Press (2014) at 63–89.

¹⁰⁰ *Ibid* at 64.

¹⁰¹ *Ibid.*

¹⁰² Peter Brett and Line Engbo Gissel *Africa and the Backlash Against International Courts* (2020) 16–33, available at <http://dx.doi.org/10.5040/9781350218093.ch.001>, accessed 21 July 2021.

¹⁰³ Cited in Duffy *op cit* note 35 at 9.

¹⁰⁴ *Ibid* at 15.

¹⁰⁵ *Ibid.*

independent body, and to fight impunity for the most severe crimes.¹⁰⁶ This is a welcome contribution of every IC and tribunal from the rule of law perspective.¹⁰⁷

On the other hand, the unstructured and non-hierarchical expansion of ICs has also raised alarms concerning the potential impact on the coherence of international law.¹⁰⁸ Scholars and legal practitioners are concerned that the fragmentation of the institutional framework might translate into a fragmentation of the legal framework.¹⁰⁹ Correspondingly, competing jurisdictions, parallel proceedings, conflicting decisions and ‘forum shopping’ may imperil and undermine not only the rule of law and the legitimacy of the international legal order but may also create a risk that ‘the very essence of a normative system of law will be lost’.¹¹⁰ Indeed, the expansion and multiplication of ICs and tribunals will likely lead to competing and conflicting jurisdiction, with multiple courts adjudicating the same disputes. While the overlapping jurisdiction may enhance access to justice for non-state actors such as individuals and NGOs and contribute to developing human rights norms, it may also lead to courts exercising jurisdiction over the same matter. In such a scenario, how can it be established whose view prevails,¹¹¹ and how does any given court decide which of the many norms now developed are applicable?¹¹² On the issue of overlapping jurisdictions, Higgins suggests that applicants may resort to ‘forum shopping’ to their advantage, considering factors such as court access, applicable procedure, court composition and the court’s case law.¹¹³

The problem of overlapping jurisdiction became evident in the case of former Chadian dictator Hissène Habré whereby both Belgium and Senegal simultaneously claimed jurisdiction over the case.¹¹⁴ Consequently, the dispute over who had jurisdiction to prosecute Hissène Habré resulted in a long-protracted dispute which made it difficult to prosecute him.¹¹⁵ As

¹⁰⁶ Geert De Baere, Anna-Luise Chané and Jan Wouters ‘The contribution of international and supranational courts to the rule of law: A framework for analysis’ in Geert De Baere and Jan Wouters *The Contribution of International and Supranational Courts to the Rule of Law* (2015) at 75–76.

¹⁰⁷ Ibid.

¹⁰⁸ Ibid.

¹⁰⁹ Ibid.

¹¹⁰ Ibid.

¹¹¹ Rosalyn Higgins ‘A Babel of Judicial Voices? Ruminations from the Bench’ (2006) 55 *Int’l & Comp. L.Q.* 791 at 792.

¹¹² Ibid.

¹¹³ Ibid at 798–799.

¹¹⁴ Jan Arno Hessbruegge ‘ECOWAS Court Judgment in *Habré v. Senegal Complicates Prosecution in the Name of Africa*’ (3 February 2010) *Am. Soc’y of Int’l L.*

¹¹⁵ Ibid.

demonstrated here, while the multiplication of ICs can contribute towards the peaceful settlement of disputes, to the fighting of impunity and to the promotion of the rule of law, it can also have negative consequences, such as delaying access to justice and denying victims of human rights violations a remedy before an independent court.

However, in spite of the challenges of overlapping jurisdiction, the issue of fragmentation and conflicting jurisdiction is not as intense as was initially predicted owing to transnational judicial dialogue between ICs and domestic courts.¹¹⁶ Research shows that modern international tribunals enrich and strengthen the unity of international law in maintaining its capacity to settle disputes in different areas of international law at interstate and intrastate levels.¹¹⁷ The extension of international jurisdiction by creating contemporary international tribunals shows how modern international law has changed: it is no longer unresponsive to human suffering.¹¹⁸ Accordingly, in the performance of their general mission of promoting and advancing justice, contemporary international tribunals take note of each other's case law and are engaged in "jurisprudential cross-fertilisation."¹¹⁹

The multiplication of ICs suggests that countries are ready and willing to settle their disputes through judicial means. However, it is worth noting that Africa's ICs were established primarily to attract donor funding rather than being based on the need to settle disputes through judicial means.¹²⁰ It is generally accepted that the ruling African political elites created Africa's ICs to show economic reforms and comply with donor conditionalities that required respect for human rights and the rule of law.¹²¹ In particular, the SADC Summit established the SADC Tribunal to attract donor funding.¹²² The critical point is that the SADC leaders needed to be

¹¹⁶ Cited in De Baere, Chané and Wouters op cit note 105 at 77.

¹¹⁷ Antônio Augusto Cançado Trindad 'Prologue: An overview of the contribution of international tribunals to the rule of law' in Geert De Baere and Jan Wouters *The Contribution of International and Supranational Courts to the Rule of Law* (2015) at 12–13.

¹¹⁸ Ibid at 13.

¹¹⁹ Ibid.

¹²⁰ Cited in Peter Brett and Line Engbo Gissel *Africa and the Backlash Against International Courts* at 22, 32, 58–62; See also Karen J Alter *The New Terrain of International Law: Courts, Politics, Rights* (2014) at 204; Tobias Lenz 'Spurred Emulation: The EU and Regional Integration in SADC and Mercosur' (2012) 35 (1) *West European Politics* 155–173 at 165–167, available at <https://doi.org/10.1080/01402382.2012.631319>. See Brett Peter *Human Rights and the Judicialisation of African Politics* Routledge 2019. See also Hulse Merran & Anna van der Vleuten 'Agent Run Amuck: The SADC Tribunal and Governance Transfer Roll-back' in Tanja A Börzel and Vera van Hüllen *Governance Transfer by Regional Organizations Patching Together a Global Script* (2015) Palgrave Macmillan.

¹²¹ Ibid.

¹²² Ibid.

more sincerely committed to establishing the tribunal; therefore, suspending it became easy when it threatened the authority of SADC member states.

Referring to the multiplication of ICs and enthusiasm for them, Alter submits that the end of the Cold War ‘created a conjunctural moment where old international political arrangements were disrupted, and governments worldwide needed to search for new strategies’.¹²³ Accordingly, the domestic supporters exploited these developments and promoted international judicial models.¹²⁴ Alter attributes the changes in Africa to the end of the Cold War, which led African leaders to explore new sources of financial support and the increasing donor conditions that required African governments to respect human rights and implement economic reforms.¹²⁵ Accordingly, this confluence of encouragements enabled African lawyers to advocate for international judicial changes.¹²⁶ By all accounts, African leaders embraced the establishment of many ICs to show their commitment to economic reforms.¹²⁷

As illustrated, since the end of the Cold War, old international political systems have been disrupted, and governments worldwide have been searching for new ways to address global problems. Consequently, the domestic supporters of the new political system saw this as an opportunity to introduce policies that promoted international judicial systems into international politics. In short, the shift in global politics also meant that many African leaders had to mobilise for new sources of financial support and comply with Western donor conditionalities that demanded respect for human rights and economic reforms. Therefore, many African leaders supported the creation of ICs to comply with the conditionalities imposed on them. Consequently, many African leaders were not sincerely committed to creating these new types of ICs but established them to attract investment and aid from Western donors. At the same time, advocacy groups, including African lawyers, did not trust emerging African governments to safeguard human rights or to provide security for their citizens. Therefore, they

¹²³ Cited in Karen J Alter op cit note 69 at 78.

¹²⁴ Ibid.

¹²⁵ Ibid at 204.

¹²⁶ Ibid.

¹²⁷ Ibid.

sought protection from independent ICs. This provided an opportunity for African lawyers to call for international judicial reforms.

On the other hand, the increasing reliance on ICs to achieve and consolidate democracy raises many questions. Are states relying too much on the courts to achieve and consolidate democratic governance and solve global problems? What does this say about the type of governments that emerged after the Cold War? The tendency of new democracies in post-authoritarian states to delegate the responsibilities of promoting and consolidating democracy to the courts has been questioned.¹²⁸ Accordingly, the constitutional and regional human rights courts are viewed as a panacea in a well-functioning democratic system.¹²⁹ These questions and more are further discussed in Chapter 2.¹³⁰ The following section discusses the compulsory jurisdiction of ICs and the diminishing role of state consent.

1.1.2 Compulsory jurisdiction of ICs

Concomitantly, ICs no longer adjudicate only interstate disputes but have expanded their jurisdiction to allow non-state actors to litigate before them.¹³¹ New-style ICs have compulsory jurisdiction and allow non-state actors to initiate litigation without the consent of the defendant state.¹³² Consequently, ICs are likely to change the meaning of law in ways the defendant government may criticise but that non-state actors and other governments may prefer.¹³³ While international law is generally founded on state consent,¹³⁴ its meaning and scope have changed since the twentieth century.¹³⁵ In particular, there has been a fundamental shift in the meaning and practice of international adjudication from a traditional consensual paradigm to a

¹²⁸ Tom Gerald Daly *The Alchemists Questioning Our Faith in Courts as Democracy-Builders* (2017) at 1. See also Avidan Kent, Nikos Skoutaris and Jamie Trinidad ‘The future of international courts What next?’ in Avidan Kent, Nikos Skoutaris and Jamie Trinidad *The Future of International Courts Regional, Institutional and Procedural Challenges* Routledge (2019) at 271.

¹²⁹ *Ibid.*

¹³⁰ See Chapter 2, section 2.7.6.

¹³¹ See James Summers ‘Introduction’ in James Summers and Alex Gough *Non-State Actors and International Obligations Creation, Evolution and Enforcement* (2018) at 1–12. See also Karen J Alter *The evolution of International Law and Courts* in Orfeo Fioretos, Tullia G. Falletti, and Adam Sheingate *The Oxford Handbook of Historical Institutionalism*, Oxford University Press (2016). See also Katrin Nyman-Metcalf and Ioannis Papageorgiou ‘Why should we obey’ at 185–187.

¹³² Karen J Alter op cit note 69 at 6.

¹³³ *Ibid* at 7.

¹³⁴ Guzman, Andrew T. ‘Against Consent’ (2012) 52 (4) *Virginia Journal of International Law* 747–790.

¹³⁵ Cesare PR Romano ‘The Shift from the Consensual to the Compulsory Paradigm in International Adjudication: Elements for a Theory of Consent’ (2007) 39 *N.Y.U. J. Int’l L. & Pol.* at 793.

compulsory paradigm.¹³⁶ The shift from state consent to creating newly styled ICs with compulsory jurisdiction has also subjected states to the compulsory jurisdiction of domestic courts.¹³⁷ This shift has limited the role of states and politics in international adjudication. However, the shift from consent to compulsory jurisdiction does not mean that the principle of consent is no longer in force.¹³⁸ State consent remains valid, but its importance is reduced.¹³⁹ While state consent remains an important source of legitimacy for ICs, it can no longer withstand many of the decisions issued in recent decades.¹⁴⁰

In other words, new-styled ICs generally operate outside the nation-states and do not necessarily need state consent to exercise their authority. Therefore, new generations of ICs can nullify domestic laws or court decisions inconsistent with international law without the consent of the defendant state. These changes demonstrate the diminishing role of states in international affairs and the increasing role of ICs and non-state actors in international law. As a result, non-state actors such as civil society groups are not only able to determine the meaning of international law but may also litigate any violation of its contents without the consent of the defendant states. Consequently, the government no longer has exclusive control over the contents of international law and no influences the direction of international adjudication. It is generally accepted that governments have limited their sovereignty. Nowadays, international legal systems empower non-state actors to enforce international law. Thus, the long-established limitation of access to international dispute settlement mechanisms only to interstate disputes is increasingly being challenged by multifaceted non-state actors.¹⁴¹ An example of this is found in the SADC Tribunal Protocol of 2001 which grants direct access to private parties (natural and legal persons) after having exhausted all domestic remedies.¹⁴² By becoming parties to the SADC Tribunal Protocol, it can be inferred that SADC member states consented to the jurisdiction of the Tribunal. Thus, the tribunal enjoys normative legitimacy which allows

¹³⁶ Ibid at 794.

¹³⁷ Born G 'A new generation of international adjudication' (2012) 61 (4) *Duke Law Journal* 775–880 at 823.

¹³⁸ Cited in Cesare PR Romano op cit note 134 at 795.

¹³⁹ Ibid.

¹⁴⁰ Cited in Armin von Bogdandy and Ingo Venzke *In Whose Name? A Public Law Theory of International Adjudication* (2014) at 3.

¹⁴¹ Eric de Brabandere 'Non-state actors in international dispute settlement pragmatism in international law' in Jean d'Aspremont *Participants in the International Legal System Multiple Perspectives on Non-state Actors in International Law* (2011).

¹⁴² Article 15 of the SADC Tribunal Protocol of 2001.

it to exercise authority and jurisdiction over SADC member states and private parties. However, as discussed in Chapter 3, this position was based on the old SADC Tribunal and has since changed since the adoption of the new protocol.

In terms of the new SADC Tribunal Protocol of 2014, the tribunal jurisdiction is limited to interpretation of SADC treaty and protocols relating to disputes between member states. As a result, the new SADC Tribunal will only hear interstate disputes. More importantly, individuals filing cases before the SADC Tribunal did not need the consent of the defendant states to file cases before the SADC Tribunal.¹⁴³ However, Zimbabwe's challenge to SADC tribunal jurisdiction demonstrate that not all SADC states voluntarily accept the compulsory jurisdiction of the tribunal in matters involving serious national interests such as the land question. In fact, by suspending the SADC Tribunal and creating a new 2014 SADC Tribunal with limited jurisdiction, SADC member states as a collective rejected the compulsory jurisdiction of the tribunal. The 2014 SADC Tribunal Protocol does not expressly confer compulsory jurisdiction to the new tribunal.¹⁴⁴ Thus, the view that new styled ICs can exercise jurisdiction without state consent requires some qualification, at least in the context of SADC Tribunal.

Individual access is important because private actors are many and are likely to pursue politically charged cases or matters that are of low priority for states with limited resources and conflicting priorities.¹⁴⁵ ICs that grant access to private actors are likely to adjudicate more rights disputes and develop their jurisprudence, legitimacy, and authority.¹⁴⁶ In contrast to the traditional international adjudication systems, the new generation of international tribunals are conferred with compulsory jurisdiction and render enforceable decisions that can be executed against states and their commercial assets.¹⁴⁷ More importantly, the design of Africa's ICs also incorporates new and global views of judicial authority.¹⁴⁸ African ICs also have compulsory jurisdiction, are independent of state consent and operate beyond their founding instruments.¹⁴⁹

¹⁴³ Article 15(3) of the SADC Tribunal Protocol of 2001.

¹⁴⁴ Cited in Gerhard Erasmus *The SADC Tribunal ... and its demise* at 148.

¹⁴⁵ Karen J Alter 'The Theory and Reality of the European Coal and Steel Community' With David Steinberg (2007) in Karen J Alter *The European Court's Political Power Selected Essays* (2009) at 264.

¹⁴⁶ *Ibid* at 265.

¹⁴⁷ Cited in Born G op cit note 136 at 776.

¹⁴⁸ Peter Brett and Line Engbo Gissel *Africa and the Backlash Against International Courts* at 17.

¹⁴⁹ *Ibid* at 18.

If there is any lesson to draw from the above, it is that individual access and compulsory jurisdiction are key to the adequate performance of ICs. Individual access and compulsory jurisdiction are crucial for the effective functioning of the SADC Tribunal since African states are known not to litigate against each other, especially in trade-related disputes.¹⁵⁰ The perception of Africa having no litigation culture is supported by the fact that all nineteen cases that came before the SADC Tribunal involved individuals as applicants in human rights or internal employment disputes.¹⁵¹ This is attributed to many factors, including low levels of intra SADC trade, general lack of motivations for legal and natural persons to litigate trade disputes against member states, weak or inadequate sanctions regimes which explains the lack of motivation for filing trade-related cases before these courts, or the view that an openly declared disputes signifies disrespect or a lack of solidarity or it may be due to technical capacity limits.¹⁵² Consequently, judicial institutions play a minimum role and the implication is that African continent is viewed as having no litigation culture.¹⁵³ By granting access to SADC citizens and compulsory jurisdiction to the SADC Tribunal, access by litigants and jurisdiction of the tribunal is not dependent on state consent of the defendant state. Access before ICs is an important development in international law and will benefit individuals. Increased access before ICs will promote access to justice and improve the rule of law at both international and domestic levels. The following section discusses the broad jurisdiction enjoyed by these new ICs.

¹⁵⁰ Onsando Osiemo ‘Lost in Translation: The Role of African Regional Courts in Regional Integration in Africa’ (2014) 41 (1) *Legal Issues of Economic Integration* 87–121 at 111; Helfer, Laurence R ‘Sub-Regional Courts in Africa: Litigating the Hybrid Right to Freedom of Movement’ (1 September 2015) *iCourts Working Paper Series* No. 32 available at https://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=6208&context=faculty_scholarship; Gerhard Erasmus ‘Is the SADC trade regime a rules-based system?’ (2011) 1 *SADC Law Journal* at 31.

¹⁵¹ See *Campbell & others v Zimbabwe* Case No SADC (T) 2/2007 (28 November 2008). *Campbell v Zimbabwe (Interim Ruling)*, Case No SADC (T) 2/2007 (17 December 2007); *Nixon Chirinda & others v Mike Campbell & others*, SADC (T) Case No 09/08 (17 September 2008); *Luke Tembani v Republic of Zimbabwe*, Case No SADC (T) 07/2008 (14 August 2009); *Gondo & others v Republic of Zimbabwe*, Case No SADC (T) 05/2008 (9 December 2010); *Angelo Mondlane v SADC Secretariat*, Case No SADC (T) 07/2009 (21 October 2009).

¹⁵² Erasmus G *Dispute Settlement Under the AfCFTA* (2018) tralac Trade Brief No. S18TB05/2018. Available at <https://www.tralac.org/publications/article/13136-dispute-settlement-under-the-afcfta.html>; See also Osiemo op cit note 149 at 112–113.

¹⁵³ Elisa Tino ‘The Role of Regional Judiciaries in Eastern and Southern Africa’ (2013) in André du Pisani, Gerhard Erasmus and Trudi Hartzenberg *Monitoring Regional Integration in Southern Africa: Yearbook 2012* at 140.

1.1.3 Broad-based jurisdiction of ICs

Another important feature of these ICs and tribunals is that they now exercise jurisdiction over several areas of law, including human rights, criminal law, trade, investment, and environmental protection.¹⁵⁴ In essence, the design features of these new ICs have changed significantly and transformed the general understanding of the role of ICs. However, it is important to state that even though ICs have expanded their role to matters that were traditionally understood as the prerogative of the national government — such as human rights, investment, and trade law — ICs must exercise caution since they are not equipped to deal with domestic policy matters. ICs must find the right balance between deference to domestic authorities and exercising judicial activism. Further, the mandates, practices, and effects of the rulings of these ICs also differ significantly.¹⁵⁵ ICs vary considerably in activity level, and certain courts have developed robust jurisprudence and case law. By contrast, others only decide on a few cases in a year.¹⁵⁶ These developments in international adjudication and questions related to the effectiveness of ICs are discussed further in Chapter 2.¹⁵⁷

The above discussion shows how much has changed since the end of the Cold War, especially in how ICs function. What do all these changes mean for the study of international adjudication? They have implications for how scholars and international lawyers assess ICs' utility or effectiveness. Assessing the usefulness of ICs can no longer be reduced to evaluating the number of judgments complied with by states as is the standard practice among international lawyers. However, one must also consider the expansive jurisdiction or multiple roles and functions ICs perform to assess their effectiveness. The transformation of ICs has profoundly influenced domestic courts, particularly courts exercising constitutional jurisdiction.¹⁵⁸ Since the early 1990s, the most significant features of Africa's transformation from authoritarian regimes to constitutional democracy have been the role and importance assumed by courts, especially constitutional courts or the courts exercising constitutional

¹⁵⁴ Helfer & Alter op cit note 97 at 480.

¹⁵⁵ Squatrito et al op cit note 10 at 3.

¹⁵⁶ Ibid.

¹⁵⁷ See Chapter 2 section 2.7.

¹⁵⁸ See Charles M Fombad *Constitutional Adjudication in Africa* (2017). See also Armin Von Bogdandy, Peter M Huber, and Christoph Grabenwarter *The Max Planck Handbooks in European Public Law Constitutional Adjudication: Institutions* Volume 3 (2020).

jurisdiction.¹⁵⁹ A complete review of these developments is beyond the scope of this study. The increasing role and power of ICs also raises questions about their legitimacy. The following section addresses the legitimacy or authority questions often facing ICs, including the SADC Tribunal.

1.1.4 The legitimacy of ICs and tribunals

Grossman notes that a legitimate IC or tribunal is one in which different actors accept its authority because it is justified.¹⁶⁰ Accordingly, the perceived legitimacy of ICs and tribunals is important for their success, acceptance, compliance with their judgments and involvement with their processes.¹⁶¹ Many ICs have been viewed as illegitimate, partly because their procedures are seen as unfair since they have been established or operationalised through an irregular procedure, or because they are out of touch with the reality of the disputes they adjudicate.¹⁶² The same happened, for instance, in the SADC. Following a series of rulings against the government of Zimbabwe and, in particular, the decision in *Mike Campbell (Pvt) Limited and Others v Zimbabwe*, the government of Zimbabwe raised questions about the legitimacy of the SADC Tribunal, particularly its legal status and authority to decide human rights cases.¹⁶³ The Zimbabwean government argued that the tribunal lacks legitimacy because the protocol establishing it never entered into force.¹⁶⁴

While it is a generally accepted principle that consent of the parties to the dispute is basis for the exercise of a court's jurisdiction, ICs have inherent jurisdiction.¹⁶⁵ Therefore, consent of the parties to the dispute does not necessarily need to be expressed but may be derived from norms relating to jurisdiction which have been developed.¹⁶⁶ Accordingly, inherent powers can

¹⁵⁹ Charles M Fombad *An Overview of Contemporary Models of Constitutional Review in Africa* in Charles M Fombad, *Constitutional Adjudication in Africa* (2017) at 1, 17. See also Sègnonna Horace Adjolohoun 'Made in Courts' Democracies? Constitutional Adjudication in African Constitutionalism' in Fombad *Constitutional Adjudication* at 248–250; Ran Hirschl 'The judicialisation of politics' in Robert E Goodin *The Oxford Handbook of Political Science* (2009) at 253.

¹⁶⁰ Nienke Grossman 'Legitimacy and International Adjudicative Bodies' 41 *Geo. Wash. Int'l L. Rev* 107 at 5.

¹⁶¹ Yvonne McDermott and Wedad Elmaalul 'Legitimacy' in William A Schabas and Shannon Brooke Murphy *Research Handbook on International Courts and Tribunals* (2017) at 229.

¹⁶² *Ibid.*

¹⁶³ See *Mike Campbell (Pvt) Limited and Others v Zimbabwe* Case no SADC 2/2008 - 28 November 2008..

¹⁶⁴ Mabasa Sasa, *Zim Pulls out of SADC Tribunal*, Herald (Zimbabwe), quoting letter dated Aug. 7, 2009, (Sept. 2, 2009), http://www.zimbabwesituation.com/sep3_2009.html.

¹⁶⁵ Chittharanjan F. Amerasinghe *Jurisdiction of Specific International Tribunals* (2009) at 20–21.

¹⁶⁶ *Ibid.*

be expressly stated or be inferred from the provisions of founding instruments as a whole.¹⁶⁷ Recent research on international adjudication show that ICs are not limited to exercising the procedural powers which are granted to them by their constitutive instruments. They can also exercise their inherent powers to fulfil their judicial function subject to certain limitations.¹⁶⁸ Inherent powers allow ICs to create new procedures and to adopt those applied by other international tribunals in similar situations.¹⁶⁹ As the court noted (as cited by Shany), ‘whatever the basis of consent, it is critical that the attitude of the defendant state must be capable of showing ‘an unequivocal indication’ of its willingness to accept the court’s jurisdiction in a voluntary and indisputable’ manner.¹⁷⁰ Therefore, the Zimbabwean government implicitly accepted and consented to the compulsory jurisdiction of the SADC Tribunal when it appointed one of its judges as one of the members of the SADC Tribunal and subsequently appeared before the tribunal as a defendant.¹⁷¹ In other words, Zimbabwe accepted that the protocol establishing the tribunal came into force through its involvement or participation in the SADC Tribunal processes. Acceptance and participation in IC or tribunal processes are important elements of legitimacy.¹⁷² It also accepted that the tribunal protocol is not only binding on itself but also embraced the SADC Summit declaration of 14 August 2001 where SADC member states accepted that the protocol entered into force.¹⁷³ Another argument advanced by the Zimbabwean government was that the SADC Tribunal does not have jurisdiction to decide human rights disputes under the SADC treaty.¹⁷⁴ It is generally accepted that the SADC Tribunal does not have express jurisdiction to decide human rights disputes. However, there continues to be debate about whether a conclusion can be drawn from the provisions of SADC legal instruments (SADC treaty and tribunal protocol) as well as from international law that

¹⁶⁷ Andrea K Bjorklund and Jonathan Brosseau *Sources of inherent powers in* Franco Ferrari and Friedrich Rosenfeld *Inherent Powers of Arbitrators* Juris (2019).

¹⁶⁸ Chester Brown ‘Inherent Powers’ in Cesare PR Romano, Karen J Alter and Yuval Shany *The Oxford Handbook of International Adjudication* (2014) at 839–840.

¹⁶⁹ *Ibid.*

¹⁷⁰ Yuval Shany *Questions of Jurisdiction and Admissibility before International Courts* Cambridge University Press (2016) at 36.

¹⁷¹ See the discussion in Chapter 3, section 3.3.2.

¹⁷² See Grossman *op cit* note 159 at 5. See also McDermott and Elmaalul *op cit* note 160 at 229.

¹⁷³ Elisa Tino ‘The Southern African Development Community and Its ‘New’ Tribunal: Some Remarks’ (2013) in *Monitoring Regional Integration in Southern Africa: Yearbook 2015/2016* at 104.

¹⁷⁴ See *Mike Campbell (Pvt) Limited & others v Zimbabwe* Case no SADC 2/2008 28 November 2008 para 15 and para 30.

the tribunal has implied human rights mandates.¹⁷⁵ The challenge of the legal status and authority of SADC Tribunal by the Zimbabwe government led to the review of the role, functions and terms of reference of the tribunal and, ultimately, to its suspension.¹⁷⁶

Although the suspension of the tribunal is an isolated incident, it must be understood within the broader context of the challenges facing ICs, particularly the resistance to ICs. With the rise of protectionism supported by populist parties, the global economic governance were challenged.¹⁷⁷ Nowadays, there are efforts to delegitimise international law including EU law while the growing calls for the restoration of sovereignty are gaining momentum.¹⁷⁸ The crisis of global governance and multilateralism is stronger and more extreme in the area of international economic dispute settlement.¹⁷⁹ Notably, well-established liberal principles have been challenged, including systems such as the World Trade Organization (WTO) and international investment agreements.¹⁸⁰ In particular, the United States government continues to block the reappointment of WTO Appellate Body judges for a second term in opposition to some of the rulings, and view such decisions as an expansion of its authority beyond its mandate.¹⁸¹

Correspondingly, despite the success of and general support for the ECJ by European member states, questions about its legitimacy to rule on specific issues have been raised. It is

¹⁷⁵ Mia Swart 'Alternative fora for human rights protection? An evaluation of the human rights mandates of the African sub-regional courts' (2013) 3 *TSAR* at 440; Solomon T Ebobrah in 'Tackling threats to the existence of the SADC Tribunal: A critique of perilously ambiguous provisions in the SADC Treaty and the Protocol on the SADC Tribunal' (2010) 4 (2) *MLJ* at 210 <https://hdl.handle.net/10520/EJC76235>. ; Cited in Lucyline Nkatha Murungi and Jacqui Gallinetti 'The Role of Sub-Regional Courts in the African Human Rights System' at 133.

¹⁷⁶ Lorand Bartels *Review of the Role, Responsibilities and Terms of Reference of the SADC Tribunal* Draft Report (14 February 2011) Faculty of Law, University of Cambridge United Kingdom WTI Advisors. See also Werner Scholtz 'Review of the role, functions and terms of reference of the SADC Tribunal' (2011) 1 *SADC Law Journal*.

¹⁷⁷ Manfred Elsig, Rodrigo Polanco and Peter van den Bossche *International Economic Dispute Settlement Demise or Transformation?* (2021) at 2.

¹⁷⁸ *Ibid.*

¹⁷⁹ *Ibid.*

¹⁸⁰ *Ibid.*

¹⁸¹ See Statement by the United States at the Meeting of the WTO Dispute Settlement Body Geneva, May 23, 2016.

Available at https://www.google.com/search?q=Statement+by+the+united+states+at+the+meeting+of+the+WTO+Dispute+Settlement+Body&source=hp&ei=cyPgYpq6MMysgQbBqKPGcW&oq=Statement+by+the+united+states+at+the+meeting+of+the+WTO+Dispute+Settlement+Body&gs_lcp=ChFtb2JpbGUtZ3dzLXdpei1ocBADOgUIIRCgA ToKCCEQHhAPEBYQHToICCEQHhAWEb06BggAEB4QFjoFCAAQhgM6BAghEBU6BwghEAoQoAFQR Fjz1gFgjNcBaABwAHgBgAG0HogB4YUBkgEPMY0yLjMuMy4xLjAuMi4zmAEAoAEB&scient=mobile-gws-wiz-hp

facing increasing public scrutiny.¹⁸² Likewise, the International Criminal Court faced a backlash from African leaders, calling it a neo-colonialist institution that promotes Western agendas that aim to shape and control African politics through its investigations and prosecutions.¹⁸³ Another set of legitimacy concerns arises because the ICs, including judges sitting before these courts, are not elected by the people and are not accountable to the public. However, their decisions have implications for domestic politics and democracy.¹⁸⁴ Notably, the institutionalisation of international law after the Cold War has opened renewed discussions about international adjudication and raised questions about its relationship to politics.¹⁸⁵ Ginsburg observes that the institutionalisation of international law and adjudication of international politics is viewed as a threat to state sovereignty, and there are concerns about the increasing power of judges.¹⁸⁶

However, it has been established that the legitimacy of ICs and supranational courts cannot be directly derived from democracy — as traditionally understood in Westphalian sovereignty — but from the rule of law and universal values.¹⁸⁷ In other words, the legitimacy of ICs and tribunals is founded on their protection of human rights, defence of efficiency and coherence of law and ordering of constitutional orders.¹⁸⁸ Furthermore, their legitimacy is founded on international agreements and on the basis that ICs judges are elected because of their expertise and moral integrity.¹⁸⁹ The legitimacy of ICs is founded on their effective advancement of international law and justice.¹⁹⁰ Accordingly, justice is the general standard by

¹⁸² See Chapter 4 section 4.6. See also Nikos Skoutaris ‘Taking back control? Brexit and the Court of Justice’ in Kent, Skoutaris and Trinidad *The Future of International Courts Regional, Institutional and Procedural Challenges* Routledge (2019).

¹⁸³ Abdul Tejan-Cole *Africa and the International Criminal Court: Legitimacy and Credibility Challenges* in Charles Chernor Jalloh and Olufemi Elias *Shielding Humanity: Essays in International Law in Honour of Judge Abdul G. Koroma* Brill (2015) at 426.

¹⁸⁴ Cesare PR Romano, Karen J Alter, and Yuval Shany *Mapping International Adjudicative Bodies, the Issues, and Players* in Cesare PR Romano, Karen J Alter, and Yuval Shany *The Oxford Handbook of International Adjudication* Oxford University Press (2014) at 14-16.

¹⁸⁵ Tom Ginsburg *Political Constraints on International Courts* in Cesare PR Romano, Karen J Alter, and Yuval Shany (2014) *The Oxford Handbook of International Adjudication* at 484.

¹⁸⁶ *Ibid.*

¹⁸⁷ Martin Belo ‘The role of courts in contemporary legal orders global rule of law instead of global democracy legitimacy of global judicial empire on the edge between Westphalian and post-Westphalian’ in Martin Belo *The Role of Courts in Contemporary Legal Orders* (2019) at 99.

¹⁸⁸ *Ibid.*

¹⁸⁹ *Ibid.*

¹⁹⁰ Mortimer S Sellers ‘Democracy, Justice, and the Legitimacy of International Courts’ in N Grossman, H Cohen, A Follesdal & G Ulfstein *Legitimacy and International Courts* (2018) at 352.

which the legitimacy of international law and ICs is measured.¹⁹¹ Therefore, judges should promote and advance law and justice; their legitimacy stems from their effectiveness in fulfilling this function.¹⁹² In other words, the legitimacy of ICs and judges from the perspective of democracy is immaterial since the authority of ICs and judges sitting before them stems from their ability to promote the rule of law and human rights, and advance international law and justice. As shown above, the new ICs have elicited political backlash from their member states, although the states have created these courts. These new ICs are viewed as a threat to state sovereignty and democracy.

Alter has described the above situation as another critical juncture where faith is lost in old international systems, including ICs.¹⁹³ Alter uses the concept of critical junctures to signify fundamental changes in international law, particularly international adjudication or the lack thereof.¹⁹⁴ In her previous study, Alter identified three periods of critical juncture which contributed to the establishment of ICs: the Hague Peace Conferences (1899–1914), the end of World War II and the beginning of the Cold War (1945–52), and the end of the Cold War (1989).¹⁹⁵ Similarly, other scholars observe that the golden age of international adjudication may be losing momentum.¹⁹⁶ Accordingly, increasing populism in many countries has provoked a sovereigntist pushback against the international rule of law, particularly against international dispute settlement mechanisms.¹⁹⁷

While it is generally agreed that ICs and tribunals are increasingly facing legitimacy questions or political backlash, there is less consensus over whether or not the future of ICs hangs in the balance.¹⁹⁸ There is general consensus among scholars of international trade

¹⁹¹ Ibid at 353.

¹⁹² Ibid.

¹⁹³ Karen J Alter ‘Critical junctures and the future of international courts in a post-liberal world order’ in Kent, Skoutaris & Trinidad *The Future of International Courts Regional, Institutional and Procedural Challenges* Routledge (2019) at 9–10.

¹⁹⁴ Ibid at 8–14.

¹⁹⁵ Cited in Karen J Alter op cit note 69 at 115.

¹⁹⁶ Ignacio de la Rasilla and Jorge E. Viñuales ‘Introduction’ in Ignacio De La Rasilla and Jorge E Viñuales *Experiments in International Adjudication historical accounts* (2019) at 1.

¹⁹⁷ Ibid.

¹⁹⁸ Avidan Kent, Nikos Skoutaris and Jamie Trinidad ‘What does the future hold for international courts?’ in Kent, Skoutaris & Trinidad *The Future of International Courts Regional, Institutional and Procedural Challenges* Routledge (2019). See also Zuzanna Godzimirska ‘Delegitimation of global courts Lessons from the past’ in Kent, Skoutaris & Trinidad. See also Joanna Nicholson ‘Learning lessons through the prism of legitimacy What future for international criminal courts and tribunals?’ in Kent, Skoutaris & Trinidad; Cited in Elsig, Polanco & van Den Bossche op cit note 176 at 2; Kholofelo Kugler ‘Operationalizing MPIA Appeal Arbitrations: Opportunities and

regarding the pending demise of the WTO dispute settlement.¹⁹⁹ By contrast, other scholars generally agree that ICs and tribunals have a future in the international order and that if ICs and tribunals are to survive, they need to be reformed or adapt to the global challenges confronting them.²⁰⁰ While Kent, Skoutaris and Trinidad agree with Alter’s description of this period as another ‘critical juncture’, they argue that the prediction of the impending demise of ICs may be overstated.²⁰¹ For them, the current situation requires that international institutions, particularly ICs, exercise caution and adjust their practices in response to external challenges.²⁰² The present thesis adopts the view that while ICs increasingly face challenges relating to their legitimacy, they will continue to have an influence on the international order and therefore have a future in the global order. It is also worth noting that throughout history, ICs have faced resistance and pushbacks from sovereign states and sometimes from domestic courts for some decisions which were viewed as a threat to their sovereignty.²⁰³ As Rasmussen observes, the ECJ faced resistance from its member states.²⁰⁴ The EU member states, including domestic courts, were against new constitutional doctrines of direct effect and primacy of the ECJ.²⁰⁵

The current set of crises facing ICs requires political leaders of the world to address the underlying causes. Globally, the current financial crisis, rising inequality and poverty, and growing xenophobic and anti-migration sentiments have certainly contributed to the backlash facing ICs and have given rise to populist movements. For instance, Sloss identifies several major threats to international rule-based order, which include new technologies, dispersion of

Challenges’ in Elsig, Polanco & van den Bossche at 68; Sean Stacy ‘WTO Dispute Settlement: “Will of the Strongest” or “Rule of Law”?’ Attempting to View Recent U.S. Actions through the Proper Lens’ in Elsig, Polanco & van den Bossche at 162; Malebakeng Forere ‘No Lessons from the Crises in the International Trade and Investment Dispute Settlement Mechanisms: The African Continental Free Trade Area’ in Elsig, Polanco & van den Bossche at 406.

¹⁹⁸ Cited in Kholofelo Kugler *Operationalizing MPIA* at 69–70.

¹⁹⁹ Ibid.

²⁰⁰ Ibid.

²⁰¹ Avidan Kent, Nikos Skoutaris and Jamie Trinidad *The future of international courts What next?* at 270.

²⁰² Ibid 271.

²⁰³ Morten Rasmussen ‘From International Law to a Constitutionalist Dream? The History of European Law and the European Court of Justice (1950–1993)’ in De La Rasilla and Viñuales *Experiments in International Adjudication historical accounts* (2019) at 305–308.

²⁰⁴ Ibid at 305.

²⁰⁵ Ibid at 306–307.

power, the rise of China, democratic decline, inequality, and anti-migrant animus.²⁰⁶ Sloss defines rule-based international order as delegation of authority to international institutions and identifies enforcement as an important aspect of a rules-based order.²⁰⁷ However, Sloss accepts that these issues are unlikely to unravel rule-based international order or lead to a more sovereign-based international order such as that which existed before 1945.²⁰⁸

On the other hand, the concept of ruled-based international order is problematic in that it is not clear what are these rules, whether states have consented to them and under what circumstances they are applied.²⁰⁹ For Dugard, the lack of clear meaning and an acceptable definition of the ‘rules’ of the ruled-based international order and the failure to deliberate on their relationship with international law has raised questions about the reasons for US reliance on ruled-based international order.²¹⁰ The way in which the US has justified its violation of international law through its armed forces or those of its allies explains its preference for ruled-based international order.²¹¹ Dugard provides other reasons why the US prefers to invoke ‘rules-based international order’ as opposed to international law.²¹² Dugard, concludes that the ruled-based international order is not international law and for him, it is another system that is not part of international law which by implication challenges and threatens international law.²¹³ It may be viewed as a liberal order or as a competing system promoted by some Western states, especially the US, which aims to impose the interpretation of international law to advance the interests of the West and promote the hegemonic goals of the US.²¹⁴ For Dugard, the West’s continued invocation and adherence to ‘rules-based international order’ and international law undermines efforts to agree upon a universal system of international law founded on similar fundamental rules, principles and values.²¹⁵

²⁰⁶ David L. Sloss ‘Introduction Preserving a Rules-based International Order’ in David Sloss *Is the International Legal Order Unraveling?* (2022) Oxford University Press.

²⁰⁷ Ibid.

²⁰⁸ Ibid.

²⁰⁹ John Dugard The choice before us: International law or a ‘rules-based international order’? *Leiden Journal of International Law* (2023), 36, 223–232 at 224. doi:10.1017/S0922156523000043.

²¹⁰ Ibid.

²¹¹ Ibid.

²¹² Ibid at 226-227.

²¹³ Ibid at 231.

²¹⁴ Ibid.

²¹⁵ Ibid at 232.

Gathii and Puig, on the other hand, argue that one of the more inclusive and legitimate ways of dealing with disenchantment with the international economic order from the Global North is to directly tackle the existing inequities.²¹⁶ The global economic order requires major reforms to make it more equitable and democratic.²¹⁷ These authors conclude that preserving the current global economic situation is not a viable option.²¹⁸ Instead, they propose deeper engagement with the legacies of colonial dispossession and postcolonial exploitation, which are the underlying causes of the existing inequities in the present international economic order.²¹⁹

These issues are the result of policy failures at the governance level. There is a need for joint effort from governments, business, civil society and courts to deal with the underlying causes of these challenges and to strengthen international institutions. Moreover, if the ICs are to survive these challenges, they must reform and adjust their approaches in view of the prevailing domestic politics. It is also important to recognise that the legitimacy question is sometimes used as a political instrument to justify attacks on ICs, and when certain judges deemed hostile to a particular state's interests, as seen in the case of the US towards the WTO Appellate Body. The current crisis of the WTO dispute settlement systems are caused by many factors, including the US invoking the General Agreement on Tariffs and Trade Article XXI security exception in order to justify a steep increase in steel and aluminium tariffs.²²⁰ If there is any lesson to be learned from the above, it is that even the most powerful and independent courts are not entirely immune to questions of legitimacy or political backlash. In instances where states in the jurisdiction of such ICs perceive them as illegitimate institutions, it is likely that such states will not support the work of these ICs and will undermine their authority. The following subsection addresses the need for more research on international adjudication, particularly detailed research on the utility of ICs such as the SADC Tribunal beyond traditional compliance measures.

²¹⁶ James T. Gathii and Sergio Puig 'The West and the Unraveling of the Economic World Order. Thoughts from a Global South Perspective' in David Sloss *Is the International Legal Order Unraveling?* (2022).

²¹⁷ *Ibid.*

²¹⁸ *Ibid.*

²¹⁹ *Ibid.*

²²⁰ Cited in Sean Stacy 'WTO Dispute Settlement' at 162.

1.1.5 Lack of research on international adjudication

Helfer and Alter note that scholars encouraged by these new ICs and their influence ‘have created a cottage industry devoted to the study of international adjudication.’²²¹ But despite the growing scholarship on international adjudication, there are generally still few monographs and treatises on international adjudication.²²² Although the existing research on African regional economic communities (RECs) has attracted much interest, it tends to focus on political, economic and sociological background issues.²²³ Many legal contributions focus on single judgments or specific areas of law, such as human rights.²²⁴ For instance, Nyathi’s monograph examines whether democracy and the rule of law are reflected in the institutional design of the SADC.²²⁵ Rudahindwa’s monograph specifically focuses on regionalism in the context of Africa. It explores how law can be applied to deal with particular issues raised by regional organisations in the African continent.²²⁶ Existing research on legal integration is overly concentrated and relies on the contributions of Oppong²²⁷ and Gathii.²²⁸ Kleis’s monograph examines the work and activities of African regional community courts in the regional integration process. It evaluates whether these courts have contributed towards the goal of integration in the present and whether these courts can shape the integration process in the future.²²⁹

Clearly, there needs to be more research on international adjudication, particularly on the SADC Tribunal, beyond compliance measures. Undoubtedly, the significance of studying the utility and legal value of the SADC Tribunal beyond the traditional measures of compliance is that one can see that the SADC Tribunal contributed to the protection of human rights, development of international law and advancement of international rule of law. Moreover, its decisions have had a limited impact on domestic legal systems of SADC member states and

²²¹ Cited in Helfer & Alter op cit note 97 at 480..

²²² Jörg Kleis *African regional community courts and their contribution to continental integration* (2016) at 33.

²²³ Ibid.

²²⁴ Ibid at 33–34.

²²⁵ Mkhululi Nyathi *The Southern African Development Community and Law* (2019).

²²⁶ Jonathan Bashi Rudahindwa *Regional Developmentalism Through International Law Establishing an African Economic Community* (2018).

²²⁷ Richard Frimpong Oppong *Legal Aspects of Economic Integration in Africa* (2011) Cambridge University Press; Kleis op cit note 221 at 34.

²²⁸ James Thuo Gathii *African Regional Trade Agreements as Legal Regimes* (2011) Cambridge University Press.

²²⁹ Cited in Kleis op cit note 221 at 34.

have indirectly influenced the actions of civil society who are calling for the reinstatement of the SADC to its original jurisdiction. The following section details the problem statement of this research.

1.2 Problem statement

The SADC Tribunal does not have a judgment enforcement mechanism and relies on the SADC Summit to enforce its judgments.²³⁰ In this context, the SADC Tribunal has been described as a ‘paper tiger’ that must be equipped with ‘teeth’.²³¹ According to Ndlovu, the provisions concerning enforcing the SADC Tribunal decisions should be reformed to remove Article 32(4) of the SADC Tribunal Protocol of 2001, which requires non-compliance to be first referred to the SADC Summit.²³² Accordingly, the SADC Tribunal is ineffective institution due to its lack of capacity to live-up to its potential, thus proving a leeway for member states to do as they wish.²³³

Similarly, Ruppel and Bangamwabo suggest that the enforcement mechanism of the SADC Tribunal may be lacking and ambiguous based on its lack of effectiveness.²³⁴ Accordingly, under the SADC Tribunal enforcement mechanism, member states can avoid their international obligations by relying on the judgments of their national courts.²³⁵ Scholtz and Ferreira submit that the problem with Article 32(5) is that the Summit is unwilling to take punitive measures against the recalcitrant member state.²³⁶ Accordingly, member states have discretion on whether to comply with tribunal decisions since the likelihood of the imposition of real sanctions against a rogue state is very slim.²³⁷ The SADC Tribunal is viewed as a paper tiger owing to the provisions of Article 32(5) of the SADC Tribunal Protocol, which provides for

²³⁰ See Articles 32(1), 32(4) and 32(5) of the SADC Tribunal Protocol of 2001. See also the discussion in section 3.4.

²³¹ Lonias Ndlovu ‘Following the NAFTA Star: SADC land reform and investment protection after the Campbell litigation’ (2011) 15 *Law Democracy & Development* available at <http://dx.doi.org/10.4314/idd.v15i1.1> accessed on 5 July 2021 at 84.

²³² *Ibid*

²³³ Abel Chikomo African Human Rights Architecture in the 21st Century: The Case of the SADC Tribunal and its effectiveness in addressing Human Rights (unpublished thesis in international relations University of Zimbabwe, February 2016) at 56.

²³⁴ Cited in Oliver C. Ruppel and Francois-X. Bangamwabo: *The SADC Tribunal: a legal analysis of its mandate and role in regional integration* at 21.

²³⁵ *Ibid*.

²³⁶ Cited in Scholtz and Ferreira *op cit* note 2 at 353.

²³⁷ *Ibid* at 353–4.

reference to the SADC Summit of Heads of States in cases of non-compliance with tribunal decisions, which by implication makes the SADC Summit the final arbiter over the court.²³⁸

Ndlovu has suggested that tribunal rules should be revised to stipulate the types of remedy available to individuals who successfully obtain favourable judgments.²³⁹ According to this author, Zimbabwe refused to comply with the SADC decision and breached SADC rules without any punishment. This demonstrates a significant weakness of the tribunal.²⁴⁰ Ndlovu suggests that strengthening the legal provisions of the SADC Treaty and its protocols would make it difficult or impossible for a litigant to disregard SADC Tribunal's decisions.²⁴¹

The present research problematises the tendency to measure the utility and legal value of the SADC Tribunal through compliance measures. It also challenges the suggestion that robust enforcement mechanisms are needed to ensure effectiveness. It challenges the characterisation of the SADC Tribunal as a paper tiger or the tendency to deny its utility and importance, which suggests that in the absence of a high compliance rate or robust enforcement mechanisms, it is ineffective and cannot transform state behaviour. Contrary to these claims, a growing body of literature shows that courts are important beyond measures of compliance.²⁴² Current literature on ICs' effectiveness shows that compliance measures are limited in evaluating the utility and contribution of ICs such as the SADC Tribunal.²⁴³ Therefore, the notion that the SADC is ineffective since it suffers from a low compliance rate or non-compliance and lacks its judgment enforcement powers is misleading since ICs generally do not enforce their judgments and rely on the cooperation of their member states for compliance with their decisions.²⁴⁴

In order to understand the utility of the SADC Tribunal, there is a need to investigate its many roles and functions beyond state compliance measures. Using an institutional design, goal-based approach, this research observes how the SADC Tribunal has performed its roles and

²³⁸ See Merran Hulse *Silencing a Supranational Court: The Rise and Fall of the SADC Tribunal* at 1 Available at <https://www.e-ir.info/2012/10/25/silencing-a-supranational-court-the-rise-and-fall-of-the-sadc-tribunal/>; See also Oliver C. Ruppel and Francois-X. Bangamwabo *The SADC Tribunal: a legal analysis of its mandate and role in regional integration* at 21; Scholtz and Ferreira op cit note 2 at 353.

²³⁹ Cited in Lonias Ndlovu *Following the NAFTA Star: SADC land reform and investment protection after the Campbell litigation* at 84.

²⁴⁰ Ibid.

²⁴¹ Ibid.

²⁴² See Chapter 2, section 2.7.1.

²⁴³ Ibid.

²⁴⁴ Ibid.

functions and whether it has achieved its ultimate and intermediate goals. In addition, more research must investigate the importance of the SADC Tribunal beyond state compliance measures in detail. Most of the work in this area has focused on non-compliance with the SADC Tribunal judgment by Zimbabwe and the lack of enforcement of tribunal decisions by the SADC Summit. Therefore, it is imperative to discuss the abovementioned problem since compliance perspectives cannot adequately explain the many functions which the SADC Tribunal has performed in the SADC region.

1.3 Research question

The critical question of this research is whether state compliance measures are appropriate for assessing the utility of the SADC Tribunal and whether such measures should be afforded any significance. To answer this question, the following subsidiary questions are raised:

- (i) What are the performance measures that are appropriate to the SADC Tribunal?
- (ii) What institutional goals have been designated to the SADC Tribunal, and have they been achieved?
- (iii) What lessons can be learned from the experiences of the East African Court of Justice (EACJ) and European Court of Justice (ECJ)?

1.4 Research methodology

This study adopts a combination of an institutional design approach and a goal-based approach in evaluating and understanding the utility of the SADC Tribunal. Drawing heavily on these approaches, the thesis concludes that the SADC Tribunal has performed its multiple roles successfully and achieved its ultimate and intermediate goals owing to its institutional design, broad jurisdiction and access rules. In this research, qualitative and desk-top legal research methods will be used. The qualitative approach is used to describe the background and the literature of this study. The desk-top legal analysis of this study includes an interpretation, examination and a critique of the selected SADC Tribunal jurisprudence and the contribution of the tribunal towards human rights, rule of law and access to international justice. A comparative desk-top analysis of the European Court of Justice (ECJ) and East African Court

of Justice (EACJ) jurisprudence and their contribution towards regional integration is conducted to establish how the ECJ and EACJ have managed to have greater impact than SADC Tribunal. A desk-top analysis examining the legal status of Community Laws as interpreted by ECJ and EACJ respectively and status of their decision with the domestic courts was also done to draw important lessons for the SADC tribunal.

1.5 Purpose of the study

The study aims to assess the utility and legal value of the SADC Tribunal beyond state compliance measures. It proffers a comprehensive investigation of the utility and legal value of the SADC Tribunal over and above compliance measures, and in so doing, sheds new light on the functioning of the SADC Tribunal. This study identifies and evaluates the multiple roles and functions of the SADC Tribunal and examines how the tribunal has performed these roles. It assesses how the SADC Tribunal works and whether it has achieved its intermediate and ultimate goals. This research does not dismiss the importance of compliance with ICs judgments but highlights that it is limited in explaining the relevance and contribution of the SADC Tribunal towards varied objectives such as human rights protection and the adherence to the rule of law in the SADC region.

1.6 Significance of the study

There is a need for more scholarship that examines the utility of the SADC Tribunal beyond state compliance measures, and this thesis aims to fill that gap. Existing literature on the SADC Tribunal focuses on its human rights jurisprudence. It mainly investigates how the SADC Tribunal has interpreted its human rights cases and sometimes mentions that Zimbabwe has not complied with the SADC Tribunal judgments, but without any detailed analysis of the actual impact of tribunal decisions or its jurisprudence on the domestic legal systems of the SADC member states and human rights protection and promotion of the rule of law. This thesis investigates the utility of the SADC Tribunal in a broader sense. The significance of this study lies in its endeavour to move beyond the focus on state compliance measures and evaluate the multiple roles and functions of the SADC Tribunal, how it has performed these roles and whether it has achieved its goals. The study aims to provide a better understanding of the work and role of the SADC Tribunal and enhance the study of its utility beyond the traditional

measures of state compliance. This research is expected to contribute to the existing literature on the study of the utility of ICs.

1.7 Limitations of the study

An important limitation of the study is the paucity of research on the effectiveness or utility of the SADC Tribunal beyond state compliance measures — which may affect the study’s outcome. Contrary to expectations, this research did not find a significant impact of SADC Tribunal judgments at the domestic levels of SADC member states. This finding suggests that SADC member states and their domestic courts, including lawyers, have not yet accepted the jurisprudence of the SADC Tribunal. Consequently, more effort must be made to mobilise individuals, the general civil society including lawyers, activists, government officials and domestic judges to support the work of the SADC Tribunal.

This study relies on comparative studies that focus on the impact of the ECJ and the EACJ to show how supranational courts decisions can be effective. It also relies on the legal research conducted by leading scholars to show the utility and contributions of the SADC Tribunal beyond compliance measures. Although this research is limited in scope, its findings provide a basis for future studies on the importance and role of the SADC Tribunal outside the traditional framework of compliance measures. The next section contains the definition of key terms to clarify their meaning and how they apply to this study.

1.8 Definition of key terms

1.8.1 Compliance

The concepts of enforcement and compliance in international law are conflated, and are sometimes used interchangeably to signify implementing treaty commitments or court decisions. Compliance is a complex concept which can be viewed from varied perspectives.²⁴⁵ The meaning of the concept is uncertain and, at times, it can be a lengthy process influenced by political and social dynamics.²⁴⁶ Measuring compliance with an IC decision requires understanding, analysis and comparison of the behaviour demanded in a judgment from the

²⁴⁵ Cited in Huneus op cit note 59 at 437.

²⁴⁶ Ibid.

unsuccessful litigant with the behaviour of all other parties after issuing the judgment.²⁴⁷ Shany defines compliance as a ‘change in the post-judgment conduct of a party to adjudication brought about by the judgment and resulting in norm-practice convergence’.²⁴⁸ In other words, Shany views compliance in terms of behaviour change or the ability to generate change in behaviour as ruled by the court. This definition is more concerned with whether the judgment itself can alter the behaviour of the state or domestic practices and create domestic norms (such as the development of new legislation) to prevent similar cases from recurring. By contrast, Raustiala and Slaughter define compliance in the country context as ‘a state of conformity or identity between an actor’s behaviour and a specified rule’.²⁴⁹ This definition concerns whether the behaviour of parties or actors conforms to specific norms or rules. Therefore, it looks at the overall implementation of the treaty obligation to evaluate whether there is any correlation or consistency between an actor’s behaviour and a particular rule. On the other hand, Giorgetti notes that compliance occurs when the unsuccessful litigant, who in international legal proceedings is either a state or private individual, implements a court decision as ruled by the court or refrains from the unlawful conduct as declared by the court.²⁵⁰ Kleis defines non-compliance as ‘non-adherence by a member state to partially or completely obey with a binding ruling’.²⁵¹ In other words, non-compliance occurs when a member state has completely or partly failed to comply with a court judgment. With this in mind, any indication by the member states that they will comply with a court judgment, or any efforts taken to comply with court judgment, fits this definition. For the purposes of this thesis, compliance is the process of giving effect to the SADC Tribunal judgment by the SADC member states.

1.8.2 Enforcement

Enforcement can be defined as ‘the act of compelling observance of or compliance with a law, rule, or obligation’.²⁵² This definition considers litigation and coercive measures such as sanctions, including the deployment of the police or army to induce compliance with law, rule

²⁴⁷ Cited in Chiara Giorgetti op cit note 68 at 326.

²⁴⁸ Cited Yuval Shany *Assessing the Effectiveness of International Courts* (2014) at 119.

²⁴⁹ K Raustiala & A-M Slaughter ‘International Law, International Relations and Compliance’ in W Carlsnaes et al (eds) *Handbook of International Relations* (2002) SAGE at 711.

²⁵⁰ Cited in Giorgetti op cit note 68 at 325.

²⁵¹ Cited in Kleis op cit note 221 at 326.

²⁵² See Oxford Dictionary available at <http://www.oxforddictionaries.com/definition/english/enforcement>.

or an obligation. Kleis defines enforcement as ‘the right of a Regional Economic Community to take measures including coercive ones to ensure the fulfilment of obligations owed to it by its members’.²⁵³ In defining enforcement as a right, Kleis insinuates that RECs are legally entitled to adopt coercive measures, including sanctions, to compel member states to comply with their treaty obligations. The use of force contemplated here is the use of legal power by an authorised REC institution (SADC Summit) to ensure the fulfilment of the treaty obligation. Reisman describes enforcement as follows:

the transformation, by community means, of authoritative pronouncement into controlling reality. Organised communities enforce their authority in two ways: By *direct enforcement*, they supervise the physical transfer of what was decreed in authoritative decisions. By *indirect enforcement*, they impose sanctions on the miscreant to persuade him to comply with community norms.²⁵⁴

This definition suggests that enforcement requires the actions of the successful party to ensure that authoritative rulings become a reality. The successful party must take meaningful steps against the losing party (usually against the state) to transform an authoritative ruling into an adequate remedy. For Reisman, there are two ways to transform authoritative rulings: through supervision or monitoring of the implementation of the authoritative decision, and through the imposition of sanction to ensure the recalcitrant party is compelled to comply with community norms. On the other hand, Whytock defines enforcement as ‘the process of obtaining a person’s compliance or punishing a person’s non-compliance when *ex-ante* background factors fail to elicit compliance’.²⁵⁵ This definition only considers using force (issuing of sanctions) when court deliberations and persuasion fail to convince a person to comply with an authoritative decision. Therefore, it considers using force as a matter of last resort.

It is clear from above that the enforcement concept is imprecise and means different things in different contexts. In this thesis, enforcement is described as the process or any action, whether legal (sanction, naming and shaming, litigation, or expulsion) or extra-legal measures

²⁵³ Cited in Kleis op cit note 221.

²⁵⁴ W. M. Reisman ‘The Enforcement of International Judgments’ (1969) 63 *The American Journal of International Law Volume* at 6.

²⁵⁵ Christopher A. Whytock ‘Enforcement of Foreign Judgments: Governance, Rights, and the Market for Dispute Resolution Services’ in Hans-W. Micklitz and Andrea Wechsler (eds) *The Transformation of Enforcement: European Economic Law in Global Perspective* (2016) 47–68 at 47.

(persuasion) taken against any SADC member states by the SADC Summit or other SADC member states in ensuring the implementation of SADC Tribunal decisions.

1.8.3 Effectiveness

Effectiveness can be defined in many ways, for instance, ‘as the degree to which a given rule induces changes in behaviour that further the goals of the rule, the degree to which a rule improves the state of the underlying problem or the degree to which a rule achieves its inherent policy objectives.’²⁵⁶ For Meyer, ‘effectiveness refers to whether the law has changed a state’s behaviour from what it would have been in the absence of the law.’²⁵⁷ According to Weiss, the concept of effectiveness ‘refers to whether the purposes of the agreement are being achieved and more generally, whether the agreement as designed is effective in addressing the problem for which it was negotiated.’²⁵⁸ All of these definitions have one thing in common: they are concerned with the behaviour of the state after an authoritative ruling. Effectiveness addresses the question: ‘Has the ruling changed the state’s practice or conduct?’.

1.9 Overview of chapters

Chapter 1

This chapter contains a general discussion of the old SADC Tribunal and highlights problems associated with compliance with its judgments. It begins by offering a background to recent developments in international law and international adjudication. These changes are contextualised for a better understanding of the role of ICs, in particular that of the SADC Tribunal. From there, the chapter develops a framework for measuring the utility and legal value of the SADC Tribunal beyond the traditional measures of state compliance.

Chapter 2

²⁵⁶ Kal Raustiala ‘Compliance & Effectiveness in International Regulatory Cooperation’ (2000) 32 (3) *Case W. Res. J. INT’L L.*

²⁵⁷ Timothy Meyer ‘How Compliance Understates Effectiveness’ Proceedings of the Annual Meeting (American Society of International Law) (2014) 108 *The Effectiveness of International Law* 168–172 at 169. <https://doi.org/10.5305/procanmeetasil.108.0168> Timothy Meyer ‘How Compliance Understates Effectiveness’. *AJIL Unbound*. 2014;108:93-98 doi:10.1017/S239877230000194X Cambridge University Press 2017.

²⁵⁸ Edith B. Weiss ‘Understanding Compliance with International Environmental Agreements: The Baker's Dozen Myths’ (1999) 32 (5) *Rich. L. Rev.* at 1564. Available at <http://scholarship.richmond.edu/lawreview/vol32/iss5/5>.

This chapter discusses the problems of theories of state compliance in relation to the SADC, to provide an insight into the dynamics involved in states' decisions on whether or not to comply with international legal norms. It also contains a critique of state compliance theories which ignore the role of courts in global politics.

Chapter 3

The SADC legal and institutional framework is examined in this chapter, with a main focus on the functioning of the key SADC institutions that are responsible for implementation of SADC community law. It critically assesses the legal order of the SADC, particularly the operative aspects of the SADC Treaty and discusses the evolution of SADC to date. SADC community law and its relationship with domestic legal systems of SADC member states is analysed to determine its legal status. The chapter then examines the application of SADC law by domestic courts of SADC member states to ascertain the extent to which the SADC Tribunal has influenced those domestic courts.

Chapter 4

Chapter 4 provides historical and political insight into the EU system. It identifies factors and conditions that allowed the ECJ to have a far-reaching impact in comparison to the SADC Tribunal. It critically assesses selected EU institutions with a main focus on the functioning of the ECJ in developing, interpreting, and applying EU law. The way in which the ECJ has addressed questions relating to state sovereignty and compliance with its judgments is examined. The chapter also examines the application of EU law by domestic courts of EU member states to measure the extent to which the ECJ has influenced national judgments. Importantly, it reflects on the reaction of EU governments to the growing influence of the ECJ and ponders on the constraints placed on the ECJ by EU governments, drawing on lessons from the EU community.

Chapter 5

This chapter presents the historical background of the East African community (EAC) and identifies factors that hinder the integration process within the community. This section critically assesses the legal system of the EAC with a particular focus on the functioning of selected community institutions. It also studies the development of EAC community law and

its relationship with the domestic legal systems of EAC partner states to determine its legal status. A substantial part of the chapter focuses on the EACJ in order to determine the extent to which its decisions have affected EAC partner states, and particularly their domestic courts.

Chapter 6

This chapter in this thesis contains a summary of findings, recommendations, contribution of the study and future research.

Question 7

In chapter seven certain conclusions are drawn about the research including the contributions of the SADC Tribunal towards the protection and promotion of human rights, the rule of law and access to international justice, its potential and future prospects.

1.10 Conclusion

The introductory part of this chapter provided a general background to the SADC Tribunal from its inception until its suspension. It highlighted problems associated with non-compliance with its judgments since it was first established. But it also demonstrated that the goals of litigants who file cases before African ICs such as the SADC Tribunal are not necessarily to ensure state compliance, but to achieve strategic goals such as exposing state oppression or injustices. From this, it is reasonable to conclude that the litigants who filed cases before the SADC Tribunal against the government of Zimbabwe were not only interested in obtaining a legal remedy but also sought to expose state oppression and injustices in that country.

This research has shown that excessive focus on compliance overlooks the importance of litigation. In particular, litigation can have a positive impact by prompting government to take responsibility for violations of individual rights. This suggests that the study of IC adjudication must be approached from the correct perspective. In other words, the study of ICs requires that one broadens one's analysis beyond state-centric analysis and focuses on the overall impact of litigation or court decisions on non-state actors and on fundamental issues such as the protection of human rights and the rule of law.

An overall context to the study of IC adjudication was presented, showing that there has been a rise of non-state actors as subjects of international law and of ICs with compulsory

jurisdiction, and the implications of these changes for the \general understanding of the role of the SADC Tribunal were discussed. The proliferation of ICs and tribunals has allowed states to settle their disputes through legal processes and has improved access to international justice. Despite initial concerns about the fragmentation of international law as a result of the increasing number of new ICs, judges are engaged in transnational judicial dialogue. It is generally accepted that this proliferation enhances the unity of international law.

Further, the chapter addressed the legitimacy question, showing that the SADC Tribunal is a legitimate institution which SADC member states, including Zimbabwe, accept as binding. This response needs to be further investigated. The next chapter discusses the foundation and nature of international law. It also discusses theories of compliance from the perspective of international law and international relations and their relevance to the SADC integration process.

CHAPTER 2: ROLE OF INTERNATIONAL COURTS IN INTERNATIONAL RELATIONS AND GLOBAL GOVERNANCE

2.1 Introduction

The preceding chapter described the general circumstances surrounding the old SADC Tribunal and the study of IC adjudication. Since the present study is concerned with whether state compliance measures are appropriate for assessing the utility of the SADC Tribunal and whether such measures should be afforded further significance, Chapter 1 developed a framework for assessing the utility and legal value of the SADC Tribunal beyond the traditional measures of state compliance. The research methodology adopted for this assessment was described as an institutional design approach and a goal-based approach.

Chapter 2 discusses the nature of international law. In particular, it examines the history of international law and provides a general overview of its foundation. The aim is to provide an understanding of the history of international law and how states have cooperated during the centuries. Furthermore, the chapter aims to explain the operation of international law, including international institutions which are founded on the principles of international law. It seeks to understand the main international actors and how international law norms shape their behaviour.

It also examines and provides a critique of the main compliance theories, including their basic assumptions. The aim here is not to engage in detailed discussions about merits of these theories, but rather to demonstrate the centrality of states in international relations scholarship and the limited amount of research available on the role of ICs in international relations. This chapter clarifies that ICs are new actors in global governance and politics. It evaluates the implications of judicialisation of international relations and international law, including how ICs have performed their multiple roles as actors in international law and relations. The aim is to develop an adequate approach for the study of the utility of the SADC Tribunal.

2.2 *History of international law*

This chapter contains a discussion on the history of international law and the link between colonialism and international law. It examines the role of international law in creating and fostering injustice in the Global South. It focuses on the history of international law, settler colonialism and land dispossession in SADC, including responses and resistance of Zimbabwean government to settler colonialism. It highlights the history of land dispossession and significance of land reform in SADC. Furthermore, it examines the complex issue of land ownership and land dispossession in SADC from a Third World Approaches to International Law (TWAIL) perspective and examines the resistance and responses of Zimbabwean government to the SADC Tribunal judgments concerning Fast Track Land Reform (FTLR).

From a strictly historical and legal perspective, it is claimed that international law is a European construct developed by the European states in the nineteenth century. The literature on international law, including its definition, emerged from the European positivist notion of law which was dominant at the time.²⁵⁹ Most researchers working in the area of international law agree that international law was founded on Western culture and political organisation.²⁶⁰ For instance, Schmitt observes that “the concepts and formulations of the international law textbooks and international law [were based on] a specific European international law”.²⁶¹ In his study of international law, Shaw discovered that modern international systems can be traced back 400 years, and some foundational concepts of international law can be found in political relationships from thousands of years ago.²⁶² In a similar vein, Kaczorowska found that the first documented treaties — signed between leaders of ancient eastern Mediterranean states around 2100 BCE — were based on the principle of *pacta sunt servanda*.²⁶³ These principles were accepted by the 1969 Vienna Convention on the Law of Treaties (VCLT) as important principles of the modern law of treaties.²⁶⁴ The Middle Ages saw the development of *Lex*

²⁵⁹ See Carl Schmitt, *The Nomos of the Earth in the International Law of the Jus Publicum Europaeum* (1950) trans. G. L. Ulmen (2003) at 228. See also Antony Anghie ‘Finding the Peripheries: Sovereignty and Colonialism in Nineteenth-Century International Law’ (1999) 40 *Harvard International Law Journal* at 1. See also Jan Klabbers *International Law* (2013).

²⁶⁰ Malcolm N. Shaw *International Law* 6 ed (2008) at 13. See also Schmitt op cit note 257 at 228. See also Alina Kaczorowska *Public International Law* 4 ed (2010) at 2.

²⁶¹ See Schmitt op cit note 257 at 228.

²⁶² Cited in Shaw *International Law* at 14.

²⁶³ Kaczorowska *Public International Law* at 2.

²⁶⁴ *Ibid.*

mercatori, among others.²⁶⁵ The 1648 Treaty of Westphalia, generally viewed as the constitutional treaty of Europe, introduced the principles of sovereignty, territorial integrity and the equality of states.²⁶⁶ It should therefore come as no surprise that principles of international law are based on the European state system.²⁶⁷

While there is wide agreement that public international law developed in Europe, Kolb's views differ from those of other writers in that he also acknowledges a plurality of international laws found in other regions of the world.²⁶⁸ Kolb criticises the historical studies of international law which tend to focus only on the European foundations of international law while ignoring the contributions of other cultures to its development.²⁶⁹ As Elias observes, Africa and Africans in their individual capacity have contributed to the development and evolution of international law.²⁷⁰ Notably, Africa has contributed to the development of frameworks relating to climate change, the ICJ and International Criminal Court jurisprudence, the law of the sea, particularly the concept of the 'exclusive economic zone', to human rights standards such as 'peoples' rights' in areas such as peace, security, diplomacy, and international leadership, including dispute resolutions.²⁷¹ Africans and African problems have provided answers and actively contributed to the development of international human rights and humanitarian law, sometimes even initiating new paradigms.²⁷²

On the other hand, international law is also linked to imperialism and colonialism.²⁷³ Anghie argues that colonialism was an important aspect of the development of international

²⁶⁵ Ibid at 3.

²⁶⁶ Ibid.

²⁶⁷ Daniel-Erasmus Khan 'Territory and Boundaries' in Bardo Fassbender and Anne Peters *The Oxford Handbook of the History of International Law* (2012).

²⁶⁸ Robert Kolb *Theory of International Law* (2016) at 9.

²⁶⁹ Ibid.

²⁷⁰ Talim Olawale Elias *Africa and the Development of International Law* (1972) Brill at 3–18.

²⁷¹ Rashmi Raman 'Changing of the guard: A geopolitical shift in the grammar of international law' in Frans Viljoen, Humphrey Sipalla & Foluso Adegalu *Exploring African Approaches to international law Essays in honour of Kéba Mbaye* (2022) at 121–127; James Nyawo 'African approaches to international law' and the international law-making process: The role of African states and personalities in the making of the Rome Statute of the International Criminal Court' in Frans Viljoen, Humphrey Sipalla & Foluso Adegalu *Exploring African Approaches to international law Essays in honour of Kéba Mbaye* (2022) at 278–294; Chris Maina Peter 'Preface From objects to subjects: Reflections on Africa's contribution to international law' in Frans Viljoen, Humphrey Sipalla & Foluso Adegalu *Exploring African Approaches to international law Essays in honour of Kéba Mbaye* (2022) at v-viii.

²⁷² Frans Viljoen 'Africa's contributions to the development of international human rights and humanitarian law' (2001) 1 (1) *AHRLJ* at 18.

²⁷³ Cited in Jan Klabbers *International Law* (2013).

law since many of the basic principles of international law such as the sovereignty doctrine were created in order to establish a legal system that could justify or explain the relations between the European and non-European worlds in the colonial confrontation.²⁷⁴ Anghie observes that the universalisation of international law was mainly a result of the imperial expansion that occurred towards the end of the nineteenth century.²⁷⁵ Accordingly, the conquest of non-European peoples for economic and political gains was the main feature of international law in the nineteenth century.²⁷⁶ The colonisation of Asia, Africa and the Pacific led to the assimilation of all non-European peoples into a system of laws that was Eurocentric since it was derived from European values and experience.²⁷⁷ Despite the fact that imperialism has been crucial to the development of international law, the theory of international law has generally ignored it over the last century.²⁷⁸

Schabas maintains that international law is and has always been characterised by what he refers to as the ‘colour line’²⁷⁹ In other words, international law is founded on and characterised by racism. Accordingly, the victims of racial discrimination were completely excluded from the process of international law-making.²⁸⁰ According to Schabas, the main texts of international law ‘continue to bear the traces of its shameful past’.²⁸¹ Many important treaties that are in force today continue to make reference to the ‘civilised nation’ and ‘civilised people’ concepts that stem from ideas of European and white supremacy.²⁸² For Schabas, the colour line continues to exist and is reproduced in many ways. These include state violence as was the case in the murder of George Floyd in the US, lack of access to Covid-19 vaccines and treatment (for non-Europeans and people of the Global South), and the treatment of war refugees during the Russian invasion of Ukraine in 2022 when European refugees were welcomed with open arms, while those from non-European countries, particularly Africans,

²⁷⁴ Antony Anghie *Imperialism, Sovereignty and the Making of International Law* (2004) at 3.

²⁷⁵ *Ibid* at 33. See also Antony Anghie ‘*Finding the Peripheries: Sovereignty and Colonialism in Nineteenth-Century International Law*’ at 1–2.

²⁷⁶ *Ibid*.

²⁷⁷ *Ibid*.

²⁷⁸ Antony Anghie *Imperialism and International Legal Theory* in Anne Orford and Florian Hoffmann *The Oxford Handbook of the Theory of International Law* (2016) at 1.

²⁷⁹ William A. Schabas *The International Legal Order’s Colour Line Racism, Racial Discrimination, and the Making of International Law* (2023) Oxford University Press 2023 at 1.

²⁸⁰ *Ibid*.

²⁸¹ *Ibid* at 3.

²⁸² *Ibid*.

were discriminated against at the borders of European countries.²⁸³ Furthermore, Rachman argues that the fact that four of the permanent members of United Nations Security Council are predominantly white countries clearly demonstrates an ‘international form of “white privilege”, inherited from the age of empires’.²⁸⁴ For Gathii and Puig, the colonial and racialised foundations of the post-World War II international order extend to the global economic system, where the International Monetary Fund, World Bank and the WTO are dominated by Western countries.²⁸⁵ Therefore, for the Global South countries and their scholars, colonialism and its legacies are the main feature not only of postcolonial Africa and Asia but also of the modern international economic order.²⁸⁶

Mugabe and Zimbabwe’s land reform exposed the nature of global white supremacy and has uncovered the continuing racism especially when white privilege is threatened.²⁸⁷ In a global society where racism continues to reign, any call for ‘correcting historical racial injustices become opprobrium, provocative, and criminalised.’²⁸⁸ The SADC Tribunal decisions relating to Fast Track Land Reform (FTLR) as discussed in section 3.6 ignored the broader context of land question in Zimbabwe. The economies and lands of Zimbabwe, South Africa and Namibia are owned by white colonial settlers who gained such control through violence.²⁸⁹ As a result, the dispossessed black majority continue to face poverty, unemployment and income inequality.²⁹⁰ Important economic sectors and industries such as mining, agriculture and financial sector are controlled by white colonial settlers.²⁹¹ The root causes of income inequality in Southern African region are linked with its settler colonial history of land dispossession and racially discriminatory socio-economic policies.²⁹²

²⁸³ Ibid at 412.

²⁸⁴ Gideon Rachman ‘Race Is also a Geopolitical Matter’ *Fin. Times* 6 April 2021 in James T. Gathii and Sergio Puig ‘The West and the Unraveling of the Economic World Order. Thoughts from a Global South Perspective’ in David Sloss *Is the International Legal Order Unraveling?* (2022).

²⁸⁵ Ibid.

²⁸⁶ Ibid.

²⁸⁷ Chimusoro Kenneth Tafira Mugabe’s Land Reform and the Provocation of Global White Antiblack Racism in Sabelo J. Ndlovu-Gatsheni *Mugabeism?: History, Politics, and Power in Zimbabwe* (2015) Palgrave Macmillan 2015 at 203-205

²⁸⁸ Ibid at 212.

²⁸⁹ Sam Moyo *Land Ownership Patterns and Income inequality in Southern Africa* at 1-53

<https://www.un.org/en/development/desa/policy/wess/wess>. See also Sam Moyo and Walter Chambati Land and Agrarian Reform in Zimbabwe Beyond White-Settler Capitalism CODESRIA 2013.

²⁹⁰ Ibid.

²⁹¹ Ibid.

²⁹² Ibid.

The above background explains why Zimbabwean government resorted to radical land reform programme to empower the marginalised black majority of Zimbabwe. Zimbabwe's post-independence land reform policies were designed to correct the colonial dispossession of African land, while also seeking to achieve equity and effective use of the land resource in the country.²⁹³ The FTLR sought to disrupt the economic inequality caused by the legacy of colonialism and end settler colonial economy. The Tribunal failed to promote and advance the rights of indigenous Africans to land and natural resources. Access to land enables one to enjoy many fundamental human rights such as access to housing, food, water, right to life and many other socio-economic rights.²⁹⁴ Thus, denying rights of indigenous Africans to land and natural resources also denies them the ability to enjoy fundamental human rights.²⁹⁵ According to Warikandwa and Nhemachena, the land rights discourse is flawed since the focus in Africa should be on the human right to land. Accordingly, such approach would allow indigenous Africans access to fundamental human rights and enable Africa to achieve its developmental goals.²⁹⁶ It is no surprise that the SADC Tribunal collapsed due to its failure to adequately address the sensitive issue of land reform.²⁹⁷ Accordingly, there was no reason for the farmers that unjustifiably benefitted from the unlawful dispossession of Africans' land to expect compensation for what they illegally acquired.²⁹⁸ Decisions such as *Mike Campbell (Pvt) Ltd v The Republic of Zimbabwe* and *von Pezold v. Zimbabwe* show how international law is used to justify land grabbing and settler colonialism.²⁹⁹ With reference to the *von Pezold v.*

²⁹³ Blessing Makuni Land Policies and the Dispossession of the African Peasantry in Colonial Zimbabwe in Tapiwa V. Warikandwa, Artwell Nhemachena & Oliver Mtapuri *Transnational Land Grabs and Restitution in an Age of the (De-) Militarised New Scramble for Africa: A Pan African Socio-Legal Perspective* Langa Research & Publishing CIG 2017 at 153.

²⁹⁴ Tapiwa V. Warikandwa & Artwell Nhemachena Human Rights to Land or Land Rights? Charting a New Roadmap to Land Ownership in Africa in Tapiwa V. Warikandwa, Artwell Nhemachena & Oliver Mtapuri *Transnational Land Grabs and Restitution in an Age of the (De-) Militarised New Scramble for Africa: A Pan African Socio-Legal Perspective* Langa Research & Publishing CIG 2017 at 530.

²⁹⁵ Ibid.

²⁹⁶ Ibid.

²⁹⁷ Lovemore Chiduzo *The Jurisprudence of the Zimbabwean Judiciary on the Protection of the Right to Property with Specific Reference to the Fast-Track Land Reform Programme and Operation Murambatsvina* in Artwell Nhemachena, Tapiwa V. Warikandwa & Samuel K. Amoo *Social and Legal Theory in the Age of Decoloniality (Re-)Envisioning Pan-African Jurisprudence in the 21st Century* 2018 at 333.

²⁹⁸ Ibid.

²⁹⁹ Madhav Mallya *Symposium on Unbroken Bond: Tracing the ties between African and Palestinian anti-colonial struggle-The application of international law to legitimise settler colonialism and land grabbing in Zimbabwe and Palestine: An analysis of the Van Pezold and Ben Sourik decisions.* <https://opiniojuris.org/2024/08/09/symposium-on-unbroken-bond-tracing-the-ties-between-african-and-palestinian-anti-colonial-struggles-a-reflection-on-forms-of-resistance-and-aid-strategies-against-apartheid-era-south-africa-that-ar/>. See also Ntina Tzouvala *Invested in Whiteness: Zimbabwe, the von Pezold Arbitration, and*

Zimbabwe decision, similar to colonial times, the tribunal applied the imperial reasoning of “whoever owns the land, the natives do not”.³⁰⁰

It is within this broader context that international lawyers from Africa and Asia called for the decolonisation of the study of international law owing to its Eurocentric views which ignore the history of Western imperialism and its consequences in the imposition of international law on developing countries.³⁰¹ A movement called Third World Approaches to International Law (TWAIL) was developed in response to this.³⁰² According to Chimni, TWAIL seeks to understand the history, structure and process of international law from the perspective of Third World countries.³⁰³

For Makau Mutua, TWAIL views international law as an illegitimate ‘predatory system that legitimises, reproduces and sustains the plunder and subordination of the third world by the West’.³⁰⁴ According to Mutua, international law’s claim of universality and promise of a global order does not make it a just, equitable or legitimate system of global governance for the Third World.³⁰⁵ Traditionally, Third World countries have viewed international law as a system and discourse of domination and subordination, not resistance and liberation; this is referred to as TWAIL.³⁰⁶ The main objectives of TWAIL scholarship are

to understand, deconstruct, and unpack the uses of international law as a medium for the creation and perpetuation of a racialised hierarchy of international norms and institutions that subordinate non-Europeans to Europeans. Second, it seeks to construct and present an alternative normative legal edifice for international governance. Finally, it seeks through scholarship, policy, and

the Question of Race in International Law 2 *Journal of Law and Political Economy* 226 (2022). Reginald L. Streater *Zimbabwe’s struggle to break the chains of colonialism: Self-determination, Land Reform, and International Law* TEMPLE INT’L & COMP. L.J.

³⁰⁰ Undermining the indigenous right to land and perpetuating colonial wrongs *Border Timbers and Von Pezold Vs Zimbabwe*

³⁰¹ See Antony Anghie *Imperialism, Sovereignty and the Making of International Law* (2004); Makau W. Mutua, What Is TWAIL? 94 *Proceedings of the ASIL Ann. Meeting* 31 (2000), available at <https://digitalcommons.law.buffalo.edu/articles/560> at 31; See also James Thuo Gathii ‘The Agenda of Third World Approaches to International Law (TWAIL)’ in Jeffrey L. Dunoff and Mark A. Pollack *International Legal Theory foundations and frontiers* (2022); See Chimni, B.S. ‘Third World Approaches to International Law: A Manifesto’ (2006) 8 *International Community Law Review* at 3–27. See B S Chimni ‘The past, present and future of international law: a critical third world approach’ (2007) 8 *MELB. J. INT’L L* 499; see Okafor, Obiora Chinedu ‘Newness, Imperialism, and International Legal Reform in Our Time: A Twail Perspective’ (2005) 43 (1/2) *Osgoode Hall Law Journal* 171-191. Available at <http://digitalcommons.osgoode.yorku.ca/ohlj/vol43/iss1/7>.

³⁰² *Ibid.*

³⁰³ Cited in B S Chimni ‘The past, present and future of international law: a critical third world approach’ at 1.

³⁰⁴ Cited in Makau W. Mutua, What Is TWAIL? at 31.

³⁰⁵ *Ibid.*

³⁰⁶ *Ibid.*

politics to completely remove or eliminate the conditions of underdevelopment in the Third World.³⁰⁷

Gathii observes that TWAIL scholars ‘seek to retell, rewrite and reconfigure international law by decentering some of its central myths such as its Westphalian origins’.³⁰⁸ Furthermore, while TWAIL seeks to rewrite and write international law from Third World perspectives, it also critically assesses international law’s doctrines, including the ideas behind them, their functioning, their normative commitments and assumptions.³⁰⁹ TWAIL rejects the Eurocentric construct of international law that ignores the history of its subordinated groups and its current impact on issues such as climate change, poverty and other forms of violence which are directly linked to the colonial history of international law.³¹⁰ According to Gathii, TWAIL is an appositional and transformative movement that calls for the rethinking of the international legal order.³¹¹ Despite the fact that TWAIL scholars accept and support international law’s ideals of self-determination, sovereign equality, justice and human rights, they also demonstrate how these doctrines have often operated as legacies of colonial era imperialism.³¹² Therefore, TWAIL challenges international law, and the scholarship that supports it, for being founded on European experiences and conceptualisations.³¹³

The TWAIL approach also seeks to give meaning to international law in the context of the lived experiences of the ordinary peoples of the Third World with a view to transform it into an international law of emancipation.³¹⁴ Gathii explains that knowledge production in international law is no longer limited to leading textbooks and casebooks of international law.³¹⁵ Accordingly, TWAIL scholars have published books and numerous journals with leading presses and journals all over the world.³¹⁶ Despite the fact that there is currently no TWAIL casebook, there has been a decentralisation of knowledge production that has allowed scholarship such as TWAIL to contest the dominant approaches to international law.³¹⁷ In

³⁰⁷ Ibid.

³⁰⁸ Cited in James Thuo Gathii *The Agenda of Third World Approaches to International Law (TWAIL)* at 153.

³⁰⁹ Ibid.

³¹⁰ Ibid.

³¹¹ Ibid.

³¹² Ibid at 154.

³¹³ Ibid.

³¹⁴ Cited in B S Chimni ‘The past, present and future of international law: a critical third world approach’ at 2.

³¹⁵ James Thuo Gathii *The Agenda of Third World Approaches to International Law (TWAIL)* at 173.

³¹⁶ Ibid.

³¹⁷ Ibid.

summary, TWAIL scholarship is opposed to the use of international law to achieve hegemonic goals and rather seeks to create a just international order.³¹⁸

One of the ways in which decolonisation can be achieved is through decolonising international law and human rights education in Africa.³¹⁹ In order to decolonise the teaching of international law at African universities, there is need for continued meaningful dialogue between and among different stakeholders such as the international law academy, for inter- and trans-disciplinary dialogue, and for dialogue between teachers and students.³²⁰ Another scholar suggests that decolonisation of human rights education can be achieved by referring to African legal instruments such as the African Charter on Human and Peoples' Rights (African Charter) and the African Charter on the Rights and Welfare of the Child (African Children's Charter) which are already in existence.³²¹ Accordingly, African human rights legal instruments can be relied on to develop and improve the international human rights law curriculum.³²² For Lubaale, these instruments create an entry point for the decolonisation of the international human rights law curriculum.³²³

2.3 *Definition of international law*

For the most part, international law is defined as the law regulating relations and activities between nations or as a set of rules that countries follow in dealing with each other.³²⁴ In the *SS Lotus Case (France v Turkey)*, the Permanent Court of International Justice (PCIJ) defined international law as follows:

International law governs relations between independent states. The rules of law binding upon states, therefore, emanate from their own will as expressed in conventions [treaties] or by usages generally accepted as expressing principles of law established in order to regulate the relations

³¹⁸ Ibid.

³¹⁹ Babatunde Fagbayibo 'Rethinking international law education in Africa: Towards a dialogic approach' in Frans Viljoen, Humphrey Sipalla & Foluso Adegalu *Exploring African Approaches to international law Essays in honour of Kéba Mbaye* (2022). See Emma Charlene Lubaale 'Africa's human rights framework as an entry-point to decolonising education' in Viljoen, Sipalla and Adegalu *Exploring African Approaches to international law Essays in honour of Kéba Mbaye* (2022).

³²⁰ Cited in Fagbayibo 'Rethinking international law education in Africa: Towards a dialogic approach' at 336–343.

³²¹ Lubaale 'Africa's human rights framework as an entry-point to decolonising education' at 321–327.

³²² Ibid at 320–321.

³²³ Ibid at 327.

³²⁴ Peter Malanczuk, *Akehurst's Modern Introduction to International Law 7 ed* (2002) at 1. See also G. I. Tunkin *Theory of International Law* (1974) at 251.

between these co-existing independent communities or with a view to the achievement of common aims.³²⁵

Furthermore, Martin Dixon defines international law as ‘a system of rules and principles that govern the international relations between sovereign states and other institutional subjects of international law such as the United Nations’.³²⁶

These definitions emphasise that international law governs interstate relations and is not concerned with relations between private actors. This is not surprising since the general view is that only states could be subjects of international law since they are endowed with an international legal personality.³²⁷ In other words, international laws were mainly created for state to state cooperation. While it is true that international law first and foremost regulates interstate relations, modern international law recognises non-state actors such as individuals and NGOs as subjects of international law. Notably, the Restatement (Third) of the Foreign Relations Law of the United States defines international law as follows:

International law, as used in this Restatement, consists of rules and principles of general application dealing with the conduct of states and international organisations and with their relations inter se, as well as with some of their relations with persons, whether natural or juridical.³²⁸

Similarly, to the above definition, Shearer defines international law more broadly to include states, international organisations or institutions, individuals and non-state parties. According to him:

International Law may be defined as that body of law which is composed for its greater part of the principles and rules of conduct which states feel bound to observe, and therefore, do commonly observe in their relations with each other, and which includes also; (a) The rules of law relating to the functioning of international institutions or organisations, their relations with each other, and their relations with states and individuals; and (b) Certain rules of relating to individuals and non-states entities so far as the rights or duties of such individuals and non-state entities are the concern of the international community.³²⁹

The above definitions accept that international law governs not only relations between the sovereign states but between states, international organisations, and individuals. Therefore,

³²⁵ *SS Lotus (France v Turkey) 1927 PCIJ (Ser.A) No 10 at 18.*

³²⁶ Martin Dixon *Textbook on International Law* 5 ed (2005) at 3.

³²⁷ Cited in Peter Malanczuk *Akehurst's Modern Introduction to International Law* at 1.

³²⁸ Restatement (Third) of Foreign Relations Law of the United States, §101, 3 ed (1987).

³²⁹ S.H. Shearer *Starke's Public International Law* 11 ed (1994) at 3.

private actors such as individuals and NGOs are subjects of international law. It is clear that international law regulates interstate relationships and other types of relationships, such as the responsibilities and obligations of individuals and international organisations under international law. For this reason, an essential element of the definition of international law is that states are not the sole actors in international law, although they may be the main actors. It is the combination of states and private actors, such as individuals and international organisations, which constitutes international law. The new definition of international law reflects the changes in international law, particularly the establishment of international institutions and the development of international human rights courts that seek to protect individual human rights and punish individuals for committing international human rights crimes.³³⁰

The next section presents a discussion of the jurisprudential and philosophical debate on the concept of law, and critically examines the concept as developed by Austin and HLA Hart. In particular, the debate challenges the validity of the claim that international law is not really law.

2.4 Is international law really law?

There are generally two views on the nature of international law. The first view claims that ‘international law is not really law’, based on the Austinian concept of law.³³¹ The second view is that ‘international law is law’, and this view is supported by scholars such as Hart, Luis Henkin and D’Amato.³³² Austin argued that all laws are commands of the sovereign backed by sanction.³³³ For Austin, international and constitutional laws were not positive laws but merely morality.³³⁴ Austin distinguished between ‘law properly so called’ and ‘law improperly so called’, and between ‘positive law’ and ‘positive morality law’, defining positive law as a command or a species of commands.³³⁵ In other words, since Austin classified ‘laws properly

³³⁰ See the discussion in section 1.1.

³³¹ Jack L. Goldsmith and Eric A. Posner *The Limits of International Law* (2005) Oxford University Press at 202.

³³² See John Austin ‘The province of jurisprudence determined’ in Wilfrid E. Rumble *A Cambridge Text in the History of Political Thought* (1995); D’Amato, Anthony ‘Is International Law Really “Law”?’ *Northwestern University Law Review* (1984-1985) 79 (5 & 6) 1293–1314 at 1312–1313; Louis Henkin, *How Nations Behave* (1979).

³³³ Cited in John Austin *The province of jurisprudence determined* at 18–26

³³⁴ *Ibid* at 124, 171 and 216.

³³⁵ *Ibid* at 25–26.

so called' as positive law, he viewed them as commands of sovereign states backed by a threat of sanction for non-compliance. Based on this conception of law, he concluded that international law is not law but a positive morality. The command theory, as developed by Austin, stressed the importance of sanction and believed that law is only effective if it is accompanied by sanction.³³⁶

On the other hand, Hart challenges Austin's view of law and argues that not all laws command people.³³⁷ Hart declares that specific laws do not necessarily command their subjects or persons but have other goals, such as creating substantive and procedural rules on how to create valid wills, contracts, or enter into a valid legal marriage and confer powers to officials such as judges to interpret laws and legislature to make laws in accordance with the needs of society.³³⁸ The concept of sanction, as defined by Austin might, in fact, be equated with criminal law.³³⁹ In other words, Austin's definition of law corresponds with criminal laws that define acceptable or unacceptable behaviour and contain types of punishment in cases of violation of criminal law statutes. Accordingly, wills and contracts cannot be described along the lines of criminal law. For these types of law, sanctions or a threat of sanction is not necessarily important and does not render these laws inadequate.³⁴⁰ Hart maintains that to claim that international law is not binding because of its lack of sanctions is to accept the view that law is a matter of orders supported by sanctions.³⁴¹

Despite the importance of sanctions in any legal system, it is doubtful whether sanctions should be afforded any significant role in defining an individual legal system and its accompanying obligation.³⁴² Laws create many legal obligations, but their violation is only sometimes sanctioned.³⁴³ It is sometimes challenging to impose sanctions, and failure to punish legal breaches does not mean that there is no legal obligation.³⁴⁴

³³⁶ Ibid at 22.

³³⁷ HLA Hart *The concept of law* 2 ed (1998) at 26.

³³⁸ Ibid.

³³⁹ Ibid at 34–35.

³⁴⁰ Ibid.

³⁴¹ Ibid at 217–218

³⁴² Raymond Wacks *Understanding Jurisprudence An Introduction to Legal Theory* 3 ed (2012) at 71.

³⁴³ Ibid.

³⁴⁴ Ibid.

Austin's concept of law does not conform to modern legal systems.³⁴⁵ For instance, community law is an autonomous legal system emanating from an independent source and is about more than interstate parties; it establishes a *sui generis* legal regime, typically referred to as 'supranational' law, which protects private parties too.³⁴⁶ Apart from this, human rights and private international law rules to a certain extent are no longer under the exclusive control of states or their national law.³⁴⁷

Since the end of World War II, human rights came to be protected under treaties.³⁴⁸ For this reason, they were no longer under the exclusive control of national law.³⁴⁹ Therefore, if there is any lesson to be drawn from the above, it is that by creating these institutions and providing them with these powers, member states have limited their sovereignty to international institutions and thereby providing such institutions authority to deal with specific issues that are usually under the exclusive domain of their national governments. The implication is that states can no longer hide under state sovereignty to escape international legal scrutiny or rely on domestic laws to evade their international legal obligations.

Furthermore, it is not true that international law lacks sanctions.³⁵⁰ As D'Amato notes, the fact that international law lacks centralised enforcement institutions such as the legislature and a police force does not mean that international law is not law; instead, it simply means that international law is enforced differently.³⁵¹ Indeed, although international law has no centralised enforcement system similar to those found at domestic level — nor an international police or sheriff to supervise and monitor compliance with international law — there are an increasing number of ICs and quasi-judicial bodies such as the United Nations Security Council, the ECJ, the European Commission (EC) and the SADC Summit which are mandated to oversee the implementation and enforcement of international law.³⁵² More importantly, in practice, there are many ways in which international law is enforced. These include the

³⁴⁵ Ibid.

³⁴⁶ Erasmus G *The COMESA [Common Market for Eastern and Southern Africa] Court of Justice: Regional Agreements do protect Private Parties* (2013) at 3.

³⁴⁷ Jaap Hage 'Sources of Law' in Jaap Hage, Antonia Waltermann and Bram Akkermans *Introduction to Law 2* ed (2017) at 18. doi: 10.1007/978-3-319-57252-9_1.

³⁴⁸ Ibid.

³⁴⁹ Ibid.

³⁵⁰ Cited in D'Amato, Anthony 'Is International Law Really "Law"?' 1313.

³⁵¹ Ibid.

³⁵² See section 1.9.2. see also section 4.8. and 4.9.

imposition of economic sanctions, naming and shaming, litigation to compel other states to comply with their international obligations, expulsion, sometimes the use of force, the use of national laws and domestic courts, and the use of civil society groups to pressure states to comply with their international legal obligations.³⁵³

It is generally accepted that states comply with their international obligations despite the lack of sanctions in international law. According to Luis Henkin, 'it is probably the case that almost all nations observe almost all principles of international law and almost all of their obligations almost all of the time'.³⁵⁴ Most states accept that international law binds them and therefore accept it as the law.³⁵⁵ Brierly writes:

The best evidence for the existence of international law is that every actual state recognises that it does exist and that it is itself under obligation to observe it. States may often violate international law, just as individuals often violate municipal law, but no more than individuals do states defend their violations by claiming that they are above the law.³⁵⁶

For instance, Iraq's invasion of Kuwait in 1990 was viewed as unlawful and, therefore a violation of international law by many states.³⁵⁷ In the same way, critics viewed the US invasion of Iraq and Afghanistan as violating international law.³⁵⁸ Most countries opposed the US invasion of Iraq and viewed it as illegal and illegitimate under international law since it was not sanctioned by the United Nations (UN).³⁵⁹ More importantly, the US and its allies did not deny international law but sought to justify its invasion as lawful under international laws governing the use of force.³⁶⁰ The fundamental point is that even states that violate international law accept that it is the law binding, although they may occasionally violate it.

Many scholars agree that international law is the law.³⁶¹ It is clear that international law qualifies as a system of law since there are political communities [UN], there are rules and

³⁵³ See section 1.8.2.

³⁵⁴ Louis Henkin *How Nations Behave* (1979) at 47.

³⁵⁵ Martin Dixon *Textbook on International Law* at 4.

³⁵⁶ James L Brierly *The Outlook for International Law* (1944) at 5.

³⁵⁷ *Ibid.*

³⁵⁸ *Ibid.*

³⁵⁹ Wayne Sandholtz 'The Iraq war and international law' in David Armstrong *Routledge Handbook of International Law* (2009) at 223.

³⁶⁰ Cited in Martin Dixon *Textbook on International Law* at 4.

³⁶¹ Cited D'Amato, Anthony 'Is International Law Really "Law"?' at 1312–1313. See also Mary Ellen O'Connell *The Power and Purpose of International Law Insights from the Theory and Practice of Enforcement* (2008) at 369; J. L. Brierly *The Laws of Nations* (1963) at 1; See also Robert Jennings and Arthur Watts *Oppenheim's International Law* (1992) at 9–13.

principles that govern international law, and the member states accept the binding nature of these rules and principles.³⁶² From the perspective of the SADC, the treaty and other SADC community laws also qualify as law in that there is also a political community comprised of SADC member states who accept them as binding.³⁶³

Furthermore, Article 38(1)(c) of the ICJ statute proves that international law is law.³⁶⁴ It confirms that international law involves ‘general principles of law recognised by civilised nations’, derived from several states’ domestic law as evidence of international law.³⁶⁵ The doctrine of *pacta sunt servanda* under Article 26 of the VCLT refers to the binding nature of treaties. It incorporates the principle of ‘good faith’ from the domestic laws of many states into international arena, thus establishing the link between international law and municipal law.³⁶⁶ The link between international and domestic law supports the view that international law is law.³⁶⁷ The fact that many states accept and respect the obligation created by *erga omnes* and *jus cogens* proves that international law is the law.³⁶⁸

Arguably, a limitation in the scholarly discourse on international law is mainly one of method.³⁶⁹ Notably, sceptics ‘start with a wrongly conceived definition of law’ and therefore deny the character of law to rules regulating human conduct, which does not appropriately fit into that definition.³⁷⁰ Subsequently, their law definition is based on domestic law and identifies law with rules imposed by the sovereign over its subjects.³⁷¹ Hathaway and Shapiro note that critics often assume that law exists only when it contains bureaucratic enforcement mechanisms, and those mechanisms employ intimidation and violence to ensure compliance.³⁷² The critics of international law have given way to the appeal of modern legal systems and

³⁶² John Dugard *International Law A South African Perspective* 4 ed (2011) at 8.

³⁶³ See Article 4 and Article 6(1) of the SADC Treaty of 1992.

³⁶⁴ Kenneth K Mwenda *Contemporary issues in international law* (2021) at 7.

³⁶⁵ *Ibid* at 17.

³⁶⁶ *Ibid* at 20–21.

³⁶⁷ *Ibid* at 21.

³⁶⁸ *Ibid* at 23–26.

³⁶⁹ L. Oppenheim ‘The Science of International Law: Its Task and Method’ (1908) 2 *The American Journal of International Law* 313–56 at 330.

³⁷⁰ *Ibid*.

³⁷¹ *Ibid*.

³⁷² Hathaway, Oona A. and Shapiro, Scott J ‘Outcasting: Enforcement in Domestic and International Law’ (2011) Faculty Scholarship Series. Paper 3850 available at http://digitalcommons.law.yale.edu/fss_papers/3850 at 255.

³⁷² Cited in HLA Hart *The concept of law* at 268.

adopted such systems as their exclusive model for law.³⁷³ Accordingly, critics have adopted what these authors call ‘the modern state conception’, which claims that regimes are legal systems only when they possess control over the use of force within a territory and use this monopoly to enforce their rules.³⁷⁴ International law is law, and the enforcement mechanism found at the domestic level, as seen from the positivist perspective, does not necessarily render it the yardstick for measuring whether or not international law is law or it exists.³⁷⁵

Nevertheless, Burgstaller notes that international law has developed into a legal system covering all aspects of relations among and between states and their federated units, states and persons, states and multinational corporations, and international organisations and their state members.³⁷⁶ For the reasons mentioned above, the increasing demand for international law contrasts with widespread scepticism regarding the relevance of international law.³⁷⁷ It follows that it has become customary for critics to comment on comparing domestic and international law and discuss the specific nature of international law.³⁷⁸ The basis for such discussion is to reject the claim that international law is irrelevant because it lacks bureaucratic enforcement systems such as centralised legislative, judicial or enforcement procedures.³⁷⁹ Koskenniemi succinctly explains this ‘dilemma’ of international law as follows:

To appreciate the value of these standard criticisms and responses, we need to look closer into the assumptions behind them. Why should the lack of certain procedures present in municipal law doubt that international law is law? An answer has to be based on a theory about the character of social life among States. The criticism is based on a distinctly Hobbesian theory: there is no natural society among states, just as there is none among individuals. Society is artificial and created by men (and States) themselves. Moreover, there is the psychological premise that men (and States) can maintain society only if they are forced to do so – by central legislative, judicial and enforcement procedures. The legal nature of municipal law rests on this. It is something other than (a speculative) morality as it is able to constrain. Lacking such procedures, international law can only be a hopelessly irrelevant utopia or an interminably flexible apology.³⁸⁰

³⁷³ Ibid at 257.

³⁷⁴ Ibid.

³⁷⁵ Cited in Kenneth K Mwenda *Contemporary issues in international law* at 6–7.

³⁷⁶ Markus Burgstaller ‘Theories of compliance with International Law Developments’ Volume 52 2004 Martinus Nijhoff Publishers at 21–22.

³⁷⁷ Ibid at 22.

³⁷⁸ Ibid.

³⁷⁹ Ibid.

³⁸⁰ Martti Koskenniemi *From Apology to Utopia: The Structure of International Legal Argument Reissue with a new Epilogue* (2005) at 172.

To put it differently, Koskenniemi questions the tendency to view international law as something other than law. For this author, the criticism is based on a flawed understanding of how society works. Namely, the assumption that people only comply with the law if it is issued by authorised institutions such as the legislature or the judiciary. Therefore, for critics, if international law lacks features found in the domestic legal system, it is either a hopelessly irrelevant utopia or an apology. In other words, critics view international law as a hopelessly irrelevant utopia if there is no link between its theory and practice. It is an apology if international law is based on state practice. Contrary to these claims, states comply with international law for many reasons which include interests, maintaining peace and order, acceptance of the legitimacy of rules of international law, and preserving their reputation.³⁸¹ These do not include the threat or fear of sanction.³⁸²

The next section examines theories of compliance with international law from the perspective of rational choice theories and constructivist theories.

2.5 Theories of compliance with international law

2.5.1 Rational choice theories

The literature on rational choice theories suggests that states comply with international law to promote their own interests.³⁸³ It shows that rational choice theorists view international rules as a tool by which states aim to maximise their interests in wealth and power.³⁸⁴ Critics of the rational choice theory argue that it is limited by bounded rationality.³⁸⁵ Therefore,

³⁸¹ Cited in John Dugard *International Law A South African Perspective* at 8–9.

³⁸² *Ibid* at 9.

³⁸³ Hans J Morgenthau and Kenneth W Thompson *Politics among Nations: The Struggle for Power and Peace* 6 ed (1993) at 10; Frederick L. Schuman *International Politics* 4 ed (1969); James E. Dougherty and Robert L. Pfaltzgraff, Jr. *Contending Theories of International Relations* (1971); Andreas Jacobs 'Realism' in Siegfried Schieder and Manuela Spindler *Theories of International Relations* (2014); Jack Donnelly 'Realism' in Scott Burchill, Andrew Linklater, Richard Devetak, Jack Donnelly, Matthew Paterson, Christian Reus-Smit and Jacqui True *Theories of International Relations* 3 ed (2005); Richard H. Steinberg 'Wanted – Dead or Alive: Realism in International Law' in Jeffrey L. Dunoff and Mark A. Pollack (2013) *Interdisciplinary Perspectives on International Law and International Relations the state of the art* at 148; Joseph S. Nye *Soft Power The means to success in World Politics* Public Affairs (2004) ch 1.

³⁸⁴ Harold Hongju Koh 'Why Do Nations Obey International Law' (1997) 106 (8) *The Yale Law Journal* Symposium: Group Conflict and the Constitution: Race, Sexuality, and Religion (June 1997) 2599–2659 available at <http://www.jstor.org/stable/797228> at 2632.

³⁸⁵ Simon, Herbert Alexander *Models of Bounded Rationality Volume 3 Empirically Grounded Economic Reason* (1997); Simon, Herbert Alexander *An Empirically Based Microeconomics* (1997).

policymakers are confronted by bounded rationality, making it difficult to formulate their foreign policy goals and national interests due to a lack of proper information and incapacity.³⁸⁶ Consequently, these limitations make it difficult for policymakers to make the right choices, meaning that it is almost impossible to maximise their policy choices.

The rational choice theories ignore the role of norms in international law. For instance, Article 4(a) and (b) of the SADC Treaty provide that the SADC member states shall act in accordance with principles of sovereignty and solidarity.³⁸⁷ In other words, the SADC member states, in their interaction with each other, are expected to respect each other's sovereignty and act in solidary when dealing with third parties. Therefore, while state interests significantly influence state behaviour, norms shape SADC member states' behaviour. Consequently, interest is not the only factor that shapes the state's behaviour in international law. The rational choice theory will be further discussed in two strands: first, within the prism of realism and second, from the perspective of liberalism.

2.5.1.1 Realism

A strand of rational choice theory is realism which also views the state as the central actor in international law.³⁸⁸ Morgenthau believed that the critical issue to understanding international politics is the concept of interest defined in terms of power.³⁸⁹ Therefore, international politics, similar to all politics, is a struggle for power.³⁹⁰ According to realist theory, states will not comply with a treaty norm or international rule if it is against their national interests.³⁹¹ The primary assumption of the realist theory is that the international system is anarchic and has no centralised authority.³⁹² Critics of realism argue that it is flawed and lacks a workable

³⁸⁶ Bryan D. Jones 'Bounded rationality' (1999) *Annu. Rev. Polit. Sci.* 2:297.321; See also Esther-Mirjam Sent 'Rationality and bounded rationality: you can't have one without the other' (2018) 25 (6) *The European Journal of the History of Economic Thought* 1370–1386. doi: 10.1080/09672567.2018.1523206; See also Jan Faber 'On Bounded Rationality and the Framing of Decisions in International Relations: Towards a Dynamic Network Model of World Politics' (1990) 27 (3) *Journal of Peace Research* 307–319, available at <http://www.jstor.org/stable/423473>.

³⁸⁷ See Article 4(b) of the SADC Treaty of 1992.

³⁸⁸ Richard H. Steinberg 'Wanted – Dead or Alive: Realism in International Law' at 148. Cited in Hans J Morgenthau and Kenneth W Thompson *Politics among Nations: The Struggle for Power and Peace* at 10.

³⁸⁹ *Ibid.*

³⁹⁰ *Ibid.*

³⁹¹ Cited in Richard H. Steinberg 'Wanted – Dead or Alive: Realism in International Law' 150.

³⁹² Anne-Marie Slaughter 'International law and international relations theory: a prospectus' in Eyal Benvenisti and Moshe Hirsch (2004) *The Impact Of International Law On International Cooperation. Theoretical Perspectives* at 22.

conceptual framework due to its failure to give an acceptable definition of power and national interests.³⁹³ In particular, measuring power is difficult, and national interest means different things for different political leaders.³⁹⁴ Hathaway has also criticised realist theory and argued that it cannot explain why states comply with human rights since the respect for individual human rights by a state provides no material benefits for other states.³⁹⁵ Nye points out that, possessing power resources does not necessarily mean that you will always get the outcome you want.³⁹⁶

2.5.1.2 Liberal theory

One of the rationalist strands is liberal theory which suggests that it is rather the interests of society that shape state preferences.³⁹⁷ According to Moravcsik, the liberal theory identifies and explains the preferences of social and sub-state actors.³⁹⁸ In contrast to realism, liberal theory foresees a role for domestic actors, such as individuals and NGOs, in foreign policy. One of the liberal theory's main assumptions is that democracies are more likely to respect international systems and comply with their treaty commitments than authoritarian regimes.³⁹⁹ Helfer and Slaughter's study of effective supranational courts also finds that the main reason for the effectiveness of European courts is the cultural and political homogeneity of European states, or the fairly strong presence of liberal democracies in Europe that are committed to the rule of law.⁴⁰⁰ Drawing on the work of Helfer and Slaughter, Hillebrecht highlights that liberal democracies have an inclination to comply with decisions of ICs and tribunals owing to their commitments to international law, human rights, the rule of law and democracy.⁴⁰¹ In sharp contrast, it has been argued that the circumstances in which international human rights

³⁹³ Oona A. Hathaway 'Do Human Rights Treaties Make a Difference?' (2002) 111 *Yale Law Journal* at 1946. Cited in James E. Dougherty and Robert L. Pfaltzgraff, Jr. *Contending Theories of International Relations* at 99–100.

³⁹⁴ *Ibid.* See also Arnold Wolfers *Discord Collaboration Essays on International Politics* (1962) at 148.

³⁹⁵ Oona A. Hathaway *Do Human Rights Treaties Make a Difference?* at 1946.

³⁹⁶ Cited in Joseph S. Nye *Soft Power The means to success in World Politics* ch 1.

³⁹⁷ Andrew Moravcsik 'Taking Preferences Seriously: A Liberal Theory of International Politics' (1997) 51 (4) *International Organization* at 513–553. Andrew Moravcsik 'Liberal Theories of International Law' in Jeffrey L. Dunoff and Mark A. Pollack (2013) *Interdisciplinary Perspectives on International Law and International Relations the state-of-the-art* at 83.

³⁹⁸ *Ibid.*

³⁹⁹ Anne-Marie Slaughter *International Law in a World of Liberal States* (1995) 6 *European Journal of International Law* at 504.

⁴⁰⁰ LR Helfer & A-M Slaughter, *Toward a Theory of Effective Supranational Adjudication* (1997) 107 *Yale Law Journal* at 335-336.

⁴⁰¹ Cited in Courtney op cit note 73 at 32.

instruments can have a domestic effect are beyond the mere distinction of liberal or non-liberal states.⁴⁰² Nevertheless, Helfer and Slaughter accept that the correlation between democracy and effective supranational courts is complex, dependent, or subject to limitations.⁴⁰³

2.5.2 Constructivist theories

In contrast to rational choice theories, constructivist theories suggest that states comply with treaties or international law for normative considerations such as ideas and culture.⁴⁰⁴ These theories posit that interactions and exposure to human rights norms inform state behaviour.⁴⁰⁵ Nye and Welch note that constructivists stress the significance of ideas and culture in influencing behaviour in international politics.⁴⁰⁶ The proponents of this theory believe that a state can ratify treaties if it is normatively right to do so, even if there is no direct material benefit to be gained from protecting human rights domestically or, in some cases, even in the absence of any serious intention to implement the norms.⁴⁰⁷

The normative constructivist theory fits well with the SADC since state behaviour among southern African states is not only influenced by material interests but also includes social and political ideas.⁴⁰⁸ It follows that the disbandment of the SADC Tribunal — which is extensively discussed in the subsequent chapter— can be explained in terms of the principles of solidarity and respect for sovereignty.⁴⁰⁹ Above all, the decision to suspend the operations of the SADC

⁴⁰² Beth A. Simmons *Mobilising for Human Rights International Law in Domestic Politics* (2009) at 1–17.

⁴⁰³ Cited in LR Helfer & A-M Slaughter *Toward a Theory of Effective Supranational Adjudication* at 334.

⁴⁰⁴ Christian Reus-Smit ‘Constructivism’ in Scott Burchill et al *Theories of International Relations* 5 ed (2013) at 217–239; Adler, Emanuel ‘Constructivism and International Relations’ in *Handbook of International Relations* (2002) SAGE Publications 28 Feb. 2011, available at http://www.sage-ereference.com/hdbk_intrelations/Article_n5.html; See also Ian Hurd ‘Constructivism’ in *The Oxford Handbook Of International Relations* (2008) at 298–316; See also Jutta Brunn´ee and Stephen J. Toope ‘Constructivism and International Law’ in Jeffrey L. Dunoff and Mark A. Pollack *Interdisciplinary Perspectives on International Law and International Relations the state of the art* (2013) at 119–145; ES Bates ‘Sophisticated constructivism in human rights compliance theory’ (2015) 25 *European Journal of International Law* 1170; Joseph S Nye, Jr and David A. Welch *Understanding Global Conflict and Cooperation An Introduction to Theory and History* 10 ed at 8.

⁴⁰⁵ ES Bates ‘Sophisticated constructivism in human rights compliance theory’ (2015) 25 *European Journal of International Law* at 1170.

⁴⁰⁶ Cited in Joseph S Nye, Jr and David A. Welch *Understanding Global Conflict and Cooperation An Introduction to Theory and History* at 8.

⁴⁰⁷ Tiyanjana Maluwa ‘Ratification of African Union Treaties by Member States: Law, Policy and Practice’ Vol 13 *Melbourne Journal of International Law* at 11.

⁴⁰⁸ Luwam Dirar ‘Norms of solidarity and regionalism: theorizing state behavior among southern African states’ (2016) *Michigan State International Law Review* Vol 24.3 at 668.

⁴⁰⁹ Laurie Nathan ‘The Disbanding of the SADC Tribunal: A Cautionary Tale’ (2013) 35 *Hum. Rts. Q.* 870 at 3. L. See also Nathan ‘Solidarity Triumphs over Democracy the Dissolution of the SADC Tribunal’ (2011) 12 *Development Dialogue* at 131.

Tribunal arises from the political culture of the SADC, which is closely linked to the region's liberation history and issues of race, land, and sovereignty.⁴¹⁰ For this reason, Western norms could not be aligned with the SADC norms on political justice and land reform.⁴¹¹ Zimbabwe could only coordinate backlash against the SADC Tribunal in response to the normative influence of a rising 'liberation narrative' applied to the land question.⁴¹² The SADC Tribunal promoted an idea of racial equality and postcolonial land reform that was socio-politically dissonant for the SADC region.⁴¹³ The constructivist theory is further discussed in three strands below.

2.5.2.1 Managerial theory

Further, advocates of constructivist theories include Chayes and Chayes, who developed managerial theory which claims that non-compliance with treaty regimes is due to ambiguity, indeterminacy, and capacity limitations.⁴¹⁴ For Chayes and Chayes, what ensures compliance is not the threat of sanction but consultation, negotiation, and persuasion.⁴¹⁵ Consequently, compliance should be replaced with a 'managerial model'.⁴¹⁶ It is general accepted that African RECs suffer from ambiguous treaty provisions and gaps which make them ineffective.⁴¹⁷ Accordingly, the ambiguity is a cause of non-compliance and non-implementation.⁴¹⁸ In the context of regional integration, it is critical to create clear, coherent, and transparent rules to ensure compliance. On the other hand, modern studies demonstrate that while it is essential to understand how to use rules, the possibility of ex post factor sanction is also crucial.⁴¹⁹ Another problem is that managerial theory suggests that fairly good compliance and the lack

⁴¹⁰ Cited in Merran Hulse and Anna van der Vleuten op cit note 119 at 97. Cited in Peter Brett and Line Engbo Gissel *Africa and the Backlash Against International Courts* at 83.

⁴¹¹ Ibid.

⁴¹² Ibid.

⁴¹³ E. Tendayi Achiume 'The SADC Tribunal Sociopolitical Dissonance and the Authority of International Courts' in Karen J Alter, Laurence R. Helfer, and Mikael Rask Madsen *International Court Authority* (2018) at 125.

⁴¹⁴ Abraham Chayes and Antonia Handler Chayes *The New Sovereignty Compliance with International Regulatory Agreements* (1995) at 3–15.

⁴¹⁵ Ibid.

⁴¹⁶ Ibid at 25–26.

⁴¹⁷ Cited in Gerhard Erasmus: 'Is the SADC trade regime a rules-based system?' at 18. See also Richard Frimpong Oppong 'Implementation of Community Law in Member States of African Regional Economic Communities' (2018) 45 (2) *The African Review* at 320–321; Ebobrah op cit note 174 at 199.

⁴¹⁸ Cited in Richard Frimpong Oppong op cit note 416 at 321.

⁴¹⁹ Jana von Stein 'The Engines of Compliance' in Jeffrey L. Dunoff and Mark A. Pollack *Interdisciplinary Perspectives on International Law and International Relations the state of the art* (2013) at 487.

of institutions to impose sanctions is good for cooperation.⁴²⁰ For Chayes and Chayes, since non-compliance is not wilful and calculated, coercive treaty methods of enforcing international law, such as military, economic, and unilateral sanctions, will likely not succeed.⁴²¹ However, there are many instances where states wilfully violate treaty provisions after calculating the costs and benefits of non-compliance.⁴²² Managerial theory cannot address such problems.⁴²³

2.5.2.2 *Legitimacy theory*

Another constructivist theorist is Thomas Franck, who claims that the legitimacy and fairness of the rule induce compliance.⁴²⁴ Franck states:

Legitimacy is a property of a rule or rule-making institution which exerts a pull toward compliance on those addressed normatively because those addressed believe that the rule or institution has come into being and operates by generally accepted principles of right process.⁴²⁵

However, the theory of legitimacy has been criticised for emphasising legitimacy rather than justice as the primary goal.⁴²⁶ Another problem is that Franck places more importance on process than persuasion, even though discussion and debate can produce fairer rules and decisions and ensure better compliance.⁴²⁷ Further, it is difficult to measure the compliance that legitimacy is meant to explain independently.⁴²⁸

2.5.2.3 *Transnational legal process theory*

Koh developed the ‘transnational legal process’ theory to emphasise the importance of interaction, interpretation, and internalisation of treaty norms.⁴²⁹ Koh believes that international treaty norms are interpreted through the interactions of transnational actors such as NGOs, and are then domesticated into the domestic legal system.⁴³⁰ For Koh, through

⁴²⁰ Ibid.

⁴²¹ Cited in Chayes and Chayes op cit note 413 at 32–33.

⁴²² Cited in Jana von Stein op cit note 418 at 487.

⁴²³ Ibid.

⁴²⁴ Thomas M. Franck *The Power of Legitimacy among Nations* (1990) at 38.

⁴²⁵ Ibid at 24.

⁴²⁶ Jana von Stein op cit note 418 at 490.

⁴²⁷ Ibid.

⁴²⁸ Ibid.

⁴²⁹ Cited in Harold Hongju Koh *Why Do Nations Obey International Law* at 2626. See also Harold Hongju Koh ‘Transnational Legal Process’ (1996) 75 *Nebraska Law Review* at 181–207.

⁴³⁰ Ibid.

transnational law litigation, states can domesticate international norms and, in that way, promote compliance.⁴³¹

The main criticism of Koh's theory is that it does not stipulate the circumstances under which certain norms may be domesticated or whether international norms are likely to encourage actors in different types of states.⁴³² Koh's claim that 'repeated participation in the international legal process' leads to norm acceptance 'is hardly theoretically satisfying since repeated interaction with duplicity or hostility would not necessarily change anyone's ideas or their incentives to comply or necessarily overcome strong incentives to defect'.⁴³³ Furthermore, the transplantation of international norms by developing countries is particularly problematic since they play a minimal role in developing international norms and institutions.⁴³⁴ Such norms lack legitimacy and are inadequate for policy in developing countries.⁴³⁵ The transnational legal process theory is limited when applied in the context of the SADC since some domestic courts of SADC member states are not ready to internalise SADC Treaty norms and ensure compliance with the SADC Tribunal judgments.⁴³⁶

The following section discusses the main challenges with the theories of state compliance.

2.6 *Criticism of state compliance theories*

The theories of state compliance provide different perspectives on why states comply with international law. Within these dominant theories, there are areas of convergence and divergence. These debates provide some important insights into the factors that shape state behaviour. While compliance theories partially explain specific behaviour of the SADC, they can still be criticised for their dominant Western views that fail to take account of Africa's place in international relations and global politics. Most of these theories are limited when applied to the African context. Therefore, there is a need for political science scholars to rethink

⁴³¹ Ibid at 2656–2657.

⁴³² Jutta Brunn'ee and Stephen J. Toope op cit note 403.

⁴³³ Joel P. Trachtman 'Open Economy Law' in Jeffrey L. Dunoff and Mark A. Pollack *Interdisciplinary Perspectives on International Law and International Relations the state of the art* (2013).

⁴³⁴ J. Patrick Kelly 'International Law and the Shrinking Space for Politics in Developing Countries' Widener Law School Legal Studies Research Paper Series no. 08-31 at 589 available at <http://ssrn.com/abstract=1104694>.

⁴³⁵ Ibid.

⁴³⁶ See the discussion in Chapter 3, section 3.7.

their understanding of Africa's behaviour beyond rationalist and constructivist theories that are dominant in the scholarship of international relations.

Scholars have openly questioned whether a compliance framework is an appropriate measure of institutional effectiveness and impact of international legal regimes.⁴³⁷ They have proposed effectiveness as an alternative measure of the utility of international legal regimes, suggesting a need to move beyond compliance studies.⁴³⁸ Meyer suggests that an extreme focus on compliance may understate international law's effectiveness.⁴³⁹ On the other hand, Howse and Teite argue that the focus on compliance 'obfuscates the character of international legal normativity'.⁴⁴⁰ Accordingly, viewing the goals or objectives of international law through the compliance lens leads to inadequate study and understanding of the numerous complex purposes and projects that several actors impose and transpose on international legality, particularly the tendency to oversimplify, if not distort the relation of international law to politics.⁴⁴¹ Consequently, scholarly writing and analysis has largely moved on from this predominant debate to more sophisticated questions about the measurement and determinants of state compliance with international law.⁴⁴² It has been suggested that scholars studying the impact of institutions should choose other measures beyond compliance.⁴⁴³

Another criticism of theories of state compliance is that they view the state as the main actor or the only actor in international law. However, a review of the literature shows that courts (both domestic and international) are important actors in international relations and global governance. Current research demonstrates that ICs and domestic courts are active actors and are play a significant role in areas such as international trade and economic integration, foreign policy, human rights, environmental protection, and investment. Pollack observes that international relations scholars in political science have generally ignored ICs and tribunals, which were viewed from a realist perspective as having no significance or importance in global

⁴³⁷ Robert Howse and Ruti Teite 'Beyond Compliance: Rethinking Why International Law Really Matters' (2010) 1 (2) *Global Policy* at 128; Cited in Meyer op cit note 255 at 168.

⁴³⁸ Ibid.

⁴³⁹ Ibid.

⁴⁴⁰ Ibid.

⁴⁴¹ Ibid.

⁴⁴² Jeffrey L. Dunoff and Mark A. Pollack 'International Law and International Relations: Introducing an Interdisciplinary Dialogue' in Jeffrey L. Dunoff and Mark A. Pollack *Interdisciplinary Perspectives on International Law and International Relations the state of the art* (2013) at 25.

⁴⁴³ Cited in Lisa L. Martin *Against Compliance* at 607.

politics.⁴⁴⁴ Alter's main criticism of compliance theories is that none of the debates on compliance theories involves studying ICs independently.⁴⁴⁵ It may be concluded from the perspective of current international law scholarship that ICs have little to do with whether or not international law influences state behaviour.⁴⁴⁶

On the contrary, ICs do matter in current international relations.⁴⁴⁷ Despite the fact that ICs and quasi-judicial bodies do not constitute a state or government and are not the main actors in international relations, they do have the capacity to influence international relations.⁴⁴⁸ ICs are new political actors at both domestic and international levels.⁴⁴⁹ Accordingly, their international character enables ICs to bypass domestic legal and political obstacles or limitations and to create legal change across borders.⁴⁵⁰ It also allows them to cause political change through legal reinterpretation, establish and spread support for the rule of law, and pressure governments.⁴⁵¹ This capacity has led to the judicialisation of international relations and the diminishing role of government over how international legal agreements are understood domestically and internationally.⁴⁵² As noted earlier in the first section of Chapter 1, since the end of the Cold war, there has been an increase in new, powerful ICs empowered with compulsory jurisdiction. These new courts can make an adverse finding against influential governments and shape international politics through their judgments.⁴⁵³ This is one aspect that international relations theories have generally ignored.

Modern studies demonstrate that courts have a role to play in international relations, particularly in foreign policy.⁴⁵⁴ In general, courts do not implement foreign policy and are

⁴⁴⁴ Pollack, Mark A. *International Relations Theory and International Courts and Tribunals* (26 March 2020). Available at <http://dx.doi.org/10.2139/ssrn.3634791>.

⁴⁴⁵ Karen J Alter 'Do International Courts Enhance Compliance with International Law?' *Review of Asian and Pacific Studies* No. 25 at 53–54.

⁴⁴⁶ *Ibid* at 54.

⁴⁴⁷ Jan Malīř 'Judicialization of international relations: Do international courts matter?' (2013) 3 (3) *The lawyer Quarterly* at 223.

⁴⁴⁸ *Ibid* at 224.

⁴⁴⁹ Cited in Karen J Alter op cit note 69 at 5.

⁴⁵⁰ *Ibid*.

⁴⁵¹ *Ibid*.

⁴⁵² *Ibid*.

⁴⁵³ *Ibid*.

⁴⁵⁴ See Riaan Eksteen 'The Role of the Highest Courts of the United States of America and South Africa, and the European Court of Justice in Foreign Affairs' (2019) *T.M.C.*; Ernest Yaw Ako and Richard Frimpong Oppong 'Foreign Relations Law in the Constitutions and Courts of Commonwealth African Countries' in Curtis A. Bradley *The Oxford Handbook of Comparative Foreign Relations Law* (2019).

never consulted in the foreign policymaking process — but through their decisions, they can shape foreign policy.⁴⁵⁵ For this reason, the judiciary is an essential actor in the foreign affairs of states founded on constitutional principles, such as the separation of powers.⁴⁵⁶ Foreign relations studies must move away from the state focus, which emphasises the executive and legislature in foreign policymaking and recognises the judiciary as essential in foreign affairs.⁴⁵⁷ Notably, although none of the constitutions of commonwealth African countries grant their courts an express role in foreign relations matters, their jurisprudence indicates that courts have an essential role to play and can interfere in foreign policy matters to ensure adherence to constitutional norms.⁴⁵⁸

Most importantly, recent research suggests a shift in scholarship, noting the role of ICs in the study of international relations.⁴⁵⁹ As discussed in Chapter 2, ICs shape government behaviour in many ways, including alliances with compliance constituencies.⁴⁶⁰ Alter, Hafner-Burton and Helfer observe that judicialisation outside the national borders suggests a fundamental shift in international relations.⁴⁶¹ In particular, the threat of litigation can encourage or cause mobilisation, bargains, and negotiations in ways that shape political decisions without formal legal actions, which is generally overlooked in international relations theory.⁴⁶² Furthermore, once the adjudication process has been initiated, it calls for attention to other new actors previously overlooked by international relations theorists.⁴⁶³ Focus on state compliance may miss an essential element of the law's influence.⁴⁶⁴ Accordingly, adjudication or threat of litigation shapes legal discourse and state and international decision-making.⁴⁶⁵ It should be noted that state interests may be shaped, limited, and influenced by adjudicatory bodies and non-state actors in ways that are not immediately clear or fully realised.⁴⁶⁶

⁴⁵⁵ Eksteen op cit note 453 at 4.

⁴⁵⁶ Ibid at 4–5.

⁴⁵⁷ Ibid at 25.

⁴⁵⁸ Cited in Ernest Yaw Ako and Richard Frimpong Oppong op cit note 453 at 595.

⁴⁵⁹ Karen J Alter, Emilie M. Hafner-Burton and Laurence R. Helfer 'Theorising the Judicialization of International Relations' (2019) 63 *International Studies Quarterly* at 449–463.

⁴⁶⁰ See section 2.7.2.

⁴⁶¹ Cited in Alter, Hafner-Burton & Helfer op cit note 458 at 458.

⁴⁶² Ibid at 459.

⁴⁶³ Ibid.

⁴⁶⁴ Ibid.

⁴⁶⁵ Ibid.

⁴⁶⁶ Ibid.

Therefore, ICs are actors of international and global governance.⁴⁶⁷ ICs' overall role in the juridification of international relations cannot be denied.⁴⁶⁸ Accordingly, 'this juridification has a fundamentally pacifying effect on international relations, which in turn, by and large, serves domestic democracy'.⁴⁶⁹ It must be commended that international relations scholars note the critical role of ICs in global politics and their contribution to the study of international relations. This is a welcomed development since it challenges state-centric analysis that overlooks the role of non-state actors in global politics.

The next section reviews the burgeoning literature on the utility and performance of ICs.

2.7 *Evaluating the performance of ICs and tribunals*

2.7.1 Compliance rate approach

Posner and Yoo have theorised that an IC can only be effective if states comply with its judgments.⁴⁷⁰ The methods used by Posner and Yoo to measure the effectiveness of ICs are compliance rate, and usage and success of treaty regime that established the court.⁴⁷¹ These methods have drawn much criticism and elicited a response from Helfer and Slaughter, who maintain that the data used as evidence to support their claim is flawed.⁴⁷² Accordingly, several methodological challenges undermine Posner and Yoo's compliance rate theory and their conclusions, such as the failure to account for the rise of independent ICs, increasing recognition of tribunals' jurisdiction by states, and increasing case law or jurisprudence of ICs and tribunals.⁴⁷³ According to Helfer and Slaughter, if independent Courts were ineffective in the ways theorised and suggested by Posner and Yoo, there would be a decline in the number of ICs, a decrease in their case law, and also in the willingness of states to subject themselves to the jurisdiction of ICs and tribunals.⁴⁷⁴ Posner and Yoo also conflate compliance with

⁴⁶⁷ Cited in von Bogdandy and Venzke op cit note 9 at 207.

⁴⁶⁸ Ibid.

⁴⁶⁹ Ibid at 207–208.

⁴⁷⁰ Eric Posner & John C. Yoo 'Judicial Independence in International Tribunals' (2005) 93 *California Law Review* 1 at 28.

⁴⁷¹ Ibid.

⁴⁷² Laurence R. Helfer and Anne-Marie Slaughter 'Why States Create International Tribunals: A Response to Professors Posner and Yoo' *California Law Review* (May 2005) 93 (3) at 909.

⁴⁷³ Ibid at 909–917.

⁴⁷⁴ Ibid at 910.

effectiveness.⁴⁷⁵ Consequently, by measuring their dependent variable mainly through compliance rates, they miss this important theoretical idea and ignore a central aspect of determining tribunal effectiveness.⁴⁷⁶

There is consensus among many scholars that the main challenge with literature on the effectiveness of ICs is the tendency to equate effectiveness with compliance with court judgments.⁴⁷⁷ Many scholars adhere to the view that despite the links between the effectiveness of ICs and compliance, the two should be distinct since inadequate remedies can generate a high level of compliance but have little impact on the state's behaviour.⁴⁷⁸ In other words, an international legal regime can be effective, even if it does not fare well when measured under compliance measures. Although high levels of compliance can be a sign of effectiveness, they can also reflect ineffectiveness.⁴⁷⁹ As noted by Raustiala and Slaughter, many international legal regimes make it easier to comply but their influence on changing state behaviour is negligible.⁴⁸⁰ Likewise, Shany hypothesises that compliance, if assessed merely as the correlation of norms and state practice, is limited as a measure of effectiveness since it may fail to explain the actual impact of court decisions on state practice.⁴⁸¹ This explains why 'low aiming' courts issuing inadequate remedies with limited impact on state behaviour are expected to generate high levels of norm–practice correlation, but would not necessarily have any significant impact on state behaviour.⁴⁸²

If there is any lesson to be drawn from the above, it is that mere indication of a high compliance rate or lack thereof may show little about international legal regimes' effectiveness or their impact on state behaviour. As mentioned, the narrow focus on compliance rates is limited since it ignores other important aspects of court effectiveness, such as the impact of

⁴⁷⁵ Ibid at 917–919.

⁴⁷⁶ Ibid 919.

⁴⁷⁷ Cited in Yuval Shany *Assessing the Effectiveness of International Courts* (2014) at 3; Solomon T. Ebovrah and Victor Lando 'Africa's sub-regional courts as back-up custodians of constitutional justice beyond the compliance question' in James Thuo Gathii *The Performance of Africa's International Courts: Using Litigation for Political, Legal, and Social Change* (2020) at 81; Helfer and Slaughter op cit note 471 at 917–919. See also cited in Edith B. Weiss op cit note 256 at 1564; Cited in Raustiala and Slaughter op cit note 247 at 712.

⁴⁷⁸ Ibid.

⁴⁷⁹ Cited in Raustiala and Slaughter op cit note 247 at 712.

⁴⁸⁰ Ibid.

⁴⁸¹ Yuval Shany *Compliance with Decisions* op cit note 59 at 240.

⁴⁸² Ibid.

court decisions, the multiple roles and functions of ICs and a broader set of goals that ICs are established to achieve.⁴⁸³ Although ICs may perform poorly in law or judgment compliance, they may perform well in other areas, such as treaty interpretation.⁴⁸⁴

In the literature on the utility of ICs, there is some consensus among scholars that the compliance rate approach is limited in explaining the utility of ICs and the actual impact of court decisions.⁴⁸⁵ From the perspective of the SADC, as noted in Chapter 1, the SADC Tribunal received about thirty applications and delivered about fifteen judgments before its suspension.⁴⁸⁶ The number of judgments issued by the tribunal was marginal in that the compliance rate is 0 per cent.⁴⁸⁷ Therefore, the tribunal has performed poorly when measured under the compliance rate approach.⁴⁸⁸ However, as this research shows, the compliance rate approach is one of many measures or criteria to assess the utility of human rights courts, such as the SADC Tribunal, which deal with human rights issues and the rule of law questions.⁴⁸⁹ The current study will demonstrate that when measured using an institutional design and goal-based approach, the tribunal has performed its role well and effectively.⁴⁹⁰

In the literature on effectiveness or utility of ICs, there seems to be some agreement that there is a need to move beyond compliance measures in assessing the value of ICs, particularly decisions of African Human Rights Tribunals (HRTs).⁴⁹¹ Indeed, the limitations of compliance studies necessitate the need to move away from such studies — without negating the importance of compliance — and pay more attention to the multiple roles of ICs so as to gain a broader understanding of how they work. As shown in this study, a growing body of literature

⁴⁸³ Ibid.

⁴⁸⁴ See section 10.5.

⁴⁸⁵ Cited in Alexandra Huneus *Compliance with Judgments and Decisions* at 439. Cited in Yuval Shany op cit note 10 at 118. Cited in Yuval Shany *Compliance with Decisions* op cit note 59 at 240–241; Victor Ayeni ‘Beyond Compliance Do Decisions of Regional Human Rights Tribunals in Africa Make a Difference?’ at 38; Cited in James Thuo Gathii op cit note 40 at 4; Frans Viljoen & Victor Ayeni ‘A comparison of state compliance with reparation orders by regional and sub-regional human rights tribunals in Africa: case studies of Nigeria, The Gambia, Tanzania, Uganda and Zimbabwe’ (2022) 26 (9) *The International Journal of Human Rights* at 1659.

⁴⁸⁶ See Chapter 1, section 1.1.

⁴⁸⁷ Frans Viljoen & Victor Ayeni ‘A comparison of state compliance’ at 1661.

⁴⁸⁸ Ibid.

⁴⁸⁹ Cited in Solomon T. Ebobrah and Victor Lando op cit note 476 at 194. See also Victor Ayeni ‘Beyond Compliance’ at 36.

⁴⁹⁰ See the discussions in sections 2.6.3–2.6.4.

⁴⁹¹ Obiora Chinedu Okafor *The African Human Rights System, Activist Forces, and International Institutions* (2007) at 12.

demonstrates that international legal regimes, particularly ICs, are important beyond compliance measures. While scholars are unanimous in their analysis that compliance perspectives are inadequate and limited in explaining the impact of international institutions in general and the effects of IC decisions, there needs to be consensus on how to measure the effectiveness of international institutions and ICs' decisions.⁴⁹² How should the study of the ICs' utility be conducted? Some scholars have proposed that ICs be measured in terms of their ability to change state behaviour effectiveness.

The next section discusses the effectiveness approach.

2.7.2 Effectiveness

Another method for measuring the impact of ICs is the effectiveness which examines the extent to which ICs' decisions or law change state behaviour.⁴⁹³ Raustiala argues that the current analytical focus on compliance is, for the most part, inadequate.⁴⁹⁴ Accordingly, it is only through a behavioural approach that scholars can understand international law's central role in shaping and influencing state behaviour.⁴⁹⁵ This approach challenges Posner and Yoo's position that ICs are mere dispute settlement bodies that cannot change state behaviour.⁴⁹⁶ Contrary to these claims, it is asserted that ICs 'influence governments through alliances with compliance constituencies, everchanging groups of domestic and international actors that actively or tacitly support compliance with international law and IC rulings.'⁴⁹⁷ Because ICs are dependent on the continued support of compliance constituencies, ICs ought to rule against powerful governments in cases of clear violations.⁴⁹⁸ Accordingly, 'it is more plausible that we accept the possibility that ICs can rule against the preferences of governments and then ask how ICs get governments then change their behaviour.'⁴⁹⁹ It has been suggested that measuring

⁴⁹² Cited in Yuval Shany op cit note 10 at 13–30.

⁴⁹³ Cited in Raustiala op cit note 247; Cited in Meyer op cit note 255 at 169; Cited in Karen J Alter op cit note 69 at 95. Cited Laurence R. Helfer *The Effectiveness of International Adjudicators* at 465.

⁴⁹⁴ Raustiala op cit note 247 at 388.

⁴⁹⁵ Ibid at 440.

⁴⁹⁶ Cited in Eric Posner & John C. Yoo op cit note 469 at 7.

⁴⁹⁷ Karen J Alter op cit note 69 at 57.

⁴⁹⁸ Ibid at 58.

⁴⁹⁹ Ibid at 46.

the effectiveness of ICs should be based on whether they lead to a change in political behaviour as required by law and as ruled by the IC.⁵⁰⁰

On the other hand, Helfer outlines four methods of measuring the effectiveness of ICs: case-specific effectiveness, *erga omnes* effectiveness, embedded effectiveness, and effectiveness in developing international law or norm-development effectiveness.⁵⁰¹ Helfer notes that case-specific effectiveness assesses whether the parties to a specific dispute implement the orders and provide the remedies that a court grants.⁵⁰² Case-specific effectiveness focuses on whether a state found to be in violation of international law has changed its behaviour after an IC ruling.⁵⁰³ Alternatively, *erga omnes* effectiveness evaluates whether IC decisions have any effect on states behaviour.⁵⁰⁴ Accordingly, *erga omnes* effectiveness focuses not only on ex post behaviour of state parties to the dispute but also on the behaviour of third-party states that are under the jurisdiction of the IC that made the decision.⁵⁰⁵ Conversely, embeddedness effectiveness assesses the level to which ICs enhance the ability of domestic actors to prevent or remedy violations of international rules in domestic legal systems.⁵⁰⁶ In the final method, norm-development effectiveness considers how IC decisions contribute to building a body of international jurisprudence.⁵⁰⁷ These approaches are mostly concerned with the behaviour of state parties to the dispute, especially the losing state after an authoritative court ruling, and the influence of ICs' decisions on domestic legal actors and legal systems.⁵⁰⁸

Gathii has criticised the measures of compliance and effectiveness of ICs for their extreme focus on state behaviour and state-driven compliance processes, arguing that they ignore the roles private actors and judges play in shaping and using litigation processes as a strategy both inside and outside the courtroom.⁵⁰⁹ Accordingly, compliance and effectiveness

⁵⁰⁰ Ibid at 95.

⁵⁰¹ Cited Laurence R. Helfer *The Effectiveness of International Adjudicators* at 465. See also Armin von Bogdandy and Ingo Venzke *In Whose Name? A Public Law Theory of International Adjudication* at 114.

⁵⁰² Ibid.

⁵⁰³ Ibid at 466.

⁵⁰⁴ Ibid at 465.

⁵⁰⁵ Ibid at 466.

⁵⁰⁶ Ibid at 465.

⁵⁰⁷ Ibid.

⁵⁰⁸ Ibid at 465–466.

⁵⁰⁹ Cited in James Thuo Gathii op cit note 40 at 8.

inadequately measure the impact of Africa's ICs.⁵¹⁰ Indeed, the effectiveness approach is limited when it is applied in the context of the SADC Tribunal. In particular, since Zimbabwe failed to comply with all the SADC Tribunal decisions and remedies issued against it, the tribunal decisions did not change Zimbabwe's behaviour.⁵¹¹ Notably, Zimbabwe continues with its human rights violations and has not withdrawn from the impugned land reform policy to compensate farmers for the loss of their farms. On the contrary, section 72(3)(a) of the Zimbabwean Constitution of 2013 grants legitimacy to Zimbabwe's land expropriation policy which was declared to violate the SADC Treaty.⁵¹² Based on the effectiveness approach, the SADC Tribunal decisions have failed to transform the behaviour of Zimbabwe or any SADC member state, and therefore its judgments had no effect on the government of Zimbabwe or on any SADC government's conduct. Scholars are unanimous in their conclusion that Zimbabwe's failure to comply with the tribunal's rulings and the suspension of the tribunal is owing to the absence of democracy and the rule of law in the SADC, particularly in Zimbabwe.⁵¹³

The following section presents a discussion the institutional design approach.

2.7.3 Institutional design approach

Scholars such as Bogdandy, Venzke, and Shelton have developed a framework that focuses on the institutional design of ICs and the multiple roles that ICs perform to measure ICs' institutional effectiveness.⁵¹⁴ Significantly, Bogdandy and Venzke have challenged the traditional view that reduces ICs to mere instruments of dispute settlement whose power is limited by the consent of the states that established them.⁵¹⁵ They view this as a narrow understanding of the role of ICs.⁵¹⁶ Consequently, they prove that ICs are actors who exercise public authority beyond their traditional role as mere dispute settlers.⁵¹⁷ Similarly, many

⁵¹⁰ Ibid at 8–9.

⁵¹¹ *Campbell v Republic of Zimbabwe* (Contempt of Court Ruling), Case No SADC (T) 03/2009 (5 June 2009).

⁵¹² See section 72(3)(a) as read with sections 295 (1) and (2) of the Constitution of Zimbabwe Amendment Act No 20 of 2013.

⁵¹³ Cited in Katrin Nyman-Metcalf and Ioannis Papageorgiou 'Why should we obey' at 177. See also cited in Christina Murray *The Rule of Law in the SADC Region: 1981–2011* at 99–101 in L Lidiia R; Basta Fleiner and Tanasije Marinkovic, *Key Developments in Constitutionalism and Constitutional Law, 2014 Eleven International Publishing*; Richard Frimpong Oppong op cit note 416 at 317.

⁵¹⁴ Cited in von Bogdandy and Venzke op cit note 9; Yuval Shany op cit note 9; cited in Shelton, Dinah 'Form, Function, and the Powers of International Courts'; Karen J Alter op cit note 9.

⁵¹⁵ Cited in von Bogdandy and Venzke op cit note 9 at 1.

⁵¹⁶ Ibid.

⁵¹⁷ Ibid.

scholars accept that ICs perform many other roles besides dispute settlement.⁵¹⁸ These include norm advancement, the maintenance of cooperative international arrangements, compliance assessment, providing advisory opinions, the stabilisation of normative expectations, law-making, the control and legitimation of public authority, review of administrative decisions, evaluation of the legal validity of legislative and government actions, and issuing binding interpretations.⁵¹⁹

According to Justice Cançado Trindad, HRTs have contributed significantly to the promotion and advancement of the rule of law at domestic and international levels, proving that no one is above the law, including the ruling political elites and states themselves.⁵²⁰ Others note that ICs and supranational courts can contribute to the rule of law through dispute settlement and compliance assessment, and the tackling of impunity through the clarification and development of international law.⁵²¹ Accordingly, these functions may be viewed as a direct contribution to the rule of law.⁵²² On the other hand, by performing these functions, ICs may indirectly contribute to the socialisation of states to the principle of international rule of law and to its increasing importance in international relations.⁵²³

The design features of new-styled ICs have allowed them to perform multiple roles and have made it difficult for government or states to exercise control over the type of litigation that comes before these courts.⁵²⁴ How ICs and tribunals perform their roles depends on various factors, including their institutional design.⁵²⁵ An essential element of the design feature of ICs is access, which is legally established through jurisdiction and admissibility rules.⁵²⁶ Ngendahimana's writings on the contribution of RECs' courts and tribunals in the protection of human rights in Africa, drew attention and interest on the importance individual access to and human rights jurisdiction while investigating their contributions to human rights

⁵¹⁸ Cited in Yuval Shany op cit note 9 at 76; Cited in Shelton op cit note 9–14. Cited in von Bogdandy and Venzke op cit note 9 at 8; Cited in Karen J Alter op cit note 9 at 34; Cited in Karen J Alter op cit note 69 at 32.

⁵¹⁹ Ibid.

⁵²⁰ Cited in Antônio Augusto Cançado Trindad op cit note 116 at 9.

⁵²¹ Cited in De Baere, Chané and Wouters op cit note 105 at 64.

⁵²² Ibid.

⁵²³ Ibid.

⁵²⁴ Cited in Karen J Alter op cit note 9 at 346.

⁵²⁵ Yaël Ronen *Functions and access* in William A. Schabas and Shannonbrooke Murphy *Research Handbook on International Courts and Tribunals* Edward Elgar Publishing 2017 at 470.

⁵²⁶ Ibid.

protections.⁵²⁷ Many scholars accept that compulsory jurisdiction and access for private litigants contribute to IC independence; most also associate IC independence with greater IC effectiveness.⁵²⁸

From the SADC perspective, the SADC Tribunal's success is attributed to its institutional design, subject matter jurisdiction and personal jurisdiction, which has allowed the SADC Tribunal to achieve its goals. The Tribunal Protocol of 2001 had broad jurisdiction and was granted the power to interpret and apply SADC Community Law.⁵²⁹ Providing the SADC Tribunal with broad jurisdiction and access to the individuals is critical and must be commended.

The implications of the suspension of the SADC Tribunal and the establishment of a new SADC Tribunal with watered-down jurisdiction are that it limits the effectiveness of the tribunal. In particular, the new SADC Tribunal Protocol denies individual access and limits jurisdiction to state parties only.⁵³⁰ As previously stated, individual access and compulsory jurisdiction are crucial for the effective functioning of the SADC Tribunal since African states are known not to litigate against each other, especially in trade-related disputes.⁵³¹

While there are a number of approaches which may be used to evaluate the utility of ICs and tribunals, the institutional design approach is preferred because it moves beyond state-centric analysis such as compliance and effectiveness and places non-state actors such as individuals and the courts themselves at the centre of its study. It is also adopted because it shows that the courts are designed to not only ensure compliance but also to perform many other roles. Furthermore, it accepts access to courts and access to justice as one of its most important elements.

The next section discusses the goal-based approach, which focuses on court jurisprudence and its processes in arriving at its decision.

⁵²⁷ Jean-Bosco Ngendahimana 'Impact of Regional Integration on Human Rights Protection in Africa' in Emmanuel Fanta, Timothy M Shaw, Vanessa T Tang *Comparative Regionalisms for Development in the 21st Century Insights from the Global South* (2016) Routledge.

⁵²⁸ Karen J Alter *Private Litigants and the New International Courts* Comparative Political Studies Volume 39 Number 1 2006 PP 22-49 at 24. See also Yuval Shany op cit note 9 at 67-78.

⁵²⁹ Article 14 l(a) (b) and (c), Articles 15 and 18 and 19 of the SADC Tribunal Protocol of 2001

⁵³⁰ Article 33 of the SADC Tribunal Protocol of 2014.

⁵³¹ See Chapter 1, section 1.1.2.

2.7.4 Goal-based approach

Scholars such as Shany, Squatrito, Young, Follesdal, and Geir Ulfstein have proposed a goal-based approach which contends that the study of ICs' effectiveness should be based on the specific goals of each court.⁵³² In particular, Shany's goal-based approach is based on the premise that each court has unique features and functions in different legal and political contexts. For this reason, a goal-based approach is more appropriate for evaluating ICs' performance.⁵³³ The goal-based approach is concerned with the outcomes courts produce and the processes that courts follow when they issue their judgments.⁵³⁴ The challenge with the goal-based approach, however, is what Shany terms "goal ambiguity" or disagreement about the court's goals.⁵³⁵ Some goals are framed in vague language and are therefore open to different interpretations, giving rise to different meanings.⁵³⁶

For the purposes of this study, the goal-based approach is preferred because it focuses on the institutional mandate of the court — or rather jurisdiction of the court — including its jurisprudence to assess its performance. It should be stressed that despite the difficulties of measuring the performance of ICs, including their goals, this research finds that the SADC Tribunal has achieved its objectives of treaty interpretation and settlement of disputes and has therefore contributed to the development of international human rights jurisprudence.⁵³⁷

Beyond the intermediate goals set up by the SADC Tribunal creators, the tribunal has defended individual human rights, and has advanced international rule of law.⁵³⁸ The tribunal has consequently achieved its ultimate goals of promoting human rights jurisprudence and developing the SADC legal norms, in accordance with Article 4(c) of the Treaty and Article 21(b) of the SADC Tribunal Protocol of 2001.⁵³⁹ This is fully detailed under section 3.6 of chapter 3.

⁵³² Cited in Yuval Shany op cit note 9 at 15. See also Squatrito et al op cit note 9 at 5–6.

⁵³³ Cited in Yuval Shany op cit note 9 at 14.

⁵³⁴ Cited in Squatrito et al op cit note 9 at 6.

⁵³⁵ Cited in Yuval Shany op cit note 9 at 20–22.

⁵³⁶ Ibid at 20.

⁵³⁷ See Chapter 3, section at 3.6.1. and 3.6.2.

⁵³⁸ As above.

⁵³⁹ As above.

Findings in this study are consistent with the findings of Cançado Trindade, De Baere, Chané and Wouters and Galvão Teles who argue that ICs and tribunals through their interpretation and sometimes expansive jurisdiction have developed international law and contributed to the promotion and advancement of the rule of law.⁵⁴⁰

The next section explores the impact of the SADC Tribunal decisions on domestic courts.

2.7.5 Impact

Current research already acknowledges and attempts to evaluate the impact of the decisions of Africa's regional bodies such as sub-regional courts.⁵⁴¹ In particular, some scholars have begun to measure the extent to which regional bodies are cited or relied on before domestic constitutional litigation.⁵⁴² Impact in the context of this study means the influence of the SADC Tribunal and its jurisprudence on non-state actors, including the domestic legal systems of the SADC member states.⁵⁴³

Many studies on the impact and utility of international legal regimes, particularly Africa's ICs and HRTs, have shown that despite the low rate of compliance or lack of compliance with their decisions, they have nonetheless had limited impact.⁵⁴⁴ Most of the research on the influence of the jurisprudence of sub-regional African courts suggests they have

⁵⁴⁰ Cited in De Baere, Chané and Wouters op cit note 105 at 70. For more discussion on contributions of ICs, see also Philippe Couvreur 'The International Court of Justice' in Geert De Baere and Jan Wouters *The Contribution of International and Supranational Courts to the Rule of Law* (2015). See also Patrícia Galvão Teles 'Prologue – One Hundred Years of International Justice and Its Contribution to the Development of International Law' in Patrícia Galvão Teles and Manuel Almeida Ribeiro *Case-Law and the Development of International Law Contributions by International Courts and Tribunals* (2022).

⁵⁴¹ Japhet Biegon 'Compliance Studies and the African Human Rights System Reflections on the State of the Field' in Aderomola Adeola *Compliance with International Human Rights Law in Africa* (2022) at 33.

⁵⁴² Ibid.

⁵⁴³ For a discussion on the meaning of 'impact', see Horace S. Adjohoun 'The ECOWAS Court as a human rights promoter? Assessing five years' impact of the Koraou slavery judgment' (2013) 31 (3) *Netherlands Quarterly of Human Rights* at 342–371; Frans Viljoen 'The impact and influence of the African regional human rights system on domestic law' in Scott Sheeran and Sir Nigel Rodley *Routledge Handbook of International Human Rights Law* (2013); CH Heyns & FJ Viljoen (eds) *The impact of the United Nations Human Rights Treaties on the Domestic Level* at 1. *Human Rights Quarterly*, vol.23, no. 3 2001, pp 483-535. Available at <https://www.jstore.org/stable/4489346>. See also FN Kabata *Impact of international human rights monitoring mechanisms in Kenya* (unpublished LLD thesis, University of Pretoria, 2015); Centre for Human Rights *Impact of the African Charter and the Women's Protocol in selected African states* (2012).

⁵⁴⁴ James Thuo Gathii op cit note 40 at 4; See Solomon T. Ebobrah and Victor Lando op cit note 476 at 179–195; Victor Lando 'The domestic impact of the decisions of the East African Court of Justice' (2018) 18 *African Human Rights Law Journal* at 474, available at <http://dx.doi.org/10.17159/1996-2096/2018/v18n2a2>. Victor Ayeni 'Beyond Compliance' at 45–69; Bonolo Ramadi Dinokatopila op cit note 7 at 225; Mia Swart op cit note 7 at 711.

had a limited impact on the domestic legal systems of African countries.⁵⁴⁵ From the perspective of the SADC, scholars note that the SADC Tribunal decisions have been cited or referred to by domestic courts of the SADC member states, albeit in limited instances.⁵⁴⁶ Despite several challenges confronting the domestic courts and constitutional limitations placed on the courts, the SADC Tribunal decisions have had limited impact on the domestic courts of Zimbabwe and South Africa.

This does not mean that the tribunal decisions had transformative impact at the domestic level. On the contrary, evidence from this study suggests that the domestic impact of tribunal decisions was marginal.⁵⁴⁷ This suggests that more effort must be made to mobilise individuals and general civil society — including lawyers, activists, government officials and the domestic judges — to support the work of the SADC Tribunal. The evidence from this study intimates that it is through the efforts of human rights activists including the general civil society that tribunal judgments can have transformative impact at the domestic level. In other words, it is through active mobilisations and efforts of several actors that the SADC Tribunal rulings can be internalised and have a direct impact on the domestic rule of law.

The impact of litigation is impossible to understand without context.⁵⁴⁸ Political and social context have a massive effect on the impact which litigation can have.⁵⁴⁹ In other words, strategic human rights litigation is often the only way in which to make a change. But this litigation often happens alongside other forms of advocacy, legal or political strategies by civil society organisations, activists, survivors, lawyers, international allies and others which aim to challenge human rights violations.⁵⁵⁰ Litigation is usually one aspect of change but not necessarily the most impactful.⁵⁵¹ For Duffy, it is important to understand the impact of litigation in this broader view.⁵⁵² Therefore, the effect of litigation cannot be isolated from

⁵⁴⁵ Ibid.

⁵⁴⁶ Ibid.

⁵⁴⁷ See section 3.8.

⁵⁴⁸ Cited in Duffy *op cit* note 35 at 40.

⁵⁴⁹ Ibid.

⁵⁵⁰ Ibid at 41.

⁵⁵¹ Ibid.

⁵⁵² Ibid.

political and social movements and cannot completely be understood by isolating particular individual cases or judgments.⁵⁵³

The limited impact of regional and sub-regional courts may be due to many factors, including the fact that domestic courts still need to accept the jurisprudence of regional courts.⁵⁵⁴ For the jurisprudence of regional and sub-regional courts to affect the adjudication of constitutional disputes in Africa, much depends on the role of other actors and their relationship with domestic courts during the litigation of constitutional disputes.⁵⁵⁵ In particular, the moment lawyers refer to decisions of regional and sub-regional courts before domestic courts, it is likely that the jurisprudence of regional courts on constitutional matters will be consistent with states' regional and sub-regional international law obligations over time.⁵⁵⁶ Biegon declares that more scholarship on the impact of regional bodies is required.⁵⁵⁷ There is a need to broaden the evaluation of indirect impact to go beyond the legal discipline and include other relevant spaces and discourses.⁵⁵⁸ The impact approach is impressive but not desirable for examining the performance of SADC Tribunal owing to the limited reach of the Tribunal decisions to only Zimbabwe and South Africa.⁵⁵⁹ The SADC Tribunal decisions are yet to influence the domestic courts of fourteen other SADC member states. Therefore, it would be a futile exercise to adopt this approach and an overgeneralisation to draw any conclusions about the impact of SADC Tribunal jurisprudence on domestic courts of SADC member states.

2.7.6 Africa's ICs as venues for political, legal and social change

Gathii's edited book studies show that Africa's ICs can become venues for political, legal and social change no matter their institutional design or how states behave towards them.⁵⁶⁰ Gathii does not propose a particular approach in measuring the utility of Africa's ICs. Rather, he grounds his view on the interaction between Africa's ICs and litigants — such as opposition

⁵⁵³ Ibid at 42.

⁵⁵⁴ Cited in Dinokatopila op cit note 7 at 234.

⁵⁵⁵ Ibid at 236.

⁵⁵⁶ Ibid.

⁵⁵⁷ Cited in Japhet Biegon op cit note 539 at 33.

⁵⁵⁸ Ibid.

⁵⁵⁹ See section 3.8.

⁵⁶⁰ Cited in James Thuo Gathii op cit note 40 at 8–34.

political parties, broader civil society groups and individuals who are victims of human rights violations — to prove his thesis that Africa’s ICs matter beyond the measures of compliance and effectiveness since these measures do not evaluate the impact of court decisions.⁵⁶¹ Accordingly, ‘compliance and effectiveness do not adequately account for the types of impact of Africa’s international courts.’⁵⁶² While the government may not comply with the rulings of ICs, this does not necessarily mean that these ICs are ineffective or that their decisions have no impact.

Gathii describes EACJ as a coordination device for opposition political parties challenging dominant political parties in their home countries.⁵⁶³ Another scholar comments that the EACJ functions as a transitional justice mechanism by providing a forum for truth and attention to be brought to issues that arise from Burundi’s ongoing conflict and authoritarian governance.⁵⁶⁴ Others scholars finds that the EACJ and the Economic Community of West African States (ECOWAS) Community Court of Justice (ECCJ) act as back-up custodians of constitutional justice that support national courts as guardians of constitutional order.⁵⁶⁵ Okafor and Effoduh describe the interaction between the ECCJ and activists as a ‘virtual alliance’ and ‘brainy relays’. They write: ‘[D]omestic activist forces and their allies have significantly in most cases functioned as “virtual alliance” with the ECOWAS Court, as “brainy relays”, in assisting in creating the above phenomena.’⁵⁶⁶ The main reason the ECCJ is characterised as such is that it acquired its human rights jurisdiction through a coordinated campaign with bar associations, NGOs and ECOWAS officials, including ECOWAS court judges themselves actively mobilising to expand the court’s jurisdiction to include human rights claims.⁵⁶⁷ This

⁵⁶¹ Ibid at 4.

⁵⁶² Ibid.

⁵⁶³ James Thuo Gathii ‘International Courts as Coordination Devices for Opposition Parties The Case of the East African Court of Justice’ in James Thuo Gathii *The Performance of Africa's International Courts: Using Litigation for Political, Legal, and Social Change* (2020) at 35–87.

⁵⁶⁴ Andrew Heinrich ‘Sub-Regional Courts as Transitional Justice Mechanisms The Case of the East African Court of Justice in Burundi’ In James Thuo Gathii *The Performance of Africa's International Courts* at 88–105.

⁵⁶⁵ Cited in Solomon T. Eboerah and Victor Lando op cit note 476 at 178–210.

⁵⁶⁶ Obiora C. Okafor and Okechukwu J. Effoduh ‘The ECOWAS court as a (promising) resource for pro-poor activist forces sovereign hurdles, brainy relays, and “flipped strategic social constructivism”’ in James Thuo Gathii *The Performance of Africa's International Courts* at 141.

⁵⁶⁷ Karen J Alter, Laurence R. Helfer, and Jacqueline R. McAllister: ‘A New International Human Rights Court for West Africa: The ECOWAS Community Court of Justice’ (2013) *American Journal of International Law* at 3. Available at: <http://ssrn.com/abstract=2107437>.

occurred with the extensive mobilisation efforts of ECCJ judges, human rights NGOs, and ECOWAS officials.⁵⁶⁸

The fundamental point in Gathii's edited book is that African ICs perform different roles than those contemplated by theories of compliance and effectiveness. Consequently, the utility and legal value of Africa's ICs are located outside compliance measures, state behaviour and institutional design but within the broader political, legal and social contexts. As noted, scholars have raised questions about the increasing role of ICs in areas traditionally viewed as state prerogatives, and about the responsibilities placed on courts.⁵⁶⁹ These questions have become more critical since African ICs such as the EACJ are understaffed and need personnel to assist judges in executing their mandate.⁵⁷⁰ A question then must be raised whether Africa's ICs are sufficiently equipped to act as transitional justice mechanisms, coordination devices for opposition political parties, and back-up custodians of constitutional justice.⁵⁷¹ Although Africa's ICs have done well in protecting human rights and promoting the rule of law in their regions, it is doubtful whether these courts have the capacity to deal with all human rights-related issues and governance matters arising on the domestic level. The increasing caseload for ICs on the African continent poses a serious risk to their effectiveness if they are not backed by adequate staffing and capacity-building to assist judges.

The growing caseload of Africa's ICs and particularly their human rights and electoral jurisprudence also demonstrate the state of affairs at the domestic level in the ECOWAS and EAC regions. They show a lack of adequate human rights systems at the domestic level to protect human rights, demonstrating that there are problems with managing and monitoring elections in these regions. As a result, state authorities, domestic courts and electoral institutions in these regions have abdicated their governance responsibilities to regional courts. Consequently, these ICs are increasingly called on to adjudicate on sensitive national policies

⁵⁶⁸ Karen J Alter, James T. Gathii and Laurence R. Helfer: 'Backlash against International Courts in West, East and Southern Africa: Causes and Consequences' in James Thuo Gathii *The Performance of Africa's International Courts: Using Litigation for Political, Legal, and Social Change* (2020) at 17–21.

⁵⁶⁹ Cited in Tom Gerald Daly *The Alchemists Questioning Our Faith in Courts as Democracy-Builders* at 1. Tomasz Milej *A Venue or a Decision Maker? The Constitutional Function of African Regional Courts* Afronomics 2021 pp 1-4. www.aftronomicslaw.org/index.php/category/analysis/venue-or-decision-maker-constitutional-function-african-regionalcourts. Accessed on 10 August 2022 at 2.

⁵⁷⁰ See Chapter 5, section 5.3.1. and 5.3.2.

⁵⁷¹ Cited in Tomasz Milej *A Venue or a Decision Maker? The Constitutional Function of African Regional Courts* at 2.

such as electoral disputes. It makes no sense that courts such as the EACJ are used by opposition political parties to challenge dominant political parties or to challenge electoral disputes despite the existence of domestic courts and electoral commissions to address such issues. This is likely to put the EACJ in critical focus.

Nevertheless, Gathii's approach of viewing Africa's ICs as venues for political, legal and social change is not suitable for the study of the SADC Tribunal utility since it is not established within an environment where SADC officials, including broader civil society such as NGOs and lawyers are ready to support the work of the SADC Tribunal. The tribunal does not have strong constituency compliance partners such as active civil society groups to challenge government policies or unfair political practices. The suspension of the SADC Tribunal is attributed to this lack of constituency partners for support.⁵⁷² Although the SADC Secretariat initially attempted to support and protect the tribunal from the political reaction from Zimbabwe, the secretariat later changed its stance.⁵⁷³ Moreover, the SADC Secretariat had no formal relationship with NGOs, particularly the SADC Lawyers Association, therefore making it difficult for NGOs to protect it from political backlash.⁵⁷⁴ When the SADC Tribunal faced this reaction, there was no consultation, communication or coordination between the SADC Secretariat and the SADC Lawyers Association.⁵⁷⁵ It was also difficult also for civil society groups to coordinate any campaign to protect the tribunal owing to capacity constraints, limited funding and challenges such as dispersed geographic location between the SADC Lawyers' Association including most regional NGOs and SADC institutions such as the SADC Secretariat and the tribunal.⁵⁷⁶ For instance, the SADC Lawyers' Association and most regional NGOS are based in Pretoria, the SADC Secretariat is based in Botswana, and the tribunal's seat is in Windhoek, Namibia.⁵⁷⁷ This situation made it more challenging for lawyers and NGOS to develop informal and formal contacts and relationships with SADC judges and officials.⁵⁷⁸

⁵⁷² Cited in Karen J Alter, James Thuo Gathii & Laurence R. Helfer op cit note 566 at 286–294.

⁵⁷³ Ibid at 289–290.

⁵⁷⁴ Ibid at 293.

⁵⁷⁵ Ibid at 293.

⁵⁷⁶ Ibid at 293–294

⁵⁷⁷ Ibid at 294.

⁵⁷⁸ Ibid.

It is important to note that the SADC Treaty foresees a role for SADC citizens and civil society groups in the SADC regional integration process.⁵⁷⁹ In practice, the SADC regional integration process is ‘state-centric, elite-dominated and exclusionary.’⁵⁸⁰ For this reason, SADC member states have failed to fulfil the objectives of involving civil society as stipulated in the treaty.⁵⁸¹ The SADC civil society groups have been marginalised from participating in the SADC structures.⁵⁸² The success of regional integration depends not only on the commitments and capacity of government but also on the involvement of non-state actors.⁵⁸³ The legitimacy of the integration process depends on the support of the people of the region.⁵⁸⁴ Since the very nature of regional integration interferes with individual liberty in many ways, it is therefore essential that it must be acceptable to the citizens of member states.⁵⁸⁵ Notwithstanding the fact that decisions are made by heads of state, the implementation of such decisions occurs largely through the private sector and other institutions and individuals.⁵⁸⁶ The SADC member states should understand that regional integration can only be successful if it also involves ordinary citizens. While it is important that the government takes the lead in the SADC integration process, the role of non-state actors such as individuals and the business community is also important. The SADC must engage with civil society and the business community to improve cooperation and promote the SADC integration agenda.

2.8 Conclusion

The nature and history of international law was discussed in this chapter to show how it has developed and evolved over time, from state-to-state cooperation to the inclusion of institutions and individuals as its subjects. This is contrary to international relations scholarship, which suggests states are the only actors in international law. Further, the growing influence of

⁵⁷⁹ Article 5(2)(b) and Article 23 of the SADC Treaty of 1992.

⁵⁸⁰ Khabele Matlosa and Kebapetse Lotshwao *Political integration and Democratisation in Southern Africa: Progress, Problems And Prospects* Electoral Institute for the Sustainability of Democracy in Africa (EISA), EISA research Report no 47 at 49.

⁵⁸¹ Fredrik Söderbaum ‘Regionalisation and Civil Society: The Case of Southern Africa’ (2007) 12 (3) *New Political Economy*. doi: 10.1080/13563460701485276 at 331.

⁵⁸² *Ibid* at 332.

⁵⁸³ Kaire M. Mbuende ‘The SADC: between cooperation and development – an insider perspective’ in Chris Saunders *Region-Building in Southern Africa: Progress, Problems and Prospects* (2012) at 56. Available at <http://ebookcentral.proquest.com/lib/uoct/detail.action?docID=867036>.

⁵⁸⁴ *Ibid*.

⁵⁸⁵ *Ibid*.

⁵⁸⁶ *Ibid*.

international law and its acceptance by states and individuals demonstrates that international law is really law, despite positivist scholars suggesting otherwise.

Beyond the rhetorical question of whether international law is really ‘law’, no single theory of compliance completely explains why states comply with international law. The theories discussed in this chapter provide a different perspective on why states comply with international law; sometimes there is an overlap between these theories. Furthermore, compliance as a study of institutional effectiveness needs to be improved. Therefore, it is necessary to move beyond compliance to evaluate the impact of rules or decisions on the behaviour of states. Theories of state compliance were criticised in this chapter on the basis that they view states as the main actors — if not the only actors — in international law. This view denies the reality that courts (both domestic and international) are important actors in international relations and global governance.

Several measures were discussed which are in use for assessing the utility or performance of ICs. These included the compliance rate approach, goal-based approach, institutional design approach, effectiveness and impact. Their strengths and challenges were examined in the context of application to the SADC Tribunal. The two preferred approaches for the purposes of this study are the institutional design approach and a goal-based approach.

The next chapter examines the legal and institutional framework of the SADC Tribunal.

CHAPTER 3: THE SADC LEGAL AND INSTITUTIONAL FRAMEWORK

3.1 Introduction

The previous chapter discussed the theories of compliance in international law and their relevance to the SADC. It showed that no single theory of law explains the behaviour of the SADC member states. The chapter also demonstrated that compliance as a study of the effectiveness of international legal regimes is limited, and called for moving beyond compliance to evaluate the impact of rules or decisions on the behaviour of states. This is consistent with the findings of Chapter 1, which demonstrated the limitation of compliance as a measure of the effectiveness of international legal regimes. Chapter 2 also discussed the history and nature of international law from its foundation to date. It proved that international law is really law, despite sceptics' claims to the contrary.

This chapter examines the legal and institutional framework of the SADC Tribunal. An assessment of the SADC Tribunal's legal and institutional framework is important since its utility partly depends on its design and the jurisdictional powers granted to it. In particular, the institutional effectiveness of the SADC Tribunal also depends on the efficiency of legal rules relating to the appointment of judges, independence of judges, and the jurisdiction powers of the court, including access rules and enforcement of its judgments. Therefore, the chapter examines the composition of the SADC Tribunal including the process for appointment of judges and thereafter examines the jurisdiction of the Tribunal. The enforcement mechanisms adopted for enforcing the SADC Tribunal judgments are also discussed. The aim is to map out the role and involvement of domestic courts of the SADC member states and the SADC Summit in the enforcement process of the SADC Tribunal decisions.

Further, the chapter presents a discussion of the case law of both the SADC Tribunal and selective domestic courts to evaluate how they have exercised their jurisdiction and interpreted the SADC legal instruments, including international legal instruments. Finally, it examines how the SADC Tribunal has contributed to settlement of disputes through legal means, treaty interpretation and development of international human rights law, access to courts and to access

to justice at international level. In other words, the chapter studies how the SADC Tribunal has contributed to the advancement of the rule of law.

The following section discusses the history of the SADC, and the aim here is to introduce the reader to the SADC.

3.2 *History of the SADC*

The Southern African Development Coordination Conference (SADCC) was established in 1980 in Lusaka.⁵⁸⁷ The SADCC was formed as a loose cooperation in response to the apartheid government in South Africa and to attain economic independence from apartheid South Africa.⁵⁸⁸ In 1992, the SADCC transformed into the SADC, and the current membership of the SADC sits at sixteen states.⁵⁸⁹ Article 3(1) of the SADC Treaty states that the SADC is an international organisation that enjoys legal status. It is empowered with legal personality to enter into a contract, acquire, own or dispose of movable or immovable property, and sue and be sued.⁵⁹⁰ In terms of Article 3(2), in the territory of each member state, the SADC has the legal capacity necessary to exercise its functions properly.⁵⁹¹ The SADC's legal personality is limited by the SADC Treaty in that it must act within the scope of the SADC Treaty.⁵⁹² The SADC Treaty provisions do not empower it to enter into international agreements on behalf of its member states.⁵⁹³ The SADC member states are obliged under the SADC Treaty to grant domestic legal personality to the SADC.⁵⁹⁴

⁵⁸⁷ Oliver C Ruppel 'Regional economic communities and human rights in East and Southern Africa' in Anton Bösl and Joseph Diescho *Human Rights in Africa Legal Perspectives on their Protection and Promotion* (2009) at 289; Ilyayambwa Mwanawina 'Regional Integration versus National Sovereignty: A Southern African Perspective' (2011) 44 (4) *Verfassung und Recht in Übersee / Law and Politics in Africa, Asia and Latin America* at 469, available at <http://www.jstor.org/stable/43239617> accessed on 25 February 2018; Dawn Nagar and Mark Paterson *The History of Regionalism South Africa In Southern Africa* (2013) at 9, available at <http://www.jstor.com/stable/resrep05170.6> accessed on 3 January 2021.

⁵⁸⁸ Ibid.

⁵⁸⁹ South Africa, Zimbabwe, Botswana, Namibia, Lesotho, Angola, Swaziland, Democratic Republic of Congo (DRC), Madagascar, Malawi, Mauritius, Mozambique, Seychelles, Tanzania, Zambia and Comoros, which joined in 2017.

⁵⁹⁰ Article 3 of the SADC Treaty.

⁵⁹¹ Article 3(2) of the SADC Treaty of 1992.

⁵⁹² Muna Ndulo 'African Integration Schemes: A case study of the Southern African Development Community (SADC)' (1999) 7 *African Yearbook of International Law* at 9–10.

⁵⁹³ Cited in Bartels op cit note 175 at 7.

⁵⁹⁴ See Article 3(2) of the SADC Treaty of 1992.

Despite Article 3(2) of the SADC Treaty containing a peremptory norm that implies a binding effect on the SADC member states to ensure that the SADC possesses domestic legal personality, it remains unclear whether such obligation on the SADC member states can be binding without implementing legislation. However, it must be noted that the international legal personality of an international organisation has been confirmed by the ICJ advisory opinion in the *Reparation for Injuries Suffered in the Service of the United Nations*, in which the ICJ found that an international organisation can possess international legal personality, and exercise certain powers at both international and domestic level.⁵⁹⁵ The ICJ acknowledged that an international organisation such as the UN is not a state and that its legal personality, rights and duties that are completely different from those of a state.⁵⁹⁶

Nevertheless, the signing of the SADC Treaty of 1992 created rights and duties on the part of member states.⁵⁹⁷ The rights and duties created by the SADC Treaty were strengthened by member states' express commitments to uphold the principles and objectives of the SADC Treaty.⁵⁹⁸ The obligations undertaken by member states were therefore binding and created legal obligations, and any breach of such undertaking would constitute a breach of member states' international legal obligation.⁵⁹⁹ The SADC Treaty adopted the institutional structure of the SADCC as the principal organ of the SADC, with similar powers and responsibilities, while creating new organs such as the SADC Tribunal.⁶⁰⁰ Establishing the SADC as an international organisation with a distinct legal personality, capacity, and powers did not entail a significant shift in the balance of powers and responsibilities over regional integration from the member states to the newly established organisation.⁶⁰¹ The SADC is still generally characterised by

⁵⁹⁵ *Reparation for Injuries Suffered in the Service of the United Nations*, Advisory Opinion, [1949] ICJ Rep 174. See also Dan Sarooshi 'Capacity and Powers' in Jacob Katz Cogan, Ian Hurd and Ian Johnstone *The Oxford Handbook of International Organizations* (2016) Oxford University Press at 986; See Ramses A. Wessel 'Reparation for Injuries Suffered in the Service of the United Nations' Advisory Opinion, [1949] ICJ Rep 174 in Cedric Ryngaert, Ige F Dekker, Ramses A Wessel and Jan Wouters *Judicial Decisions on the Law of International Organizations* (2016) at 11–18.

⁵⁹⁶ 'Reparation for Injuries Suffered in the Service of the United Nations' Advisory Opinion, [1949] ICJ Rep 177.

⁵⁹⁷ Adeyemi Ashimizo Afadameh-and Kalula Evance 'SADC at 30: Re-examining the legal and institutional anatomy of Southern African Development Community' in *Monitoring Regional Integration in Southern African Development Community Yearbook* (2010) Vol 10 ch 1 at 9.

⁵⁹⁸ Ibid.

⁵⁹⁹ Ibid.

⁶⁰⁰ C. Ng'ong'ola 'The Legal Framework for Regional Integration in the Southern African Development Community' (2008) 8 *U. Botswana L.J.* 3 (University of Botswana Law Journal December 2008) at 14.

⁶⁰¹ Clement Ng'ong'ola 'Regional Integration and Trade Liberalization in the Southern African Development Community' (2000) *Journal of International Economic Law* at 493.

the reluctance of its member states to yield sovereignty to the organisation.⁶⁰² Despite a commitment to democracy, the rule of law and to human rights, the SADC Treaty does not contain any provisions on the criteria for admission nor guidelines for membership or which subject membership to the observance of these democratic principles.⁶⁰³ In terms of Article 4(c) of the SADC Treaty, the SADC and its member states are required to act in accordance with the principle of sovereignty, human rights, democracy and the rule of law.⁶⁰⁴ Accordingly, a state may be admitted to the SADC irrespective of its violation of the democratic and human rights of its citizens.⁶⁰⁵ For instance, the Democratic Republic of Congo (DRC) was admitted despite its lack of democracy and the observance the rule of law.⁶⁰⁶

The next section discusses the institutional and legal framework of the SADC Tribunal.

3.3 *SADC Tribunal*

3.3.1 Establishment of the SADC Tribunal

As noted in Chapter 1, the SADC Tribunal (old Tribunal) was established in 2005 as a judicial institution of the SADC under Article 9 of the SADC Treaty.⁶⁰⁷ In accordance with Article 4(4) of the Protocol on Tribunal, the Summit of Heads of State appointed the members of the Tribunal in Gaborone, Botswana, on 18 August 2005.⁶⁰⁸ Despite the tribunal being established under the 1992 SADC Treaty, it only became operational in 2005 and received its first case around 2007.⁶⁰⁹ The slow institutional start-up was due to the failure to establish the tribunal and its accompanying rules of procedure timeously.⁶¹⁰ Many SADC member states favoured less formal dispute settlement systems such as arbitration and mediation and were opposed to supranational law.⁶¹¹ Accordingly, when the SADC Summit adopted the protocol, they did not

⁶⁰² Ibid.

⁶⁰³ See Article 8(2) SADC Treaty (1992).

⁶⁰⁴ Article 4(c) of the SADC Treaty of 1992.

⁶⁰⁵ Anna Van Der Vleuten and Andrea Ribeiro 'Hoffmann 'Explaining the Enforcement of Democracy by Regional Organizations: Comparing EU, Mercosur and SADC' (2010) 48 (3) *JCMS (Journal of Common Market Studies)* at 751.

⁶⁰⁶ Ibid.

⁶⁰⁷ See the discussions in Chapter 1, section 1.1.

⁶⁰⁸ As above.

⁶⁰⁹ As above.

⁶¹⁰ Brian Sang Yk op cit note 15 at 360.

⁶¹¹ Asmelash, Henok Birhanu (2017) 'Southern African Development Community (SADC) Tribunal' MPILux Working Paper 10.

expect any threats to state sovereignty and did not foresee the possibility of the tribunal overstepping its mandate.⁶¹² Despite their initial opposition to supranational courts, SADC member states created a court with supranational features modelled on the EU system.⁶¹³

Since the establishment of the old SADC Tribunal, several cases have been referred to it, and most of these cases were brought against the Zimbabwean government.⁶¹⁴ Among these disputes were eight cases concerning Zimbabwe's agricultural land expropriation policy.⁶¹⁵ The old SADC Tribunal received about thirty applications brought by individuals and issued about fifteen judgments before its suspension in 2011.⁶¹⁶ The suspension of the tribunal followed its ruling against the Republic of Zimbabwe's land expropriation policy, which it held was against the principles of human rights, the rule of law and non-discrimination and, therefore, in violation of the SADC Treaty.⁶¹⁷

3.3.2 Composition of SADC Tribunal

It has been suggested that an important factor that affects the legitimacy of a court is its composition.⁶¹⁸ Consequently, the composition of a court has a direct effect on how the court is perceived, particularly its fairness, neutrality and credibility.⁶¹⁹ Accordingly, the process through which judges of the court are appointed directly affects their independence and ability to settle disputes without any interference.⁶²⁰ The SADC Treaty provides that 'Members of the Tribunal shall be appointed for a specified period'.⁶²¹ The Tribunal consists of 10 Members who are each appointed from individual SADC Member States.⁶²² The members of the SADC Tribunal are required to possess the highest qualifications required for appointment judges in their home countries or 'at least have or must be jurists of recognised competence.'⁶²³

⁶¹² Cited in Hulse and van der Vleuten op cit note 119 at 84.

⁶¹³ Tobias Lenz op cit note 119 at 155.

⁶¹⁴ See section 1.1.

⁶¹⁵ Ibid.

⁶¹⁶ Ibid.

⁶¹⁷ Ibid.

⁶¹⁸ R. Frimpong Oppong 'Legitimacy of Regional Economic Integration Courts in Africa' (2014) 7 (1) *African Journal of Legal Studies* at 65.

⁶¹⁹ Ibid.

⁶²⁰ Ibid.

⁶²¹ Article 16(3) of the SADC Treaty.

⁶²² Article 3(1) of the SADC Tribunal Protocol of 2001.

⁶²³ Article 3(1) of the SADC Tribunal Protocol of 2001.

‘The Summit, on the recommendation of the Council of Ministers, is to appoint the ten members, five are permanent members, those who shall regularly sit on the Tribunal.’⁶²⁴ ‘The other five members constitute a pool from which the President may temporarily choose a judge to join the Tribunal.’⁶²⁵

The first President of the SADC Tribunal was Justice Mondlane of Mozambique who served from 2005–2008. The successor to Justice Mondlane was Justice Pillay of Mauritius who served from 2008–2011.⁶²⁶ It is worth noting that Zimbabwe government officials strongly criticised their own judge, Justice Antonina Guvava. Notably, they complained during the workshop held in Pretoria, South Africa, that this judge was ‘too junior’ to override the decisions of the Supreme Court of Zimbabwe while sitting before the SADC Tribunal despite some of these officials having selected and nominated the said judge.⁶²⁷ The Registrar of the Tribunal, Justice M C C Mkandawire of Malawi and eight other supporting staff were appointed in 2006.⁶²⁸ In terms of Article 4(2) of the SADC Tribunal Protocol, in the appointment of judges, the SADC Council together with the SADC Summit must ensure that there is fair gender representation. It should be noted that the SADC Council and the SADC Summit had only appointed one female judge- Justice Antonina Guvava — to the bench of the SADC Tribunal.

It is generally agreed that gender balance or women representation is important for the legitimacy of domestic courts and ICs.⁶²⁹ For Justice Mumba, the call for more appointment of female judges and the issue of representation should start at state level.⁶³⁰ Accordingly, national governments must be encouraged to open judiciaries to female judges and persuaded to

⁶²⁴ Art 4(4) of the Protocol

⁶²⁵ Art 3(2) of the Protocol.

⁶²⁶ Cited in Michelo Hansungule op cit note 18 at 137.

⁶²⁷ Ibid at 137–138.

⁶²⁸ Ibid at 137.

⁶²⁹ Cited in R. Frimpong Oppong op cit note 616 at 66; Rachel Ellett ‘Justina Kelello Mafoso-Guni The Gendering of Judicial Appointment Processes in African Courts’ in Josephine Jarpa Dawuni and Akua Kuenyehia *International Courts and the African Woman Judge Unveiled Narratives* (2018).

⁶³⁰ Justice Florence Ndepele Mwachande Mumba ‘Women Judges in International Courts and Tribunals The Quest for Equal Opportunities’ in Josephine Jarpa Dawuni and Akua Kuenyehia *International Courts and the African Woman Judge Unveiled Narratives* (2018).

promote their nomination to ICs.⁶³¹ If not, women judges can easily be ignored and left out since the majority of heads of state continue to be men.⁶³²

Nevertheless, the members of the tribunal serve a five-year term and may only be re-appointed for an additional five-year term.⁶³³ Since the five-year term of office of the judges is renewable, the concern naturally arises that judges could be encouraged to please their governments to get a renewal of their terms.⁶³⁴ The provisions of the Protocol on the Tribunal and Rules of Procedure relating to the appointment of judges and their tenure of office represent a very unfavourable position for strengthening judicial independence in the SADC.⁶³⁵ The Council, by being involved in the selection process of judges and determining the terms and conditions of service, salaries and benefits of the Registrar and other staff demonstrate lack of institutional independence on the part of the Tribunal.⁶³⁶ Financial security is an important factor contributing to judicial independence and the overall legitimacy of a court.⁶³⁷ Accordingly, the process of nominating and appointing judges through political organs including determination of their employment contract and salaries can undermine the independence of REC courts.⁶³⁸

Since the security of tenure is a crucial element of judicial independence, the suspension of the SADC Tribunal violated the independence of the judiciary.⁶³⁹ The SADC judges remaining in office for the sole purpose of finalising cases before the tribunal did so without any contractual security as to their terms of office.⁶⁴⁰ For this reason, any resulting judgments may be challenged for lack of judicial independence.⁶⁴¹ However, despite these challenges affecting the functioning of the court, it is generally accepted that the SADC Tribunal judges

⁶³¹ Ibid.

⁶³² Ibid.

⁶³³ Art. 6(1) of the Protocol.

⁶³⁴ Mia Swart 'Judicial independence at the regional and sub-regional African courts' (2014) 29 *SAPL* at 405–406.

⁶³⁵ Ilyayambwa Mwanawina 'The position of Judicial independence within the SADC Institutional Framework' (2013) 46 (3) *Verfassung und Recht in Übersee / Law and Politics in Africa, Asia and Latin America* at 333.

⁶³⁶ Ibid.

⁶³⁷ Cited in R. Frimpong Oppong op cit note 616 at 67.

⁶³⁸ Ibid at 67–68.

⁶³⁹ Swart op cit note 632 at 405.

⁶⁴⁰ Ibid.

⁶⁴¹ Ibid.

have shown that they are independent and this is one of the reasons why the SADC Summit decided to suspend the operation of the tribunal.⁶⁴²

3.3.3 Jurisdiction of the SADC Tribunal

The SADC Tribunal was established ‘to ensure adherence to and the proper interpretation of the provisions of the Treaty and subsidiary instruments and to adjudicate on such disputes as may be referred to it.’⁶⁴³ Furthermore,

any dispute arising from the interpretation or application of this Treaty, the interpretation, application or validity of Protocols or other subsidiary instruments made under this Treaty, which cannot be settled amicably, shall be referred to the Tribunal.⁶⁴⁴

‘Decisions of the Tribunal shall be final and binding.’⁶⁴⁵ It ‘shall give advisory opinions on such matters as the Summit or the Council may refer to it’.⁶⁴⁶

The SADC Tribunal has ‘exclusive jurisdiction over all disputes between natural or legal persons and the Community. Such disputes may be referred to the Tribunal ... by the competent institution or organ of the Community’.⁶⁴⁷ In terms of the Tribunal Protocol of 2001, it had personal jurisdiction to hear disputes between member states, member states and natural or legal persons, natural or legal persons and the SADC, member states and the SADC, and SADC employees and the SADC.⁶⁴⁸ More importantly, access before the tribunal was not limited to SADC nationals or residents as in other regional courts and tribunals; both domestic and foreign investors had access to the tribunal.⁶⁴⁹ However, individuals are required to first exhaust local remedies.⁶⁵⁰ The rationale for this requirement is to enable local courts to first deal with the matter because they are well placed to resolve legal issues involving national law

⁶⁴² Ibid.

⁶⁴³ Article 16 of the SADC Treaty.

⁶⁴⁴ Article 32 of the SADC Treaty.

⁶⁴⁵ Article 16(5) of the SADC Treaty.

⁶⁴⁶ Art 16(4) of the Treaty.

⁶⁴⁷ Art 18 of the Protocol.

⁶⁴⁸ Articles 15(1), 17, 18 and 19 of the SADC Tribunal Protocol.

⁶⁴⁹ See Article 26 of the the ECOWAS Treaty. See also Article 26 of the COMESA Treaty.

⁶⁵⁰ Article 15(2) of the Protocol.

before them.⁶⁵¹ It also ensures that the international tribunal does not deal with cases which could easily have been disposed of by national courts.⁶⁵²

It should be noted that Article 33 of the 2014 SADC Tribunal Protocol provides that ‘the Tribunal shall have jurisdiction on the interpretation of the SADC Treaty and Protocols relating to disputes between member states.’⁶⁵³ Consequently, the new SADC Tribunal will only hear interstate disputes. Private individuals and the SADC officials (including the staff of the Secretariat) are denied jurisdiction to bring disputes about their contracts of employment to the Tribunal. As noted earlier, SADC member states do not litigate against each other and therefore it is extremely possible that this trend will continue.⁶⁵⁴ The 2014 SADC Tribunal Protocol does not expressly confer compulsory jurisdiction to the new tribunal.⁶⁵⁵ It has been suggested that all member states must be legally bound to submit themselves to the jurisdiction of the court hearing the dispute filed by another member state.⁶⁵⁶ Therefore, jurisdiction of the court should not depend on an *ex post facto* or consent of the defendant state.⁶⁵⁷

Moreover, the new SADC Tribunal Protocol of 2014 makes it possible for member states to withdraw from the SADC Tribunal dispute settlement system.⁶⁵⁸ This is in conflict with Article 16 of the SADC Treaty which provides that ‘the Protocol on the Tribunal shall form an integral part of this Treaty’.⁶⁵⁹ In other words, the SADC Tribunal Protocol is *sui generis* and member states may not decide to withdraw from it while still members of SADC.⁶⁶⁰ The absence of individual jurisdiction including lack of access by SADC institutions will have major implications for the functioning of the SADC. It is essential that the SADC member states follow South Africa and withdraw their signatures from the proposed new SADC Protocol of 2014 since it denies individual access and will have negative implications for the protection of individual human rights and rule of law in the region.

⁶⁵¹ Cited in Scholtz and Ferreira op cit note 2 at 337.

⁶⁵² Ibid.

⁶⁵³ See Article 33 of the 2014 SADC Tribunal Protocol.

⁶⁵⁴ See Chapter 1, section 1.1.2.

⁶⁵⁵ Cited in Gerhard Erasmus *The SADC Tribunal ... and its demise* at 148.

⁶⁵⁶ Ibid at 149.

⁶⁵⁷ Ibid.

⁶⁵⁸ Ibid. See also Article 50 of the 2014 SADC Tribunal Protocol.

⁶⁵⁹ Ibid.

⁶⁶⁰ Ibid

The next section discusses the mechanisms adopted for enforcing SADC Tribunal judgments. The purpose is to map out the role and involvement of domestic courts of the SADC member states and the SADC Summit in the enforcement process of SADC Tribunal decisions.

3.4 Mechanisms for enforcing SADC Tribunal judgments

African sub-regional courts do not have institutions with powers to compel the enforcement of their judgments.⁶⁶¹ These courts depend on the political institutions of RECs, the indulgence of national governments or the willingness of national courts to implement their binding decisions.⁶⁶² Despite the fact that the judgment of a regional court activates domestic enforcement, it nevertheless does not constitute domestic enforcement.⁶⁶³ However, regional courts may pressure the state to ensure effective enforcement through their activities after having made their judgment.⁶⁶⁴

In general, two types of enforcement mechanisms apply to the SADC Tribunal decisions. These are

the mechanism for registration and enforcement of Tribunal decisions within the legal orders of the SADC member states and secondly, the mechanism for enforcing decisions at the international level, by reference to the SADC Tribunal and the Summit.⁶⁶⁵

In particular, Article 32(1) of the Protocol on Tribunal and Rules of Procedure provides that ‘the law and rules of civil procedure for the registration and enforcement of foreign judgments in force in the territory of the State in which the judgment is to be enforced shall govern enforcement’.⁶⁶⁶

There are also procedural gaps with enforcing the SADC Tribunal decisions as foreign judgments since the laws and rules of recognition and enforcement of foreign judgments found

⁶⁶¹ Cited in Solomon T. Ebobrah op cit note 1 at 96.

⁶⁶² Ibid at 96–97.

⁶⁶³ Tarisai Mutangi ‘Enforcing Compliance with the Judgments of the African Court on Human and Peoples’ Rights Prospects and Challenges’ in Aderomola Adeola *Compliance with International Human Rights Law in Africa* (2022) at 225.

⁶⁶⁴ Ibid.

⁶⁶⁵ Cited in Bartels op cit note 175 at 38.

⁶⁶⁶ Article 32(1) on the Protocol on Tribunal and Rules of Procedure 2001.

in the SADC member states do not extend to the SADC Tribunal judgments.⁶⁶⁷ In particular, none of the SADC member states has redesigned their national laws to ensure that such national recognition and enforcement legislation would apply to the decisions of the SADC Tribunal.⁶⁶⁸ For instance, in the case of *Gramara (Private) Ltd. & others v. Government of Zimbabwe & others*, the Zimbabwean High Court noted that the decisions of the SADC Tribunal are not registrable or enforceable in terms of section 3 of Civil Matters (Mutual Assistance) Act of Zimbabwe because the SADC Tribunal is not designated.⁶⁶⁹ Similarly, on the question of whether South African courts have the jurisdiction to register and enforce a costs order issued against the Government of Zimbabwe by the SADC Tribunal, in the case of *Government of the Republic of Zimbabwe v Fick & others*, the Constitutional Court of South Africa rejected the application of the Enforcement of Foreign Civil Judgments Act 32 of 1988.⁶⁷⁰ The application was rejected because the SADC Tribunal had yet to be designated in terms of the Act.⁶⁷¹ It is difficult to understand why the SADC Tribunal decisions are treated as foreign judgments, considering that the SADC member states themselves created the tribunal.

Article 32(4) states that ‘any failure by a State to comply with a decision of the Tribunal may be referred to the Tribunal by any party concerned’.⁶⁷² In terms of Article 32(5), ‘if the Tribunal establishes the existence of such failure, it shall report its finding to the Summit for the latter to take appropriate action’.⁶⁷³ The tribunal is extremely limited and only able to act once it has been informed of non-compliance with its decisions.⁶⁷⁴ In terms of Article 32(3) of the Protocol on the SADC Tribunal, the decisions of the tribunal are binding on the parties to

⁶⁶⁷ For instance, Article 2 of the Enforcement of Foreign Civil Judgments Act 32 of 1988 of South Africa only applies to foreign judgments from designated countries. In this case, it is only Namibia that is designated. Similarly, under section 3 (1) of the *Reciprocal Enforcement of Judgments Act 1922 of Swaziland*, it is clear that the Act was designed to facilitate the reciprocal enforcement of judgments and awards between the United Kingdom (UK) and Swaziland. However, in terms of Section 5 Notice No.97 of the *Reciprocal Enforcement of Judgments Act 1922 of Swaziland Act*, designation has been extended to 15 other Commonwealth territories other than the UK.

⁶⁶⁸ Cited in Bartels op cit note 175 at 41.

⁶⁶⁹ *Gramara (Private) Ltd. & Others v. Government of Zimbabwe & Others* High Court of Zimbabwe (Jan. 26, 2010) at 6.

⁶⁷⁰ *Government of the Republic of Zimbabwe v Fick and Others* 22013 (5) SA 325 (CC) Para 36-37.

⁶⁷¹ Para 37.

⁶⁷² Article 32(4) on the Protocol on Tribunal and Rules of Procedure 2001.

⁶⁷³ Article 32(5) on the Protocol.

⁶⁷⁴ Memory Dube and Rob Midgley: *Land reform in Zimbabwe: context, process, legal and constitutional issues and implications for the SADC region*: In Monitoring Regional Integration in Southern Africa Yearbook Volume 8 (2008) at 24.

the dispute in respect of that particular case and enforceable within the territories of the states concerned.⁶⁷⁵ The tribunal plays no active role in the enforcement process of its judgments beyond merely notifying the SADC Summit of the non-compliance. Instead, the role of the SADC Tribunal is to interpret and adjudicate disputes brought before it.⁶⁷⁶ In other words, the role of the tribunal is to make rulings on the legality of state practice or government conduct only in cases submitted before it.

Since ICs generally suffer from a lack of compliance with their judgments, scholars have proposed that ICs be empowered with judgment enforcement mechanisms as an alternative.⁶⁷⁷ This suggestion is based on the assumption that ICs can only achieve compliance with their judgments and be effective if a robust enforcement system supports them. From the perspective of the SADC, the view is that more robust enforcement mechanisms are needed to ensure enforcement and compliance with SADC Tribunal judgments.⁶⁷⁸ However, ICs generally do not enforce their judgments owing to the nature of international law.⁶⁷⁹ Notably, international law has no institutions like those found in domestic legal systems to enforce binding decisions.⁶⁸⁰ Guzman discusses the general practice in international law and observes that

in the context of a domestic dispute, the failure of a losing party to comply with the ruling of Court ... leads to sanctions—most typically a seizure of property or person In contrast, when a state loses before an international tribunal, no formal legal structure exists to enforce the ruling. The assets of the noncompliant state will not be seized, nobody will be arrested, and the state will not even lose its ability to file complaints.⁶⁸¹

For instance, the International Court of Justice (ICJ) has no mechanisms for enforcing its decisions and relies on the UN member states and the United Nation Security Council (UNSC) for enforcement of its judgments.⁶⁸² Similarly, the ECJ has no mechanisms for enforcing its decisions and depends on the European Commission (EC) and member states of the EU for

⁶⁷⁵ Article 32(3) on the Protocol on Tribunal and Rules of Procedure 2001.

⁶⁷⁶ Article 16(1) of the SADC Treaty.

⁶⁷⁷ *ibid.*

⁶⁷⁸ *Ibid.*

⁶⁷⁹ Joseph Sindi Warioba *Monitoring compliance with and enforcement of binding decisions of International Courts* in JA Frowein and R Wolfrum *Max Planck Yearbook of United Nations law*, Volume 5, 2001, pages 41-52 at 42.

⁶⁸⁰ *Ibid.*

⁶⁸¹ Andrew T Guzman “*International tribunals: a rational choice analysis*” 2008 *University of Pennsylvania Law Review* (U PA L Rev) 171 -179 at 178-179.

⁶⁸² See Article 94 (1) as read with Article 92 (2) of the UN Charter of 1945.

enforcement of its decisions.⁶⁸³ As shown above, ICs generally lack judgment enforcement mechanisms and depend on states to enforce their judgments. Therefore, there are no guarantees that states will comply with binding ICs rulings, and it is often challenging to compel states to comply with IC decisions if there is no cooperation on the part of the state. Of course, this does not mean that there are no other ways of compelling states to comply, but rather that it is more challenging to force states to comply with IC decisions than with domestic court decisions. Many critics of international law consider ICs to be inadequate because of the lack of enforcement systems to support court rulings.⁶⁸⁴ Hillebrecht observes that one of the inherent problems of viewing ICs as enforcement mechanisms — or as mechanisms that are an integral part of the enforcement process — is that ICs themselves need states to engage in a compliance process.⁶⁸⁵ In other words, ICs are not in themselves enforcement mechanisms since they cannot generate compliant behaviour or issue costs for non-compliance on their own.⁶⁸⁶ Rather, their rulings activate or should activate their compliance processes.⁶⁸⁷ ICs cannot compel states to comply with their decisions any more than treaties can.⁶⁸⁸

The main limitation of ICs is not their lack of strong enforcement powers.⁶⁸⁹ It is doubtful whether empowering ICs with enforcement powers would change the fact that international judges are legally and politically limited.⁶⁹⁰ On the contrary, compliance with the decisions of ICs depends on the same actors and processes in the same way as international law, more generally.⁶⁹¹ Moreover, courts play multiple roles other than law enforcement.⁶⁹² Generally, ICs are involved in international law enforcement but do not themselves enforce the law.⁶⁹³ The role of judges is to rule on the legality of state conduct or practice and sometimes issue remedies.⁶⁹⁴ There is no court that enforces its decision or remedies judges' issues.⁶⁹⁵ The

⁶⁸³ See also Article 258, 259, 260(1) and 260 (2) of the Treaty on the Functioning of the European Union (TFEU).

⁶⁸⁴ Cited in Karen J Alter op cit note 69 at 32.

⁶⁸⁵ Courtney Hillebrecht 'Compliance: actors, context and causal processes' in Wayne Sandholtz and Christopher A. Whytock (2017) *Research Handbook on the Politics of International Law* at 48.

⁶⁸⁶ Ibid.

⁶⁸⁷ Ibid.

⁶⁸⁸ Ibid.

⁶⁸⁹ Cited in Karen J Alter op cit note 69 at 36

⁶⁹⁰ Ibid at 37.

⁶⁹¹ Ibid.

⁶⁹² Ibid at 244.

⁶⁹³ Ibid 245.

⁶⁹⁴ Ibid.

⁶⁹⁵ Ibid at 246.

fundamental point is that ICs differ from domestic courts and do not necessarily require strong enforcement mechanisms to exercise their limited authority. Therefore, the view that the SADC is ineffective since it does not have its own judgment enforcement powers is misleading since most ICs do not enforce their own judgment and rely on their member states' cooperation to enforce their decisions. Similar to many ICs, the SADC Tribunal depends on the SADC member states and SADC Summit for enforcement and compliance with its judgments.⁶⁹⁶ Therefore, since the SADC Tribunal does not enforce its judgment, the lack of enforcement and compliance with its judgments cannot be blamed on the tribunal. Rather, the SADC Summit as an institution and respective Members of SADC should play a more forceful role and ensure compliance with the SADC Tribunal judgments. The problem of lack of enforcement and non-compliance with the SADC Tribunal lies with the SADC Summit and SADC member states since Article 6 of the SADC Treaty, as read with Article 32 of the SADC Tribunal Protocol, makes it clear that they are responsible for ensuring enforcement and compliance with SADC Tribunal judgments.

The next subsection assesses the challenges of enforcing SADC Tribunal judgments via domestic courts and the SADC Summit. It offers a comprehensive account of the main challenges of enforcing the SADC Tribunal via domestic courts of the SADC member states and the SADC Summit.

3.4.1 Enforcement via the SADC member states

Independent judicial institutions are important for compliance with international law.⁶⁹⁷ For this reason, strong and independent courts can advocate for compliance in the face of executive resistance or compel the legislature to enact new policies to conform to international law.⁶⁹⁸ This by no means suggests that domestic institutions such as domestic courts are always willing to ensure compliance.⁶⁹⁹ More importantly, the success of regional integration is mainly dependent on the willingness of states to accept, with a sense of obligation, the central values of African human rights systems, including the REC's mechanisms of human rights

⁶⁹⁶ Cited in Solomon T. Ebobrah op cit note 1 at 96–97.

⁶⁹⁷ Hillebrecht op cit note 684 at 36.

⁶⁹⁸ Ibid.

⁶⁹⁹ Ibid at 37.

protection.⁷⁰⁰ This requires that states domesticate the treaty provisions into the domestic legal system and ensure compliance (through their domestic courts) with the REC courts' judgments.⁷⁰¹ It also means that states recognise and comply with the judgments of the RECs' courts despite ideological differences that may exist between their jurisprudence and that of the RECs' courts.⁷⁰²

Section 6 of the SADC Treaty clarifies that the primary responsibility to enforce and execute the SADC Tribunal's decisions and rulings lie with the SADC member states.⁷⁰³ The requirement of 'domestication' is consistent with Article 26 of the Vienna Convention on the Law of Treaties (VCLT), which provides that treaty obligations must be performed in good faith.⁷⁰⁴ Therefore, states' obligation to comply with a court's judgments is found in the principles of *pacta sunt servanda*.⁷⁰⁵ In particular, a state has complied with the *pacta sunt servanda* principle when it intends to enforce the court order, therefore removing the adverse consequences suffered by the individual as a result of the violation.⁷⁰⁶ Consequently, member states bear the responsibility, through their domestic institutions, to ensure that the SADC Tribunal decisions are enforced.⁷⁰⁷ It is expected that the member states, through their domestic institutions such as the attorneys general and the judiciary, would assist the SADC Tribunal to ensure that its decisions are enforced.⁷⁰⁸ It follows, therefore, that compliance with international human rights tribunals' rulings is a domestic affairs issue.⁷⁰⁹ Consequently, members of the executives, judiciary, and legislatures can compel compliance on the domestic level.⁷¹⁰ As observed above, under Article 6 of the SADC Treaty and Article 26 of the VCLT, compliance partners such as the members of the executive and the judiciary assume

⁷⁰⁰ Cited in Jean-Bosco op cit note 526 at 187.

⁷⁰¹ Ibid.

⁷⁰² Ibid.

⁷⁰³ See section 6 of the SADC Treaty.

⁷⁰⁴ Article 26 of the Vienna Convention on the Law of Treaties (VCLT).

⁷⁰⁵ Cited in Taisai Mutangi op cit note 662 at 194.

⁷⁰⁶ Ibid.

⁷⁰⁷ Cited in MCC Mkandawire *The SADC Tribunal perspective on enforcement of judgments: state support and cooperation* at 572.

⁷⁰⁸ Ibid.

⁷⁰⁹ Cited in Hillebrecht op cit note 684 at 3.

⁷¹⁰ Ibid.

responsibility for the compliance process and hold governments accountable for their international legal commitments.⁷¹¹

Domestic or national courts are critical in international trade dispute resolution.⁷¹² Notably, a trader in goods or services involved in a trade-related dispute with a government or its agencies will likely institute a claim against the offending government before its courts or tribunals.⁷¹³ Domestic courts play a vital role as they become integral to a dispute settlement ‘package’ created by the founding agreement and its protocols.⁷¹⁴ An important aspect of domestic courts is that the moment a domestic court issues a final judgment, the court order is executed through domestic enforcement mechanisms that are not readily available for the enforcement of REC court decisions.⁷¹⁵

Therefore, the domestic courts of SADC member states are essential for enforcing the SADC Tribunal decisions. When the government fails to enforce an IC’s judgments, domestic courts can provide a platform for individuals to compel their government to comply with IC decisions. Oppong observes that in Africa’s economic integration, national courts serve as an institutional means or mechanism through which community norms can be translated into domestic benefits for individuals.⁷¹⁶ Accordingly, national courts are an essential complement to a community’s law enforcement mechanisms.⁷¹⁷ Using national courts to enforce international judgments is potentially the most effective means of securing compliance with ICs’ decisions and enhancing the effectiveness of international adjudication.⁷¹⁸ Therefore, relying on national courts to enforce international judgments advances the rights of individuals by depoliticising the post-adjudicative phase of international litigation.⁷¹⁹

⁷¹¹ Ibid.

⁷¹² Dawid van Wyk *Domestic courts and remedies* in Gerhard Erasmus, Trudi Hartzenberg, Creck Buyonge Miritto & Dawid van Wyk *African Trade and Integration: Law, Practice and the Courts* (2022) at 183.

⁷¹³ Ibid.

⁷¹⁴ Ibid at 184.

⁷¹⁵ Ibid at 185.

⁷¹⁶ Cited in Richard Frimpong Oppong *Legal Aspects of Economic Integration in Africa* at 149.

⁷¹⁷ Ibid.

⁷¹⁸ Richard Frimpong Oppong ‘Enforcing judgments of the SADC Tribunal in the domestic courts of Member States’ in *Monitoring Regional Integration in Southern African Development Community Yearbook* (2010) Vol 10 ch 7 at 120.

⁷¹⁹ Ibid.

Nollkaemper proposes that national courts can fill the missing link in the international rule of law by providing remedies when the government violates its international obligations.⁷²⁰ This author contends that domestic judicial powers are a more acceptable means of establishing a ‘world under the law’ than international or supranational institutions that seek to limit their state sovereignty.⁷²¹ This is demonstrated by the fate of the SADC Tribunal judgment in the *Campbell* case, in that even if states have agreed to empower an international court, that in itself is not enough and will only promote or advance the rule of law with the support of national courts.⁷²² However, some domestic courts of the SADC member states do not appear to be prepared to accept supranational laws, let alone the SADC Tribunal judgments due to constitutional limitations.⁷²³ This situation is exacerbated by the lack of clear legal status of SADC community laws within the respective legal systems of SADC member states.⁷²⁴

Drawing heavily on arguments advanced by the above scholars, it is submitted that enforcing SADC Tribunal decisions through national courts requires cooperation between the tribunal and domestic courts if these decisions are to be enforced by national courts. However, there is little evidence of such dialogue or cooperation between the SADC Tribunal judges and domestic judges. The only forum that brings together East African and southern African judges that the researcher is aware of is the Southern African Chief Justices’ Forum, established on 7 November 2003.⁷²⁵ The main aim of this forum is to promote cooperation among the courts in the eastern and southern African regions and to promote the rule of law, democracy, and the independence of the courts within these regions.⁷²⁶ This is one aspect that the SADC Tribunal judges and national courts must improve should the SADC Tribunal be reinstated to its initial format. It is proposed that this judicial dialogue can be achieved through formal and informal mechanisms such as domestic court judges invoking the SADC laws and tribunal decisions in their rulings.

⁷²⁰ Andre Nollkaemper *National Courts and the International Rule of Law* (2011) at 6.

⁷²¹ *Ibid* at 8–9.

⁷²² *Ibid* at 9.

⁷²³ See the discussion in section 3.8.

⁷²⁴ Cited in Bartels *op cit* note 175 at 14.

⁷²⁵ Visit SACJF website at <https://sacjforum.org/about-sacjf>.

⁷²⁶ *Ibid*.

3.4.2 Enforcement by reference to the SADC Summit

The SADC Summit is comprised of heads of state and governments from all of the SADC member states.⁷²⁷ It is responsible for policy formulation and control of the functions of the SADC community.⁷²⁸ Article 10(3) of the SADC Treaty empowers the Summit to adopt legal texts and instruments to implement the treaty.⁷²⁹ Furthermore, the decisions of the Summit are ‘binding’.⁷³⁰ The SADC follows an intergovernmental system in that the exercise of sovereign power is the prerogative of the SADC Summit, also of the heads of state of SADC member states.⁷³¹ Schermers and Blokker note that decision-making powers are the prerogatives of government representatives in an intergovernmental organisation.⁷³²

As previously stated, if any SADC member states fails to comply with the SADC Tribunal decision, the tribunal should report such non-compliance to the SADC Summit for the latter to take appropriate action.⁷³³ Article 33 of the SADC Treaty empowers the SADC Summit to issue sanctions and penalties in cases of non-compliance.⁷³⁴ However, the sanctions are not mandatory; there is no procedure for their imposition and no guidelines for penalty amounts or a timeline for compliance.⁷³⁵ Accordingly, there are no provisions for monitoring compliance or sanctions in cases of failure to implement court rulings.⁷³⁶ In other words, the SADC Summit has broad discretion on whether to issue sanctions or penalties against the

⁷²⁷ Article 10(1) of the SADC Treaty.

⁷²⁸ Cited in Muntschick *The Southern African Development Community (SADC) and the European Union (EU) Regionalism and External Influence* (2018) at 95. See also Saurombe Amos ‘The role of SADC institutions in implementing SADC Treaty provisions dealing with regional integration’ (2012) 15 (2) *PER / PELJ* available at <http://dx.doi.org/10.4314/pej.v15i2.16> at 459/569; Adeyemi Ashimizo Afadameh-and Kalula Evance op cit note 596 at 12.

⁷²⁹ Article 10(3) SADC Treaty of 1992.

⁷³⁰ See Article 10(8) of SADC Treaty (1992).

⁷³¹ Mkhululi Nyathi ‘Supreme in Letter, Supreme in Spirit, Supreme in Deed: An Exposition of the SADC Summit’s Overarching Powers in the SADC Regional Integration Project’ (2017) 31 (2) *Speculum Juris* at 167–178; Andrew Moravcsik ‘Preferences and Power in the European Community: A Liberal Intergovernmentalist Approach’ (1993) at 31 (4) *Journal of Common Market Studies*; Roger J. Goebel ‘Supranational: Federal: Intergovernmental: The Governmental Structure of the European Union after the Treaty of Lisbon’ (2013) 20 (142) *J. EUR. L.* 77.

⁷³² Henry G. Schermers and Niels M. Blokker *International Institutional Law Unity within Diversity* 5 ed (2011) at 55.

⁷³³ Article 32(4) and Article 32(5) on the Protocol on Tribunal and Rules of Procedure 2001.

⁷³⁴ Article 33(1) (a) of the SADC Treaty provides that ‘Sanctions may be imposed against any Member State that persistently fails, without good reason, to fulfil obligations assumed under this Treaty’. Article 33(2) of the Treaty proves that ‘the Summit shall determine sanctions on a case-by-case basis’.

⁷³⁵ Osiemo op cit note 149 at 114.

⁷³⁶ *Ibid.*

recalcitrant member states, and it also has the power to decide the type of sanction to impose. However, the researcher notes that Article 33 does not provide a specific type of penalty payment or timeframe for when member states are to comply with sanctions imposed by the SADC Summit. Under those circumstances, one can foresee a situation in which the member states blatantly ignore a specific SADC Summit decision due to a lack of timeframe for when member states are to comply with sanctions imposed by the SADC Summit.

Furthermore, as noted by Zenda, the sanction available under article 33 are political and their effectiveness will undoubtedly depend on the political environment existing in SADC at the particular time.⁷³⁷ This may create difficulties and pose certain risks for private actors who may have obtained judgment against a certain member state which subsequently fails to comply with the Tribunal judgment even when political pressure is exerted at the political level since there is no mechanism of compulsory judicial enforcement.⁷³⁸

The SADC Summit is an important institution that enjoys extensive powers, and one would expect that any treaty violations by any SADC member state would be adequately addressed. However, the SADC Summit has proven ineffective and unwilling to protect the SADC Treaty and the SADC Tribunal. Furthermore, the SADC Summit takes decisions through consensus.⁷³⁹ No provisions in the treaty provide a mechanism for breaking the impasse in situations where it is impossible to decide by consensus.⁷⁴⁰ This silence on the part of the treaty creates a lacuna in the quest for regional integration in the SADC because the way in which decisions of the summit are implemented is left to the discretion of the SADC member states.⁷⁴¹ In intergovernmental organisations, decisions are taken through consensus; therefore, member states can veto draft decisions to prevent their adoption.⁷⁴² Consensus decision-making can be difficult in an organisation such as the SADC, which comprises more than sixteen member states facing different economic and social challenges and having different national interests. From the perspective of politics, consensus decisions may act as an incentive for the

⁷³⁷ Free Zenda *The SADC Tribunal and the Judicial Settlement of International Disputes* (LLD thesis University of South Africa 2010 at 124.

⁷³⁸ Ibid.

⁷³⁹ Article 10(9) of the SADC Treaty provides that '[u]nless otherwise provided in this Treaty, the decisions of the Summit shall be taken by consensus and shall be binding'.

⁷⁴⁰ Cited in Clement Ng'ong'ola op cit note 596-600 at 494; See also Saurombe Amos op cit note 727 at 461/569.

⁷⁴¹ Cited in Adeyemi Ashimizo Afadameh-and Kalula Evance at 12.

⁷⁴² Cited in Schermers & Blokker op cit note 731 at 55.

SADC member states to cooperate on many issues that are facing the region. However, from a strictly legal perspective, it poses serious challenges to implementing binding legal instruments and decisions since any state can veto any decisions taken by the SADC Summit. For this reason, some suggest that there is a need for a ‘reverse consensus’ system as practised in the WTO.⁷⁴³

Schermers and Blokker define consensus as a ‘common feeling’ or ‘concurrence of feelings’.⁷⁴⁴ These authors note that consensus from the perspective of decision-making in an international organisation has been described as follows:

a decision shall be deemed made if neither Member State issues any objections to any proposed decisions”; “the absence of any objection expressed by a participating State to the adoption of the decision in question”; “the absence of any formal objection made at the time the decision was taken”; or “... if no member, present at the meeting where the decision is taken, formally objects to the proposed decision.⁷⁴⁵

Osode notes that consensus decision-making grants each member state a veto power that prevents it from making a decision it is opposed to and does not support.⁷⁴⁶ Erasmus concludes that under Article 10(9) of the SADC Treaty, member states can vote against proposals to implement tribunal decisions, as Zimbabwe did in 2010.⁷⁴⁷ Accordingly, the SADC does not allow for a ‘reversed consensus’ system as practised in the WTO.⁷⁴⁸ Even though decision-making through consensus may occasionally be effective, its applicability depends on a clear quorum in cases of non-compliance.⁷⁴⁹ This is attributed to poor drafting.⁷⁵⁰ Accordingly, the SADC system depends on the good faith of the SADC member states.⁷⁵¹ Based on international organisations’ general practice, non-compliant members are not allowed or permitted to actively engage in the decision to suspend their rights.⁷⁵² The wording of Article 10(9) of the SADC Treaty suggests that exceptions to the principle of consensus were foreseen, and

⁷⁴³ Cited in Gerhard Erasmus *The SADC Tribunal ... and its demise* at 148.

⁷⁴⁴ Cited in Schermers & Blokker op cit note 731 at 535.

⁷⁴⁵ Ibid.

⁷⁴⁶ P.C. Osode ‘The Southern African Development Community in Legal Historical Perspective’ (2003) 28 (3) *Journal for Juridical Science* at 1–9.

⁷⁴⁷ Cited in Erasmus, G *The South African Constitutional Court annuls decision on SADC Tribunal: What are the Implications?* at 13.

⁷⁴⁸ Ibid.

⁷⁴⁹ Cited in Jörg Kleis op cit note 221 at 341.

⁷⁵⁰ Ibid.

⁷⁵¹ Ibid.

⁷⁵² Cited in Bartels op cit note 175 at 49.

therefore there is no inherent objection to an implied exception.⁷⁵³ Furthermore, where the provisions of Article 10(9) are interpreted negatively, it would render the provisions of Article 32(5) of the SADC Tribunal Protocol and Article 33(2) a nullity and, therefore, an implied exception to the consensus rule must apply for effective interpretation.⁷⁵⁴ The nature of consensus decision-making involves protracted negotiations to achieve satisfactory agreement of views and avoid express objections.⁷⁵⁵ It is submitted that consensus decision-making in the SADC is currently applied and is reached where there are no objections by any SADC member state to the SADC Summit decisions, whether formal or informal.

Nevertheless, the use of non-judicial institutions such as the SADC Summit to enforce the SADC Tribunal decisions is consistent with other international treaties.⁷⁵⁶ However, in the case of the SADC, the use of the SADC Summit to enforce the Tribunal decisions has so far proven ineffective for various reasons including procedural challenges alluded to above and a lack of political will from the SADC Summit to enforce the SADC Tribunal. The summit lacks the political will to compel its member states to respect and comply with the SADC Tribunal decisions. It must be noted that many SADC members have questionable human rights track records within their countries.⁷⁵⁷ Many SADC members have demonstrated a blatant disregard for the rule of law and have undermined the SADC Tribunal.⁷⁵⁸ Therefore, it is unsurprising that the SADC Summit did not demonstrate the political will to compel Zimbabwe to respect the rule of law and comply with the SADC Tribunal decisions.

The following section discusses the status of SADC laws before domestic laws of SADC member states.

⁷⁵³ Ibid at 49–50.

⁷⁵⁴ Ibid at 50.

⁷⁵⁵ Cited in Henry G. Schermers and Niels M. Blokker *International Institutional Law Unity within Diversity* at 535.

⁷⁵⁶ See Article 94(2) of the United Nations Charter. See also Article 46(3)(4) of the Protocol on the Statute on the African Court of Justice and Human Rights.

⁷⁵⁷ See Chapter 3, section 3.6.1.

⁷⁵⁸ Ibid.

3.5 Status of SADC community laws before domestic laws

The SADC Treaty is silent on the status of community law within the SADC member states' national legal systems.⁷⁵⁹ The methods adopted to enforce treaty obligations vary according to the national legal systems of the SADC member states.⁷⁶⁰ In other words, the SADC Treaty's legal status depends on the domestic legal systems of the SADC member states. Therefore, applying SADC community law may lead to different interpretations and meanings depending on the approach followed by the respective legal systems of the SADC member states. The resulting lack of clarity on the status of SADC community law before the domestic legal system of SADC member states leads to fragmentation. This is in contrast with the idea of community law, which is based on the uniform application and interpretation of community law before all member states. This is inconsistent with the principle of community law as developed by the EACJ and ECJ, as will be seen in subsequent chapters.⁷⁶¹

Commenting on the nature of community law, scholars such as Opong and Kleis unanimously agree that an essential issue is defining and managing relational issues between different actors, laws, institutions and legal systems.⁷⁶² According to these scholars, it is only if such relational issues are clarified that African integration is likely to be a success.⁷⁶³ Indeed, clarifying the relationship between community law and national law is important for understanding community laws. It may assist economic communities in avoiding a situation in which member states invoke their national laws to justify their non-compliance with treaty obligations.

Since the SADC Treaty is silent on the status of SADC laws within the domestic legal setting, reference must be made to the national constitutions of the SADC member states and domestic case law to determine the legal status of SADC laws. This is where the dualist and

⁷⁵⁹ Cited in Bartels op cit note 175 at 14.

⁷⁶⁰ Ibid.

⁷⁶¹ Case C 6/64, *Flaminio Costa v. ENEL* (1964) E.C.R. 585 at 593–594.

⁷⁶² Richard Frimpong Opong 'A relational theory of regional economic integration – implications for Africa' Inaugural Conference, Geneva (15–17 July 2008). Society of International Economic Law, Working Paper No 50/08 available at <http://ssrn.com/abstract=1160282> at 1–2; Cited in Richard Frimpong Opong *Legal Aspects of Economic Integration in Africa* at 31; Cited in Kleis op cit note 221 at 228–229.

⁷⁶³ Ibid.

monist debates become relevant.⁷⁶⁴ Monism regards public international law and national law as a single system of law; therefore, international law is directly applicable to the national legal order.⁷⁶⁵ In terms of the monist system, there is no need to implement domestic legislation to incorporate international law since the latter is directly applicable.⁷⁶⁶ According to monist theory, international law is supreme over domestic law, and the latter should therefore always follow international law. The monist system follows two approaches to implement international law, automatically adopting the international legal instrument as part of the domestic legal system or creating implementing legislation to give effect to international law.

On the other hand, dualism regards the two areas of law as separate and distinct legal systems that exist alongside each other.⁷⁶⁷ Under the dualist system, it is a requirement that for international law to be applicable and have the force of law, it must be accompanied by implementing legislation.⁷⁶⁸ For instance, in the common law of dualist SADC countries such as Zimbabwe, it is a requirement that treaties must be accompanied by implementing legislation to have any legal effect and be enforceable before national legal systems.⁷⁶⁹ The Constitution of Zimbabwe provides that international legal instruments must be approved by Parliament, and such international legal instruments do not form part of Zimbabwean law unless incorporated into law through legislation.⁷⁷⁰ Despite section 34 of the new Zimbabwean Constitution of 2013, Zimbabwe continues to be a dualist state, requiring that the state take necessary action to incorporate treaties into national law.⁷⁷¹ Likewise, in terms of section 238 (4) of the Swaziland Constitution, an international agreement becomes law only when enacted by an Act of Parliament.⁷⁷² Similarly, South Africa follows a dual system when incorporating

⁷⁶⁴ Magnus Killander ‘The Effects of International Law Norms on Constitutional Adjudication in Africa’ in Charles M Fombad *Constitutional Adjudication in Africa* (2017); Barnard M ‘Legal reception in the AU against the backdrop of the monist/dualist dichotomy’ (2015) 48(1) *The Comparative and International Law Journal of Southern Africa*; G Ferreira and A Ferreira-Snyman ‘The incorporation of Public International law into Municipal law and Regional law against the background of the dichotomy between monism and dualism’ (2014) 17 (4) *PER / PELJ* available at <http://dx.doi.org/10.4314/pelj.v17i4.08>.

⁷⁶⁵ Barnard M op cit note 761 at 154.

⁷⁶⁶ Ibid.

⁷⁶⁷ Cited in G Ferreira and A Ferreira-Snyman op cit note 761 at 1471.

⁷⁶⁸ Barnard M op cit note 761 at 155.

⁷⁶⁹ See amended section 111(B) of the Zimbabwean Constitution of 2005.

⁷⁷⁰ Ibid.

⁷⁷¹ Section 34 of the 2013 Zimbabwe. See also Magnus Killander op cit note 761 at 215.

⁷⁷² See section 238(4) of the Swaziland Constitution of 2005.

international treaties. Section 231(4) of the South African Constitution states: ‘International agreement becomes law in the Republic when it is enacted into law by national legislation.’⁷⁷³

As shown above, monism and dualism theories are limited in clarifying the relationship between international and domestic law or the legal status of international law within the domestic legal systems of SADC member states. Therefore, there is a need to develop an alternative approach to explain the relationship between international law and domestic laws of the SADC member states. To understand the legal status of SADC laws before the domestic laws of SADC member states, one must also refer to the individual cases before national courts to further determine the status of SADC laws. Whether a country follows a monist or dualist system is also a matter of court interpretation and case law. Therefore, it is crucial that in answering the question of the legal status of SADC community laws that one also refer to domestic courts case law since the Tribunal has not yet addressed the question.

The following section examines the jurisprudence of the SADC Tribunal to show the critical role it played in developing its jurisprudence and protecting individual human rights.

3.6 Jurisprudence of SADC tribunal

(i) Mike Campbell (Pvt) Ltd v The Republic of Zimbabwe — Interim ruling

On 11 October 2007, the applicants (Mike Campbell & others) filed a case before the SADC Tribunal against Zimbabwe. They sought an interim measure interdicting the Zimbabwean government from expropriating their agricultural land.⁷⁷⁴ On the question of whether the tribunal has jurisdiction over the parties as per Article 15(1) of the Protocol, it ruled that it has jurisdiction to receive disputes between a natural and a legal person and SADC member countries.⁷⁷⁵ It also confirmed that in terms of Article 14 of the Protocol, it has jurisdiction over all disputes and all applications referred to it relating to the interpretation and application of the Treaty.⁷⁷⁶ The tribunal stated that the relevant Treaty provision which requires interpretation and application is Article 4 of the SADC Treaty, which provides that SADC and

⁷⁷³ See Section 231(4) of the Republic of South Africa Constitution, 1996.

⁷⁷⁴ *Mike Campbell (Pvt) Ltd and William Michael Campbell v The Republic of Zimbabwe* case no SADCT: 2/07, 13 December 2007 at pp 2.

⁷⁷⁵ *Ibid.*

⁷⁷⁶ See pp 2 and 3.

member states to respect and promote human rights, democracy and the rule of law.⁷⁷⁷ On 13 December 2007, the tribunal granted the interim measure.⁷⁷⁸ Following this decision, 77 other applicants applied to join the main proceedings in terms of Article 30 of the Protocol, as read with rule 70 of the Rules of Procedure of the SADC Tribunal.⁷⁷⁹ Furthermore, the 77 applicants applied for an interdict restraining the Zimbabwean government from removing them from their agricultural lands, pending the outcome of their application.⁷⁸⁰

On 28 March 2008, the tribunal granted the application to intervene in the proceedings and granted the interim measure sought.⁷⁸¹ The case of Mike Campbell and the other 77 applicants was consolidated into one case.⁷⁸² The Zimbabwean government failed to comply with the interim relief granted by the tribunal. On 20 June 2008, the applicants referred to the tribunal the failure of the Zimbabwean government to comply with the tribunal's decision.⁷⁸³ The tribunal, having established the failure, reported its finding to the SADC Summit pursuant to Article 32(5) of the SADC Tribunal Protocol.⁷⁸⁴

In its ruling, the court used the opportunity to clarify its mandate and jurisdiction.⁷⁸⁵ More importantly, the tribunal declared that the application for interim measures concerned the interpretation and application of Article 4 of the SADC Treaty relating to fundamental principles of human rights, democracy and the rule of law governing SADC.⁷⁸⁶ Thus, the tribunal gave meaning to the provisions of Article 4(c) of the SADC Treaty by declaring that it places an obligation to SADC member states to ensure that they promote and protect democracy and the rule of law in the SADC region.⁷⁸⁷ The significance of this ruling is that despite the fact positivist scholars may argue that SADC is not a human rights organisation considering the rule of law and the protection of human rights, the tribunal gave meaning to

⁷⁷⁷ See pp 3.

⁷⁷⁸ See pp 7.

⁷⁷⁹ *Mike Campbell (Pvt) Limited & others v Zimbabwe* Case no SADC 2/2008 - 28 November 2008 at Para 3.

⁷⁸⁰ Para 4.

⁷⁸¹ Para 5.

⁷⁸² Para 6.

⁷⁸³ Para 9.

⁷⁸⁴ Para 9.

⁷⁸⁵ *The role of the Southern African Development Community (SADC) Tribunal in promoting human rights and strengthening regional social, economic and political integration in SADC* Report commissioned by SADC Lawyers' Association Prepared by Centre for Human Rights, Faculty of Law, University of Pretoria November 2015 at 4.

⁷⁸⁶ *Ibid* at 4-5.

⁷⁸⁷ *Ibid* at 5.

the provisions of article 4(c) of the treaty which may otherwise been mere rhetoric without any real meaning.⁷⁸⁸ By this ruling, the tribunal provided judicial leadership by helping SADC member states to mainstream democracy, rule of law and human rights as an important feature of SADC regional integration agenda.⁷⁸⁹ The court's decision clarified the meaning of article 4, upholding that SADC member states as a collective and in their individual capacity have an obligation to promote and protect democracy, the rule of law and human rights.⁷⁹⁰ More importantly, the court's decision also confirmed that the duty imposed by the provisions of article 4 extend to both the domestic and Community level.⁷⁹¹ The Tribunal's ruling showed its ability to use the principles in the Treaty to prevent human rights violation and advance the rule of law in the region.⁷⁹² Despite this important ruling, the decision has not been complied with by Zimbabwe and is viewed as the main reason why the government of Zimbabwe challenged the legality of the tribunal.⁷⁹³

(ii) *Mike Campbell (Pvt) Ltd & others v The Republic of Zimbabwe — main case*

The main case dealt with substantive legal questions such as whether the tribunal had jurisdiction to entertain the application,⁷⁹⁴ whether the applicants had been denied access to the domestic courts of Zimbabwe,⁷⁹⁵ whether the applicant had been discriminated against on the basis of race,⁷⁹⁶ and if compensation was payable for the lands compulsorily acquired from the applicants.⁷⁹⁷ The SADC Tribunal referred to Article 21(b) of the SADC Tribunal Protocol of 2001.⁷⁹⁸ It ruled that it was not necessary to have a protocol on human rights to give effect to the SADC principles and that due to Article 4(c) of the treaty, the tribunal has jurisdiction to decide any dispute relating to human rights, democracy and the rule of law.⁷⁹⁹ Notwithstanding the fact that the SADC Treaty does not expressly confer human rights jurisdiction to the SADC

⁷⁸⁸ Ibid.

⁷⁸⁹ Ibid.

⁷⁹⁰ Ibid.

⁷⁹¹ Ibid at 5-6.

⁷⁹² Cited in Moses Retselisitsoe Phooko op cit note 2 at 154.

⁷⁹³ Ibid.

⁷⁹⁴ *Mike Campbell (Pvt) Limited & others v Zimbabwe* Case no SADC 2/2008 – 28 November 2008 at Para 16.

⁷⁹⁵ Para 16.

⁷⁹⁶ Para 16.

⁷⁹⁷ Para 16.

⁷⁹⁸ Para 31.

⁷⁹⁹ Para 31.

Tribunal, it can be argued that the SADC Treaty drafters envisaged such human rights mandate for the SADC Tribunal. It was important for the SADC Tribunal to assume jurisdiction since the domestic courts of Zimbabwe failed to uphold the principle of human rights and rule of law. On the issue of access to courts, the SADC Tribunal held that:

It is settled law that the concept of the rule of law embraces at least two fundamental rights, namely the right of access to Courts and the right to a fair hearing before an individual is deprived of a right, interest or legitimate expectation.⁸⁰⁰

The SADC Tribunal relied on several international legal instruments — including the African Charter on Human and Peoples’ Rights, the jurisprudence of the African Commission on Human and Peoples’ Rights, the European Court of Human Rights, the Inter-American Court of Human Rights, and the Constitutional Court of South Africa — and found that the applicants had been denied access to courts in Zimbabwe.⁸⁰¹ With regard to discrimination, the tribunal found that the Amendment 17 legislation ‘had an unjustifiable and disproportionate impact upon a group of individuals distinguished by race such as the applicants.’⁸⁰² The tribunal, relying on a number of international legal instruments, held that the Republic of Zimbabwe breached its obligations under Articles 4(c) and 6(2) of the SADC Treaty and that Amendment 17 was also in breach of the same provisions.⁸⁰³

The SADC Tribunal decision concerning expropriation of property for public policy and payment of compensation remains controversial.⁸⁰⁴ Numerous scholars have criticised the *Campbell* judgment on the basis that the SADC Tribunal took a simplistic view that the issue before it was whether Amendment 17 violated the provisions of Article 6(2) of the SADC Treaty on non-discrimination, while failing to take into account the historical context of the land question in the SADC.⁸⁰⁵ Indeed, the SADC Tribunal interpreted Article 6(2) of the SADC

⁸⁰⁰ Para 35.

⁸⁰¹ Para 37–46, 53 and 87 (b).

⁸⁰² Para 77.

⁸⁰³ Para 88. See also Judge Tshosa convincing dissenting opinion from Para 90–95.

⁸⁰⁴ Dunia P. Zongwe ‘Contribution of *Campbell v Zimbabwe* to the foreign investment law on expropriations’ (2009) 05 (09) *Comparative Research in Law and Political Economy CLPE* Research Paper 50/2009 at 26; See Ben Chigara ‘What should a re-constituted Southern African Development Community (SADC) Tribunal be mindful of to succeed’ 81 (2012) *Nordic Journal of International Law* at 366; Henok Asmelash ‘The Legacy of the SADC Tribunal in International Investment Law’ in Hélène Ruiz Fabri and Edoardo Stoppioni *International Investment Law An Analysis of the Major Decisions* (2022). Cited in Moses Retselisitsoe Phooko op cit note 2 at 156.

⁸⁰⁵ *Ibid.*

Treaty without considering the land question's historical, political, cultural, and economic context. While Amendment 17 had racial implications and, on face value, appeared discriminatory, the tribunal should have moved beyond the SADC Treaty provisions to understand the land question within the broader context.

On the other hand, the SADC Tribunal ruled that compensation for the expropriation of land is a requirement in terms of SADC law.⁸⁰⁶ However, the SADC Treaty is silent on whether compensation is payable for any expropriated property. In most SADC countries, the issue of payment of compensation for the expropriated property is regulated by national constitutions.⁸⁰⁷ Moreover, the tribunal decision has been criticised for lack of persuasion and failure to provide any legal basis for its decision.⁸⁰⁸ The standard practice in international law is that states can generally expropriate property, including land, within their territory. International law generally recognises that property belonging to a foreign national may be expropriated subject to payment of compensation.⁸⁰⁹ The rule that a standard of compensation must accompany the expropriation of property is a contentious issue in international law. There are conflicting views about whether the abovementioned requirement for the expropriation of property constitutes a customary international law rule binding on states.⁸¹⁰

As demonstrated, the SADC Tribunal's decision that Zimbabwe must pay compensation for expropriating property of its nationals is based on the misapplication of international law and is not supported by the SADC Treaty. The SADC Tribunal decision does not apply the methodology of international law because there is no requirement for sovereign states to pay compensation for property belonging to its nationals. While it is generally accepted that some form of compensation must accompany the expropriation of foreign national property, there is no requirement on Zimbabwe in terms of SADC laws or international law to pay compensation

⁸⁰⁶ *Mike Campbell (Pvt) Limited & others v Zimbabwe* (2008) Para 83

⁸⁰⁷ Section 8 (1) (b) (i) of the Botswana Constitution, Article 16(2) of the Namibian Constitution and Section 25 (2) of the South African Constitution.

⁸⁰⁸ Gino J Naldi (2009). *Mike Campbell (Pvt) Ltd et al v The Republic of Zimbabwe: Zimbabwe's Land Reform Programme Held in Breach of the SADC Treaty*. *Journal of African Law* 53 at 317. doi:10.1017/S0021855309990088, available at http://journals.cambridge.org/abstract_S0021855309990088.

⁸⁰⁹ See Article IV of the World Bank Guidelines on the Treatment of Foreign Direct Investment. See Article 2(2) of the 1974 Charter of Economic Rights and Duties of States (CERDS). See also Borzu Sabahi *Compensation and Restitution in Investor-State Arbitration* (2011) at 92–93.

⁸¹⁰ Chimni BS 'Customary International Law: A Third World Perspective' *American Journal of International Law*, Vol 112, issue 1, January 2018, pp.1-46 at 34–35. <https://doi.org/10/1017/ajil.2018.12>.

for property belonging to its nationals. Instead, expropriating land without compensation is usually a domestic legal question addressed through domestic legal processes.

Nevertheless, Zimbabwe failed to comply with the tribunal's orders.⁸¹¹ The applicants in the *Campbell* case refer the non-compliance to the SADC Tribunal.⁸¹² The tribunal ruled that the applicants have presented satisfactory evidence to demonstrate that Zimbabwe had failed to comply with its decision and therefore, pursuant to Article 32(5) of the Protocol, the Tribunal reported its findings to the SADC Summit for the latter to take appropriate action.⁸¹³ Following non-compliance with the SADC Tribunal rulings in the *Campbell* cases, some of the applicants in the *Campbell* matter approached the SADC Tribunal under Article 32(4) of the Protocol on Tribunal for an order that the tribunal refer the non-compliance with its decision by Zimbabwe to the summit to take appropriate action.⁸¹⁴ The tribunal noted that it is clear that the Zimbabwe has failed to comply with the tribunal decision.⁸¹⁵ Consequently, the tribunal ruled that it will report such non-compliance to the SADC Summit for the latter to take appropriate action.⁸¹⁶ Despite the applicants in the *Campbell* cases having referred non-compliance with SADC Tribunal by Zimbabwe to the SADC Summit on several occasions for the latter to take appropriate action against Zimbabwe, the SADC Summit failed to ensure that Zimbabwe comply with tribunal judgments.⁸¹⁷

⁸¹¹ *Campbell v Republic of Zimbabwe* (Contempt of Court Ruling), Case No SADC (T) 03/2009 (5 June 2009).

⁸¹² Para 1.

⁸¹³ Para 4 and 9.

⁸¹⁴ *Fick & others v Republic of Zimbabwe*, CASE No SADC (T) 01/2010 (6 July 2012).

⁸¹⁵ Para 6.

⁸¹⁶ Para 6.

⁸¹⁷ *Campbell v Zimbabwe (Interim Ruling)*, Case No SADC (T) 2/2007 (17 December 2007); *Campbell v Republic of Zimbabwe* (Contempt of Court Ruling), Case No SADC (T) 03/2009 (5 June 2009). See also *Fick & others v Republic of Zimbabwe*, CASE No SADC (T) 01/2010 (6 July 2012).

Accordingly, the position adopted by the Zimbabwean government is a violation of its international law obligation to comply with decisions taken by a court that it accepted its jurisdiction of.⁸¹⁸ The decision to suspend the tribunal is an indication of lack of judicial independence, since the Tribunal itself can be disbanded because of a decision taken outside the scope of acceptable norms of separation of powers and judicial independence by the Summit.⁸¹⁹

The significance of this judgment from the perspective of human rights and the rule of law in SADC is that the Tribunal clarified the scope of its jurisdiction by connection it to human rights and laid out the requirements for invoking that jurisdiction and reinforced its authority to use and apply to apply international law within the SADC framework.⁸²⁰ Moreover, the tribunal used this decision to develop an understanding of certain rights and their connection to the rule of law.⁸²¹ Furthermore, this Campbell decision marked the beginning of the tribunal's attempt to 'constitutionalise' the SADC Treaty by using its provisions as its source to review national constitutions, legislation, policies and actions for compliance with human rights standards.⁸²² The tribunal confirmed that article 16 of the SADC Treaty as the source of its de jure authority, it emphasised that its functions were to ensure adherence to, and the proper interpretation of the Treaty and other legal instruments of SADC.⁸²³ The court noting confirmed that its role is to interpret and apply the Treaty provision under article 4(c) involving the promise and commitment of SADC member states' to protect and promote human rights, democracy and the rule of law.⁸²⁴ Using article 21(b) of its 2000 Protocol, it asserted power to fill the gap created by the lack of a human rights protocol within the SADC framework. The tribunal established itself as an international forum for human rights protection within the SADC region.⁸²⁵ Significantly, in many ways, this case enabled the Tribunal to give content

⁸¹⁸ Ilyayambwa *Mwanawina Challenges to political and economic integration in Africa: A socio-legal perspective* (unpublished LLD thesis, North-West University 2013) at 127.

⁸¹⁹ *Ibid* at 142.

⁸²⁰ *Op cit* note 782 at 7.

⁸²¹ *Ibid*.

⁸²² *Ibid*.

⁸²³ *Ibid* at 7-8

⁸²⁴ *Ibid*.

⁸²⁵ *Ibid*.

and meaning to the principles of respect for human rights, democracy and rule of law under the SADC Treaty, thus showing that these were important values in the SADC regional integration agenda under the SADC legal framework.⁸²⁶

(iii) *Tembani v Zimbabwe*

In *Tembani v Zimbabwe*, the question was whether section 38 of the Agricultural Finance Corporation Act of the Laws of Zimbabwe conforms with Articles 4(c) and 6(1) of the Treaty of the SADC.⁸²⁷ In this case, the applicant (farmer) could not satisfy his indebtedness to the Agricultural Bank of Zimbabwe. Therefore, his farm was attached in terms of section 38 of the Act and subsequently sold.⁸²⁸ The applicant brought an application to set aside the sale of his farm before the High Court of Zimbabwe and challenged the Act's constitutionality.⁸²⁹ The High Court granted the application to set aside the sale of the applicant's farm. Still, it ruled that there was no need to refer the question of the constitutionality of section 38 of the Act to the Supreme Court since the court had already ruled on the matter.⁸³⁰

The applicant approached the SADC Tribunal to challenge section 38 of the Agricultural Finance Corporation Act of the Laws of Zimbabwe because it conflicts with Articles 4(c) and 6(1) of the Treaty of the SADC.⁸³¹ The SADC Tribunal ruled that the Agricultural Bank of Zimbabwe had denied the applicant access to independent courts and deprived the applicant of a fair hearing in violation of the provision of the SADC Treaty. Therefore, the sale was illegal and void.⁸³² However, despite the applicant receiving a favourable judgment, the Zimbabwean government ignored the SADC Tribunal ruling, and the applicant and his family were evicted from their farmhouse.⁸³³ Although the case is not much different from the Campbell case in that in that the court measured national constitutional and legislative provisions against SADC Treaty provisions standards, it is important in the sense that the human rights violations were committed by state agency as opposed to state officials.⁸³⁴ Nevertheless, the implication of

⁸²⁶ Ibid.

⁸²⁷ *Tembani v Zimbabwe* (SADC T 2009) Case no SADC 7/2008 para 8.

⁸²⁸ Para 8.

⁸²⁹ Para 8.

⁸³⁰ Para 10 and 11.

⁸³¹ Para 13–38.

⁸³² Para 38.

⁸³³ *Black commercial farmer wants SADC Tribunal reinstated* SADC Tribunal Rights Watch (19 May 2011).

⁸³⁴ Op cit 782 at 16.

ignoring tribunal decisions is that it to some extent affected the legitimacy and authority of the court.

(iv) *Gondo & others v Zimbabwe*

In *Gondo & others v Zimbabwe*,⁸³⁵ the applicants in the case were victims of violence by state security officials and instituted legal proceedings against the government of Zimbabwe in several courts in Zimbabwe. The applicants were successfully granted their order with interests and costs.⁸³⁶ However, in response to the failure to comply with the court judgment issued by the domestic court of Zimbabwe, the applicants brought an application before the SADC Tribunal in which they claimed that the Zimbabwean government had violated Articles 4(c) and 6(1) of the SADC Treaty by failing to ensure that effective remedies were available to them, and failing to act in accordance with the principles of human rights, and implementing measures likely to jeopardise the principles of human rights provided for in the treaty.⁸³⁷ The applicant, therefore, sought an order that Zimbabwe was in breach of the treaty by failing to comply with orders of the High Court of that country and an order that section 5(2) of the State Liability Act of Zimbabwe violates the treaty in so far as it provides that property of the state may not form the subject matter of execution, attachment or process to satisfy a judgment debt.⁸³⁸

The SADC Tribunal ruled that Zimbabwe violated Articles 4(c) and 6(1) of the treaty in that it had acted in contravention of several fundamental human rights, namely the right to an effective remedy, the right to have access to an independent and impartial court or tribunal and the right to a fair hearing.⁸³⁹ The tribunal held that section 5(2) of the State Liability Act of Zimbabwe is also in breach of the right to equality before the law and the right to equal protection of the law and, therefore, is inconsistent with Zimbabwe's obligations under Articles 4(c) and 6(1) of the Treaty.⁸⁴⁰ The Zimbabwean government failed to comply with the SADC

⁸³⁵ *Gondo & others v Zimbabwe* Case no SADC (T) 05/2008, 9 December 2010.

⁸³⁶ Para 1–2.

⁸³⁷ Para 3.

⁸³⁸ Para 5.

⁸³⁹ Para 23.

⁸⁴⁰ Para 37.

Tribunal ruling.⁸⁴¹ Research also shows that there were efforts by the Zimbabwean government to align the State Liabilities Act with the Constitution and Zimbabwe's international law obligations.⁸⁴² This case is important as it is one of the judgments that is detailed and well-reasoned on the scope of human rights obligations under the SADC Treaty.⁸⁴³ It shows SADC Tribunal's willingness to move beyond the limits of SADC legal framework for the elaboration of rights.⁸⁴⁴

(v) *Bach's Transport Pty Ltd v The Democratic Republic of Congo*

The applicant in *Bach's Transport Pty Ltd* brought an application claiming damages, including costs, against the DRC government.⁸⁴⁵ The damages arose from the unlawful seizure and sale of the applicant's truck and trailer by the respondent's control officers.⁸⁴⁶ The main question before the SADC Tribunal was whether it had jurisdiction over the dispute.⁸⁴⁷ The tribunal noted that the applicant was not a natural person but rather a legal person incorporated under the laws of Botswana and had brought a claim for damages against DRC, a member state of the SADC.⁸⁴⁸ The SADC Tribunal ruled that the dispute involves a legal person and a member state and therefore falls within the jurisdiction of the SADC Tribunal according to Article 15(1) of the SADC Protocol.⁸⁴⁹

On the issue of exhaustion of all domestic remedies, the tribunal noted the evidence adduced by the applicant, which shows that the applicant tried to utilise all the legal remedies available to it in the DRC to have its truck and trailer released but failed.⁸⁵⁰ The SADC Tribunal concluded that the applicant had tried to obtain legal remedies before the domestic legal system of DRC but failed.⁸⁵¹ The tribunal therefore granted the default application in favour of the

⁸⁴¹ Tarisai Mutangi *An update on compliance by Zimbabwe with decisions and judgments of international human rights judicial and quasi-judicial bodies* University of Zimbabwe Law Journal (2018) at 213.

⁸⁴² *Ibid* at 213–214.

⁸⁴³ *Op cit* 782 at 18.

⁸⁴⁴ *Ibid*.

⁸⁴⁵ *Bach's Transport Pty Ltd v The Democratic Republic of Congo* Case no SADC (T) 14/2008 (11 June 2010) at 2.

⁸⁴⁶ *Ibid* at 8.

⁸⁴⁷ *Ibid* at 5.

⁸⁴⁸ *Ibid*.

⁸⁴⁹ *Ibid*.

⁸⁵⁰ *Ibid* at 6.

⁸⁵¹ *Ibid* at 7.

applicant and awarded damages, including interests, to the applicant.⁸⁵² It also awarded costs in favour of the applicant.⁸⁵³ The DRC government offered to pay compensation.⁸⁵⁴ Since this was a default judgment, the Tribunal did not make any major pronouncements regarding the scope SADC integration agenda.⁸⁵⁵

The following section examines the contributions of the SADC Tribunal to the settlement of disputes, development of international law, access to justice and the international rule of law.

3.7 Contributions of the SADC Tribunal

The decisions cited above demonstrate that the SADC Tribunal is an effective judicial institution, ready to settle disputes between the disputing parties. By interpreting the relevant SADC Treaty provisions including other international legal instruments, the SADC Tribunal set the standards of human rights and rule of law that other SADC governments should follow. The court found it unacceptable that the land dispossession had been conducted arbitrarily in violation of human rights principles such as the right of access to court and access to justice, which are an integral part of the rule of law.

An important aspect of the tribunal judgments is their boldness and innovative approach in addressing the land question, which is a sensitive subject and evokes many emotions for many people in southern Africa. By interpreting the SADC legal instruments purposefully, the SADC Tribunal gives meaning to human rights. These cases prove that the SADC Tribunal is an effective judicial institution that has the potential to contribute to social and political change. The prospect and potential of the SADC Tribunal serves as a continuous incentive for its reinstatement to its initial jurisdiction. However, the SADC alone cannot drive social and political change without the support of various actors such as civil society including lawyers, activists, government officials and domestic judges. The following section examines the contribution of the SADC Tribunal to the settlement of disputes.

⁸⁵² Ibid at 9.

⁸⁵³ Ibid at 10.

⁸⁵⁴ Cited in Gerhard Erasmus *The SADC Tribunal ... and its demise* at 138.

⁸⁵⁵ Op cit note 782.

3.7.1 Contribution of the SADC Tribunal to dispute settlement

As evident from case law, the SADC Tribunal has settled disputes brought before it, applying the SADC legal instruments and international law. Therefore, the SADC Tribunal has achieved its intermediate goals of settlement of disputes between the SADC member states and individuals. In spite of the fact that the decision to suspend the SADC Tribunal can be viewed as a major setback in the quest for the peaceful settlement of disputes, it must be understood in the context within which it was taken by the SADC member states.⁸⁵⁶ Despite the suspension of the SADC Tribunal, it can be argued that in its short-lived existence, it succeeded in presiding and adjudicating over disputes which confirmed its role as an effective institution to settle disputes in accordance with SADC legal instruments.⁸⁵⁷ It also shows that in the absence of a rule or treaty provision, the tribunal is willing to fill this gap through innovative treaty interpretation.

As noted by De Baere, Chané and Wouters, by engaging in dispute settlement through peaceful means and on the basis of law, the adjudicator [the SADC Tribunal in this case] ideally removes the cause of tension between the disputing parties and ensures that it is only law that decides the outcome of the dispute, thus preventing arbitrariness and contributing to the equal protection of individuals.⁸⁵⁸ Consequently, the settlement of disputes by legal processes can in itself be viewed as an important contribution to the rule of law.⁸⁵⁹ More simply, by resolving disputes through dispute settlement, ICs and tribunals make an important contribution to the rule of law.⁸⁶⁰ Drawing from the work of De Baere, Chané and Wouter, it is submitted that by settling disputes through a legal process, the SADC Tribunal contributed to the rule of law. Despite the fact that the SADC Tribunal suffers from non-compliance, it has performed well in settling disputes between SADC member states and individuals.

⁸⁵⁶ Bongani C. Majola and Charles Riziki Majinge 'Peaceful Settlement of Disputes among States and the Role of Regional Judicial Institutions in Africa' in Charles Riziki Majinge *Rule of Law through Human Rights and International Criminal Justice: Essays in Honour of Adama Dieng* (2015) at 545.

⁸⁵⁷ Ibid.

⁸⁵⁸ Cited in De Baere, Chané and Wouters op cit note 105 at 64.

⁸⁵⁹ Ibid at 65.

⁸⁶⁰ Ibid at 66.

3.7.2 Contribution of the SADC Tribunal to the interpretation and development of international human rights

As evident from case law, the SADC Tribunal has performed its role of treaty interpretation well and thereby contributed to the development of international human rights law. While the SADC Tribunal was not established to adjudicate on human rights disputes, it has contributed to the development of international human rights law by interpreting and applying SADC legal instruments and taking into account other sources of international law, including adopting a comparative approach to develop its human rights jurisprudence, albeit in limited instances.⁸⁶¹ The SADC Tribunal relied on Article 4(c) of the SADC Treaty and Article 21(b) of the SADC Tribunal Protocol of 2001 to develop its human rights jurisprudence.⁸⁶² It also cited the European Convention on Human Rights, the African Charter on Human Peoples' Rights, South African case law and VCLT to justify its human rights jurisdiction.⁸⁶³ In the absence of an adequate system of human rights protection before the domestic legal system of SADC member states, the SADC Tribunal has filled this gap by adopting innovative interpretative methods.⁸⁶⁴ Therefore, the SADC Tribunal has performed its role well and achieved its goals of proper interpretation and application of the SADC Treaty and other SADC legal instruments.

It is clear that the SADC Tribunal is impartial and is bold in executing its mandate.⁸⁶⁵ Accordingly, the court has issued judgments that have not endeared it to community member states.⁸⁶⁶ The court has exercised its jurisdiction and granted *locus standi* to individuals against a government's opposing arguments.⁸⁶⁷ Furthermore, despite lack of express provisions to decide human rights cases, the SADC Tribunal has assumed for itself such jurisdiction through innovative interpretation of the relevant provision of the SADC Treaty.⁸⁶⁸ It may therefore be argued that SADC Tribunal has fulfilled its mandate in accordance with the SADC Treaty provisions.⁸⁶⁹ Likewise, Kleis asserts that REC courts, including the SADC Tribunal, have generally fulfilled their mandate promoting jurisprudential development that results in legal

⁸⁶¹ See section 3.6.

⁸⁶² Ibid.

⁸⁶³ Ibid.

⁸⁶⁴ Ibid.

⁸⁶⁵ Cited in Osiemo op cit note 149 at 110.

⁸⁶⁶ Ibid.

⁸⁶⁷ Ibid.

⁸⁶⁸ Ibid at 110–111.

⁸⁶⁹ Ibid at 111.

dispute resolution while increasing their reputation.⁸⁷⁰ Accordingly, REC courts have performed their role well by clarifying unclear legal questions.⁸⁷¹ However, regarding the SADC Tribunal, Kleis concludes that the court is falling behind compared to the EACJ and ECOWAS Court of Justice because the tribunal is not an integral part of the SADC and was therefore unable to contribute towards its goals.⁸⁷² Accordingly, the only positive impact of the SADC Tribunal decisions is that the *Campbell* cases made the international community focus on the lack of rule of law in southern Africa.⁸⁷³ This was not a result of the judges' actions or their supposedly innovative approaches to the interpretation of SADC law.⁸⁷⁴

This argument underestimates the importance of interpretation and clarification of international law for the rule of law. As De Baere, Chané and Wouters observe, ICs and tribunals contribute to the rule of law through their own interpretation and clarification of international law.⁸⁷⁵ Their contribution moves beyond the cases filed before them and affects international law as a whole.⁸⁷⁶ De Baere, Chané and Wouters argue that the critics who measure the contribution of ICs and tribunals to the rule of law only through the numbers and type of disputes settled ignore the fact that the courts' impact moves beyond the individual case and affects the international legal order in its entirety.⁸⁷⁷ While it is generally accepted that IC judgments are binding only on the parties to the disputes and that there is no rule of precedent in international law, IC decisions contribute to shaping the standards of the entire international legal system.⁸⁷⁸ For this reason, the significance of clarification and development of international law for the promotion of the rule of law must not be overlooked.⁸⁷⁹ Therefore, by clarifying unclear SADC legal instruments and developing SADC laws in accordance with international legal norms, the tribunal contributes to the international rule of law.

⁸⁷⁰ Cited in Jörg Kleis op cit note 221 at 358.

⁸⁷¹ Ibid at 359.

⁸⁷² Ibid at 362.

⁸⁷³ Ibid at 362–363.

⁸⁷⁴ Ibid.

⁸⁷⁵ Cited in De Baere, Chané and Wouters op cit note 105 at 70. For more discussion on contributions of ICs see also Philippe Couvreur op cit note 539. See also Patrícia Galvão Teles op cit note 539.

⁸⁷⁶ Ibid.

⁸⁷⁷ Ibid at 75.

⁸⁷⁸ Ibid.

⁸⁷⁹ Ibid.

3.7.3 Contribution of the SADC Tribunal towards access to international justice

As noted in Chapter 1 of this thesis, the SADC Tribunal's success is also a consequence of its institutional design and jurisdiction, be it subject matter jurisdiction or personal jurisdiction, which has allowed the SADC Tribunal to achieve its goals.⁸⁸⁰ The contributions of the SADC Tribunal to personal jurisdiction, and to access to justice at international level, are in line with recent developments in international law. As judge Cançado Trindad has observed, modern international tribunals have contributed positively to the consolidation of an expanded international jurisdiction, and to the assertion and consolidation of the international juridical personality and capacity of the human person, as subjects of international law.⁸⁸¹ Accordingly, international tribunals have granted access to international justice to many justiciables, in different contexts across the globe.⁸⁸² The multiplication of ICs has contributed to the access to justice at international level.⁸⁸³

Therefore, the disbandment of the old SADC Tribunal and the subsequent re-establishment of a new SADC Tribunal in its current setting constitutes a denial of access to justice to citizens within the SADC region, including individuals and corporations doing business in the region.⁸⁸⁴ The decision to revise the SADC Tribunal Protocol and remove the right of individuals to bring cases before the tribunal has demolished the hopes of individuals, natural and juristic, to pursue remedies from the SADC Tribunal, mainly when they cannot get justice in the domestic courts of the SADC member states.⁸⁸⁵ The decision is a step backwards in the quest to institutionalise the protection of human rights, democracy, and the rule of law in the region.⁸⁸⁶ It is likely to undermine the regional human rights protection system and the SADC's primary regional integration and economic growth objectives.⁸⁸⁷ As a result, suspending the SADC Tribunal has enabled robust multinational cooperation in weak legal

⁸⁸⁰ Article 14 l(a) (b) and (c), Articles 15, 16, 17 and 18 of the SADC Tribunal Protocol of 2001.

⁸⁸¹ Antônio Augusto Cançado Trindad op cit note 116 at 4.

⁸⁸² Ibid.

⁸⁸³ Ibid.

⁸⁸⁴ Onkemetse Tshosa 'An assessment of the right of individuals to access the Southern African Development Community Tribunal' in Muna Ndulo and Cosmas Emeziem *The Routledge Handbook of African Law* (2022) at 575.

⁸⁸⁵ Ibid at 577.

⁸⁸⁶ Ibid.

⁸⁸⁷ Jonas, O'Neuterung the SADC Tribunal by Blocking Individuals' Access to the Tribunal' (2013) 2 (2) *International Human Rights Law Review* at 294–321

regimes such as Swaziland to violate environmental rights with impunity.⁸⁸⁸ The decision of the SADC member states to suspend the SADC Tribunal to limit its jurisdiction to disputes between states only fundamentally means that there is no remedy for violations committed in such weak states.⁸⁸⁹

The challenge of access to justice in Africa is notable in electoral disputes.⁸⁹⁰ African courts are unwilling to nullify presidential elections and call for new elections.⁸⁹¹ Many decisions concerning presidential election disputes show a consistent pattern of judicial deference in favour of incumbents.⁸⁹² In several anglophone jurisdictions, electoral justice is hollowed out by judicial deference.⁸⁹³ In the current study, electoral justice is applied as the right of aggrieved individuals to challenge electoral processes and receive adequate remedies.⁸⁹⁴ In Zimbabwe, electoral justice is hampered by unresolved cases, delays in finalising cases, proceduralism, technicalities and inconsistent approaches to electoral petition proceedings.⁸⁹⁵ Therefore, this practice undermines the administration of electoral justice.⁸⁹⁶ This explains why litigants in electoral disputes resort to ICs in Africa.⁸⁹⁷ As Gathii and Akingugbe point out, litigants filing cases before African ICs raise awareness of electoral injustices in ways normally barred by domestic institutions.⁸⁹⁸ For these reasons, the utility and legal value of the SADC Tribunal lies in its ability to allow non-state actor individuals and private actors to file cases before the court without the consent of the defendant states. It is for the same reasons that law society organisations, NGOs and academia are currently campaigning for the reinstatement of the SADC Tribunal to its initial format.⁸⁹⁹

⁸⁸⁸ Angelo Dube 'Does SADC provide a remedy for human rights violations in weak legal regimes? A case study of iron ore mining in Swaziland' (2013) 3 (1) *SADC Law Journal* at 59.

⁸⁸⁹ *Ibid.*

⁸⁹⁰ O'Brien Kaaba and Charles M Fombad 'Adjudication of Disputed Presidential Elections in Africa' in Nico Steytler and Charles M Fombad *Democracy, Elections, and Constitutionalism in Africa* (2021) at 361–400.

⁸⁹¹ *Ibid* at 366.

⁸⁹² *Ibid* at 367.

⁸⁹³ *Ibid* at 369.

⁸⁹⁴ Tarisai Mutangi 'The Judiciary and Electoral Adjudication in Zimbabwe' in James Tsabora *The Judiciary and the Zimbabwean Constitution* (2022) at 162.

⁸⁹⁵ *Ibid* 179–184.

⁸⁹⁶ *Ibid* at 185.

⁸⁹⁷ James Thuo Gathii and D Akingugbe 'Judicialization of election disputes in Africa's international courts' (2022) 84 (181) *Law and Contemporary Problems* at 281.

⁸⁹⁸ *Ibid* at 282.

⁸⁹⁹ Coalition for an Effective SADC Tribunal Civil Society group (*Coalition for an Effective SADC Tribunal*) *mourns the demise of the SADC Tribunal* (21 November 2017).

The tribunal gave hope to victims of human rights violation within the SADC region and placed SADC government on notice that their impunity can no longer be tolerated. This is why it is important to reinstate the SADC tribunal. Despite the positive contribution of the SADC Tribunal to the protection of human rights, the advancement of the rule of law and access to justice, impunity and violence against SADC citizens, particularly opposition leaders and civil society groups continue to reign.⁹⁰⁰ Several SADC governments continue to intimidate, threaten and arrest opposition leaders and members of civil society groups.⁹⁰¹ This shows that the tribunal cannot completely on its own address all the challenges relating to inadequate human rights protection and weak democracy at the domestic level without the efforts and involvement of SADC citizens and civil society groups.

The next section discusses the case law of domestic courts to understand how domestic courts view SADC laws and whether they are prepared to enforce SADC Tribunal judgments.

3.8 Interpretation of SADC laws and SADC Tribunal judgments by domestic courts

(i) Gramara (Private) Ltd & others v Government of Zimbabwe & others

This case concerned the legal status of the SADC Treaty and SADC Tribunal judgment before the domestic courts of Zimbabwe.⁹⁰² For contextual background, it is important to note that in early 2000, the Government of Zimbabwe embarked on a Fast Track Land Reform (FTLR) Programme to reform land. The legal implication of this programme was that it gave power to the government to expropriate land and redistribute it without payment of compensation. In particular, the government of Zimbabwe passed Constitutional Amendment Act No 16 in 2000, which legalised the expropriation of land in Zimbabwe without payment of compensation. This amendment also ousted the jurisdiction of the domestic courts to hear cases concerning FTLRP.

⁹⁰⁰ Southern African: SADC lawmakers must strengthen laws to respond to human rights threats <https://www.amnesty.org/en/latest/press-release/2020/12/southern-african-sadc-lawmakers-must-strengthen-laws-to-respond-to-human-rights-threats>. Amnesty International December 07 2020. See also SADC Regional leaders must fix the deteriorating human rights situation across the region.

<https://www.amnesty.org/en/latest/press-release/2020/08/sadc-regional-leaders-must-fix-the-deteriorating-human-rights-situation-across-the-region>. Amnesty International August 14 2020

⁹⁰¹ Ibid.

⁹⁰² *Gramara (Private) Ltd. & others v. Government of Zimbabwe & others* High Court of Zimbabwe (26 January 2010).

Left with no legal recourse before the domestic courts of Zimbabwe, the applicants successfully challenged the legality of the FTLRP before the SADC Tribunal in the case of *Mike Campell* case of 2007 and attempted to enforce it before the High Court of Zimbabwe.⁹⁰³ The government of Zimbabwe opposed the application and the enforcement of the SADC Tribunal before Zimbabwe arguing that it had never ratified the SADC Treaty.⁹⁰⁴ The question before the court was whether the SADC Tribunal had jurisdiction over the case before it and whether the recognition and enforcement of the tribunal's decision in that case would be contrary to public policy in Zimbabwe.⁹⁰⁵ Judge Patel dismissed the claim that the SADC Tribunal had no jurisdiction and held that the SADC Tribunal Protocol of 2001 was duly adopted in terms of Article 36(1) of the SADC Treaty and that it became binding on all the member states, including Zimbabwe, on its adoption without the need for its ratification.⁹⁰⁶

The court held that it would be against Zimbabwe's public policy not to recognise and enforce any decision of the tribunal before domestic law, except where the decision was inconsistent with legislation or previous domestic court decision.⁹⁰⁷ It also held that by complying with the SADC Treaty as amended and therefore accepting the jurisdiction of the Tribunal, the government of Zimbabwe had created an enforceable legitimate expectation that it would comply with the provisions of the SADC Treaty, including the decisions of the Tribunal.⁹⁰⁸ It also took note that under Article 32 of the SADC Tribunal Protocol, the Zimbabwean government had bound itself to enforce the decisions of the tribunal through its domestic procedural law and had therefore created further expectation that it would do so.⁹⁰⁹ The court concluded that the legitimate expectation that the government would comply with the judgments of the tribunal and take steps to enforce those decisions in the domestic legal system must be viewed as an important and fundamental aspect of public policy in Zimbabwe.⁹¹⁰ On that account, it held that the recognition and enforcement of the tribunal's judgments would not be against the public policy of Zimbabwe.⁹¹¹ Accordingly, 'public policy

⁹⁰³ See *Campbell v Republic of Zimbabwe* (Contempt of Court Ruling), Case No SADC (T) 03/2009 (5 June 2009).

⁹⁰⁴ *Gramara (Private) Ltd. & others v. Government of Zimbabwe & others* at 9.

⁹⁰⁵ *Ibid* at 8.

⁹⁰⁶ *Ibid* at 12–13

⁹⁰⁷ *Ibid* at 15.

⁹⁰⁸ *Ibid*.

⁹⁰⁹ *Ibid*.

⁹¹⁰ *Ibid*.

⁹¹¹ *Ibid* at 15–16.

directs that the Tribunal's judgments, issued within the limits of its international jurisdictional competence, be recognised and enforced in Zimbabwe.⁹¹² The court cited the tribunal decision in the *Campbell* case.⁹¹³

Despite the court recognising the binding nature of the SADC Treaty and Tribunal decisions at international law, the court held that the Supreme Court of Zimbabwe had already confirmed the legality and constitutionality of the land reform programme under 16B of the Constitution.⁹¹⁴ The court noted that the implication of the tribunal decision is that it challenges the legality of the programme already confirmed by the Supreme Court.⁹¹⁵ Therefore, the effect of registering the SADC Tribunal's judgment in Zimbabwe would be to challenge the decision of the Supreme Court and so undermine its authority in Zimbabwe.⁹¹⁶ Accordingly, it held that such a scenario would be against public policy in Zimbabwe and would work against the registration of the tribunal's decision by the court.⁹¹⁷ It stated that if the tribunal's judgment were to be registered by this court and complied with or enforced through court orders, the government would be required to violate and ignore legislation enacted by Parliament in terms of section 16B of the Constitution, which is against the law and public policy of Zimbabwe.⁹¹⁸

Furthermore, the court held that in terms of section 3 of the Constitution of Zimbabwe, the Constitution is the supreme law and any law that conflicts with it is invalid to the extent of such inconsistency.⁹¹⁹ The court held that, as a consequence,

the extent that the common law is invoked to enforce a foreign judgment, the common law must be [interpreted] 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.⁹²⁰

It also held that it would be against the public policy of Zimbabwe to require its government to act against its own constitution.⁹²¹ The court noted that despite the SADC

⁹¹² Ibid at 16.

⁹¹³ Ibid.16.

⁹¹⁴ Ibid at 17.

⁹¹⁵ Ibid.

⁹¹⁶ Ibid.

⁹¹⁷ Ibid at 17–18.

⁹¹⁸ Ibid at 18.

⁹¹⁹ Ibid.

⁹²⁰ Ibid.

⁹²¹ Ibid at 18–19.

Tribunal's decision being limited to the 79 applicants who appeared before it, its impact extended beyond the applicants and included all former owners of all the agricultural land that had been expropriated by the government since 2000.⁹²² As a result, enforcement of and compliance with the SADC Tribunal judgment concerning the 79 applicants would require the government to reverse all the land expropriated since 2000.⁹²³ The court ruled that registration and enforcing SADC Tribunal judgment in Zimbabwe would be against public policy.⁹²⁴

It is clear from the above case that Zimbabwean judges are sometimes willing to apply international law in their decision-making, but are limited by national constitutions and domestic legal systems. Since domestic courts are subject to national constitutions, they also cannot go beyond what is provided for by a constitution in determining the legal status of international law.

(ii) *Etheredge v The Minister of State for National Security Responsible for Lands, Land Reform and Resettlement & another*

The applicant in this case was Richard Thomas Etheredge, the nineteenth applicant in *Campbell & others v Zimbabwe*.⁹²⁵ The applicant, after obtaining an interim measure from the SADC Tribunal, filed an application for a spoliation order before the High Court of Zimbabwe.⁹²⁶ In this case, the applicant's farm had been gazetted by government for acquisition under the land reform policy.⁹²⁷ Consequently, in 2008 the applicant and his sons were forcibly removed from their farm.⁹²⁸ The persons who removed the applicant from his farm allegedly evicted him from his property on the instructions of the Respondents.⁹²⁹ Accordingly, all efforts to remove the illegal occupiers by the police failed. Consequently, the applicant approached the court for a spoliation order (*mandament van spolie*) and other reliefs on an urgent basis.⁹³⁰

⁹²² Ibid at 19.

⁹²³ Ibid.

⁹²⁴ Ibid.

⁹²⁵ See case no SADCT: 2/07 discussed in section 3.5.

⁹²⁶ *Etheredge v The Minister of State for National Security Responsible for Lands, Land Reform and Resettlement & another*, HC 3295/08 (Unreported) at 1.

⁹²⁷ Ibid at 2.

⁹²⁸ Ibid.

⁹²⁹ Ibid.

⁹³⁰ Ibid.

The second respondent (senator Edna Madzongwe) opposed the application, arguing that the applicant lacked the necessary locus standi to bring the matter before the court.⁹³¹ According to the second respondent, the applicant had lost his right through the expropriation of his farm by the government including his right to institute these proceedings.⁹³² More important, the respondent submitted that the matter of land acquisition was pending before the SADC Tribunal where the applicant and others had claimed specific relief from the tribunal.⁹³³ On the issue of pending litigation before the SADC Tribunal, judge Gowora held that:

The supreme law in this jurisdiction is our Constitution and it has not made provision for these Courts to be subject to the Tribunal. This Court is a Court of superior jurisdiction and has an inherent jurisdiction over all people and all matters in the country, and its jurisdiction can only be ousted by a statutory provision to that effect. I do not have placed before me any statute to that effect and the protocol certainly does not do that.⁹³⁴

In the words of judge Gowora, the Constitution of Zimbabwe is the supreme law and consequently, domestic courts of Zimbabwe are not subject to the SADC Tribunal in terms of their hierarchy. Rather, the High Court including the Supreme Court of Zimbabwe enjoy superior status over the SADC Tribunal and its jurisdiction can only be limited by legislation. Again, this case is a demonstration of challenges faced by domestic courts vis-à-vis the relationship between domestic law and international law.

(iii) *Southern Trading Company (PTY) Limited v Minister for Agriculture and Cooperatives*

Although this case does not concern SADC law or the SADC Tribunal judgment, it demonstrates the attitudes of domestic courts towards international law concerning the relationship between section 238(4) of the Swaziland Constitution and provisions of the Southern African Customs Union (SACU) Agreement of 2002.⁹³⁵ In this case, the Minister for Agriculture and Cooperatives of Swaziland issued a regulation (Legal Notice No. 44 of 2011) amending the Schedule Products Regulation by adding in Regulation a new product, edible and crude oil from soya beans.⁹³⁶ The practical effect of these changes was that it would empower

⁹³¹ Ibid.

⁹³² Ibid.

⁹³³ Ibid at 9.

⁹³⁴ Ibid at 9–10.

⁹³⁵ *Southern Trading Company (PTY) Limited v Minister for Agriculture and Cooperatives* [2012] SZSC 17.

⁹³⁶ Para 1.

the National Agricultural Marketing Board to impose a 15% levy on the importation of edible oil. The Appellant (Southern Trading Company (PTY) Limited) filed a review application before the High Court of Swaziland against the Minister for Agriculture and Cooperatives and others.⁹³⁷ It sought an order in the following terms:

1. The first respondent's decision to amend the Schedule Product Regulations promulgated in terms of section 15 of the National Agricultural Marketing Board Act 13 of 1985 by the addition thereto of the words (h) All edible oil and crude oil from the following crops - sunflower, groundnuts, cotton and soya beans' is reviewed and set aside.⁹³⁸
2. Legal Notice 44 of 2011 published in Government Gazette No. 30 on 28th March 2011 is declared to be of no force and effect and is set aside.⁹³⁹
3. The second respondent's decision to impose an import levy of 15% on 'edible oil and products is reviewed and set aside.⁹⁴⁰

The High Court dismissed the application with costs and the appellant appealed the matter before the Supreme Court on the grounds that the amendment of the said Regulations is unlawful since it violates Swaziland's binding international law obligations under Article 25 (3) of the Southern African Customs Union ("SACU") Agreement of 2002.⁹⁴¹ The Supreme Court of Swaziland confirmed that in terms of section 238(4) of the Swaziland Constitution, an international agreement becomes law only when enacted by an Act of Parliament.⁹⁴² The court noted that Article 25(3) of the SACU Agreement contains an exception which grants the member states the discretion to pass municipal laws prohibiting or restricting the importation or exportation of goods for economic, social, cultural or other reasons as they may consider necessary for their respective countries.⁹⁴³ It observed that Articles 18 and 25(2) and (3) seek to promote municipal law above the SACU Agreement to protect national interests.⁹⁴⁴ The court concluded that the SACU Agreement does not override the relevant provisions of the

⁹³⁷ Para 4.

⁹³⁸ Para 4.

⁹³⁹ Para 4.

⁹⁴⁰ Para 4.

⁹⁴¹ Para 6.

⁹⁴² Para 22–23.

⁹⁴³ Para 15.

⁹⁴⁴ Para 19.

Act.⁹⁴⁵ It held that the logical effect of the conclusion was that the SACU Agreement has yet to be enacted into law as envisaged by section 238 (4) of the Constitution and that the appellant had failed to show any treaty violation or contravention of international law.⁹⁴⁶ This case demonstrates domestic courts' challenges, particularly the constitutional limits placed on them by their domestic legal orders. The constitutional limitations on courts make it difficult for ICs to apply international law and hold their governments accountable for their treaty obligations.

(iv) *Progress Office Machines CC v South African Revenue Services & others*

Another case regarding the relationship between international law and domestic laws involved the Supreme Court of Appeal (SCA) and the Constitutional Court of South Africa.⁹⁴⁷ In this matter, the applicant, Progress Office Machine brought an application against the South African Revenue Services (SARS) and others in which it sought a declarator order that the Anti-Dumping Duties imposed by the fourth respondent on certain paper products imported from Singapore has no force and effects on the 27th of November 2003.⁹⁴⁸ The question before the court was whether the Duty was imposed on the 28 May 1999 when the statute was published or the 28th of November 1998 from which date the Duty first became collectable.⁹⁴⁹

The SCA took note of section 231(4) of the South African Constitution and ruled that the Anti-Dumping Agreement, as approved by Parliament in 1995, was binding on South Africa under international law despite not being enacted into the domestic legal system.⁹⁵⁰ The court noted that the South African Parliament had passed legislation (International Trade Administration Act [ITAA] 71 of 2002) giving effect to the Anti-Dumping Agreement and that the Minister of Trade had passed a regulation on anti-dumping measures under section 59 of ITAA, which demonstrated the intention of the minister to give effect to the provisions of the treaties which are binding on South Africa in international law.⁹⁵¹ This interpretation was cited with approval

⁹⁴⁵ Para 19.

⁹⁴⁶ Para 24.

⁹⁴⁷ *Progress Office Machines CC v South African Revenue Services & others* 2008 (2) SA 13 (SCA). *International Trade Administration Commission v SCAW South Africa (Pty) Ltd* 2012 (4) SA 618 (CC). *Government of the Republic of Zimbabwe v Fick & others* 2013 (5) SA 325 (CC). *Glenister v President of the Republic of South Africa & others* 2011 3 SA 347 CC.

⁹⁴⁸ *Progress Office Machines CC v South African Revenue Services & others* High Court, Durban and Coast Local Division, case no 4373/05 Page 2.

⁹⁴⁹ Page 6.

⁹⁵⁰ 2008 (2) SA 13 (SCA) Para 6.

⁹⁵¹ Para 6.

by the Constitutional Court in the case of *The International Trade Administration Commission v SCAW South Africa (Pty) Ltd*.⁹⁵² These cases demonstrate the willingness of South African courts to receive and apply international law as part of the domestic legal system. The domestic courts of South Africa have used innovative interpretation to ensure that South Africa complies with its international legal obligations.

(v) *Government of the Republic of Zimbabwe v Fick & others*

Another example of a South African court showing willingness to apply and develop international law concerned Zimbabwe's land expropriation policy.⁹⁵³ Following the Zimbabwean High Court decision in the *Gramara* case, some applicants approached South African courts seeking to enforce the SADC Tribunal judgment—*Campbell* judgment.⁹⁵⁴ Zimbabwe opposed this case, arguing that the South African Parliament had not given effect to the SADC Treaty as required by section 231 of the Constitution, concluding that the treaty was not binding in South Africa.⁹⁵⁵ Nevertheless, the Constitutional Court of South Africa dismissed this argument. It ruled that the South African Parliament had approved the SADC Treaty in 1995; therefore, the treaty, including the SADC Tribunal Protocol, was binding upon South Africa, at least on the international plane.⁹⁵⁶ The Constitutional Court noted further that Article 32(2) of the Tribunal Protocol imposes a legal obligation on South Africa to take all legal steps necessary to facilitate the execution of the decisions of the SADC Tribunal.⁹⁵⁷

On the question of immunity of Zimbabwe from civil litigation in South Africa, the Constitutional Court noted that the government of Zimbabwe enjoys immunity against civil suits in South Africa in terms of section 2 of the Foreign States Immunities Act 87 of 1981.⁹⁵⁸ However, the court noted that section 3(1) of the Immunities Act provides that immunity will be forfeited where the state expressly waived its immunity.⁹⁵⁹ The court held that Article 32 of

⁹⁵² *International Trade Administration Commission v SCAW South Africa (Pty) Ltd* 2012 (4) SA 618 (CC) at para 25.

⁹⁵³ *Government of the Republic of Zimbabwe v Fick & others* 2013 (5) SA 325 (CC).

⁹⁵⁴ *Fick & others v Government of the Republic of Zimbabwe*, Case No 78881/2009, North Gauteng High Court, Pretoria, 13 January 2010, unreported para 4.1.

⁹⁵⁵ *Government of the Republic of Zimbabwe v Fick & others* 2013 (5) SA 325 (CC) Para 29.

⁹⁵⁶ Para 30.

⁹⁵⁷ Para 31.

⁹⁵⁸ Para 32.

⁹⁵⁹ Para 32.

the Tribunal Protocol imposes an obligation on member states to take all steps necessary to ensure the enforcement of judgments and decisions of the tribunal.⁹⁶⁰ Therefore, Zimbabwe has a duty to act in accordance with Article 32 provisions.⁹⁶¹ It ruled that by accepting to be bound by the SADC Tribunal Protocol, including Article 32, Zimbabwe expressly waived its immunity in terms of section 3(1) of the Act.⁹⁶²

Concerning the question of whether South African courts have the jurisdiction to register and enforce a costs order issued against the government of Zimbabwe by the SADC Tribunal, Chief Justice Mogoeng, in his majority judgment, rejected the application of the Enforcement of Foreign Civil Judgments Act 32 of 1988 on the basis that the Act is limited to magistrates' courts and does not extend to the High Court and that the Minister of Justice had not designated the SADC Tribunal in terms of the Act.⁹⁶³ Consequently, the court had to develop common law to enforce the tribunal decision.⁹⁶⁴ The court stated that the need to develop common law arose from the need to ensure that lawful judgments are not to be evaded with impunity by any state or person in the global community.⁹⁶⁵ It held that based on Article 32(1) of the SADC Tribunal Protocol, the common law must be developed in order to enable the domestic courts of South Africa to register and enforce the SADC Tribunal judgments.⁹⁶⁶ The court stated that in order to give meaning to the enjoyment of rights to access to courts, Articles 32(1) and (2) of the SADC Tribunal Protocol and section 34 of the Constitution must be interpreted generously to allow successful litigants access to domestic courts of South Africa for the enforcement of court orders.⁹⁶⁷ According to the court, this can only be achieved by extending definition of 'foreign courts' to include the SADC Tribunal.⁹⁶⁸ The court held that Article 4(c) of the SADC Treaty, Article 32 of the SADC Tribunal Protocol, and sections 34, 8(3) and 39 of the Constitution allow the court to develop common law; therefore, 'foreign courts' included the tribunal.⁹⁶⁹

⁹⁶⁰ Para 33.

⁹⁶¹ Para 34.

⁹⁶² Para 35.

⁹⁶³ Para 36–37.

⁹⁶⁴ Para 54.

⁹⁶⁵ Para 54.

⁹⁶⁶ Para 58.

⁹⁶⁷ Para 62.

⁹⁶⁸ Para 62.

⁹⁶⁹ Para 70.

(vi) *Trustees for the time being of the Burmilla Trust & another v President of the RSA & another*

Swissborough Diamond Mines (Pty) Limited held mining leases in Lesotho. However, Government of Lesotho sought to revoke the leases. Swissborough instituted legal proceedings in Lesotho to interdict the cancellation before the High court of Lesotho.⁹⁷⁰ On Appeal, the court of Appeal of Lesotho declared that the revocation of specified mines to be void and of no force or effects.⁹⁷¹

Despite this ruling, the Government of Lesotho ignored this judgment and proceeded to revoke the mining licences of Swissborough Diamond Mines. The claimants requested the Government of South Africa to exercise diplomatic protection for their investments in Lesotho.⁹⁷² The South African Government, however, failed to intervene. The applicants brought the matter before the North Gauteng High Court, South African claiming the right to diplomatic protection from South Africa under the Constitution.⁹⁷³ Judge Patel dismissed the application of the applicants granted leave to appeal.⁹⁷⁴

On appeal, the Supreme Court of Appeal (SCA) ruled that the appellants have no right under South African law to diplomatic protection.⁹⁷⁵ However, the court held that South African nationals have a right to request diplomatic Government to consider providing diplomatic protection on the rational grounds.⁹⁷⁶ Notably, the SCA ruled that the Government is not under any international obligation to provide the appellants diplomatic protection. Accordingly, it dismissed the appeal.⁹⁷⁷

⁹⁷⁰Swissborough Diamond Mines (Pty) Ltd and Another v Commissioner of Mines and Geology N O and Others (CIV/APN 394 of 91) [1997] LSHC 95 (12 December 1997).

⁹⁷¹ Swissborough Diamond Mines (pty) Ltd and Another vs LHDA and others (C OF A 09/1999) reported in Lesotho Appeal Cases 2000 – 2004.

⁹⁷² Letter to the Department of Foreign Affairs of South Africa dated the 25th of October 2000. See also the case of Van Zyl and Others v Government of Republic of South Africa and Others (20320/02) [2005] ZAGPHC 70 (20 July 2005).

⁹⁷³ *Van Zyl and others v Government of RSA and others* [2007] SCA 109 (RSA) para 3.

⁹⁷⁴ Para 119.

⁹⁷⁵ (RSA) *Van Zyl and others v Government of RSA and others* [2007] SCA 109 (RSA) para 6.

⁹⁷⁶ Para 6.

⁹⁷⁷ Para 6

The applicant brought the matter before the SADC Tribunal where it claim damages arising from the expropriation of its mining leases.⁹⁷⁸ The applicant claimed damages against Lesotho following the suspension of its leases and expropriation of its mineral rights. It also claimed damages resulting from Lesotho's violations of Articles 4(c) and 6 of the SADC Treaty. In August 2010, the SADC Summit decided to review the roles, functions and terms of references of the SADC Tribunal and subsequently decided to suspend the SADC Tribunal.⁹⁷⁹

The suspension of the SADC Tribunal meant that the case of the Swissbourgh Group could not proceed and remains unresolved. In 2019, the Trustees for the Time Being of the Burmilla Trust and Josias Van Zyl (plaintiffs in the case of Swissbourgh Group) brought a claim of damages against the South African government arising from the suspension of SADC Tribunal.⁹⁸⁰ The High Court dismissed most of the claims raised by the applicants.⁹⁸¹ On appeal, the SCA dismissed the appeal with costs.⁹⁸²

For purposes of this research, it is important to note that the SCA relied heavily on the SADC Tribunal decision in the *Campbell* case in addressing the question of property rights, compensation for expropriation of property, access to justice and exhaustion of local remedies.⁹⁸³ The SCA, citing the SADC Tribunal decision in the *Campbell* case, held that clear legal title to the property is required for compensation for expropriated property.⁹⁸⁴ It noted that in *Campbell*, the applicants' legal title did not arise and was not one of the issues the SADC tribunal had to determine since the title of the applicants was not disputed.⁹⁸⁵ On the issue of exhaustion of local remedies, the SCA noted that in *Campbell*, the tribunal stated that the exhaustion of local remedies was not unique to the protocol.⁹⁸⁶ The court further noted that the tribunal in the *Campbell* decision made reference to several international human rights instruments.⁹⁸⁷ The SCA, citing the SADC Tribunal decision in *Campbell*, held that the

⁹⁷⁸ Swissbourgh Diamond Mines (pty) Ltd and Others v Kingdom of Lesotho Case No SADC (T) 04/2009 (11 June 2010).

⁹⁷⁹

⁹⁸⁰ *Trustees for the time being of the Burmilla Trust & another v President of the RSA & another* (Case no 64/2021) [2022] ZASCA 22 (1 March 2022) para 1.

⁹⁸¹ Para 45.

⁹⁸² Para 133.

⁹⁸³ Para 89, 116, 117 and 118 .

⁹⁸⁴ Para 89.

⁹⁸⁵ Para 89.

⁹⁸⁶ Para 116.

⁹⁸⁷ Para 116.

rationale of the requirement to exhaust local remedies is to allow domestic courts to deal with matters raising domestic issues first.⁹⁸⁸ The SCA further noted that in the *Campbell* decision, the SADC Tribunal dispensed with the requirement of internal exhaustion, since Amendment 17 of the Zimbabwean Constitution barred or prohibited judicial review of any matter challenging acquisition of agricultural land.⁹⁸⁹

(vii) *Von Abo v President of the Republic of South Africa*

Similarly, the High Court of South Africa has cited the SADC Tribunal judgment in the case of *Von Abo v. President of the Republic of South Africa*.⁹⁹⁰ This case involved a South African farmer, Mr Von Abo, who owned various properties in Zimbabwe.⁹⁹¹ In 1997, the government of Zimbabwe embarked on FTLR Programme to reform land to expropriate land owned by farmers.⁹⁹² The applicant's properties were among those expropriated by the government without payment of compensation.⁹⁹³ The applicant initially approached the domestic courts of Zimbabwe and thus exhausted all possible remedies but was unsuccessful.⁹⁹⁴ The applicant successfully obtained a judgment against the Zimbabwean government, but the latter ignored the court judgments granted against it.⁹⁹⁵ Consequently, the applicant approached the South African government for intervention, requesting diplomatic protection to protect his properties in Zimbabwe.⁹⁹⁶ The South Africa government failed to provide diplomatic protection to him and as a result, he approached the South African High Court for a declaratory order that he is entitled to diplomatic protection under the South African Constitution.⁹⁹⁷

The High Court found that the South African government had clearly failed to comply with its diplomatic protection obligations.⁹⁹⁸ According to Judge Prinsloo, South Africa's failure to

⁹⁸⁸ Para 117.

⁹⁸⁹ Para 118.

⁹⁹⁰ *Von Abo v. President of the Republic of South Africa* High Court of South Africa, Case No. 3106/07 (5 February 2010); *The Government of the Republic of South Africa v Von Abo* (283/10) [2011] ZASCA 65 (4 April 2011). *Von Abo v President of the Republic of South Africa* 2009 5 SA 345 (CC).

⁹⁹¹ *Von Abo v President of the Republic of South Africa* 2009 5 SA 345 (CC) para 2.

⁹⁹² Para 5.

⁹⁹³ Para 6.

⁹⁹⁴ Para 6.

⁹⁹⁵ Para 7.

⁹⁹⁶ Para 7.

⁹⁹⁷ Para 7-8.

⁹⁹⁸ *Von Abo v. President of the Republic of South Africa* High Court of South Africa, Case No. 3106/07 (5 February 2010) para 58.

afford diplomatic protection to Von Abo was exacerbated by the absence of any evidence that it had considered and relied on the SADC Tribunal's decision in *Campbell*.⁹⁹⁹ The court discussed the SADC Tribunal decision in the *Campbell* case No 2 of 2007 (the interim ruling) and held as follows:

I am of the view that diligent government ministers, in the position of the respondents facing the task to comply with orders 4 and 5, could also have relied on the judgment of the tribunal to fortify their efforts to employ effective diplomatic interventions on behalf of the applicant. They failed to do so.¹⁰⁰⁰

The above cases show that the domestic courts of South Africa sometimes follow a more relaxed dualist or monist approach when interpreting the status of international law before the domestic legal system of South Africa. In particular, the South African judges have used innovative interpretations to apply international law as part of domestic law. This provides predictability and legal certainty that international law will apply as part of the domestic legal system of South Africa. On the other hand, the domestic courts of Zimbabwe and Swaziland follow a strict dualist approach to interpreting and applying international law. Therefore, there is a need to clarify the legal status of the SADC community laws before the domestic courts. Importantly, the SADC Summit and SADC member states should also adopt the necessary measures to ensure that tribunal decisions are enforceable before domestic courts.

3.9 Conclusion

The main conclusion that can be drawn from this chapter is that the SADC, from its inception, has always followed an intergovernmental approach to integration. The transformation of the SADCC to the SADC did not alter the intergovernmental nature of the SADC integration process. Despite this fact, however, member states created a supranational court with compulsory jurisdiction to attract donor funding. The supranational nature of the SADC Tribunal, including its activism and openness to exercise and expand its jurisdiction, has allowed it to operate outside the SADC intergovernmental framework. This is one of the reasons why SADC member states decided to suspend the SADC Tribunal and abolish its compulsory jurisdiction. Clearly, it posed a serious threat to their sovereignty and policy space.

⁹⁹⁹ Para 58 (6).

¹⁰⁰⁰ Para 58 (6)

In terms of the SADC Tribunal composition, issues such as lack of fair gender representation and the process of selecting and appointing judges affect the legitimacy and independence of the SADC Tribunal as an institution. However, the SADC Tribunal judges are independent and have made adverse rulings against Zimbabwe without any fear of government reprisal. Under the old SADC Tribunal of 2001 Protocol, the tribunal had wide jurisdiction and access rules which allowed it to contribute to the development of international human rights law and access to international justice, thereby contributing to the rule of law. The suspension of the SADC Tribunal and the adoption of a new tribunal with limited jurisdiction is a major setback for human rights, international justice and the rule of law. The new SADC Tribunal will affect how the judges exercise their roles. It will also negatively affect private individuals who will have no legal recourse to the tribunal.

The mechanisms adopted by SADC member states to enforce the tribunal judgments were discussed, revealing that there are a number of procedural and substantive challenges which affect the way in which SADC Tribunal judgments are enforced. Since the SADC Tribunal is not responsible for enforcement of or compliance with its decisions, non-compliance cannot be blamed on the tribunal. The SADC Summit as an institution and SADC member states need to take responsibility and ensure that tribunal judgments are enforced.

Using innovative interpretation, the SADC Tribunal has managed to settle disputes between SADC member states and individuals through legal means. The tribunal has significantly contributed to the development of international human rights law and to the advancement of access to international justice. Consequently, it has contributed to the rule of law at international level and has shown itself to be an effective judicial institution. Therefore, the argument that SADC is ineffective because it does not have judgment enforcement powers is incorrect since all ICs rely on the cooperation of their member states and do not enforce their judgments.

Despite SADC Tribunal human rights jurisprudence, some domestic courts are not prepared to accept supranational laws, including decisions of the SADC Tribunal, owing to constitutional limitations and a lack of clarity on the status of SADC community laws before domestic legal systems. The only exception is South African courts who have demonstrated a willingness to accept SADC laws and SADC Tribunal judgments.

CHAPTER 4: LESSONS FROM THE EUROPEAN COURT OF JUSTICE (ECJ) ON REGIONAL INTEGRATION

4.1 Introduction

The previous chapter's analysis established that the SADC follows an intergovernmental system in which the SADC Summit exercises unlimited power. Notwithstanding the intergovernmental nature of the SADC, the SADC Tribunal enjoyed some supranational status. The tribunal's supranational character allowed it to operate independent of the SADC and therefore to exercise its jurisdiction effectively. The suspension of the SADC Tribunal to a certain extent is attributed to its independence. However, there are several concerns relating to gender representation, selection and appointment of judges which affect its legitimacy.

Chapter 3 also discussed the jurisdiction of the SADC Tribunal of 2001 and touched on the implication of watered-down jurisdiction of the new SADC Tribunal of 2014 for private actors. The challenges of enforcing SADC Tribunal judgments as foreign judgments through domestic courts and through the SADC Summit were highlighted in addition to procedural and substantial challenges. The chapter discussed the jurisprudence of the SADC Tribunal and reflected on its contributions towards human rights and the rule of law. It also examined how domestic courts of SADC member states have received SADC Tribunal judgments and conclusions were drawn.

The current chapter discusses the corresponding structural features of the ECJ to show how the court has addressed questions relating to state sovereignty and enforcement of judgments. This chapter provides historical and political insights into the EU system and identifies factors and conditions which have allowed the ECJ to have a far-reaching impact. The EU legal system is then critically assessed with a primary focus on the functioning of the ECJ in developing, interpreting, and applying EU law. The aim is to discern how the ECJ has established a far-reaching impact on the EU member states. In addition, the chapter examines the application of EU law by domestic EU courts to explore the extent to which the ECJ has influenced national judgments. Importantly, it will reflect on the reaction of EU governments

to the growing influence of the ECJ and ponder the constraints placed on the ECJ by EU governments.

Notwithstanding concerns about state sovereignty and supranational courts, the SADC governments adopted the SADC Tribunal — which contains certain aspects of the ECJ model such as compulsory jurisdiction and giving advisory opinions while also adapting certain features such as direct effect, direct applicability and supremacy — to protect national sovereignty.¹⁰⁰¹ The decision to emulate the ECJ-styled court was an attempt to retain credibility with the EU and other international cooperation partners.¹⁰⁰² Based on these similarities, it is worthwhile examining the ECJ to understand its effectiveness and proffer some recommendations for the SADC Tribunal.

The ECJ is considered to be the most successful supranational court to have played an important role in promoting regional integration through its jurisprudence.¹⁰⁰³ The European model is consequently viewed as a way to promote law compliance and possibly promote integration through law.¹⁰⁰⁴ Moreover, the ECJ model is viewed as helpful in dealing with legal challenges arising from the regional integration process.¹⁰⁰⁵

The SADC Tribunal can draw important lessons from the experience of the ECJ. The rationale behind the discussion in this chapter is that, given its structural and institutional influences on the SADC Tribunal, an analysis of the ECJ example will complement the SADC Tribunal model. The following section discusses the historical and political background of the EU system.

4.2 *Foundation of the European Union (EU) integration model*

World War II began with Hitler's invasion of Poland in September 1939 and ended with the defeat of Nazi Germany in May 1945.¹⁰⁰⁶ It is generally agreed that after the destruction caused by two world wars and the ideology of nationalism, the EU countries in 1950's sought to

¹⁰⁰¹ Cited in Tobias Lenz op cit note 119 at 155.

¹⁰⁰² Ibid.

¹⁰⁰³ Alter, Karen J, 'The Global Spread of European Style International Courts' (2011). Faculty Working Papers. Paper 7, available at <http://scholarlycommons.law.northwestern.edu/facultyworkingpapers/7>.

¹⁰⁰⁴ Ibid.

¹⁰⁰⁵ Ibid.

¹⁰⁰⁶ Tony Judt *Postwar A history of Europe since 1945* (2006).

establish a new international organisation to achieve political and economic cooperation.¹⁰⁰⁷ After World War II, Europe was not only destroyed; it was entirely devastated.¹⁰⁰⁸ The territorial disputes and ideological differences between the Nazis and allied liberals and communists which had triggered the war¹⁰⁰⁹ continued post-World War II, with Europe divided between communist parties in eastern and central Europe and a ‘Western’ sector where capitalism dominated.¹⁰¹⁰ From the beginning of WWI to the end of WWII, there were calls for a single European market owing to the increase in Japanese and US exports, economic stagnation, economic nationalism and tariff protectionism in Europe.¹⁰¹¹ In other words, after EU countries suffered heavily from major conflicts, especially from World War II, they decided to create an international organisation to address wars and competition between EU countries. Consequently, many states understood that it would be more difficult to address the economic and political challenges they faced. Therefore, they realised that to end wars and remove protectionist trade policies, they needed to cooperate towards the integration of Europe.

It should be noted that before World War II, EU countries were unwilling to cede their national sovereignty to supranational institutions and preferred to protect their national sovereignty.¹⁰¹² With the occupation of Europe by Nazi Germany and the inability of national governments to guarantee security, many EU countries later embraced the idea of a united Europe.¹⁰¹³ The calls for the integration of Europe and the creation of a federal state with supranational powers intensified after the end of World War II.¹⁰¹⁴ European governments believed that liberty and civilisation would only be realised if a federal union replaced the existing anarchy of European states.¹⁰¹⁵ Interestingly, the idea of European unity can be traced as far back as 1600.¹⁰¹⁶ During the European wars, a strong movement supported the concept

¹⁰⁰⁷ Paul Craig and Gráinne de Búrca *EU LAW Text, Cases, and Materials* 5 ed (2011) at 4. See also Martin J. Dedman *The Origins and Development of the European Union 1945–95 A history of European integration* (1996) at 16.

¹⁰⁰⁸ Alina Kaczorowska *European Union Law* 4 ed (2016) at 4.

¹⁰⁰⁹ Dan Stone *Goodbye to all that? The story of Europe since 1945* (2014) at 3.

¹⁰¹⁰ Mary Fulbrook *The Short Oxford History of Europe: Europe since 1945* (2001).

¹⁰¹¹ Cited in Martin J. Dedman op cit note 966 at 16.

¹⁰¹² *Ibid.*

¹⁰¹³ *Ibid* at 17.

¹⁰¹⁴ *Ibid.*

¹⁰¹⁵ *Ibid.*

¹⁰¹⁶ Cited in Paul Craig and Gráinne de Búrca op cit note 966 at 4.

of European unity.¹⁰¹⁷ However, the movement towards integration in Europe failed after World War II.¹⁰¹⁸

Nevertheless, to revitalise Europe's postwar economy, in 1947, the US announced the Marshall Plan to provide aid to Europe.¹⁰¹⁹ Marshall offered financial grants to European countries on condition that they cooperate in the distribution of aid and abolish trade barriers.¹⁰²⁰ The plan was largely successful in helping to restore western European trade and production while managing inflation.¹⁰²¹ The only area in which no progress was made was in moving towards political union due to the United Kingdom's opposition to supranational institutions and its preference for intergovernmental systems to protect its sovereignty.¹⁰²² As a result of the UK's rejection of supranational institutions and its preference for an intergovernmental system, Robert Schuman proposed merging certain western European countries' coal and steel industries under a supranational High Authority.¹⁰²³ It is generally accepted that the Schuman Plan was the first significant step towards European integration beyond intergovernmentalism, creating a supranational authority with binding powers.¹⁰²⁴ The Schuman Plan did not make reference to a judicial body but provided for establishing a High Authority, which later became the European Commission (EC).¹⁰²⁵ Many European states were concerned about Germany's dominance in coal and steel, which could provide military support for invasion or its war machine against European countries.¹⁰²⁶ In other words, the Schuman Plan was also aimed at limiting or containing Germany's military threat.

In 1957 the Rome Treaty, which created the European Economic Community (EEC), came into force on 1 January 1958 to end interstate wars and competition among the European

¹⁰¹⁷ Ibid.

¹⁰¹⁸ Cited in Martin J. Dedman op cit note 966 at 16.

¹⁰¹⁹ Paul Craig and Gráinne de Búrca op cit note 966 at 4. See also Martin J. Dedman op cit note 966 at 16.

¹⁰²⁰ Ibid.

¹⁰²¹ Ibid at 5.

¹⁰²² Cited in Paul Craig and Gráinne de Búrca op cit note 966 at 4.

¹⁰²³ Michael Dougan 'The development of European integration and EU constitution reform' in Dennis Patterson and Anna Södersten *A Companion to European Union Law and International Law* (2016) at 26; See Paul Craig and Gráinne de Búrca op cit note 966 at 5.

¹⁰²⁴ Cited in Karen J Alter *The Theory and Reality of the European Coal and Steel Community* (2007) at 47; Michael Dougan op cit note 982 at 26.

¹⁰²⁵ Loïc Azoulai and Zane Rasnača 'The Court of Justice of the European Union as a Self-Made Statesman' in Dennis Patterson and Anna Södersten *A Companion to European Union Law and International Law* (2016) at 166.

¹⁰²⁶ Cited in Karen J Alter *The Theory and Reality of the European Coal and Steel Community* (2007) at 47.

countries.¹⁰²⁷ The EEC sought to create a common market covering all economic sectors except those falling within the European Coal and Steel Community Treaty (also known as the Euratom Treaty).¹⁰²⁸ The EEC Treaty established several supranational institutions to achieve community objectives, such as the Council of Ministers, the Commission, the Assembly, and the Court of Justice, which later became the ECJ.¹⁰²⁹ The ECJ was created to enforce areas where European Community institutions such as the High Authority had no competence or limited powers.¹⁰³⁰ It was delegated with authority to monitor the abuse of powers on the part of the High Authority.¹⁰³¹

The 1960s and 1970s were a period of political stagnation in the EU, with the Commission facing increasing difficulties securing Council agreement to its proposals.¹⁰³² Later, the Treaty on the European Union, or the Maastricht Treaty of 1992, was signed in February 1992 and entered into force on 1 November 1993 to unite Europe politically and develop common policies.¹⁰³³ Some five years later, the Treaty of Amsterdam was signed in October 1997 and entered into force on 1 May 1999.¹⁰³⁴

The Treaty of Amsterdam reformed the Community's legislative process by expanding the scope and power of the European Parliament within the codecision procedure.¹⁰³⁵ This process was introduced in 1992 and expanded in 1999. After the adoption of the Lisbon Treaty, the term 'codecision' changed to the ordinary legislative procedure and it has since then been used as a mechanism for adopting EU legislation, with a particular focus on key policy areas.¹⁰³⁶

The Treaty of Nice was signed on 26 February 2001 and came into force on 1 February 2003.¹⁰³⁷ This treaty made important reforms in order to adapt the institutional functioning of

¹⁰²⁷ See the Treaty of Rome 1958.

¹⁰²⁸ Michael Dougan op cit note 982 at 29.

¹⁰²⁹ Ibid.

¹⁰³⁰ Loïc Azoulay and Zane Rasnača op cit note 984 at 167.

¹⁰³¹ Ibid.

¹⁰³² Cited in Paul Craig and Gráinne de Búrca op cit note 966 at 10.

¹⁰³³ See Article 2 and Article 3 of the Maastricht Treaty of 1992.

¹⁰³⁴ See Treaty of Amsterdam 1999

¹⁰³⁵ Michael Dougan op cit note 982 at 33.

¹⁰³⁶ The ordinary legislative procedure-Consilium.europa.eu <https://www.consilium.europa.eu/en/council-eu/decision-making/ordinary-legislative-procedure/> accessed on 04 February 2024.

¹⁰³⁷ See the Treaty of Nice.

the EU the challenges of further enlargement.¹⁰³⁸ Finally, the Treaty of Lisbon was formally signed by EU member states in December at Lisbon and came into effect in 2009.¹⁰³⁹ It combines the EU and the European Community (EC) into a single European Union based on the Treaty on European Union (TEU) and a Treaty on the Functioning of the European Union (TFEU).¹⁰⁴⁰ The EU is established under Article 1 of the TEU.¹⁰⁴¹

In Summary, the EU followed an incremental approach that eventually led to its establishment. The EU was established mainly for economic, political and military reasons. In particular, the EU was created to preserve peace in Europe and rebuild the European economy, which suffered greatly due to the destruction caused by wars and trade barriers. Furthermore, many EU states sought to limit Germany's military power and contain it to ensure it did not seriously threaten European security. The EU has subsequently expanded its competence to include state prerogatives such as foreign policy, security, immigration, trade policy and the environment. The following section discusses various EU legal values to trace their development and identify current EU challenges relating to democracy and the rule of law.

4.3 *EU legal values*

In terms of Article 2 of the TEU, the EU is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities.¹⁰⁴² Despite the EU Treaty referring to 'values', in reality, the concept of values means 'principles' or fundamental principles of EU law.¹⁰⁴³ The EU's fundamental values were developed as a result of ECJ case law.¹⁰⁴⁴ EU institutions have since then also adopted and approved a joint declaration on fundamental rights in which they committed to respecting the values of democracy, the rule of law and human rights.¹⁰⁴⁵ The EU

¹⁰³⁸ Michael Dougan op cit note 982 at 34.

¹⁰³⁹ The Consolidated Texts of the EU Treaties as amended by the Treaty of Lisbon 2009.

¹⁰⁴⁰ See Article 1 of the Treaty of Lisbon.

¹⁰⁴¹ Ibid.

¹⁰⁴² See Article 2 of the TEU.

¹⁰⁴³ Dimitry Kochenov 'The Acquis and Its Principles The Enforcement of the "Law" versus the Enforcement of "Values" in the EU' in András Jakab and Dimitry Kochenov *The Enforcement of EU law and values-ensuring Member States' compliance* (2017) at 9.

¹⁰⁴⁴ Giuliano Amato and Nicola Verola 'Democracy Rule Of Law' in Giuliano Amato, Enzo Moavero-Milanesi, Gianfranco Pasquino and Lucrezia Reichlin *The History of the European Union Constructing Utopia* (2019) at 58.

¹⁰⁴⁵ Ibid.

has also adopted the Copenhagen criteria for accession, which requires the applicant state to have a stable democracy, the rule of law, human rights, respect for and protection of minorities and a functioning market economy before admission to the EU.¹⁰⁴⁶ The European Council has relied on Copenhagen criteria, and found for instance, that Belarus does not fulfil the membership criteria. refusing to accept its membership owing to human rights concerns.¹⁰⁴⁷

Clearly, the EU is founded on respect for human dignity, equality, freedom and solidarity. EU member states and EU institutions are required to protect these values. Respect for human dignity, equality, freedom and solidarity are the preconditions that EU applicant states need to satisfy before admission to the EU. Once an applicant state becomes a full member of the EU, it must protect the EU values; any persistent failure to protect these values is a breach of EU values.¹⁰⁴⁸

Since the expansion of the EU, some EU member states including Austria, Hungary and the UK have challenged and questioned the fundamental values of the EU which member states traditionally accept as binding.¹⁰⁴⁹ Despite Hungary's democratisation process in the 1990s and being a frontrunner for EU accession, constitutional democracy in that country is declining, and Euroscepticism is increasing.¹⁰⁵⁰ Since the adoption of the Fundamental Law of Hungary in 2011, the country has been criticised. Many European institutions, including human rights organisations, have questioned whether certain principles and rules in the new fundamental law comply with European law or meet EU democratic standards.¹⁰⁵¹ Hungary's non-compliance challenges relate to its failures to implement secondary EU legislation and rule of law problems violating the fundamental values of EU law.¹⁰⁵²

¹⁰⁴⁶ Stephen Mathias & Stadler Trengove 'Membership and Representation' in Jacob Katz Cogan; Ian Hurd and Ian Johnstone *The Oxford Handbook of International Organizations* at 966.

¹⁰⁴⁷ Christian Tomuschat 'Democracy and the Rule of Law' in Dinah Shelton *The Oxford Handbook of International Human Rights Law* (2013) Oxford University Press at 2.

¹⁰⁴⁸ See Article 7 of the TEU.

¹⁰⁴⁹ See Konrad Lachmayer 'Questioning the Basic Values—Austria and Jörg Haider' in András Jakab and Dimitry Kochenov *The Enforcement of EU law and values-ensuring Member States' compliance* (2017). See also Zoltán Sente 'Challenging the Basic Values—Problems in the Rule of Law in Hungary and the Failure of the EU to Tackle Them' in András Jakab and Dimitry Kochenov *The Enforcement of EU law and values-ensuring Member States' compliance* (2017). See also Adam Łazowski 'Inside but Out? The UK and the EU' in András Jakab and Dimitry Kochenov *The Enforcement of EU law and values-ensuring Member States' compliance* (2017).

¹⁰⁵⁰ See Zoltán Sente op cit note 1008 at 456.

¹⁰⁵¹ Ibid at 457.

¹⁰⁵² Ibid.

Similarly, since the Law and Justice Party of Poland won the election in 2015, it has made several constitutional and legislative reforms.¹⁰⁵³ These reforms violate principles such as democracy, the rule of law and the separation of powers.¹⁰⁵⁴ The Law and Justice Party has ignored the rule of law.¹⁰⁵⁵ On the other hand, the Commission and other European institutions viewed this amendment as posing serious risks to the rule of law. They have engaged Poland on these issues using different mechanisms to relay their concerns.¹⁰⁵⁶ The authoritarian tendencies in Poland are viewed as a serious threat to the integrity of the EU since they undermine the legal foundations of European integration, threatening the proper functioning of the EU legal system.¹⁰⁵⁷

The situation in Poland and Hungary has shown that the mechanisms provided for in the treaties are inadequate to effectively address some risks or infringements of the rule of law that may occur in the member states.¹⁰⁵⁸ Consequently, EU institutions have failed to resolve many violations of the rule of law and human rights principles.¹⁰⁵⁹ It is clear that a refusal to respect the rule of law, a refusal to comply with ECJ judgments and an attempt to question the legitimacy of EU institutions and their power to act against recalcitrant states must be viewed as questioning a country's participation in the process of European integration.¹⁰⁶⁰ Accordingly, the homogeneity of values is a prerequisite for the legitimacy of the EU's cohesion and effectiveness.¹⁰⁶¹ A systemic violation of the rule of law may undermine the effectiveness of EU law within the domestic legal system of EU member states.¹⁰⁶² EU law is

¹⁰⁵³ Iwona Wróblewska 'The Rule of Law The Polish perspective' in Tímea Drinóczi and Agnieszka Bień-Kacała *Rule of Law, Common Values, and Illiberal Constitutionalism Poland and Hungary within the European Union* (2021) at 137–148.

¹⁰⁵⁴ *Ibid* at 137.

¹⁰⁵⁵ *Ibid*.

¹⁰⁵⁶ *Ibid* 143–148.

¹⁰⁵⁷ Sylwia Majkowska-Szulc 'Safeguarding the European Union's core values The EU Rule of Law mission in Poland' in Tímea Drinóczi and Agnieszka Bień-Kacała *Rule of Law, Common Values, and Illiberal Constitutionalism Poland and Hungary within the European Union* (2021) at 190.

¹⁰⁵⁸ Agnieszka Grzelak 'Are the EU Member States still masters of the Treaties? The European Rule of Law concept as a means of limiting national authorities' in Tímea Drinóczi and Agnieszka Bień-Kacała *Rule of Law, Common Values, and Illiberal Constitutionalism Poland and Hungary within the European Union* Routledge (2021) at 213.

¹⁰⁵⁹ Cited in Zoltán Szente op cit note 1008 at 470.

¹⁰⁶⁰ Cited in Agnieszka Grzelak op cit note 1017 at 214.

¹⁰⁶¹ *Ibid*.

¹⁰⁶² *Ibid*.

significantly different from that of general legal regimes.¹⁰⁶³ Although the EU was established as an international organisation under public international law, it has since evolved into a regime *sui generis* commonly referred to as ‘supranational’.¹⁰⁶⁴ The next section discusses the general structure of the ECJ, including its jurisdiction.

4.4 Court of Justice of the European Union (CJEU)

It should be noted that the ECJ and the Court of Justice of the European Union (CJEU) are used interchangeably and refer to the same court. The ECJ was established in terms of Article 13(1) of the TEU.¹⁰⁶⁵ It has significantly contributed to the success of European integration, particularly in establishing an effective internal market and the development of EU law.¹⁰⁶⁶ The CJEU has been an essential tool for integration during times of serious crises and has facilitated the development of the process known as ‘integration through law’, which assisted the EU in becoming an effective supranational organisation without becoming a federal state.¹⁰⁶⁷

The CJEU was established to ensure that EU law is interpreted correctly and consistently in all member states and that all member states respect their treaty commitments.¹⁰⁶⁸ The court’s jurisdiction under Article 263 of the TFEU includes actions, appeals, reviews, and acts.¹⁰⁶⁹

Furthermore, the ECJ has jurisdiction to hear disputes involving its interstate institutions.¹⁰⁷⁰ These cases are generally those for action that challenge mainly Union institutions or the member states, including infringement proceedings, sanctioning and failure to act under Articles 258, 260 and 265 of the TFEU respectively.¹⁰⁷¹ Moreover, the ECJ is

¹⁰⁶³ Holger P Hestermeyer ‘The implementation of European Union Law in Germany’ in Erika de Wet, Holger Hestermeyer and Rüdiger Wolfrum *The implementation of international law in Germany and South Africa* (2015) at 444.

¹⁰⁶⁴ *Ibid.*

¹⁰⁶⁵ Article 13(1) TEU.

¹⁰⁶⁶ Armin Cuyvers ‘The Institutional Framework of the EU’ in Emmanuel Ugirashebuja, John Eudes Ruhangisa, Tom Ottervanger, Armin Cuyvers *East African Community Law Institutional Substantive and Comparative EU Aspects* (2017) at 97.

¹⁰⁶⁷ *Ibid.*

¹⁰⁶⁸ Article 19(1) on the TEU.

¹⁰⁶⁹ Article 263 of the TFEU.

¹⁰⁷⁰ Article 265 of the TFEU.

¹⁰⁷¹ Michal Bobek ‘The Court of Justice of the European Union’ in Anthony Arnall and Damian Chalmers *The Oxford Handbook of European Union Law* (2015) at 158.

competent to review the legality of acts of EU institutions.¹⁰⁷² It is also empowered to rule on references for a preliminary ruling submitted according to Article 267 of the TFEU by national courts that need guidance on the correct interpretation or assessment of the validity of an EU act.¹⁰⁷³ Typically, a decision issued by the ECJ under the preliminary reference procedure becomes part of the national proceedings and will be applied by the referring court and national courts of member states.¹⁰⁷⁴ However, for the preliminary reference procedure to be effective, it must be founded on cooperation between the ECJ and national courts since the decision to refer for preliminary ruling depends on the national courts. For this reason, individuals may find it challenging to approach the ECJ without the national court referring the preliminary ruling to the ECJ.

The question of national sovereignty or judicial independence on the part of national courts, and the lack of rule of law are relevant issues to the preliminary reference procedure. Moreover, where there is a lack of rule of law and judicial independence, it is highly possible that the national court would not invoke the preliminary reference procedure. For instance, while Polish courts have often used the preliminary reference procedure, in other countries, it has been difficult to use this procedure due to the challenges of the rule of law.¹⁰⁷⁵ The main problem is establishing the level to which domestic courts have jurisdiction to refer questions for a preliminary ruling to the ECJ.¹⁰⁷⁶ The ruling executive in countries such as Poland, Hungary, or Romania has proclaimed that domestic courts are prohibited from referring questions for a preliminary ruling related to important aspects of the functioning of the justice system that exclusively that fall within the scope and powers of the member states.¹⁰⁷⁷ The Polish Prosecutor General has challenged the constitutionality of Article 267 of the TFEU.¹⁰⁷⁸ The ECJ relies on the support of the national courts to effectively execute its mandate.

¹⁰⁷² Article 19(3)(b) on the TEU.

¹⁰⁷³ *Ibid.*

¹⁰⁷⁴ Michal Bobek op cit note 1030 at 158.

¹⁰⁷⁵ Cited in Agnieszka Grzelak op cit note 1017 at 210.

¹⁰⁷⁶ *Ibid.*

¹⁰⁷⁷ *Ibid.*

¹⁰⁷⁸ *Ibid* at 210-211.

The ECJ consists of a general court and a CJEU.¹⁰⁷⁹ The ECJ comprises judges, Advocates-General, legal secretaries, and other staff.¹⁰⁸⁰ In terms of Article 16(1) of the statute of the ECJ, ‘the Court shall establish chambers consisting of three and five judges’.¹⁰⁸¹ The statute provides that the judges shall elect the presidents of the chambers between themselves.¹⁰⁸² The presidents of the chambers of five judges shall be elected for three years.¹⁰⁸³ The Grand Chamber consists of fifteen judges.¹⁰⁸⁴ The Court shall sit as a full Court in matters concerning the provisions of Articles 228(2), 245(2), 247, or 286(6) of the TFEU.¹⁰⁸⁵ Decisions of chambers that consist of three or five Judges shall be valid only if a minimum of three judges issue them.¹⁰⁸⁶ The Court of Justice is assisted by eleven Advocates-General, who must demonstrate complete impartiality and independence.¹⁰⁸⁷ The Advocates-General office provides legal opinion and support to the court.¹⁰⁸⁸ A panel of seven members is responsible for selecting candidate judges and Advocate-General in terms of their suitability to perform the duties of the CJEU.¹⁰⁸⁹

The following section examines the nature of EU law, how the ECJ has interpreted and developed EU community law and advanced the EU integration agenda. It identifies ways in which the ECJ has developed EU community law and promoted the EU integration agenda.

4.5 *Legal status of EU law*

4.5.1 Direct effect of EU law

Traditionally, direct effect means creating rights for individuals that the national courts must protect.¹⁰⁹⁰ Individuals can rely on EU law norms before domestic court cases as a source of

¹⁰⁷⁹ Article 251 of the TFEU.

¹⁰⁸⁰ Cited in Michal Bobek op cit note 1030 at 162.

¹⁰⁸¹ See Article 16(1) of the Statute of the CJEU.

¹⁰⁸² Ibid.

¹⁰⁸³ Ibid.

¹⁰⁸⁴ Article 16(2) of the Statute of the CJEU.

¹⁰⁸⁵ Article 16(4) of the Statute of the CJEU.

¹⁰⁸⁶ Article 17(2) of the Statute of the CJEU.

¹⁰⁸⁷ Article 252 TFEU.

¹⁰⁸⁸ Ibid.

¹⁰⁸⁹ Article 255 of the TFEU.

¹⁰⁹⁰ Bruno de Witte ‘Direct effect, Primacy, and the nature of the legal order’ in Paul Craig and Gráinne de Búrca *The Evolution of EU Law* 3 ed (2021) at 193.

new rights and as a protection against conflicting national norms.¹⁰⁹¹ Administrative authorities must enforce EU law norms and set aside conflicting national legislation.¹⁰⁹² In terms of Article 4(3) of the TEU, the member states, in line with the principle of cooperation, must assist each other in implementing treaty commitments.¹⁰⁹³ The TFEU provides that regulations are directly applicable in all member states without any need for implementing legislation.¹⁰⁹⁴ Direct effect means that individuals and companies can rely on EU law before all national courts and public bodies, just as they can on national law.¹⁰⁹⁵

Principles such as direct applicability, direct effect and supremacy of EU laws in the member states were developed in the case law of the ECJ through its jurisdiction to give preliminary rulings under Article 267 of the TFEU.¹⁰⁹⁶ For instance, in *Van Gend en Loos v Nederlandse Administratie der Belastingen*, the ECJ developed the principle of direct effect and ruled that European community law creates rights and obligations for the member but also for their nationals, irrespective of the domestic legislation of these member states.¹⁰⁹⁷ In addition, it ruled that the provisions of the treaty must be interpreted as producing ‘direct effects’ and creating individual rights that the national courts of member states must protect.¹⁰⁹⁸

All members of the EU are obliged to adopt the EU law and the courts must provide platforms for individuals who wish to enforce their rights.¹⁰⁹⁹ Indeed, the direct effect principle allows individuals to invoke EU law before national and European courts. As noted above, in terms of the principle of direct effect, EU law directly becomes the source of law, and there is no need to implement legislation or translate EU law into the domestic legal system. The CJEU took an important step towards setting apart the EU law from ordinary public international law and declaring that EU law would become a living reality rather than just another interstate

¹⁰⁹¹ Ibid at 194.

¹⁰⁹² Ibid at 196.

¹⁰⁹³ Article 4(3) of the TEU.

¹⁰⁹⁴ Article 288 of the TFEU.

¹⁰⁹⁵ Armin Cuyvers The Scope, Nature and Effect of EU Law in Emmanuel Ugirashebuja, John Eudes Ruhangisa, Tom Ottervanger, Armin Cuyvers *East African Community Law Institutional, Substantive and Comparative EU Aspects* (2017) Brill at 165.

¹⁰⁹⁶ Holger P Hestermeyer op cit note 1022 at 449.

¹⁰⁹⁷ Case 26/62, *NV Algemene Transport- en Expeditie Onderneming van Gend & Loos v. Netherlands Inland Revenue Administration* (1963) E.C.R. 1.

¹⁰⁹⁸ Ibid.

¹⁰⁹⁹ Michele E. Olivier ‘The role of African Union law in integrating Africa’ (2015) 22 (4) *Southern Africa Journal of International Affairs* 513–533. doi: 10.1080/10220461.2015.1119718 at 513.

cooperation.¹¹⁰⁰ The ECJ adopted an innovative approach and has ruled that the EU law governs when a provision of EU law has direct effect.¹¹⁰¹ In terms of the *Van Gend en Loos* judgment, member states can no longer decide whether to implement a treaty provision.¹¹⁰²

Furthermore, the ECJ ruled that the community establishes a new legal order of international law in which states have agreed to limit their sovereign rights to their benefit and this new legal order includes not only the member states but also their subjects.¹¹⁰³ Accordingly, the treaty conferred rights on the individuals since Article 12 EEC treaty contained clear and unconditional prohibition, which was accepted without any reservations. Therefore, its implementation did not require any legislative measures by the states.¹¹⁰⁴ This decision was informed by the premise that domestic courts collaborating with the ECJ could resist political pressures and protect individuals while implementing the treaty.¹¹⁰⁵

The ECJ was aware that its interaction with domestic courts would enable it to offer significant support to citizens of weaker states against many predatory policies adopted by the more powerful states in the organisation.¹¹⁰⁶ This is an important reason to support and embrace this type of judicial activism as a way to ensure that democracy is informed by the participation of individuals in public decision-making that affects them.¹¹⁰⁷ This decision shows the promise of greater interaction and coordination between domestic courts and ICs in preventing democratic failures at both the domestic and international stages.¹¹⁰⁸ Consequently, the ECJ decision in *Van Gend en Loos* revolutionised European law.¹¹⁰⁹ The ECJ, supported by the legal service of the EC, took an important step in addressing the problems of the lack of uniform application of European law by domestic courts of EU member states and the lack of primacy

¹¹⁰⁰ Cited in Armin Cuyvers op cit note 1054 at 167.

¹¹⁰¹ Cited in Holger P Hestermeyer op cit note 1022 at 450–451.

¹¹⁰² Ibid at 451.

¹¹⁰³ Ibid.

¹¹⁰⁴ Ibid.

¹¹⁰⁵ Eyal Benvenisti and George W. Downs 'The premises, assumptions, and implications of *Van Gend en Loos*: viewed from the perspectives of democracy and legitimacy of international institutions' (2014) 25 (1) *The European Journal of International Law* at 85.

¹¹⁰⁶ Ibid.

¹¹⁰⁷ Ibid.

¹¹⁰⁸ Ibid.

¹¹⁰⁹ Morten Rasmussen 'Revolutionizing European Law: A History of the *Van Gend en Loos* Judgment' (Abstract only) (2014) 25 (1) *The European Journal of International Law* doi:10.1093/ejil/chu023.

granted to international law in many EU member states.¹¹¹⁰ In so doing, the ECJ began to move towards establishing an alternative enforcement system.¹¹¹¹

The direct effect of EU law was reiterated in the case of *Jean Reyners v Belgian State*¹¹¹² where the ECJ ruled that a treaty provision requiring adoption by the community of additional measures was directly effective at the end of the transitional period.¹¹¹³ In *Franz Grad v Finanzamt Traunstein*¹¹¹⁴ the claimant was allowed to rely on an act of community secondary law.¹¹¹⁵ As a result, this allowed EU directives to be accepted as creating a ‘direct effect’ within the EU member states’ national legal systems.¹¹¹⁶ The next section discusses the principle of supremacy as developed by the ECJ.

4.5.2 The supremacy of EU law

The principle of supremacy refers to the hierarchical relationship between EU law and national law and complements the principle of direct effect.¹¹¹⁷ It places duties on different government authorities.¹¹¹⁸ Concerning the domestic legislator, it places a duty not to adopt laws inconsistent with binding rules of EU law and to modify the laws that prove to be inconsistent with EU law obligations.¹¹¹⁹ For domestic courts, the primacy means that when a directly effective EU rule applies in a particular case, any national norm that is inconsistent with the EU norm must be set aside.¹¹²⁰ The principle of primacy of EU law obligates the domestic courts to set aside the application of any conflicting national provisions, regardless of a judgment of the domestic Constitutional Court.¹¹²¹ Where a national rule is set aside for its inconsistency with EU law, it will be void only to the extent of this inconsistency.¹¹²² In relation

¹¹¹⁰ Ibid.

¹¹¹¹ Ibid.

¹¹¹² Case 2/74 *Jean Reyners v Belgian State* [1974] ECR 631.

¹¹¹³ Dorota Leczykiewicz ‘Effectiveness of EU law before national courts: direct effect, effective judicial protection, and state liability’ in Anthony Arnall and Damian Chalmers *The Oxford Handbook of European Union Law* (2015) at 214.

¹¹¹⁴ Case 9/70 *Franz Grad v Finanzamt Traunstein* [1970] ECR 825.

¹¹¹⁵ Cited in Dorota Leczykiewicz op cit note 1072 at 215.

¹¹¹⁶ Ibid.

¹¹¹⁷ Cited in Armin Cuyvers op cit note 1054 at 174.

¹¹¹⁸ Cited in Bruno de Witte op cit note 1049 at 205.

¹¹¹⁹ Ibid.

¹¹²⁰ Ibid.

¹¹²¹ Ibid.

¹¹²² Ibid at 206.

to secondary EU law, the precondition for the application of primacy is that the acts should be validly adopted as a matter of EU law.¹¹²³

In the case of *Flaminio Costa v. ENEL* the ECJ held:

by contrast with ordinary international treaties, the EEC Treaty has created its own legal system which, on the entry into force of the Treaty, became an integral part of the legal systems of the Member States and which their Courts are bound to apply.¹¹²⁴

According to the ECJ, the EU legal system constitutes a new legal order that is part of the domestic legal system of the EU member states. The national court of EU member states is obligated to apply it. This new legal system is independent of international law, including EU member states' national constitutions. The autonomy of the EU law ensures that it is directly linked to domestic law and that it is applied uniformly throughout the EU. As shown above, this new legal order not only views the EU member states and their governments as the main actors, but also allows individuals to invoke this new legal order before domestic and European courts. The court ruled further and observed the following:

By creating a Community of unlimited duration ... the Member States have limited their sovereign rights ... and have thus created a body of law which binds both their nationals and themselves. ... It follows from all these observations that the law stemming from the Treaty, an independent source of law, could not, because of its special and original nature, be overridden by domestic legal provisions, however, framed, without being deprived of its character as community law and without the legal basis of the community itself being called into question.¹¹²⁵

According to the ECJ, member states have transferred legislative sovereignty to the EU by joining the EU. By transferring their sovereignty to the EU, member states have created a new legal system that binds them, their citizens and their domestic courts. Therefore, EU law takes precedence in cases where there is conflict. Consequently, the sovereign power is the EU and in cases of any conflict between EU law and those of member states, the former takes precedence.

Further, the primacy of EU law was confirmed in the case of *Internationale Handelsgesellschaft mbH v. Einfuhr- und Vorratsstelle für Getreide und Futtermittel*, where the ECJ held that the status of EU law and its effects with the domestic systems of EU member

¹¹²³ Ibid at 207.

¹¹²⁴ Case C 6/64, *Flaminio Costa v. ENEL* (1964) E.C.R. 585 at 593–594.

¹¹²⁵ Ibid.

states could not be invalidated by arguments that it conflicts with either fundamental rights created by the Constitution of that state or the principles of a national constitutional structure.¹¹²⁶ In the *Amministrazione delle finanze dello Stato v. Simmenthal (II)* ruling, the ECJ ruled that EU community law requires national courts to interpret national laws in line with EU law.¹¹²⁷ The ECJ therefore confirms the independence of the EU legal order from that of its member states. As a result, EU law cannot be undermined by national law.¹¹²⁸ Also, the ECJ places importance on the principle of *pacta sunt servanda*.¹¹²⁹ According to the ECJ, member states accepted EU law based on reciprocity, which means that each member state promised other member states it would respect all its obligations under EU law.¹¹³⁰

The decisions of the ECJ discussed above introduced principles that had far-reaching impacts on the implementation of EU law and limited the EU member states' legislative powers. In particular, the *Van Gend en Loos* decision introduced the principles of direct effect, which made it possible for citizens of EU member states to invoke EU law directly before the ECJ and national courts of EU member states, while the *Costa v. ENEL* decision introduced the principle of supremacy which made it difficult for EU member states to nullify EU legislation through domestic legislation. The ECJ judgment in *Costa v. ENEL* ensured that the homogeneity of the EU is preserved since EU law would be undermined, and questions would be raised about the EU legal system if member states could willingly override EU law and ECJ decisions through domestic legal systems. The EU would exist, at least on paper, if its legal order was to be overridden by domestic laws. The homogeneity of EU law would no longer be possible, making it difficult for the EU to achieve its stated objectives since the application of EU law would depend on the discretion of EU member states. This would negatively affect the effectiveness and proper functioning of the EU. As stated, the ECJ ruling had far-reaching implications for the EU member states and allowed EU citizens to participate in the EU integration project. The ECJ successfully executed its mandate by adopting innovative interpretations to ensure that the EU member states observe the EU Treaty. While positivist

¹¹²⁶ Case 11/70, *Internationale Handelsgesellschaft mbH v. Einfuhr- und Vorratsstelle für Getreide und Futtermittel* (1970) E.C.R. 1125, 3.

¹¹²⁷ Case 106/77, Judgment of Mar. 9, 1978, *Amministrazione delle finanze dello Stato v. Simmenthal* (1978) E.C.R. 629, 21–22.

¹¹²⁸ Cited in Armin Cuyvers op cit note 1054 at 177.

¹¹²⁹ Ibid.

¹¹³⁰ Ibid.

scholars would view this as judicial activism, the researcher supports the ECJ decisions as they were necessary to preserve the prestige of the EU legal system.

Despite EU legal actors having recognised EU law's supremacy over EU member states' national laws, primacy remains sensitive and contested.¹¹³¹ EU member states have yet to embrace the primacy of EU law fully.¹¹³² The ECJ can be criticised for its judicial activism and for extending EU competencies beyond those granted by the member states.¹¹³³ Consequently, this has caused discontent within the EU. The decision by the UK government to leave the EU was partly informed by the need to limit the influence of EU law within the domestic legal system of the UK.¹¹³⁴ The attitude of the UK government towards EU law and the ECJ was expected since, from the inception of its membership, the UK government did not fully accept the EU law principles of primacy and direct effect.¹¹³⁵ Brexit offers a unique opportunity for the UK legal system to disassociate itself from EU legal principles that have created tectonic changes to its judicial system.¹¹³⁶ It was expected that the EU legal principles of supremacy and direct effect would be at odds with a legal system that is based on parliamentary sovereignty.¹¹³⁷ Consequently, it is not surprising that the UK government decided to limit or remove the influence of EU law from its domestic legal system.¹¹³⁸ The following section examines how the domestic courts of the EU have interpreted EU law and ECJ jurisprudence. It also reflects on the growing scepticism towards the EU and ECJ.

4.6 *Interpretation of EU law by domestic courts*

An important aspect of applying the principles of primacy and direct effect is the attitude of domestic courts and ruling powers.¹¹³⁹ It is insufficient for the ECJ to declare that EU legal rules should have a direct effect and should trump domestic laws.¹¹⁴⁰ The Federal

¹¹³¹ Monica Claes 'The Primacy of EU Law In European and National Law' in Anthony Arnall and Damian Chalmers *The Oxford Handbook of European Union Law* (2015) at 178.

¹¹³² *Ibid.*

¹¹³³ See discussion in section 4.6.

¹¹³⁴ Cited in Nikos Skoutaris op cit note 181 at 93.

¹¹³⁵ *Ibid.*

¹¹³⁶ *Ibid.*

¹¹³⁷ *Ibid* at 95.

¹¹³⁸ *Ibid* at 96.

¹¹³⁹ Cited in Bruno de Witte op cit note 1049 at 211.

¹¹⁴⁰ *Ibid.*

Constitutional Court of Germany's initial case law relating to the relationship between EU community law and German national law relied on the ECJ's jurisprudence confirming that community law constituted an autonomous legal order.¹¹⁴¹ This court has accepted the supremacy of community law over national law, but in the form of 'priority in application' (Anwendungsvorrang) and not 'priority in validity' (Geltungsvorrang).¹¹⁴²

In relation to Belgium, the Belgian courts have generally accepted the jurisprudence of the ECJ, declaring the principle of the direct applicability of secondary European community law despite the need for more clarity as to whether unilateral acts of international organisations, in general, must be accepted and adopted by Parliament.¹¹⁴³ It has been the general practice of Belgian courts to accept their jurisdiction to apply and interpret international treaties and to decide that they confer on individuals' rights and obligations.¹¹⁴⁴ Furthermore, the Belgian legal system is consistent with that of the European legal order in that the domestic courts of Belgium accept the supreme jurisdiction of the ECJ to rule on the direct effect of EU law in the domestic legal system, despite these courts themselves regularly directly applying EU law independently without any reliance on the ECJ.¹¹⁴⁵ Therefore, the Belgian courts have supported the direct applicability of directives in cases involving state and private parties in accordance with the ECJ's jurisprudence with few exceptions.¹¹⁴⁶

In *Von Colson and Elisabeth Kamann v Land Nordrhein-Westfalen*,¹¹⁴⁷ the court held that national courts had a duty to 'effectively' transpose a directive when national legislators failed to enact provisions that achieved the objectives of imposing an effective sanction.¹¹⁴⁸ This obligation became known as the 'doctrine of consistent interpretation' or the 'doctrine of indirect effect', merely because it created another possibility for EU provisions to generate

¹¹⁴¹ Juliane Kokott 'Report on Germany' in Anne-Marie Slaughter, Alec Stone Sweet and J. H. H. Weiler *The European Court and National Courts—Doctrine and Jurisprudence Legal Change in Its Social Context* (1997) Hart Publishing Oxford at 83.

¹¹⁴² *Ibid.*

¹¹⁴³ Hervé Bribosia 'Report on Belgium' in Anne-Marie Slaughter, Alec Stone Sweet and J H H Weiler *The European Court and National Courts—Doctrine and Jurisprudence Legal Change in Its Social Context* (1997) Hart Publishing Oxford at 6.

¹¹⁴⁴ *Ibid.*

¹¹⁴⁵ *Ibid* at 10.

¹¹⁴⁶ *Ibid.*

¹¹⁴⁷ Case 14/83 *Sabine von Colson and Elisabeth Kamann v Land Nordrhein-Westfalen* [1984] ECR 1891.

¹¹⁴⁸ See Case 14/83.

some effect before national courts.¹¹⁴⁹ Accordingly, the doctrine of consistent interpretation enabled insufficiently precise and conditional provisions of a directive to produce some effects in national law.¹¹⁵⁰ In *Von Colson*, the court acknowledged that domestic courts have an important role in ensuring that states comply with their community obligations and called on the German courts to complement the domestic legislation by interpreting it consistently with the EU directive. The court recognised that despite the directive giving discretion to member states to decide on the methods of its implementation, courts should ensure that they interpret the legislation consistent with the directive by ensuring it provides adequate remedies.

In *Solange I*, the German Constitutional Court agreed that community law, as stated by the ECJ, is not a national legal system nor international law but constitutes an independent legal system emanating from an independent legal source, and this law creates a sui generis community in the process of advancing integration.¹¹⁵¹ The court ruled as follows:

It follows from this that, in principle, the two legal spheres stand independent of and side by side one another in their validity, and that, in particular, the competent Community organs, including the European Court of Justice, have to rule on the binding force, construction and observance of Community Law, and the competent national organs on the binding force, construction and observance of the constitutional law of the Federal Republic of Germany.¹¹⁵²

The court qualified the direct effect of community law and observed that it is not enough to suggest the supremacy of community law over national constitutional law, ruling that community law is not permitted to prevail over cogent (zwingendes) constitutional law under the basic law.¹¹⁵³ The court ruled that the latter must prevail in a conflict between community law and basic law.¹¹⁵⁴ Therefore, in cases of a conflict between domestic law and community law, the Federal Constitutional Court qualifies and limits the supremacy of community law over domestic law.¹¹⁵⁵ In such cases, EU laws are not binding on Germany.¹¹⁵⁶ Accordingly, the Federal Constitutional Court no longer considers EU law an autonomous legal system.¹¹⁵⁷

¹¹⁴⁹ Cited in Dorota Leczykiewicz op cit note 1072 at 219.

¹¹⁵⁰ Ibid.

¹¹⁵¹ BVerfGE 37, 271 2 BvL 52/71 Solange I-Beschluß 29 May 1974 para 2.

¹¹⁵² Para 2.

¹¹⁵³ Ibid.

¹¹⁵⁴ Ibid.

¹¹⁵⁵ Cited in Juliane Kokott op cit note 1100 at 83.

¹¹⁵⁶ Ibid at 84.

¹¹⁵⁷ Ibid.

In *Fromagerie Franco-Suisse Le Ski v État belge*, the Court of Belgium has held that in the case of a conflict between domestic law and a norm of international law or community law, the rule created in terms of treaty law will prevail over domestic law.¹¹⁵⁸ The court confirmed that community law constitutes a new legal system in which the member states have limited their sovereign powers in identified areas favouring community law.¹¹⁵⁹ The above decisions demonstrate that the domestic courts of the EU generally adhere to the principles of direct effect and supremacy of EU law over domestic legislation and other similar acts. However, the constitutional courts of EU member states have yet to fully embrace the idea of the supremacy of EU law over national constitutions. Consequently, national constitutions do not allow national judges to accept EU law as supreme law over the constitution.

It is generally agreed that the success of the ECJ in relation to the existing domestic conditions of the EU member states — such as the existence of independent domestic institutions committed to the rule of law, including the legal and political culture of the EU member states — contributed to its success.¹¹⁶⁰ Notably, some suggest that the European courts exercised jurisdiction over a homogeneous group of western European states in which democratic governance and the rule of law were already well established.¹¹⁶¹ Therefore, many states in the Council of Europe shared a specific commitment to implement the decisions of the European courts in their domestic systems.¹¹⁶² Others contend that the ECJ's success is due to the political background and legal culture of EU member states and the general tendency towards the judicialisation of politics in Europe.¹¹⁶³

However, since its enlargement to eastern Europe, the ECJ and the entire EU system is facing challenges relating to the rule of law and the decline of democracy across Europe.¹¹⁶⁴ The ECJ and European institutions lack the popular support that they enjoyed some decades

¹¹⁵⁸ *Fromagerie Franco-Suisse Le Ski v. État belge*, para 9.

¹¹⁵⁹ *Ibid.*

¹¹⁶⁰ See J.H.H. Weiler 'The Transformation of Europe' 100 *The Yale Law Journal* at 2410-2412; James L. Cavallaro & Stephanie Erin Brewer 'Reevaluating regional human rights litigation in the twenty-first century: The case of the Inter-American Court' (2008) 102 *American Journal of International Law* 768 at 772; Daniel Kelemen 'The Court of Justice of the European Union Changing authority in the twenty-first century' in Karen J Alter; Laurence R. Helfer and Mikael Rask Madsen *International Court Authority* (2018) at 223-224.

¹¹⁶¹ Cited in James L. Cavallaro & Stephanie Erin Brewer op cit note 1046 at 772.

¹¹⁶² *Ibid.*

¹¹⁶³ Daniel Kelemen op cit note 1119 at 224.

¹¹⁶⁴ See the discussion in section 4.3.

ago.¹¹⁶⁵ Indeed, there is growing Euroscepticism and many countries, such as Poland and Hungary, are questioning the EU values and the ECJ authority.¹¹⁶⁶ Certain EU member states have questioned the competence of EU institutions such as the ECJ to rule on specific policy matters.¹¹⁶⁷ Despite its impressive initial record, the ECJ finds itself restricted and unable to adjust to its changing environment.¹¹⁶⁸ Its failure to provide sufficient reasons or justifications for some of the decisions in its case law threatens to undermine the reputation it developed when it was initially established in the 1960s.¹¹⁶⁹ These days, the ECJ finds itself under greater public scrutiny.¹¹⁷⁰ Lawyers, politicians and judges of the most influential constitutional courts of the EU member states have all openly questioned the court's judgments.¹¹⁷¹ Further, support from member state governments is no longer guaranteed.¹¹⁷² This is mainly because of the intrusion of EU law into sensitive national policy areas previously considered part of member states' retained powers.¹¹⁷³ Many of ECJ recent judgments have caused controversy within the domestic systems of EU member states.¹¹⁷⁴

Legal formalism has lost its strength since the EU was enlarged.¹¹⁷⁵ This is exemplified by the Polish Constitutional Tribunal decision which declared certain TEU provisions to be inconsistent with the Polish Constitution.¹¹⁷⁶ The following section discusses the infringement proceedings of the EU to determine how the EC monitors the implementation of EU law.

4.7 *Infringement proceedings*

Should member states fail to implement EU law or fail to remove obstacles to the implementation of EU law, the EC will institute infringement proceedings against such member states.¹¹⁷⁷ Moreover, a member state which considers that another member state has failed to

¹¹⁶⁵ Cited in Daniel Kelemen op cit note 1119.

¹¹⁶⁶ See the discussion in section 4.3.

¹¹⁶⁷ Cited in Daniel Kelemen op cit note 1119.

¹¹⁶⁸ Anthony Arnall 'The Effect of EU Law' in Dennis Patterson and Anna Södersten *A Companion to European Union Law and International Law* (2016) at 62.

¹¹⁶⁹ *Ibid* at 75.

¹¹⁷⁰ Cited in Loïc Azoulay and Zane Rasnača op cit note 984 at 172.

¹¹⁷¹ *Ibid*.

¹¹⁷² *Ibid*.

¹¹⁷³ *Ibid*.

¹¹⁷⁴ *Ibid*.

¹¹⁷⁵ *Ibid* at 173.

¹¹⁷⁶ See Constitutional Court of Poland Case K 3/21.

¹¹⁷⁷ Article 258 TFEU.

fulfil an obligation under the treaties is also empowered to institute an action before the EC and, where necessary, before the ECJ.¹¹⁷⁸ Since this procedure is unlikely to be utilised due to political considerations, it is almost entirely the EC that initiates the infringement proceedings under Article 258 of the TFEU.¹¹⁷⁹ Despite the clear obligation on the part of the EC to deliver a reasoned opinion in cases of member states failing to comply with EU law, such obligation is discretionary.¹¹⁸⁰ The EC cannot be forced to commence infringement proceedings.¹¹⁸¹ While waiting for the ECJ to hear the case, the EC may withdraw or stop proceedings without any factual or legal grounds or providing any valid reasons.¹¹⁸² In legal terms, no recognised parties other than the member states and the EC are in infringement proceedings. As a result, third parties cannot compel prosecution or obtain information relating to the infringement records or documents since such information is confidential.¹¹⁸³

The EC is dependent on the cooperation of the member states being investigated and on third-party complaints.¹¹⁸⁴ In practice, member states either do not cooperate at all, or else national authorities of the concerned member states in all government sectors cooperate insincerely, which renders the EC's investigation ineffective.¹¹⁸⁵ In *Greece v The EU Commission*, the Greek government adopted a measure that made importing cereal into Greece difficult.¹¹⁸⁶ The EC requested the Greek government to remove the trade barriers created by such measures.¹¹⁸⁷ However, the Greek government refused to remove the measures in question and argued that they were necessary and did not hinder imports because all import applications had been accepted.¹¹⁸⁸ The EC requested that the Greek government provide it with the

¹¹⁷⁸ Article 259 TFEU.

¹¹⁷⁹ Armin Cuyvers 'Judicial Protection under EU Law: Direct Actions' in Emmanuel Ugirashebuja, John Eudes Ruhangisa, Tom Ottervanger, Armin Cuyvers *East African Community Law Institutional, Substantive and Comparative EU Aspects* (2017) at 260.

¹¹⁸⁰ Laurence W Gormley 'Infringement Proceedings' in András Jakab and Dimitry Kochenov *The Enforcement of EU law and values-ensuring member states' compliance* (2017) at 65.

¹¹⁸¹ *Ibid.*

¹¹⁸² Melanie Smith 'The evolution of infringement and sanction procedures of pilots, diversions, collisions, and circling' in Anthony Arnall and Damian Chalmers *The Oxford Handbook of European Union Law* (2015) at 352.

¹¹⁸³ *Ibid* at 353.

¹¹⁸⁴ Brian Jack 'Enforcing Member State Compliance with EU Environmental Law: A Critical Evaluation of the Use of Financial Penalties' *Journal of Environmental Law* at 77. available at <http://jel.oxfordjournals.org/>.

¹¹⁸⁵ *Ibid.*

¹¹⁸⁶ *Greece v Commission* Case 240/86 at 1836.

¹¹⁸⁷ *Ibid.*

¹¹⁸⁸ *Ibid.*

regulations.¹¹⁸⁹ In response, the Greek government refused to do so.¹¹⁹⁰ The EC commenced legal proceedings against Greece in terms of Article 169 of the old EEC Treaty, claiming Greece was in breach of its obligations under Article 5 of the EEC Treaty since it had failed to cooperate and provide the EC with the information requested.¹¹⁹¹ The ECJ held that Greece breached what is now Article 4(3) TEU.¹¹⁹²

There is generally a need for more information about compliance with EU law on the ground.¹¹⁹³ Many European law books focus on the institutional design, the competence of the ECJ instruments of compliance, legal principles, the preliminary ruling procedure, and infringement procedures.¹¹⁹⁴ Several studies show that EU member states have generally complied with EU infringements proceedings.¹¹⁹⁵ The functioning of the EU internal market indicates that EU member states comply with nearly all EU laws in almost all cases.¹¹⁹⁶

Most of the research relating to infringement proceedings has occurred in political science, relying on the data produced by the infringement process.¹¹⁹⁷ However, such studies may be viewed as limited when they rely on statistics obtained from the EC reports.¹¹⁹⁸ Conversely, studies on compliance with international norms and rules are confronted by the methodological challenge of measuring their dependent variable.¹¹⁹⁹ Several scholars have created their assessment measures and collected empirical information in laborious case studies.¹²⁰⁰ In contrast, other researchers have relied on statistical data available from the monitoring bodies of international organisations.¹²⁰¹ Notably, the EU research has used several forms of data published by the EC to measure non-compliance with EU law.¹²⁰² Börzel and Sedelmeier suggest that scholars should exercise caution when using infringement data as an

¹¹⁸⁹ Ibid.

¹¹⁹⁰ Ibid at 1837.

¹¹⁹¹ Ibid at 1841.

¹¹⁹² Ibid at 1852.

¹¹⁹³ Wind, Marlene 'Can Legal and Political Culture Explain the Successes and Failures of European Law Compliance?' in Hans-W Micklitz and Andrea Wechsler *The Transformation of Enforcement: European Economic Law in Global Perspective* (2016) at 70.

¹¹⁹⁴ Ibid.

¹¹⁹⁵ See Tanja A. Börzel *Why Noncompliance The Politics of Law in the European Union* (2021) at 3-4.

¹¹⁹⁶ Ibid.

¹¹⁹⁷ Cited in Melanie Smith op cit note 1141 at 354.

¹¹⁹⁸ Ibid.

¹¹⁹⁹ Tanja A. Börzel op cit note 1154 at 15-16.

¹²⁰⁰ Ibid.

¹²⁰¹ Ibid at 16.

¹²⁰² Ibid.

indicator of compliance.¹²⁰³ Notably, the data only contains cases that the EC is aware of, and detection is difficult for cases concerning the incorrect application of EU law.¹²⁰⁴ The infringement data overlook late, incomplete or incorrect transposition of directives, including the incorrect application of directives, regulations and treaty articles.¹²⁰⁵ Moreover, infringement cases document the EC's view of what is a violation of EU law, and the EC has the discretion to track suspected non-compliance.¹²⁰⁶

These findings are consistent with the findings in previous chapters showing that compliance measures are limited. The next section examines the sanctioning procedure of the EU to assess how the EC and the ECJ deal with violation of EU law.

4.8 *The sanctioning procedure*

Article 260(1) of the TFEU states:

If the Court of Justice of the European Union finds that a member state has failed to fulfil an obligation under the Treaties, the State shall be required to take the necessary measures to comply with the judgment of the Court.¹²⁰⁷

Consequently, the European member states are duty-bound to comply with the judgment of the court, and a failure to comply with the terms of that judgment will constitute a breach of Article 260(1) TFEU. The EC can, in terms of Article 260(2), commence with new enforcement proceedings for violation of the terms of the judgment under Article 260(1).¹²⁰⁸ Should the EC decide to refer any new enforcement proceedings under Article 260(2) to the ECJ, it can make recommendations on a lump sum or penalty payment that should be imposed against recalcitrant EU member states.¹²⁰⁹

The EC generally responsible for monitoring member states' compliance with ECJ judgments imposing a lump sum or penalty payment. However, nothing stops the ECJ from

¹²⁰³ Tanja A. Börzel and Ulrich Sedelmeier 'Larger and more law abiding? The impact of enlargement on compliance in the European Union' in Tanja A. Börzel, Antoaneta Dimitrova and Frank Schimmelfennig *European Union Enlargement and Integration Capacity* (2018).

¹²⁰⁴ *Ibid.*

¹²⁰⁵ *Ibid.*

¹²⁰⁶ *Ibid.*

¹²⁰⁷ See Article 260(1) TFEU.

¹²⁰⁸ Article 260(2) TFEU states.

¹²⁰⁹ *Ibid.*

imposing any appropriate amount under certain circumstances.¹²¹⁰ The ECJ may impose financial sanctions for failing to notify measures transposing a directive within the prescribed period.¹²¹¹ The ECJ can only issue sanctions under Article 260(2) TFEU once a member state fails to comply with a previous judgment stating that it infringes EU law.¹²¹²

In practice, the EC provides detailed reasons for the type of financial sanction adopted. It identifies cases it deems serious violations of EU law that necessitate the imposition of the financial penalty.¹²¹³ In deciding the amount of sanctions to impose, the EC in collaboration with the ECJ, applies three tests: the seriousness of the infringement, the duration of the infringement, and the need to ensure that the penalty is a deterrent to further infringements.¹²¹⁴ The EC also considers other issues, such as private and public interests.¹²¹⁵

4.9 Conclusion

By analysing the foundation of the EU and the functioning of its court system, this chapter established that the ECJ contributed to European integration and managed to have a far-reaching impact, not only because of its supranational character but also because it was established in an environment where there was already a commitment to democracy and the rule of law. An important lesson from the experience of the EU is that regional integration must be based on a system of shared values.¹²¹⁶ The EU is founded on democracy, good governance, and the rule of law.¹²¹⁷ From its inception, admission to the EU was made subject to adherence to the rule of law, and any new member states were required to have a certain level of democracy.¹²¹⁸ Authoritarian governments such as Belarus were denied admission to the

¹²¹⁰ See Article 260(2) and Article 260(3) of the TFEU.

¹²¹¹ *Ibid.*

¹²¹² Pål Wennerås 'Making effective use of Article 260 TFEU' in András Jakab and Dimitry Kochenov *The Enforcement of EU law and values-ensuring member states' compliance* (2017) . at 79.

¹²¹³ Cited in Melanie Smith op cit note 1141 at 369.

¹²¹⁴ *Ibid.*

¹²¹⁵ Cited in Pål Wennerås op cit note 1171 at 89.

¹²¹⁶ See section 4.3.

¹²¹⁷ *Ibid.*

¹²¹⁸ *Ibid.*

EU.¹²¹⁹ These values allowed EU institutions to function properly and ensured that EU member states did not undermine core EU values.

The rule of law ensures that EU member states implement EU law before their domestic legal systems. However, countries like Hungary and Poland have recently challenged EU core values such as democracy and the rule of law, including the primacy of EU law over their national legal systems. Nevertheless, an important lesson from the EU experience for the SADC is that EU core values are more than mere policy statements and are applied by different institutions to achieve the objectives of the EU. A further lesson for the SADC is that regional integration must be founded on a system of shared values. A commitment to democracy and the rule of law is necessary, which entails respect for the independence of the courts if SADC integration is to be a success.

The ECJ was able to develop its jurisprudence because EU member states accepted its authority and surrendered their state sovereignty to the ECJ and EU institutions.¹²²⁰ The domestic courts of the EU, particularly the Constitutional Courts, played a critical role in incorporating ECJ jurisprudence into their domestic legal system and in interpreting domestic laws consistent with EU law.¹²²¹ Another critical lesson for the SADC is that EU institutions were willing to support the EU courts' decisions before the domestic legal system of EU founding member states. Furthermore, the ECJ managed to have a far-reaching impact because of external factors such as the institutional background of the European community and support from constituency partners such as national governments, national courts, and members of the EU legal sector.¹²²² In particular, the principles of direct effect and doctrine of supremacy, as developed by the ECJ, were supported by a system of judicial review.¹²²³ In contrast to the EU, the SADC Tribunal has not been established in an environment with transnational networks and SADC institutions ready to advance SADC community law and promote SADC Tribunal jurisprudence. As shown above, creating such a system would require more readily available funding.

¹²¹⁹ Ibid.

¹²²⁰ See discussion in 4.5.

¹²²¹ See discussion in 4.6.

¹²²² Ibid.

¹²²³ Ibid.

CHAPTER 5: THE EAST AFRICAN COMMUNITY (EAC) INTEGRATION PROCESS: LESSONS FROM THE EAST AFRICAN COURT OF JUSTICE (EACJ)

5.1 Introduction

The preceding chapter discussed the historical and structural features of the ECJ and the EC to show how they have addressed matters concerning state sovereignty and enforcement of ECJ judgments. Factors and conditions were identified which allowed the ECJ to have a much wider impact than that of the SADC Tribunal. The application of EU law by domestic EU courts was examined to explore the level to which the ECJ has influenced domestic courts of EU member states. The chapter also reflected on the waning influence and increasing public scrutiny facing the ECJ, and drew important lessons from the EU experience.

The current chapter provides historical, political, and legal insight into the EAC and identifies factors enabling the EAC's integration process. It critically assesses the legal system of the EAC with a particular focus on the functioning of selected institutions. The institutional system of the EAC is discussed, focusing on the East African Legislative Assembly (EALA) and the EACJ to determine the role and functioning of these two institutions in the EAC integration process. The rationale is to examine how these institutions have managed to advance the integration agenda within the EAC.

This chapter also studies the development of EAC community law and its relationship to the domestic legal systems of EAC partner states to determine its legal status. A substantial part of the chapter concentrates on the EACJ to determine the extent to which its decisions have affected the domestic courts of its EAC partner states, general civil society, and citizens of the EAC. The SADC and EAC are compared because they share a similar history and have the same economic, political, and social development levels. More importantly, similar challenges confront their institutional and legal systems. Furthermore, both the SADC and EAC follow the EU's linear approach to the integration process. Finally, the SADC Tribunal and the EACJ are both confronted by the challenges of limited jurisdiction and compliance with their judgments. The following section provides historical background to the EAC, tracing its origin and the factors which led to the collapse of the first EAC.

5.2 *Historical background of the EAC*

The EAC is a regional intergovernmental organisation aiming to develop policies and programmes that deepen cooperation among partner states in political, economic, social, legal, and judicial affairs for their mutual benefit.¹²²⁴

The East African countries' economic cooperation can be traced to the late nineteenth century, in the early days of colonialism in the region.¹²²⁵ The formal economic and social integration in the East African Region commenced with the construction of the Kenya Uganda Railway 1897–1901, the establishment of the Customs Collection Centre in 1900, the East African Currency Board in 1905, the Postal Union in 1905, the Court of Appeal for Eastern Africa in 1909, and the Customs Union in 1919.¹²²⁶ In 1967, Kenya, Tanzania and Uganda signed the Treaty for the East African Cooperation, establishing the EAC and succeeding the East African Common Services Organisation (EACSO).¹²²⁷ However, in 1977, the old EAC collapsed.¹²²⁸ Its collapse is attributed to several factors including ideological differences, lack of strong political will, and lack of strong participation of the private sector and civil society.¹²²⁹

In November 1999, the EAC was revived with the adoption of the Treaty for the East African Cooperation to re-establish the EAC, signed by the heads of state of Kenya, Uganda and Tanzania.¹²³⁰ Article 2(1) establishes the EAC with a legal capacity within the member states.¹²³¹ Furthermore, Article 138 grants the EAC an international legal personality.¹²³² The principles governing the EAC are people-centred and market-driven cooperation and good governance, and further entail principles of democracy, the rule of law, social justice and the protection of universal human rights.¹²³³ In 2005, the EAC established a customs union; in

¹²²⁴ Article 5(1) of the East African Community Treaty (as amended) (1999/2000).

¹²²⁵ Wanyama Masinde and Christopher Otieno Omolo 'The Road to East African Integration' in Emmanuel Ugirashebuja, John Eudes Ruhangisa, Tom Ottervanger, Armin Cuyvers *East African Community Law Institutional, Substantive and Comparative EU Aspects* (2017) at 14.

¹²²⁶ East African Community Treaty (as amended) (1999/2000 Preamble).

¹²²⁷ Cited in Wanyama Masinde and Christopher Otieno Omolo op cit note 1184 at 15.

¹²²⁸ Ibid.

¹²²⁹ Ibid at 56–66.

¹²³⁰ East African Community Treaty (as amended) (1999/2000).

¹²³¹ Article 2(1) of the EAC Treaty provides that the Contracting Parties establish among themselves an East African Community hereinafter referred to as 'the Community'.

¹²³² Article 138 of the EAC provides that 'the Community shall enjoy international legal personality'.

¹²³³ See Articles 7(1)(a) and 7(2) of the EAC Treaty.

2010 it created a common market and is in the process of establishing a monetary union.¹²³⁴ The main objective of the EAC is to establish a political union.¹²³⁵ The new member states were Burundi and Rwanda, which joined the EAC in 2007, and South Sudan in 2016.¹²³⁶ Most recently, the DRC joined the EAC after signing the Treaty of Accession on 8 April 2022 and depositing the instrument of ratification on the accession of the EAC Treaty on 11 July 2022. Somalia recently became the eighth member of the EAC. The following section discusses specific EAC institutions which are important in monitoring and implementing EAC community laws.

5.3 *East African Court of Justice (EACJ)*

5.3.1 Jurisdiction of the EACJ

The EACJ was established under Article 9(1) of the East African Treaty and became operational on 30 November 2001, after an inauguration ceremony that signified the commencement of operations of the Court of Justice.¹²³⁷

In terms of the EAC Treaty, the Court of Justice is empowered and mandated to ensure adherence to the law in the interpretation and application of the EAC Treaty.¹²³⁸ The court has jurisdiction to adjudicate on all matters under the treaty to determine the legality of any act, regulation, directive, decision, action or matter – including matters referred to the court by the member states or the Secretary General – to hear community staff disputes and matters arising from arbitral proceedings, and provide an advisory opinion on the question of law arising from the provisions of the treaty.¹²³⁹ To avoid any potential conflict between decisions of the EACJ and national courts, Article 34 of the treaty requires national courts to refer questions of interpretation and application of the treaty or questions of the validity of any regulations, directives, decisions or actions of the community to it for preliminary rulings before a domestic court gives a judgment of a ruling in the matter.¹²⁴⁰ It is granted jurisdiction over the

¹²³⁴ Cited in Wanyama Masinde and Christopher Otieno Omolo op cit note 1184 at 13.

¹²³⁵ Article 5(2) of the East African Community Treaty.

¹²³⁶ Richard E Mshomba *Economic integration in Africa: The East African Community in Comparative Perspective* (2017) at 26.

¹²³⁷ *Ibid* at 2.

¹²³⁸ Article 23(1) of the EAC Treaty.

¹²³⁹ See Articles 27, 28, 29, 30, 31 and 32 of the EAC Treaty.

¹²⁴⁰ Article 34 of the EAC Treaty.

interpretation and application of this treaty.¹²⁴¹ The EAC Council of Ministers may conclude a protocol to extend the competence of the court to include other original and appellate jurisdictions, including jurisdiction over human rights matters.¹²⁴² The EACJ cannot decline to hear a dispute merely because it raises human rights issues.¹²⁴³ Consequently, the court's role is always to ascertain whether or not any breach of a treaty provision has occurred.¹²⁴⁴

At the Fifteenth Ordinary Summit of the EAC's heads of state, the EAC partner states decided to extend the EACJ jurisdiction to include trade and investment as well as disputes relating to implementing the Monetary Union Protocol.¹²⁴⁵ It is important to note that a decision to extend human jurisdiction of the EACJ as envisaged under Article 27(1) of the EAC Treaty was halted.¹²⁴⁶ The extension of EACJ jurisdiction to trade and commercial matters was not called for by the general civil society and activists.¹²⁴⁷ Despite extending the EACJ jurisdiction to include trade and investment, such jurisdiction is limited to disputes over investors or investments from the partner states, particularly to services or service providers in which certain rights such as those of the most favoured nation and national treatment are invoked.¹²⁴⁸

Despite the absence of an express human rights jurisdiction, the EACJ has, through its liberal jurisprudence, demonstrated a willingness to consider human rights claims and expand its interpretation. Some scholars have therefore argued that the EACJ has an implied mandate to consider human rights claims.¹²⁴⁹ This argument is supported by several factors, including extensive references to human rights under the EAC Treaty and the fact that the EACJ has adjudicated cases raising human rights questions.¹²⁵⁰

¹²⁴¹ See Article 27(1) of the EAC Treaty.

¹²⁴² *Ibid.*

¹²⁴³ Cited in Ada Ordor 'Advancing the Role of Regional Courts for Regional Integration in Africa: A Study of the East African Court of Justice and the ECOWAS Court of Justice' at 74.

¹²⁴⁴ *Ibid.*

¹²⁴⁵ EAC, Communique of the 16th Ordinary Summit of the East African Community Heads of State, J 9, available at <http://news.eac.int/index.php?option=com-docman&task=doc-download&gid=410&Item id=>.

¹²⁴⁶ *Ibid.*

¹²⁴⁷ A Possi *An Appraisal of the Functioning and Effectiveness of the East African Court of Justice* (2018) 21 *PER / PELJ* available at <http://dx.doi.org/10.17159/1727-3781/2018/v21i0a2311> at 11.

¹²⁴⁸ James Otieno-Odek 'Law of Regional Integration – A Case Study of the East African Community' in Johannes Döveling, Hamudi I. Majamba, Richard Frimpong Oppong, Ulrike Wanitzek (eds) *Harmonisation of Laws in the East African Community: The State of Affairs with Comparative Insights from the European Union and Other Regional Economic Communities* (2018) at 52.

¹²⁴⁹ Cited in Mia Swart op cit note 174 at 440.

¹²⁵⁰ *Ibid* at 441.

In *Katabazi & others v Secretary General of the East African Community & another*, one of the fundamental issues before the court was whether the EACJ had jurisdiction to hear human rights claims.¹²⁵¹ In this case, the applicants filed an application against the Secretary General of the EAC and against the Attorney General of Uganda, claiming they were charged with treason and imprisoned for treason and remained in custody.¹²⁵² However, in 2006, the High Court of Uganda granted bail to fourteen applicants.¹²⁵³ As soon as the High Court issued this judgment, it was immediately surrounded by security agents who interfered with the processing of the bail.¹²⁵⁴ In the end, the applicants were re-arrested and sent back to prison.¹²⁵⁵ In November 2006, the applicant appeared before a military court on charges of unlawful possession of firearms and terrorism.¹²⁵⁶ The Uganda Law Society approached the Constitutional Court of Uganda in order to challenge the interference in the court process by security agents and the constitutional conduct of the prosecutions.¹²⁵⁷ The Constitutional Court declared the interference with court processes unconstitutional.¹²⁵⁸ However, despite this ruling, the applicants were not released from detention.¹²⁵⁹

The applicants approached the EACJ, and the question before the court was whether armed security agents' invasion of the High Court premises, including the re-arrest of the applicants granted bail by the High Court and their continued incarceration constituted an infringement of the EAC Treaty.¹²⁶⁰ Uganda opposed the jurisdiction of the EACJ to deal with human rights matters, arguing that the jurisdiction of the court is dependent on the adoption of the protocol empowering the court with human rights jurisdiction.¹²⁶¹ It argued that without such protocol, the court cannot decide human rights cases and concluded that the court is limited by provisions of Article 27(20) of the EAC Treaty.¹²⁶² The court held that while it did not have jurisdiction over human rights violations per se, it may still consider human rights

¹²⁵¹ (2007) AHRLR 119 (EAC 2007) Ref 1 of 2007, 1 November 2007.

¹²⁵² Reference No. 1 of 2007 Para 1–2.

¹²⁵³ Para 2.

¹²⁵⁴ Para 2.

¹²⁵⁵ Para 3.

¹²⁵⁶ Para 4.

¹²⁵⁷ Para 4.

¹²⁵⁸ Para 5.

¹²⁵⁹ Para 16.

¹²⁶⁰ Para 16.

¹²⁶¹ Para 26.

¹²⁶² Para 26.

violations if they fall under the provisions of Article 27(1) of the EAC Treaty.¹²⁶³ It noted that in terms of Article 8(1)(c), the EAC partner states are obliged to not take any measures likely to jeopardise the achievement of the objectives or implementation of EAC Treaty.¹²⁶⁴ The court further ruled that the intervention by armed security agents to prevent the execution of a lawful court order violated the principle of the rule of law and consequently contravened Article 6(d) of the EAC Treaty.¹²⁶⁵ It held that compliance with court decisions is the cornerstone of the independence of the judiciary, which is one of the principles of the observation of the rule of law.¹²⁶⁶

In the context of the EACJ and the ECOWAS Court of Justice, Ada Ordor notes that the critical role played by these regional courts is shown in their continued use by litigants and the type of judgments these courts issue.¹²⁶⁷ Accordingly, the EACJ has interpreted its legal environment and established its role and relevance.¹²⁶⁸ Consequently, judges who sit before this court are not waiting for all the gaps in the constitutive instruments to be resolved before exercising their powers.¹²⁶⁹ Therefore, judges in these courts understand their role as facilitators of justice and are willing to exercise their powers where there is no reasonable objection.¹²⁷⁰

Despite the lack of express treaty provisions in founding instruments, the increasing demand for the intervention of regional courts in human rights cases indicates what private citizens consider to be the most significant value of the court to them when dealing with powerful states.¹²⁷¹ Indeed, where human rights protection and the rule of law are weak, litigants and civil society groups have relied on the EACJ to protect individual human rights. In this way, the EACJ has filled this gap and granted individuals access to court to file their human rights cases before it. This has allowed East African citizens to expose human rights violations in collaboration with civil society groups and lawyer associations.

¹²⁶³ Paras 33-34 and 39.

¹²⁶⁴ Para 38.

¹²⁶⁵ Para 49 and 54.

¹²⁶⁶ Para 49.

¹²⁶⁷ Cited in Ada Ordor op cit note 80 at 64.

¹²⁶⁸ Ibid.

¹²⁶⁹ Ibid at 68.

¹²⁷⁰ Ibid.

¹²⁷¹ Ibid at 73.

The following discussion examines the composition of EACJ and expose administrative challenges facing the court which could potentially affects its effectiveness.

5.3.2 Composition of the EACJ

The court comprises two divisions: the First Instance Division and the Appellate Division.¹²⁷² The First Instance Division has jurisdiction to hear and determine, at first instance, any matter before the court. An aggrieved party may institute an appeal before the Appellate Division on any points of law, grounds of lack of jurisdiction, or procedural irregularity.¹²⁷³ The decisions of the EACJ ‘have precedence over national court decisions on a similar matter’.¹²⁷⁴ Subject to the rules relating to the review of judgments, decisions of the EACJ are final, binding and conclusive.¹²⁷⁵ Regarding the treaty, national courts are mandated to request the court to give a preliminary ruling on any question of law related to treaty interpretation.¹²⁷⁶

The Summit appoints judges of the court from among persons recommended by the partner states who are of proven integrity, impartiality and independence and who fulfil the conditions required in their own countries for the holding of such high judicial office or who are jurists of recognised competence, in their respective partner states.¹²⁷⁷ The court comprises fifteen judges, of whom not more than a maximum of ten are appointed to the First Instance Division, and a maximum of five to the Appellate Division.¹²⁷⁸ The EAC mandates that the EACJ judges hold office for a non-renewable term of seven years.¹²⁷⁹ A judge is to hold office for the full term during their tenure of employment unless the judge resigns, reaches retirement age (70 years), dies or is removed from office in accordance with the EAC Treaty.¹²⁸⁰

¹²⁷² In terms of Article 23(2) of the EAC Treaty.

¹²⁷³ See Article 23(3) and Article 35A of the EAC Treaty.

¹²⁷⁴ Article 33(2) of the EAC Treaty.

¹²⁷⁵ See Article 35 of the EAC Treaty read with Article 72 of the EACJ Rules of procedure.

¹²⁷⁶ Article 34 of the EAC Treaty.

¹²⁷⁷ Article 24 of the EAC Treaty.

¹²⁷⁸ Ibid.

¹²⁷⁹ Ibid.

¹²⁸⁰ Article 25(2) of the EAC Treaty

It has been suggested that the ideal situation would be if all judges were appointed and finished their terms of employment irrespective of age.¹²⁸¹ This is because when new judges are appointed, a significant amount of time is lost, leading to delays in finalising cases.¹²⁸² Moreover, an issue leading to further delays in cases occurs when judges are on leave.¹²⁸³ The appointment of new judges typically is a protracted process until the Summit makes appointments.¹²⁸⁴ This can be avoided if new judges are appointed six months before the end of the term of sitting judges.¹²⁸⁵ Article 26 of the EAC Treaty deals with removing a judge from office. The judges shall not be removed from office except by the Summit for misconduct or inability to perform the function of his office or due to infirmity of body or mind.¹²⁸⁶ The challenge with the EACJ is the ad hoc manner of its operation, particularly of its sitting and sessions.¹²⁸⁷ Since the judges of the EACJ are not on permanent terms, they continue to serve in their respective national courts or domestic institutions while also sitting on the EAC court bench.¹²⁸⁸ Accordingly, this arrangement delays the hearing and delivery of cases.¹²⁸⁹ The sessions of the EACJ take place once every four months.¹²⁹⁰ For this reason, filing a case up to the hearing can take more than a year, but such a scenario could be avoided if the judges were all permanently based in Arusha, where the court is located.¹²⁹¹

It is submitted that the EAC must formalise the operations and sittings of EACJ judges to improve the quality of its case management and ensure that the court delivers its judgments

¹²⁸¹ Okubo: 'EAC court limping along under difficult conditions' *The East African* 17 May 2022. Available at <https://www.google.com/amp/s/www.theeastafrican.co.ke/tea/news/east-africa/eac-court-limping-along-under-difficult-conditions-3814736%3fview=htmlamp>.

¹²⁸² *Ibid.*

¹²⁸³ *Ibid.*

¹²⁸⁴ *Ibid.*

¹²⁸⁵ *Ibid.*

¹²⁸⁶ Article 26 of the EAC Treaty.

¹²⁸⁷ Ada Ordor op cit note 80 at 76; See also Odek James Otieno Judicial Enforcement and Implementation of EAC Law in Emmanuel Ugirashebuja, John Eudes Ruhangisa, Tom Ottervanger, Armin Cuyvers *East African Community Law Institutional, Substantive and Comparative EU Aspects* (2017) Brill at 485; See Petro Protas and Juliana Masabo 'Tanzania Citizens' Sovereignty, National Constitution, and the EAC Treaty Nexus' in Korwa Gombe Adar, Kasaija Phillip Apuuli, Agnes Lucy Lando, PLO-Lumumba, and Juliana Masabo *Popular Participation in the Integration of the East African Community Eastafricanity and Eastafricanization* (2020) at 212.

¹²⁸⁸ *Ibid.*

¹²⁸⁹ *Ibid.*

¹²⁹⁰ Cited in Okubo 'EAC court limping along under difficult conditions' *The East African* 17 May 2022. Available at <https://www.google.com/amp/s/www.theeastafrican.co.ke/tea/news/east-africa/eac-court-limping-along-under-difficult-conditions-3814736%3fview=htmlamp>.

¹²⁹¹ *Ibid.*

efficiently and expeditiously. A lack of funding for the EACJ and inadequate budget allocation to the court has led to the cancellation of court sessions, affecting the delivery of justice.¹²⁹² Even while acknowledging the challenges of the delays in hearing cases, and the ad hoc way in which judges sit and hear cases, EACJ Registrar Okubo has suggested that the turnaround time of a single case should not be used as a measure of the EACJ's performance.¹²⁹³ Instead, one should measure the quality of the judgment and the jurisprudence developed.¹²⁹⁴ The EACJ can improve its operations and facilitate access to justice by adding more judges than the EAC Treaty currently provides for and increasing the court quorum for sitting judges to strengthen the jurisprudence of the court. Further, the EAC Treaty can also require that the judge resides in Arusha, where the court is located. In order to improve the functioning of the EACJ, the Registrar approved and implemented the use technology by the court during the Covid-19 lockdowns.¹²⁹⁵ This has the potential to reduce the workload of the judges of the EACJ. Instead of parties arguing or filing cases in person, the cases could be filed and adjudicated online, expediting justice delivery.

Ordor notes that there is critical need for researchers to assist judges by freeing them to perform their work.¹²⁹⁶ This point is supported by Mwanawina, who observes that the EACJ needs more staff and currently depends on staff from the Secretariat to execute some of its mandates.¹²⁹⁷ Accordingly, the entire EACJ has only one researcher.¹²⁹⁸ Moreover, there is only one Deputy Registrar instead of two to serve both the Court of First Instance and the Appellate Division.¹²⁹⁹ There would likely be delays in decision-making without strong and quality research support for judicial officers since they are expected to perform their research without assistance.¹³⁰⁰ As a consequence of the failure to adequately budget for research assistants to assist judges, the EAC is suffocating the flow of work the EACJ is expected to

¹²⁹² Ibid.

¹²⁹³ Ibid.

¹²⁹⁴ Ibid.

¹²⁹⁵ Ibid.

¹²⁹⁶ Ada Ordor op cit note 80 at 76.

¹²⁹⁷ Ilyayambwa Mwanawina 'Enhancing Judicial Independence in the East African Court of Justice' (2018) 45 (2) *The African Review* (Special Issue) December at 83.

¹²⁹⁸ Ibid.

¹²⁹⁹ Ibid.

¹³⁰⁰ Ibid.

perform.¹³⁰¹ It is submitted that there is a need to increase the number of EACJ judges and court staff to support judges in their work. The lack of adequate staff will delay finalising cases, which can be detrimental to aggrieved individuals seeking justice or immediate remedies before the EACJ. These will include cases where human rights protection may be weak at the domestic level or where individuals are denied legal remedies at the national level. Researchers are critical to keeping the institutional memory and research records of the court, which demonstrate the jurisprudential development behind the court's decision-making in a manner that facilitates a smooth transition for new judges.¹³⁰² The overall impact of failure to address these issues adequately is that they erode good governance and the rule of law within the EAC, particularly the institutional independence of the court.¹³⁰³ The governance model of the EAC ignores the principles of separation of powers and judicial independence, thereby posing a threat to the democratic advancement of the EAC.¹³⁰⁴

The following section discusses the nature of EAC community law and its relationship with the national laws of EAC partner states to determine its legal status.

5.4 Nature of EAC law

Regarding the status of EAC law in the domestic legal system's hierarchy of laws of each partner state, the question is whether, in the case of a conflict, EAC law will take priority over national law. There are two approaches to address this question, each leading to a different conclusion.¹³⁰⁵ The first approach is determining whether the EAC is a supranational organisation and autonomous from the partner states. The second examines whether the supremacy of the EAC Treaty law should be assessed from the perspective of the hierarchy of norms in legal order.¹³⁰⁶

The EAC was established by the EAC Treaty of 1999. Consequently, it is governed first by the Vienna Convention on the Law of Treaties (VCLT).¹³⁰⁷ Therefore, the EAC is guided

¹³⁰¹ Ibid.

¹³⁰² Cited in Ada Ordor op cit note 80 at 76.

¹³⁰³ Cited in Ilyayambwa Mwanawina op cit note 1256 at 83.

¹³⁰⁴ Ibid at 95.

¹³⁰⁵ James Otieno-Odek op cit note 1207 at 41.

¹³⁰⁶ Ibid.

¹³⁰⁷ Khoti C Kamanga 'Fast-Tracking' East African Integration and Treaty Law: Pacta Sunt Servanda, Betrayed?' (2010) 67 (2) *Journal of African for Comparative International Law* at 697.

by the principle of *pacta sunt servanda*.¹³⁰⁸ The EAC partner states have signed and ratified the EAC Treaty and must implement their treaty commitments in good faith.¹³⁰⁹ Indeed, the EAC Treaty creates a binding obligation on its partner states under public international law. Therefore, the EAC Treaty creates legal rights and binding obligations for the EAC partner states. Citizens of the respective partner states can rely on the principles of *pacta sunt servanda* before domestic courts to force the government to comply with any EAC Treaty provisions.

On the other hand, Article 8(4) of the EAC Treaty renders the EAC a supranational organisation in that it provides that EAC organs, institutions, and laws take precedence over similar national ones in matters concerning the implementation of the EAC Treaty.¹³¹⁰ This means that individuals within the EAC can invoke the community laws before domestic courts and enforce against any other EAC partner states or any organ or institution of the community. The nature of EAC law is *sui generis* in being neither based on municipal law nor international law but bearing elements of both, albeit limited by supreme national constitutions. For instance, it bears elements of international law in that the EAC's constitutive instruments are treaties between sovereign states which are interpreted and applied in accordance with international law principles such as *pacta sunt servanda*, including the provisions of the VCLT. On the other hand, the EAC Treaty is incorporated into the partner states' legal systems by the operation of national law, making them directly applicable within the partner states' national frameworks.¹³¹¹ This extends to protocols and annexes to protocols, which in terms of Article 151 of the EAC Treaty, are an integral part of the treaty after signing and ratification following the Summit's approval.¹³¹² In this sense, EAC law becomes part of the national laws of the partner states on signing and ratification. This and more will be discussed in greater detail in the following sections.

The next section evaluates the relationship between EAC law and the national laws of partner states, and the interaction between EAC law and the national constitutions of its partner states. The relationship between EAC community law and the domestic laws of EAC partner

¹³⁰⁸ *Ibid.*

¹³⁰⁹ *Ibid.*

¹³¹⁰ Article 8(4) of the EAC Treaty provides that 'Community organs, institutions and laws shall take precedence over similar national ones on matters pertaining to the implementation of this Treaty'.

¹³¹¹ See Article 8(2) of the EAC Treaty.

¹³¹² Article 151 of the EAC Treaty.

states is essential from the perspective of domestic legal processes and, particularly, the implementation of EAC law before domestic courts. In addition, the general legal status of and methods to incorporate EAC law before a partner state is discussed. The section offers a brief overview of the legal systems of the EAC partner states and the methods of incorporating international treaties to determine whether such approaches are adequate for receiving the EAC Treaty and its accompanying protocols. In other words, this section examines how EAC partner states give effect to international law in general and the EAC Treaty in particular.

5.4.1 Direct applicability of EAC law

The VCLT contains no provision requiring states to open their national courts for invocation of treaty norms, either by other states or by individuals.¹³¹³ International law merely obliges each country to comply with its international legal commitments while allowing each country to decide on the implementation methods.¹³¹⁴ In other words, applying treaties or international law within states is a matter of domestic law. So, whether a state is monist or dualist becomes fundamental. Therefore, for international lawyers, the main challenge with international law is implementation at the domestic level or ensuring that international law becomes part of domestic law.¹³¹⁵ This challenge is more acute in dualist legal systems where it is a requirement that treaties must first be domesticated before they become part of domestic law.

Concerning community law, some RECs have found ways to avoid the problems associated with the above constitutional or procedural requirements by adopting the principle of direct applicability. This principle allows for the integration of community law into member states' legal systems without implementing legislation or approval from the Parliament or national legislature.¹³¹⁶ It provides for a uniform application of community law into member states' legal systems. Therefore, direct applicability refers to self-executing provisions or regulations that have an effect without the need to implement legislation. For instance, Article

¹³¹³ Sean D. Murphy 'Does International Law Obligate States to Open Their National Courts to Persons for the Invocation of Treaty Norms That Protect or Benefit Persons?' in David Sloss *The Role Of Domestic Courts In Treaty Enforcement: A Comparative Study* (2009) at 66.

¹³¹⁴ Christopher Greenwood "'The development of international law by national courts" part 3 law-making in international law' in Tiyanjana Maluwa et al *The Pursuit of a Brave New World in International Law: Essays in Honour of John Dugard* (2017) at 194.

¹³¹⁵ Richard Frimpong Oppong *Legal Aspects of Economic Integration in Africa* at 43.

¹³¹⁶ *Ibid.*

8(2) of the EAC Treaty requires that the treaty must be accompanied by implementing legislation or ratified or be domesticated into the national legal system of each partner state.¹³¹⁷ Conversely, Article 151 of the EAC Treaty provides that annexes and protocols are integral to the EAC Treaty.¹³¹⁸ Therefore, community protocols and other annexes are binding and should become directly applicable within the partner states. In compliance with Article 8(2) of the EAC Treaty, the respective member states of the EAC have each passed domestic legislation to give effect to the EAC Treaty within their national legal systems, accordingly domesticating EAC law as a new legal order in their national legal systems.¹³¹⁹

The mere fact that Article 8(2) suggests that the EAC Treaty must be domesticated raises questions as to whether it is directly applicable. The requirement for implementing legislation before the EAC Treaty can have the force of law before the domestic legal system of EAC partner states. This is in stark contrast with the principle of direct applicability or community law.¹³²⁰ The problem with this approach is that it is in conflict with Articles 8(4), 8(5), 16 and 33(2) of the EAC Treaty which makes it clear that EAC laws — including the EAC Treaty and EAC institution — are supreme over national laws. As long as the legislation adopted for the implementation of the EAC Treaty continues to be subject to supreme national constitutions of EAC partner states, there is a possibility that nationalist or populist politicians and domestic judges may nullify such legislation as violating their national constitution. Under such conditions, it is difficult to see how the uniform application of EAC laws envisioned under the EAC Treaty can be achieved.

It must be recalled that direct applicability of community law requires that the EAC Treaty immediately becomes directly applicable without any legislative or parliamentary action. Article 8(2) provision suggests that if the EAC partner states have not yet passed implementing legislation, then the EAC Treaty will not have the force of law in such countries. Therefore, the EAC Treaty must be governed by domestic laws in such new member states. Such a scenario defeats the purpose of direct applicability, ensuring uniform application of community law in all EAC partner states. Article 8(2) also reflects the dualist nature of the African states

¹³¹⁷ See Article 8(2) of the Treaty.

¹³¹⁸ Article 151(4) of the EAC Treaty of 2000.

¹³¹⁹ Kenya's Treaty for the establishment of East Africa Community Act 2000, Uganda's East African Community Act of 2002, Tanzania's Treaty for the establishment of East Africa Community Act 2001.

¹³²⁰ See the discussion in Chapter 4, section 4.5.1.

found in the common law culture, which makes it difficult to apply the principles of direct effect, direct applicability and supremacy of the EAC law.¹³²¹

Further, it needs to be clarified whether the reference to legislation in Article 8(2) of the EAC Treaty includes the domestic constitutions of EAC partner states. As will be shown later in this chapter, most constitutions of EAC partner states contain a supremacy clause and are supreme laws of the land. To change this state of affairs, one would require a national referendum.¹³²² This gap in the EAC Treaty creates the impression that once member states enact such legislation, as required by Article 8(2) of the EAC Treaty, then member states have fully complied with this provision and the EAC Treaty is directly applicable. However, the respective national constitutions of EAC partner states contain supremacy provisions. Consequently, the EAC Treaty is not directly applicable and is subject to the respective constitutions of EAC partner states.

It does not help that the treaty is replete with ambiguities. It remains to be seen what the legal status and hierarchy of EAC laws are within the domestic legal systems of EAC partner states despite the provisions of Article 8. Notwithstanding the above situation, the EACJ has confirmed that by accepting to be bound by the treaty provisions with no reservation, EAC partner states cannot invoke their domestic legislations in order to avoid implementation of community laws.¹³²³ This is discussed in more detail in section 5.4.2.

As shown above, EAC partner states still follow the monist–dualist approach to determine the legal status of the EAC Treaty; therefore, the EAC Treaty is still treated like any other treaty under public international law. Although the provisions of Article 8(2)(b) of the treaty make any community law, regulation and directive enacted by the Assembly directly applicable, the issues are not settled as a consequence of the requirements of national legal systems of the EAC partner states and, particularly, of constitutional requirements. Article 8(2) of the EAC Treaty directs EAC partner states to follow the dualist system in implementing the EAC Treaty. Despite the provisions of Article 8(2), the issue of how the EAC partner states are to receive treaty law is ultimately governed by the respective national constitutions of EAC

¹³²¹ Winnie Cheserem and Tomasz Milej ‘Assessment of Kenya’s Constitutional framework as a driver for implementation of EAC legislation’ (2018) 45 (2) *The African Review* (Special Issue December) at 117.

¹³²² *Ibid.*

¹³²³ *British American Tobacco Ltd versus The Attorney General of Uganda* Reference NO 7 of 2017 Para 108.

partner states. While member states of the EAC have developed implementing legislation to accept the EAC Treaty, the issue is constitutional since the Constitution is the supreme law in several EAC partner states.

Despite the adoption of implementing legislation giving effect to the EAC Treaty, EAC partner states and their court systems can still deny the direct applicability of the EAC Treaty and its protocols on constitutional grounds.¹³²⁴ Even if the secondary legislation becomes directly applicable, it would be because national legislators of the member states decided to do so and not because the nationals of the member states are subjects of the EAC law.¹³²⁵ There is no specific obligation to grant the EAC Treaty the ‘force of law’ since it cannot be considered ‘legislation of the community’ within the meaning of Article 8(2)(b) of the EAC Treaty.¹³²⁶ Accordingly, there is only a general obligation to give effect to the treaty provisions in Article 8(2) of the EAC Treaty.¹³²⁷ The methods of fulfilling this obligation are left to the discretion of partner states.¹³²⁸

Given the above, the EAC Treaty is directly applicable, at least on paper, and is given effect by the domestic legislation of EAC partner states, albeit limited by national constitutions. None of the constitutions in African countries including EAC countries contains any provisions allowing community law to become a source of national law.¹³²⁹ Community law is still treated as part of public international law.¹³³⁰ The national constitutions of African countries, domestic legal systems do not provide adequate and appropriate conditions for implementing community programmes and activities.¹³³¹ This is one of the reasons the EAC has yet to achieve its treaty goals. This explains the failure to challenge many national measures, laws and regulations that violate community law in domestic courts.

¹³²⁴ For instance, in *Okunda & another v Republic of Kenya*, the Court declared that the Kenyan Constitution is supreme over any law, including community law and where there is conflict, community law is void. See *Okunda & another v Republic EALR 1970 453*.

¹³²⁵ Tomasz P. Milej ‘What Is Wrong about Supranational Laws? The Sources of East African Community Law In Light of the EU’s Experience’ (2015) *ZaoRV* at 586.

¹³²⁶ *Ibid* at 588.

¹³²⁷ *Ibid*.

¹³²⁸ *Ibid*.

¹³²⁹ Cited in Richard Frimpong Oppong op cit note 416 at 313.

¹³³⁰ *Ibid*.

¹³³¹ LO Wauna Oluoch ‘Legitimacy of the East African Community’ (2009) 53 *J Afr L* at 214.

5.4.2 Direct effect of EAC law

In contrast to the principle of direct applicability, the principle of direct effect grants access to private parties to raise community law before domestic courts.¹³³² Accordingly, direct effect provides an opportunity for incorporating community laws into domestic legal systems by providing national courts and individuals with the opportunity to contribute to and enforce community laws. Therefore, direct effect allows individuals to invoke community norms before domestic courts, providing them with legal rights. The EAC Treaty is the primary source of community law and identifies cooperation areas on which the partner states of the community have agreed to cooperate.¹³³³ As sources of law, the EAC partner states are bound to observe and comply with these norms. Therefore, individuals within the EAC can invoke any of these norms before domestic courts as independent sources of law, providing them with legal protection even without implementing legislation. For instance, Article 39 of the EAC Customs Union Protocol provides that the customs law of the community shall apply uniformly in the customs union except as provided for in the protocol.¹³³⁴ Consequently, the EAC Customs Protocol has a direct effect.

In *East African Law Society v The Secretary General of the East African Community*, the First Instance Division held:

As Partner States, by virtue of their being the main users of the Common Market Protocol on a daily basis, it would be absurd and impractical if their national Courts had no jurisdiction over disputes arising out of implementation of the Protocol. Indeed, Community Law would be helpless if it did not provide for the right of individuals to invoke it before national Courts.¹³³⁵

This decision accepts that it would defeat the purpose of community law if domestic courts were not granted jurisdiction to adjudicate on matters concerning the Common Market Protocol. In other words, establishing a common market protocol would only be valid if individuals were allowed to invoke it before domestic courts.

¹³³² Cited in Richard Frimpong Oppong op cit note 717 at 8.

¹³³³ John Eudes Ruhangisa 'The Scope, Nature and Effect of EAC Law' in Emmanuel Ugirashebuja, John Eudes Ruhangisa, Tom Ottervanger, Armin Cuyvers *East African Community Law Institutional, Substantive and Comparative EU Aspects* (2017) at 140

¹³³⁴ Article 39 of the EAC Customs Management Act.

¹³³⁵ See *East African Law Society v. The Secretary General of the East African Community* NO 1 of 2011 at 28.

Nevertheless, the direct effect of international law is effective in human rights enforcement but is limited by the national interests of states and other political considerations.¹³³⁶ This is because the direct effect principle is incompatible with the Westphalia principle of state sovereignty, whose modern understanding is opposed in many countries, especially in African states.¹³³⁷ For instance, Chimni observes that international law is changing the meaning of a ‘democratic state’ and transferring sovereign economic powers to international institutions, thereby significantly limiting the likelihood of developing third world countries pursuing independent policy and development.¹³³⁸ Globalisation and global governance contradict the idea of national constitutions being unique and supreme, undermining the operation of constitutional principles.¹³³⁹ This affects the principles of the rule of law, social security, territorial integrity and the principle of democracy.¹³⁴⁰

Mude points out that international law is a ‘lawfare instrument adopted by the West to subject African countries to their imperialist political agendas.’¹³⁴¹ In the context of the decolonisation agenda, nationalism and the need to dismiss or challenge the idea of Western superiority, African states have embarked on a political and constitutional transformation agenda, resulting in contempt for international law machinations, including human rights.¹³⁴² It is therefore clear that dissociating from international law and viewing it with contempt — including direct effect whose foundations are Western —implied is on the agenda of African states.¹³⁴³ Others contend that owing to the functional duality of direct effect, the principle of direct effect can also be used to justify the non-application of international law and protect the national legal order from the impact of international law.¹³⁴⁴

¹³³⁶ Torque Mude ‘Theorising the direct effect doctrine of international law in human rights enforcement’ in Everisto Benyera *Reimagining Justice, Human Rights and Leadership in Africa Challenging Discourse and Searching for Alternative Paths* (2020) at 78.

¹³³⁷ *Ibid* at 83.

¹³³⁸ BS Chimni ‘Third World Approaches to International Law: A Manifesto’ (2006) 8 *International Community Law Review* at 3.

¹³³⁹ Anne Peters and Ulrich K Preuss ‘International relations and international law’ in Mark Tushnet, Thomas Fleiner and Cheryl Saunders *Routledge Handbook of Constitutional Law* (2013) at 79.

¹³⁴⁰ *Ibid*.

¹³⁴¹ Cited in Torque Mude op cit note 1295 at 83.

¹³⁴² *Ibid* at 84.

¹³⁴³ *Ibid*.

¹³⁴⁴ André Nollkaemper ‘The Duality of Direct Effect of International Law’ 2014). *European Journal of International Law* 25(1), 105-125 at 108 and 115-117. <https://doi.org/10.1093/ejil/cht085>.

The principle of direct effect is limited if it is not supported by adequate domestic conditions.¹³⁴⁵ If the conditions of direct effect are interpreted severely, they may lead to a shift to a more dualist model of transformation. In spite of the fact that international law is formally recognised as part of domestic law, the courts cannot apply it.¹³⁴⁶

5.4.3 Supremacy of EAC law

The principle of supremacy of community law is a mechanism for resolving conflict of laws.¹³⁴⁷ Supremacy of community laws should be enshrined in the community's constitutive instrument but also may be inferred from its founding treaty and goals.¹³⁴⁸ The principle avoids domestic and international laws on resolving the conflict of laws; it affirms the autonomy of the community legal system, ensures that national laws do not override the community's legitimate interests, and fosters a coherent community legal system.¹³⁴⁹ For instance, Article 8(4) of the EAC Treaty provides that 'Community organs, institutions and laws shall take precedence over similar national ones on matters pertaining to the implementation of this Treaty'. Article 8(5) of the EAC Treaty provides that:

in pursuance of the provisions of paragraph 4 of this Article, the Partner States undertake to make the necessary legal instruments to confer precedence of Community organs, institutions and laws over similar national ones.

This means that EAC community laws will prevail over similar national laws and that EAC member states must pass the necessary legislations or amend their national laws to grant supreme status to community organs, institutions and laws over 'similar national ones'. Furthermore, Article 33(2) of the EAC Treaty provides that the EACJ takes precedence over domestic courts' decisions on similar questions.¹³⁵⁰ However, Article 1 of the EAC Treaty is ambiguous and does not define the meaning of 'similar one'. It is unclear whether the phrase 'similar ones' refers to domestic legislation or extends to the national constitutions of EAC

¹³⁴⁵ Cited in Andre Nollkaemper *National Courts and the International Rule of Law* at 133.

¹³⁴⁶ Ibid.

¹³⁴⁷ Cited in Richard Frimpong Oppong op cit note 717 at 7.

¹³⁴⁸ Ibid.

¹³⁴⁹ Ibid.

¹³⁵⁰ See Article 33(2) of the EAC Treaty.

partner states.¹³⁵¹ It is also not clear whether ‘similar ones’ extends to the EAC Treaty itself — including the protocols — and to the directives.¹³⁵²

Despite the EAC Treaty being made by and governed and binding upon each partner state, and to all EAC partner states as a group, it is not an EAC constitution.¹³⁵³ While the EAC Treaty contains essential elements of a constitution, including supremacy over the national Constitution in identified areas of cooperation, it cannot be said that the treaty is a constitution for East Africa since partner states do not qualify as a nation or as states, which is a precondition for a national constitution.¹³⁵⁴ Further, it does not have other basic features such as a system of government led by a head of state, or a common defence and security system including an integrated foreign policy.¹³⁵⁵

However, the treaty does have far-reaching elements which resemble a national constitution.¹³⁵⁶ Notably, the feature of the supremacy of the treaty over certain areas of the domestic laws, including the national constitutions, makes it clear that this is the most fundamental feature of the EAC Treaty linking it with a national constitution.¹³⁵⁷ The second feature of the EAC Treaty concerning national constitutions is the separation of executive, legislative and judicial powers.¹³⁵⁸ The treaty creates several community organs such as the Summit of the Heads of State, the Council and the Secretariat — all of which act as the executive or have executive powers — in addition to the EALA which acts as the legislative body, and the EACJ which act as the judiciary.¹³⁵⁹ However, in contrast to national constitutions, the EAC Treaty need a centralised enforcement system such as security, defence and police machinery to give teeth to the EAC’s executive organs.¹³⁶⁰ There needs to be more linkage between the national constitutions and the EAC Treaty.¹³⁶¹

¹³⁵¹ Cited in Winnie Cheserem and Tomasz Milej op cit note 1280 at 125.

¹³⁵² Ibid at 126.

¹³⁵³ James Ogoola ‘Where Treaty Law meets the Constitutional Law: National Constitutions in the light of the EAC Treaty’ in Johannes Döveling Kennedy Gastorn and Ulrike Wanitzek *Constitutional Reform Processes and Integration in East Africa* (2013) at 50.

¹³⁵⁴ Ibid.

¹³⁵⁵ Ibid at 51.

¹³⁵⁶ Ibid.

¹³⁵⁷ Ibid at 52.

¹³⁵⁸ Ibid at 55.

¹³⁵⁹ Ibid 55–56.

¹³⁶⁰ Ibid at 55.

¹³⁶¹ Ibid at 63–64.

With this in mind, the EAC Treaty is more similar to domestic legislation than to national constitutions. Therefore, it will take precedence over any domestic legislation of EAC partner states in cases of conflict. This, however, does not extend to the national constitutions of EAC partner states since they expressly provide that they are the supreme law of the land. For the EAC Treaty and other supplementary instruments to prevail over the national constitutions of EAC partner states, the latter would have to be amended. For this reason, the conceptual issue remains unclear as to which legal system is supreme between the regional and national legal systems.¹³⁶² Indeed, it is difficult to determine the EAC's actual legal status within its partner states' domestic legal systems due to poor craftsmanship. When reading the provisions of Article 8(1)(C) together with Article 8(2)(b) and Article 8(4) of the EAC Treaty, it appears that the treaty drafters envisaged a more significant role for the EAC Treaty within the domestic legal systems of EAC partner states. This is important because the source of inspiration of these provisions is the EU legal system, which has had a wide-reaching impact on EU member states' national legal systems. However, this is made difficult by the national constitutions of EAC partner states, which contain supremacy clauses. Given this situation, the EAC Treaty does not constitute an autonomous legal order to which partner states and individuals are subject.

In the case of *Prof Peter Anyang' Nyong'o & 10 others v The Attorney General of Kenya & 5 others*, the issue concerned the election of members of the EALA and Article 50 of the EAC Treaty.¹³⁶³ The main dispute relates to the election of Kenya's new representatives to the EALA and the procedure adopted by the National Assembly of Kenya for the nomination and election of representatives, which was considered flawed and in violation of Article 50 of the EAC Treaty.¹³⁶⁴ The court noted that Article 33(2) of the EAC Treaty only regulates the hierarchical relationship between EAC courts' judgments and domestic courts of member states. However, the treaty needs to provide a solution where a treaty provision conflicts with a national rule.¹³⁶⁵ The court held that the answer to this problem is the principle of international law, which provides that a state cannot justify failure to fulfil its treaty obligation to its national law.¹³⁶⁶ The court referred to the jurisprudence of the ECJ in dealing with the question of the

¹³⁶² Cited in James Otieno-Odek op cit note 1207 at 41.

¹³⁶³ Reference No 1 of 2006 at 2.

¹³⁶⁴ Ibid at 3.

¹³⁶⁵ Ibid at 41.

¹³⁶⁶ Ibid.

status of the EAC law within the national legal systems of EAC member states as persuasive authority.¹³⁶⁷ The EACJ noted that where there is a conflict between community law and national law, community law is granted primacy to achieve uniformity and effectiveness.¹³⁶⁸

According to Van der Mei, EU lawyers may have hoped that the reference to the European court judgments in the case of *Anyang' Nyong'o* would have motivated and triggered the EACJ to address the relationship between EAC law and national law and, subsequently, to resolve legal consequences for national laws that are inconsistent with EAC law or that violate EAC law.¹³⁶⁹ Although the court drew inspiration from ECJ jurisprudence, it failed to establish or develop the EAC legal system as an autonomous legal order or legally rule on the primacy of EAC law over the law of the member states.¹³⁷⁰ The *Anyang' Nyong'o* judgment is interesting because it lacks any reference to Article 8(4) of the EAC Treaty, which explicitly addresses the issue of supremacy of EAC law.¹³⁷¹ This was a missed opportunity to rest the lingering question on the legal status of the EAC Treaty before the domestic legal systems of EAC partner states. The court applied avoidance tactics and did not want to address the issue of the legal status of the EAC Treaty within the domestic legal system of EAC partner states, perhaps because of the sensitive political nature of the case and the potential backlash that would have ensued if the court had expressly declared EAC Treaty to be supreme law over national law.

In the recent judgment of the EACJ in the case of *British American Tobacco Ltd v The Attorney General of Uganda*, the applicant, British American Tobacco, brought an application in the EACJ First Instance Division to set aside specific provision of Uganda's Excise Duty (Amendment) Act for contravening various requirements of the EAC Treaty, the Protocol on the Establishment of the East African Customs Union and the Protocol on the Establishment of the East African Community Common Market.¹³⁷² The court held that the concerned

¹³⁶⁷ Ibid.

¹³⁶⁸ Ibid at 41–42.

¹³⁶⁹ Anne Pieter van der Mei 'Regional Integration: The Contribution of the Court of Justice of the East African Community' (2009) 69 *ZaöRV* at 421, available at <http://www.zaoerv.de/>.

¹³⁷⁰ Ibid.

¹³⁷¹ Cited in Tomasz P Milej op cit note 1284 at 591.

¹³⁷² *British American Tobacco Ltd v The Attorney General of Uganda* Reference No 7 of 2017. See also Erasmus G *The Development of REC Community Law: The EAC Court of Justice makes an important Contribution* (2019) tralac Brief No. S19TB07/2019 at 9.

domestic tax law provision constitutes an infringement of the EAC Treaty and its Customs Union Protocol.¹³⁷³ It noted that Article 27 of the VCLT succinctly constrains a party to a treaty from invoking ‘the provisions of internal laws as justification for its failure to perform a Treaty.’¹³⁷⁴

The court further held that Article 8(4) of the treaty gives primacy to community laws.¹³⁷⁵ The court observed that by purporting to construe the internal domestic tax laws to the exclusion of the applicable Treaty and Customs Union Protocol, the Uganda Revenue Authority acted in a manner that was likely to jeopardise the achievement of the treaty’s objectives, therefore rolling back the gains of the customs union and common market which had been realised to that point.¹³⁷⁶ The court emphasised that under Article 27 of the VCLT, partner states’ domestic laws cannot be invoked as a justification for failure to perform a treaty obligation.¹³⁷⁷ The EACJ ruled further that the EAC Treaty including relevant protocols were domesticated into Uganda’s national laws in accordance with section 3 of the East African Community Act No 13 of 2002 and have the force of law before the domestic legal system of Uganda.¹³⁷⁸ Furthermore, the court held that by accepting to be bound by the EAC Treaty with no reservations, Uganda (or indeed any partner state) could no longer apply domestic legislation in ways that make its effects prevail over those of community law.¹³⁷⁹ The court noted that in terms of Article 33(2) of the EAC Treaty, it has supreme status over decisions of domestic courts.¹³⁸⁰ Similarly, the EACJ in the case of *Samuel Mukira Mohochi vs The Attorney General of the Republic of Uganda* stated that by accepting the EAC Treaty with no reservations, Uganda can no longer rely on its domestic legislation to avoid implementation of the EAC Treaty and the Protocol on free movement of persons.¹³⁸¹ The court concluded that

¹³⁷³ *British American Tobacco Ltd versus The Attorney General of Uganda* para 45.

¹³⁷⁴ Para 42.

¹³⁷⁵ *Ibid.*

¹³⁷⁶ Para 44.

¹³⁷⁷ Para 106.

¹³⁷⁸ Para 107.

¹³⁷⁹ Para 108.

¹³⁸⁰ *Ibid.*

¹³⁸¹ *Samuel Mukira Mohochi vs The Attorney General of the Republic of Uganda* Reference No 5 of 2011 First Instance Division at Para 52

the government of Uganda cannot rely on domestic legislation deny the supremacy of EAC community law.¹³⁸²

This ruling does not address the relationship between the EAC Treaty and the constitutions of EAC partner states. The EAC Treaty is still treated as any other domestic legislation and does not have supreme status over the respective national constitutions of EAC partner states. Consequently, the EAC partner states and their national courts can rely on their respective national constitutions to escape their treaty obligations, as was the case in *Okunda & another v Republic*, where the Kenyan court declared that the Kenyan Constitution is supreme over any law, including community law and where there is conflict, community law is void.¹³⁸³ The court in *British American Tobacco* ought to have moved beyond merely making a declaration that EAC partner states are not permitted to invoke domestic laws to justify their failure to implement treaty obligations as a matter of treaty law. The court should have addressed the issue of the relationship between EAC Treaty and national constitutions as contained in Article 8(4) of the EAC Treaty.

5.5 *Is the EAC law an autonomous legal order?*

Because the EU legal system influences EAC law, one would expect that EAC partner states would surrender certain aspects of their sovereignty to the EAC and create an autonomous legal system that operates independently from the national constitutions of partner states under international law. The EAC Treaty does not create an autonomous legal order since its application is dependent on international law and the domestic legal systems of the EAC partner state. While the treaty expressly provides for the direct effect and supremacy of the community legal system over the domestic laws of EAC partner states, it is treated as international law. It is secondary to the national constitutions of many EAC countries.

EAC law is neither sovereign nor supreme to the national laws of the partner states; rather, the two legal systems coexist and are complementary and interdependent.¹³⁸⁴ The EAC community is subject to and not sovereign over the partner states.¹³⁸⁵ EAC partner states have

¹³⁸² Para 53.

¹³⁸³ *Okunda & another v Republic EALR 1970 453*

¹³⁸⁴ Cited in James Otieno-Odek op cit note 1207 at 43.

¹³⁸⁵ *Ibid.*

not ceded their sovereignty to the EAC institutions but granted them functional, operational and judicial competence on matters relating to the community.¹³⁸⁶ Therefore, the supranational nature of EAC law as envisaged under the treaty places the member states in a complicated situation since EAC partner states are only partially willing to relinquish a substantive part of their sovereignty.¹³⁸⁷

The EACJ's reference to Article 27 of the VCLT as the decisive conflict rule makes it clear that the EACJ views the EAC law not as an autonomous legal order, but as a part of public international law.¹³⁸⁸ Accordingly, the EACJ is willing to incorporate at least some elements of the concept of supranational into the EAC framework, which, however, is similar to other international law instruments.¹³⁸⁹ Therefore, the application of the EAC Treaty is not guaranteed since it does not function independently from international law. Taking this situation into account, the application of community law differs from member state to member state. It depends on whether a particular country follows a dualist or monist system in incorporating international law. The homogeneity of EAC law, as envisaged by the treaty, is impossible in this scenario.

The EAC Assembly has adopted a few community Acts under the provisions of the EAC Treaty.¹³⁹⁰ This situation is attributed to the integration model adopted by the EAC partner states, which develops from the treaty text and emphasises the harmonisation of laws and the principle of variable geometry.¹³⁹¹ Accordingly, the whole debate about the progress towards achieving a common market in the EAC is centred on domestic legislation and measures to be adopted by national governments.¹³⁹² The EAC member states intentionally emphasise national law instead of supranational law as a method of implementation to deliberately slow down the integration process in certain areas.¹³⁹³ While member states of the EAC have committed

¹³⁸⁶ Ibid.

¹³⁸⁷ Cited in John Eudes Ruhangisa op cit note 1292 at 160.

¹³⁸⁸ Cited in Tomasz P. Milej op cit note 1284 at 592.

¹³⁸⁹ Ibid at 593.

¹³⁹⁰ Ibid at 582.

¹³⁹¹ Ibid. The principle of variable geometry allows weaker economies to delay the implementation of their agreement. Accordingly, the principle of variable geometry restricts more advanced forms of trade liberalisation goals because it is designed to accommodate poor member states or reluctant member states of an RTA that are worried about the economic and political costs of trade liberalisation for their countries. Cited in James Thuo Gathii *AFRICAN REGIONAL TRADE AGREEMENTS AS LEGAL REGIMES* at 35.

¹³⁹² Ibid.

¹³⁹³ Ibid at 582–583.

themselves to cede some aspects of their sovereignty to the EAC, they still enjoy a significant level of sovereignty.¹³⁹⁴

The following section examines the application and interpretation of the EAC Treaty by domestic courts in selected EAC countries. It provides a complete discussion of the EAC domestic courts' use of EAC community law. The aim is to determine whether domestic courts of EAC partner states rely on EAC community to interpret domestic laws.

5.6 The effect of EAC law on the national legal order

In terms of Article 8(1)(C), member states of the EAC are required to abstain from any measures likely to jeopardise the achievement of the objectives or the implementation of provisions of the EAC Treaty.¹³⁹⁵ This provision requires the cooperation of EAC partner states since the EAC can only achieve its stated objectives with the assistance of EAC partner states. Therefore, for the provisions of Article 8(1)(C) to be effective, it requires the support of partner states through their domestic institutions, such as the national legislature and national courts.

In terms of Article 33 of the EAC Treaty, the national courts of EAC partner states can support the implementation of the treaty by exercising their jurisdiction granted to them by ensuring uniform interpretation and observance of community law.¹³⁹⁶ To avoid potential conflict between EACJ and national court decisions, Article 34 of the EAC Treaty provides a preliminary reference procedure to preserve the EAC system and ensure uniform interpretation of community law in all domestic legal systems of EAC member states.¹³⁹⁷ These provisions have become critical because they provide national court jurisdiction over community matters and create a judicial dialogue between national courts and the EACJ.¹³⁹⁸ Indeed, the preliminary reference procedure requires effective cooperation between the EACJ and the national courts of partner states. Currently, the preliminary reference procedure depends on the national courts' discretion since no specific treaty provision requires national courts to abide

¹³⁹⁴ Cited in John Eudes Ruhangisa op cit note 1292 at 146.

¹³⁹⁵ Article 8(1)(C) of the EAC Treaty.

¹³⁹⁶ See Article 33 of the EAC Treaty.

¹³⁹⁷ Article 34 of the EAC Treaty.

¹³⁹⁸ Cited in Jonathan Bashi op cit note 225 at 154.

by Article 34 of the treaty in matters concerning community law. Nevertheless, applying community law ultimately depends on the domestic laws of EAC partner states.

According to Ruhangisa, the EAC member states follow a dualist approach regarding the relationship between their respective national law and international law or other regional law.¹³⁹⁹ However, this statement is only partially accurate because former French, Belgian, Spanish, and Portuguese colonies are generally monist countries.¹⁴⁰⁰ This is particularly true of Burundi and Rwanda.¹⁴⁰¹ Therefore, regarding the relationship between international and domestic law, Rwanda follows a monist system with some elements of dualism concerning the hierarchy of laws.¹⁴⁰² In contrast, former British colonies that inherited the Anglo-American legal system generally follow the dualist system. EAC partner states such as Kenya, Uganda, and Tanzania required the EAC Treaty to be incorporated into domestic law after its signing and ratification before it could have any legal effect.¹⁴⁰³

Consequently, the EAC partner states follow two broad approaches to incorporating international treaties: monism or dualism — and sometimes a combination of both approaches. The respective EAC countries incorporate international treaties differently depending on whether they follow monist or dualist systems. Therefore, the legal status of international law before the EAC partner states is also a matter of domestic law. Since international law in some EAC partner states becomes law once it is incorporated through domestic legislation, the question of its legal status and hierarchy is a matter of domestic law. Depending on the legal system of the respective EAC countries, EAC law may take precedence over constitutional law, or treated as part of Public International Law. In practice, the EAC law is treated similarly to Public International Law in that the EACJ continue to make reference to Article 27 of the VCLT to resolve conflicts between the EAC law and domestic law.

¹³⁹⁹ Cited in John Eudes Ruhangisa op cit note 1292 at 149.

¹⁴⁰⁰ Andre Mbata Mangu ‘Rwanda Citizens’ Sovereignty, National Constitution, and the EAC Treaty Nexus’ in Korwa Gombe Adar, Kasaija Phillip Apuuli, Agnes Lucy Lando, PLO-Lumumba, and Juliana Masabo *Popular Participation in the Integration of the East African Community Eastafricanness and Eastafricanization* (2020) at 188.

¹⁴⁰¹ Ibid.

¹⁴⁰² Ibid.

¹⁴⁰³ Ibid.

A significant feature of all national constitutions of EAC partner states is that they all make provisions for constitutional supremacy.¹⁴⁰⁴ These supremacy clauses imply that national courts must respect and comply with the partner states' constitutions. Put differently, national courts, like other branches of government, are expected to operate within constitutional bounds, and any judicial overreach may be viewed as a violation of a constitution. The legal status of the EAC Treaty and its subsidiary legal instruments within the constitutions of countries such as Tanzania needs to be clarified.¹⁴⁰⁵ There is no reference to the EAC Treaty or laws in the Constitution of Tanzania, even though the adoption of the EAC Treaty came before the 2000 and 2005 amendments to the Constitution of Tanzania.¹⁴⁰⁶

Despite Uganda having made progress in domesticating the EAC Treaty, the actualisation of the integration principles in Uganda is limited by constitutionally enshrined sovereignty.¹⁴⁰⁷ The EAC Treaty is law in Rwanda and the country is bound to comply with it, although it is secondary law to the Constitution of Rwanda.¹⁴⁰⁸ The researcher believes that EAC Treaty and its protocols create supranational legal order, albeit limited to supreme national constitutions. Therefore, EAC partner states still enjoy their sovereignty and have yet to cede their sovereignty to the EAC entirely.

5.6.1 Interpretation of the EAC Treaty by domestic courts

In view of the legal uncertainty identified above, it is necessary to refer to the decisions of national courts for guidance to determine the legal status of the EAC Treaty and its supplementary instruments before domestic laws. Many cases before the domestic courts relate to implementing and enforcing the EAC Customs Management Act.¹⁴⁰⁹

In *Okunda & another v Republic*, the court confirmed the supreme status of the Kenyan Constitution to any law, including community law, and observed that in cases where there is a

¹⁴⁰⁴ See Article 48 of the Constitution of Burundi, Article Kenyan Constitution of 2010 and Article 2(1) of the Ugandan Constitution of 2005 as Amended.

¹⁴⁰⁵ Petro Protas and Juliana Masabo op cit note 1246 at 199.

¹⁴⁰⁶ Ibid.

¹⁴⁰⁷ Kasaija Phillip Apuuli 'Uganda Citizens' Sovereignty, National Constitution, and the EAC Treaty Nexus' in Korwa Gombe Adar, Kasaija Phillip Apuuli, Agnes Lucy Lando, PLO-Lumumba, and Juliana Masabo *Popular Participation in the Integration of the East African Community Eastafricanness and Eastafricanization* (2020) at 221.

¹⁴⁰⁸ Cited in Andre Mbata Mangu op cit note 1359 at 189.

¹⁴⁰⁹ Cited in James Otieno-Odek *Judicial Enforcement and Implementation of EAC Law*.

conflict with the national Constitution of Kenya, such community law or international treaty is void to the extent of the conflict.¹⁴¹⁰ Domestic sovereignty was the challenge that ultimately led to the collapse of the EAC.¹⁴¹¹ The EAC partner states, particularly their political leaders, were unprepared to surrender any aspect of their newfound political and economic sovereignty to support a successful EAC.¹⁴¹² The powerful political leaders of the respective founding countries view EAC as a threat to their political bases and fiefdoms.¹⁴¹³

PLO-Lumumba further notes that legal obstacles continue to hinder the EAC integration process.¹⁴¹⁴ According to PLO-Lumumba, the *Okunda v R* ruling demonstrates that the EAC is secondary to the constitutions of the member states.¹⁴¹⁵ Accordingly, the National Assemblies cannot limit the legal sovereignty of their countries to the EAC community since the parliamentarians cannot grant sovereignty they do not have.¹⁴¹⁶ The EAC regional integration agenda must be linked to the domestic policies of EAC member states. In particular, EAC community law must be complemented by domestic laws. There is a need to ensure that the national constitutions of EAC partner states are linked to EAC community law. Put differently, the EAC community needs to ensure that all EAC partner states adopt similar standards in matters of EAC community law.

In *Rono v Rono*, the Kenyan appeal court noted several international human rights legal instruments to which Kenya is a signatory and which Kenya has ratified, such as the Universal Declaration of Human Rights (1948).¹⁴¹⁷ The court highlighted that Kenya follows the common law system, which provides that international law only becomes part of domestic law after it has been incorporated into the national legal system.¹⁴¹⁸ However, the court acknowledged that common law accepts that domestic courts can apply both international customary law and

¹⁴¹⁰ *Okunda & another v Republic EALR 1970 453.*

¹⁴¹¹ PLO-Lumumba 'Kenya Citizens' Sovereignty, National Constitution, and the EAC Treaty Nexus' in Korwa Gombe Adar, Kasaija Phillip Apuuli, Agnes Lucy Lando, PLO-Lumumba, and Juliana Masabo *Popular Participation in the Integration of the East African Community Eastafricanness and Eastafricanization* (2020) at 172.

¹⁴¹² *Ibid.*

¹⁴¹³ *Ibid.*

¹⁴¹⁴ *Ibid* at 177.

¹⁴¹⁵ *Ibid.*

¹⁴¹⁶ *Ibid* at 178.

¹⁴¹⁷ *Rono v Rono, Civil Appeal No 66 of 2002* 8.

¹⁴¹⁸ *Ibid.*

treaty law in instances where there is no conflict with national law, even without implementing legislation.¹⁴¹⁹

In *Shah v Manurama Ltd*, the High Court held that partner states of the EAC must ensure that the citizens of the EAC enjoy their rights provided for under community law.¹⁴²⁰ The court took note of the EAC Treaty provision under Article 8(2)(b), which gave the force of law to the treaty and held that the treaty law takes precedence over similar national law under Article 8(5).¹⁴²¹ There needs to be more national jurisprudence on the primacy of EAC regional law over national laws.¹⁴²²

5.6.2 Impact of EACJ judgments

Article 44, as read with Rule 74 of the EACJ Rules of Procedure, provides that the

execution of a judgment of the Court which imposes a pecuniary obligation on a person shall be governed by the rules of civil procedure in force in the Partner State in which execution is to take place.¹⁴²³

Judgments that do not impose pecuniary obligations are implemented under the broad framework of Article 38(3), which requires the Council of Ministers or the partner states to implement the court's decisions expeditiously. This means that the national executives in the partner states are charged with ensuring compliance with these decisions of the court.

Even though the EACJ decision in *Katabazi* discussed in section 5.3.1. did not lead to any legal reform, its impact within the domestic arena enabled courts to administer justice impartially and independently without fear of any retaliations or punishments from security agencies.¹⁴²⁴ This statement is supported by the fact that the applicants, in this case, were not only released from unlawful custody but there has been no similar incidence of interference with judiciary processes by the military.¹⁴²⁵ Furthermore, the impact of the EACJ judgments within the national domestic legal systems is that it has been relied upon by litigants and the

¹⁴¹⁹ Ibid.

¹⁴²⁰ *Shah v. Manurama Ltd* [2003] 1 East Afr. LR 294.

¹⁴²¹ Ibid.

¹⁴²² James Otieno-Odek op cit note 1207.

¹⁴²³ Article 44 of the EAC Treaty.

¹⁴²⁴ Cited in Victor Lando op cit note 495 at 474.

¹⁴²⁵ Ibid.

High Court of Uganda as an authoritative source of law.¹⁴²⁶ The EACJ decision also profoundly affected all EAC countries and revolutionised human rights litigation before the EACJ.¹⁴²⁷ In this case, the EACJ risked its human rights jurisdiction, although in a limited fashion.¹⁴²⁸ Therefore, the *Katabazi* decision has acted as a reference source for litigants in subsequent cases filed before the EACJ involving human rights violations or claims.¹⁴²⁹ Therefore, the decision has influenced individual litigants, lawyers and civil society organisations in the EAC partner states by allowing them to ventilate human rights problems or challenges before the EACJ.¹⁴³⁰

In the case of *Martha Wangari Karua v The Attorney General of the Republic of Kenya*, the applicant, a Kenyan lawyer and politician, filed an application in terms of Articles 6(d), 7(2), 27(1) and 30 of the EAC Treaty claiming that Kenyan government violated its right to access justice through its judicial organ's acts and omissions.¹⁴³¹ The background of this case is that the applicant participated in the general election of 2017 in Kenya as a candidate for Governor of Kirinyanga County and lost to Hon Anne Mumbi Waiguru (first intervener) before this case.¹⁴³² The applicant, aggrieved by the election results, filed an election petition before the Kenyan court at Kerugoya, challenging Hon Waiguru's election victory.¹⁴³³ The applicant exhausted all domestic courts avenues available in Kenya to nullify the disputed election, but her petition was dismissed on technical grounds (non-compliance with electoral rules).¹⁴³⁴

The main question before the EACJ First Instance Division was whether the government of Kenya, through the acts or omissions of its judicial organs, violated its commitments to the fundamental and operational principles of the EAC Treaty.¹⁴³⁵ Another question was whether the applicant is entitled to remedies.¹⁴³⁶ The court ruled that the government of Kenya, through the actions or omissions of its judicial organ, violated the fundamental principles of the EAC

¹⁴²⁶ Ibid.

¹⁴²⁷ Ibid at 475.

¹⁴²⁸ Ibid.

¹⁴²⁹ Ibid.

¹⁴³⁰ Ibid.

¹⁴³¹ Reference No. 20 of 2019 Para 1.

¹⁴³² Para 6.

¹⁴³³ Para 6.

¹⁴³⁴ Para 8–9.

¹⁴³⁵ Para 18.

¹⁴³⁶ Para 18.

Treaty, particularly the principle of the rule of law protected under the treaty.¹⁴³⁷ More importantly, the court confirmed that it has jurisdiction to award general damages in cases of breach of the EAC Treaty.¹⁴³⁸ It ordered the government of Kenya to pay compensation for general damages of USD 25 000.¹⁴³⁹ Interestingly, this is the first human rights-related case where the EACJ has granted general monetary damages. This order for an award of general damages is important. It suggests that the EACJ is moving away from merely declaratory orders towards granting compensation to victims of human rights violations. The decision needs to be revised in that it needs to provide a specific timeframe within which partner states are to comply with EACJ rulings. The EACJ should stipulate timeframes for compliance with its orders. In turn, this would allow judicial oversight over the EAC partner states, and in this way, the court can monitor the implementation of its decisions.

This case follows the EACJ decision in *Hon. Dr Margaret Zziwa v The Secretary General of the East African Community*, where the court confirmed that it has jurisdiction to determine compensation and damages.¹⁴⁴⁰ The EACJ appeal court held that its jurisdiction is not confined to the interpretation of the treaty and that it is also mandated with ensuring adherence to the law in the application of and compliance with the treaty.¹⁴⁴¹ It emphasised that it has to ensure that the member states remedy any breaches of the treaty.¹⁴⁴² The court held that the effectiveness of community laws and the EAC Treaty, including the protection of rights granted by such laws, demands that the court issue adequate remedies in cases where such laws are breached.¹⁴⁴³ It ruled that ‘otherwise such laws would be no more than pious platitudes.’¹⁴⁴⁴ The appellate court held that since the First Instance Division had found the appellant’s removal from office null and void and in breach of the EAC Treaty, it could not order her reinstatement to ensure compliance with the EAC Treaty since her tenure of office had come to an end.¹⁴⁴⁵ The court confirmed that in terms of Articles 23(1) and 27(1) of the treaty, its jurisdiction is not limited to mere interpretation of the treaty and issuing declaratory orders but

¹⁴³⁷ Para 60–61.

¹⁴³⁸ Para 64.

¹⁴³⁹ Para 70.

¹⁴⁴⁰ Appeal NO 2 OF 2017 (25 May 2018) Para 35.

¹⁴⁴¹ *Ibid.*

¹⁴⁴² *Ibid.*

¹⁴⁴³ *Ibid.*

¹⁴⁴⁴ *Ibid.*

¹⁴⁴⁵ *Ibid.*

extends to granting adequate remedies to ensure adherence to law and compliance with the treaty.¹⁴⁴⁶

The court accepted that the remedy of compensation or damages is well established in international law, and it is accessible for the community's breach of its treaty obligation in cases where the aggrieved party can show that the Act, regulation, directive, decision or action of the community in question has caused such complainant a financially assessable loss.¹⁴⁴⁷ The court granted the appellant an award of USD 114 000, including interest.¹⁴⁴⁸

The EACJ's jurisdiction only allows it to make declaratory orders against government conduct that violates the EAC Treaty.¹⁴⁴⁹ Although the court has issued injunction orders against state parties and other EAC institutions and organs for violation of EAC treaties, the EACJ does not have jurisdiction to issue damages or issue a broad array of remedial powers that domestic courts enjoy.¹⁴⁵⁰ Unlike the ECOWAS court, the EACJ operates mainly as a declaratory human rights regime.¹⁴⁵¹ The EACJ is not requested to and does not issue mandatory orders requiring states to take specific actions.¹⁴⁵² However, this is not to say that the EACJ does not give binding decisions with which states must and do comply.¹⁴⁵³ Compliance is problematic for the EACJ when direct impact and individual justice are questioned.¹⁴⁵⁴ Consequently, this leads some writers to view these courts as ineffective mistakenly and to assume that the protective value of their judgments is questionable.¹⁴⁵⁵

While the EACJ's human rights decisions have, yet to mostly lead to any immediate apparent changes to policy, state behaviour or institutional practices within the EAC partner states, EACJ human rights decisions have had a significant indirect impact.¹⁴⁵⁶ The effect of the *Anyang' Nyongo* decision was that it rendered the Kenyan nominees to the EALA ineligible to take office. Therefore, the EALA needed to be established through the proper process

¹⁴⁴⁶ Ibid.

¹⁴⁴⁷ Para 75.

¹⁴⁴⁸ Para 106.

¹⁴⁴⁹ Cited in John Eudes Ruhangisa op cit note 1292 at 153.

¹⁴⁵⁰ Ibid.

¹⁴⁵¹ Cited in Solomon T. Ebobrah and Victor Lando op cit note 476 at 184.

¹⁴⁵² Ibid.

¹⁴⁵³ Ibid at 188.

¹⁴⁵⁴ Ibid at 191.

¹⁴⁵⁵ Ibid.

¹⁴⁵⁶ Ibid at 192–194.

required by EAC Treaty to conduct its business.¹⁴⁵⁷ As a result, the Kenyan Parliament later passed new legislation (the Treaty for the Establishment of the East African Community (Election of Members of the Assembly) Rules 2007) to govern the appointment of Kenyan Members to the EALA guided by the EACJ in its judgment in the *Anyang' Nyong'o* case.¹⁴⁵⁸

Concerning human rights, the judgment ensured that there was a legal reform in Kenya which created a more representative and more democratic framework for the election of members of the EALA from Kenya in line with the EAC Treaty and therefore protecting the right to political participation and effective representation in the regional Parliament.¹⁴⁵⁹ This case also had an impact beyond the state of Kenya and was influential across the EAC partner states. In particular, the EACJ's decision in *Anyang' Nyong'o* had a spillover effect, moving beyond Kenya and leading to the filing of similar cases before the EACJ by litigants in countries such as Uganda and Tanzania, challenging elections of members of the EALA.¹⁴⁶⁰ The decision also influenced national courts because it relied on litigation before domestic courts, especially in human rights cases.¹⁴⁶¹

The EACJ's human rights rulings still need to generate immediately demonstrable results in law or policy within the EAC partner states.¹⁴⁶² The strategy adopted by EACJ in arriving at its decision makes it difficult to assess the direct impact of its ruling.¹⁴⁶³ However, it is different for claims involving an allegation of violation of treaty provisions for non-human rights.¹⁴⁶⁴ A significant part of the EACJ's decisions on human rights cases has consistently had an indirect impact rather than immediately noticeable changes in law or policy.¹⁴⁶⁵ Despite the influence of the *Anyang' Nyong'o* decision, the EAC member states reacted by calling for an amendment of the EAC Treaty, including the court's jurisdiction.¹⁴⁶⁶ However, in spite of the political backlash from the EAC's political organs, the case had a positive outcome: it galvanised

¹⁴⁵⁷ Cited in Victor Lando op cit note 495 at 470.

¹⁴⁵⁸ Ibid.

¹⁴⁵⁹ Ibid.

¹⁴⁶⁰ Ibid at 471.

¹⁴⁶¹ Ibid.

¹⁴⁶² Cited in Solomon T. Ebobrah and Victor Lando op cit note 476 at 192.

¹⁴⁶³ Ibid.

¹⁴⁶⁴ Ibid.

¹⁴⁶⁵ Ibid at 193.

¹⁴⁶⁶ Cited in Victor Lando op cit note 495 at 472.

various non-state actors, including the East African Law Society, legal scholars, Kenyan legislators, and NGOs around the EACJ to protect it from the political backlash.¹⁴⁶⁷

5.7 Conclusion

This chapter demonstrated that the EAC suffers from design, affecting how its court systems operate. Notably, the reluctance of EAC partner states to cede their sovereignty to community institutions affects how the EACJ operates. Moreover, the lack of clear legal status of the EAC community law before the domestic legal systems of EAC member states makes it difficult for the EACJ to rely on the EAC Treaty when there is a conflict between EAC laws and the domestic legal systems of EAC partner states. The EACJ has often relied on the VCLT to resolve conflicts between EAC community law and domestic legal systems. The court has generally avoided declaring the EAC community law supreme law over domestic legal systems of EAC member states, partly because the national constitution of EAC partner states places limits on the courts.

This research has found that EACJ judgments have had an indirect impact on the domestic legal systems and, in general, they have complied with EACJ judgments. Further, many EACJ judgments have declaratory orders that do not call for EAC partner states to take specific actions. However, one of the more significant findings to emerge from this study is that the EACJ has started to issue awards for general damages in cases relating to human rights. This suggests that the EACJ is ready to play a more prominent role and ensure that its judgments are not reduced to mere declaratory orders.

On the other hand, similar to the SADC Tribunal, the EACJ has demonstrated its independence in making adverse rulings against EAC member states despite its limited jurisdiction.¹⁴⁶⁸ Notwithstanding the EACJ's lack of express jurisdiction in human rights cases, the court has exercised human rights jurisdiction and performed its role well.¹⁴⁶⁹ The EACJ has been more influential because EACJ judges have shown commitment to exercising their power to achieve justice within the EAC region.¹⁴⁷⁰ In particular, where human rights protection and

¹⁴⁶⁷ Ibid at 473.

¹⁴⁶⁸ See the discussion in 5.3.2 and 5.4.

¹⁴⁶⁹ See section 5.3.2.1.

¹⁴⁷⁰ Ibid.

the rule of law are weak in the EAC region, litigants and civil society groups have relied on the EACJ to protect individual human rights.¹⁴⁷¹

In spite of this, there is a disjuncture between the EAC Treaty and the national constitutions of EAC member states, which makes it challenging to enforce the EAC Treaty and its accompanying protocols before the domestic courts of EAC partner states. As shown in this chapter, the EAC Treaty suggests that it is directly applicable before the domestic legal system of EAC partner states and should take precedence in cases where there is conflict. But this is defeated by the national constitutions of the EAC partner states, which contain supremacy clauses.¹⁴⁷² Also, the way in which the EACJ and domestic courts interpret the EAC Treaty suggests that it is not an autonomous legal system. Notably, the EACJ's continued reference to Article 27 of the VCLT in cases where there is a conflict between community law and domestic laws suggests that the court treats EAC law as a part of public international law.¹⁴⁷³ Despite this limitation, some EACJ decisions have indirectly affected EAC partner states' domestic policies and galvanised civil society into action.¹⁴⁷⁴

An important lesson to be learned from the EAC is that regional integration requires political commitment to be successful. Therefore, politicians must establish institutions and grant them the necessary power to implement community goals. This requires a system of shared governance in which political leaders cede certain aspects of their sovereignty to regional institutions. This will ensure that the political leaders are not the only role players in the regional integration process and that the success and survival of the EAC community are independent of politicians.

¹⁴⁷¹ See section 5.4.

¹⁴⁷² See section 5.4.1.

¹⁴⁷³ See section 5.4.3.

¹⁴⁷⁴ See section 5.6.2.

CHAPTER 6: FINDINGS AND RECOMMENDATIONS

6.1. Introduction

As noted in the previous chapters, the ECJ jurisprudence has played an important role towards regional integration and through its case law, it has developed the doctrine of direct effect and supremacy of EU Law. As shown, the EAC has embraced these principles and adopted them in its founding instrument. However, the EACJ has not clarified the status of the EAC Law before EAC Partner States. The adoption of doctrine of direct effect and supremacy by EAC legislature was achieved through comparative law and comparative studies. It therefore make sense to have a comparative analysis in order to draw important lessons for SADC tribunal from the ECJ and EACJ respectively. This is done through the table below.

6.1.1. Roles of Community Courts and Tribunal: A comparative study

COMMUNITY COURT OR TRIBUNAL	JURISDICTION	STATUS OF COMMUNITY COURTS JUDGMENT BEFORE DOMESTIC LAWS	ENFORCEMENT AND COMPLIANCE WITH SUB-REGIONAL COURTS DECISIONS	IMPACT AND CONTRIBUTIONS OF COMMUNITY COURTS
SADC TRIBUNAL	In terms of Articles 16 and 32 of the SADC Treaty, Articles 15(1), 17, 18 and 19 of the SADC Tribunal Protocol the Tribunal has wide jurisdiction to interpret SADC Treaty and other subsidiary instruments, to adjudicate	Generally, SADC Tribunal decisions have no direct effect before domestic laws and courts of SADC Member States. Also, in terms of domestic case law, tribunal judgment does not enjoy supreme status	SADC Tribunal judgments have not been complied with by the Government of Zimbabwe.	In the absence of strong democracy, rule of law and effective human rights protection at the domestic level, the tribunal through its innovative interpretation of SADC legal instruments and other international instruments has contributed to the protection and promotion of

	<p>disputes referred to it, to hear and decides all disputes between natural or legal persons and the Community, between member states, member states and natural or legal persons, member states and the SADC, and SADC employees and the SADC to give advisory opinions on matters referred to it by SADC institutions. The tribunal does not have an express human rights jurisdiction.</p>	<p>over the decision of domestic courts.</p>		<p>international human rights, access to international justice and the rule of law.</p>
<p>EUROPEAN COURT OF JUSTICE (ECJ)</p>	<p>In terms of Article 19(1), 19(3)(b) on the TEU, Articles 258, 260, 263, 265 and 267 of the TFEU, ECJ has jurisdiction to interpret EU law, to review the legality of any action or</p>	<p>ECJ judgments have direct effect over domestic laws and enjoy supreme status over decisions of EU domestic courts.</p>	<p>Generally, ECJ have been mostly complied with by EU Member States.</p>	<p>The ECJ contributed to the development of the principles of direct effect, direct applicability and supremacy of EU Law. Its decision has therefore contributed to the development of EU Law as an</p>

	hear any appeals relating to legislative acts, acts of EU institutions, to hear disputes involving EU institutions, to hear infringement and sanctioning proceedings, and to hear and make preliminary rulings.			autonomous system of law.
EAST AFRICAN COURT OF JUSTICE (EACJ)	In terms of Articles 23(1), Articles 27, 28, 29, 30, 31, 32, 34 of the EAC Treaty, the EACJ has jurisdiction to interpret and apply the EAC Treaty, to adjudicate on all matters under the treaty including those relating to any act, regulation, directive, decision, action, to hear arbitral proceedings, give advisory opinions and make preliminary rulings.	EACJ judgments do not have a clear legal status before the domestic laws of EAC Partner States despite certain provisions of EAC legal framework suggesting otherwise. EAC Partner States, their domestic courts and EACJ itself continue to treat EAC Community Laws as part of public international law subject to supreme constitutions.	The EACJ judgments have generally been complied with by EAC Partner States.	The EACJ decisions have had marginal and indirect impact on the policies of EAC Partner States. However, in the absence of effective judicial systems within the EAC Partner States to monitor, protect and promote human rights, the court has filled this gap. Therefore, the EACJ contributed greatly to the goal of improving access to international justice, protection of human rights and promotion of rule of law by allowing civil society groups and

		This is the case despite the treaty containing supremacy clauses.		human rights activists to file cases before it.
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6.2 Findings and Recommendations

6.3 Chapter summary

This study sought to investigate the utility and legal value of the SADC Tribunal beyond state compliance measures.¹⁴⁷⁵ It identified and examined the multiple roles and functions of the SADC Tribunal and studied how the tribunal has performed these roles.¹⁴⁷⁶ This study sheds new light on the importance and contribution of the SADC Tribunal towards human rights protection and the rule of law.

As noted in Chapter 1, all the judgments issued by the SADC Tribunal against Zimbabwe have yet to be complied with by the government of Zimbabwe.¹⁴⁷⁷ Scholars have attributed the failure to comply with the SADC Tribunal judgments to inherent weaknesses within the SADC Tribunal Protocol establishing the tribunal.¹⁴⁷⁸ In other words, advocates of compliance measures have theorised that the SADC Tribunal can only be effective if its judgments are complied with or are supported by a strong enforcement system. Given the above problem, the critical question of this research, as stated in Chapter 1, is whether state compliance measures are appropriate for assessing the utility of the SADC Tribunal and whether such measures should be afforded any significance.¹⁴⁷⁹ Before delving into this question, the background section of Chapter 1 briefly introduced the SADC Tribunal from its inception to date. It touched on attendant issues such the number of cases it received and adjudicated over, including issues concerning non-compliance with its judgments.¹⁴⁸⁰ Recent developments in and changes to

¹⁴⁷⁵ See section 1.5.

¹⁴⁷⁶ See section 1.5.

¹⁴⁷⁷ See section 1.1.

¹⁴⁷⁸ See sections 1.1 and 1.2.

¹⁴⁷⁹ See section 1.3.

¹⁴⁸⁰ See section 1.2.

international law, particularly the study of international adjudication, were also contextualised to explain the general role and functions of ICs, particularly of the SADC Tribunal.¹⁴⁸¹

The role of ICs in international relations and global governance was further examined in Chapter 2.¹⁴⁸² The chapter discussed the foundations of international law and criticised the existing scholarship on international law that overlooks the contribution of Africa and Third World countries to the development of international law.¹⁴⁸³ The TWAIL scholarship that offers an alternative view to the study of international law was also viewed.¹⁴⁸⁴ This chapter examined the concept of international law, showing how it has evolved from interstate cooperation to now include private actors, and reflecting on the implications of these changes for the general understanding of international law.¹⁴⁸⁵ The discourse in Chapter 2 sought to establish whether there is any linkage between theories of state compliance and the SADC member states' behaviour towards international treaty obligations.¹⁴⁸⁶ Thereafter, the state compliance theory was criticised for its dominant Western view and state-centric approach that ignores the role of ICs in global politics,¹⁴⁸⁷ and the strengths and weaknesses of several measures used to assess the utility or performance of ICs were discussed.¹⁴⁸⁸

Chapter 3 examined the SADC Tribunal's legal and institutional framework. It first discussed the evolution of the SADC to date and provided a general overview of the SADC.¹⁴⁸⁹ It then provided a general background to the SADC Tribunal,¹⁴⁹⁰ followed by a discussion of the legal status of SADC community law.¹⁴⁹¹ The chapter examined the tribunal's jurisprudence to assess how it has used its jurisdiction, and reflected on how domestic courts have interpreted international treaties and how they view IC decisions such as those of the SADC Tribunal judgments.¹⁴⁹² More importantly, the enforcement mechanism adopted for enforcing the SADC Tribunal judgments was discussed. In addition, Chapter 3 examined the

¹⁴⁸¹ See section 1.1.1.

¹⁴⁸² Section 2.1.

¹⁴⁸³ Section 2.2.

¹⁴⁸⁴ *Ibid.*

¹⁴⁸⁵ See sections 2.3 and 2.4.

¹⁴⁸⁶ See section 2.5.

¹⁴⁸⁷ Section 2.6.

¹⁴⁸⁸ Section 2.7.

¹⁴⁸⁹ Section 3.2.

¹⁴⁹⁰ Section 3.3.

¹⁴⁹¹ Section 3.7.

¹⁴⁹² Section 3.3.3.

jurisprudence of the SADC Tribunal and showed that the SADC Tribunal has generally exercised its jurisdiction well. Furthermore, it reflected on the contributions of the SADC Tribunal towards settlement of disputes, interpretation and development of international human rights and access to international justice.¹⁴⁹³

The fourth chapter discussed the legal and institutional framework of the EU, specifically the ECJ) and EC, to show how they have addressed questions relating to state sovereignty and the enforcement of its judgments.¹⁴⁹⁴ It provided historical and political insight into the EU system and identified factors and conditions that allowed the ECJ to have a far-reaching impact.¹⁴⁹⁵ It also assessed the EU legal system with a primary focus on the status of EU law before the domestic legal systems of EU member states.¹⁴⁹⁶ In addition, this chapter examined the application of ECJ judgments by domestic courts and explored how ECJ jurisprudence has influenced national courts.¹⁴⁹⁷ Importantly, it reflected on the reaction of the EU governments to the growing influence of ECJ and deliberated on the constraints placed on the ECJ by EU governments.¹⁴⁹⁸

Chapter 5 provided a general political background of and legal insight into the EAC and identified factors that hindered its integration process.¹⁴⁹⁹ It examined the institutional system of the EAC with a particular focus on the functioning of the East Africa Court of Justice (EACJ).¹⁵⁰⁰ It also examined the legal framework of EAC community law and its relationship with the domestic legal systems of EAC partner states to determine its legal status and judgments.¹⁵⁰¹

6.3 Summary of the findings

Five key findings can be drawn from this thesis. The principal foundational finding is that while compliance with IC judgment is important for the ICs' legitimacy, and non-compliance

¹⁴⁹³ Ibid.

¹⁴⁹⁴ Section 4.1.

¹⁴⁹⁵ See sections 4.2. and 4.3.

¹⁴⁹⁶ See sections 4.5. and 4.6.

¹⁴⁹⁷ Section 4.6.

¹⁴⁹⁸ Ibid.

¹⁴⁹⁹ See sections 5.2. and 5.3.

¹⁵⁰⁰ Section 5.3.

¹⁵⁰¹ See sections 5.4. and 5.5.

with court rulings can have negative consequences for the court and victims of human rights violations, the primary objectives of litigants who file cases before ICs — particularly Africa’s ICs — is not always to ensure compliance with court decisions.¹⁵⁰² On the contrary, litigants sometimes use ICs to mobilise and advance their strategic goals such as exposing state oppression and injustices.¹⁵⁰³ Despite the fact that the decision to suspend the SADC Tribunal was as a major setback for activists’ litigants who file cases before Africa’s ICs, the decision has galvanised activists to challenge it in a number of forums- which ultimately forced the South African government to withdraw its signature from the new 2014 SADC Protocol.¹⁵⁰⁴

Therefore, evaluating the performance of ICs through enforcement and compliance ignores other important aspects of court decisions such as the influence of litigation process in various aspects.¹⁵⁰⁵ It overlooks how such court cases shape political and legal mobilisation or lead to advocacy beyond the courtroom.¹⁵⁰⁶ It also ignores the impact of the court decision on third parties not bound by a particular court decision.¹⁵⁰⁷ As has been noted, compliance overlooks the multiple roles and functions that ICs perform other than law enforcement.¹⁵⁰⁸

This research has evaluated the arguments for and against enforcement and compliance measures for evaluating IC effectiveness using specific examples. The study adopted the broader view which is that activists and litigants file cases for several reasons other than to ensure state compliance with court judgments.¹⁵⁰⁹

The main criticism of compliance measures is that they conflate compliance with effectiveness.¹⁵¹⁰ A court can issue inadequate remedies and accordingly produce high compliance rate but have no transformative impact on a state’s behaviour.¹⁵¹¹ The evidence from this study shows that the compliance rate approach is not desirable since the aggregate compliance rate to the SADC Tribunal judgments is 0 per cent.¹⁵¹² Consequently, it is an

¹⁵⁰² See section 1.1.

¹⁵⁰³ *Ibid.*

¹⁵⁰⁴ *Ibid.*

¹⁵⁰⁵ *Ibid.*

¹⁵⁰⁶ *Ibid.*

¹⁵⁰⁷ *Ibid.*

¹⁵⁰⁸ *Ibid.*

¹⁵⁰⁹ *Ibid.*

¹⁵¹⁰ See section 2.7.1.

¹⁵¹¹ *Ibid.*

¹⁵¹² *Ibid.*

overstatement to suggest that ICs can only be effective if states comply with their decisions.¹⁵¹³ ICs are important beyond measures of state compliance. Therefore, state compliance measures alone are inadequate for the study of the utility of the SADC Tribunal. It is important to use other measures without negating the importance of compliance.

The second major finding of this research is the appropriate approaches for studying the SADC Tribunal are the institutional design approach and goal-based approaches.¹⁵¹⁴ They are preferred since they move beyond state-centric analysis of compliance and effectiveness and place the court at the centre of their analysis.¹⁵¹⁵ They are also preferred since they show that ICs are designed not only to ensure compliance but also to perform many other roles.¹⁵¹⁶ These two approaches make it much easier to assess the legal value and importance of the SADC Tribunal than other approaches such as impact on non state actors¹⁵¹⁷

Thirdly, this study showed that the SADC Tribunal was established to perform many roles. These include settlement of disputes between member states, member states and natural or legal persons, natural or legal persons and the SADC, member states and the SADC, and SADC employees and the SADC, interpretation of SADC all legal instruments, development of SADC human rights jurisprudence and international human rights.¹⁵¹⁸ The SADC Tribunal has significantly contributed to the settlement of disputes between the SADC member states and individuals, thus ensuring that it is the law that decides the outcome of the dispute.¹⁵¹⁹ By settling disputes through legal means, the SADC Tribunal has contributed to the rule of law.¹⁵²⁰

Furthermore, the study demonstrated that the SADC Tribunal has effectively performed its role of treaty interpretation and contributed accordingly to the development and clarification of the SADC legal treaty and international human rights norms.¹⁵²¹ By interpreting and clarifying the SADC Treaty provisions and other international legal instruments, the tribunal contributed to the rule of law.¹⁵²² The Tribunal has performed its role well and achieved its

¹⁵¹³ Ibid.

¹⁵¹⁴ See sections 2.7.3. and 2.7.4.

¹⁵¹⁵ Ibid.

¹⁵¹⁶ Ibid.

¹⁵¹⁷ Ibid.

¹⁵¹⁸ See sections 2.7.3, 3.3.3 and 3.6.

¹⁵¹⁹ See section 3.7.1.

¹⁵²⁰ Ibid.

¹⁵²¹ See section 3.7.2.

¹⁵²² Ibid.

goals of proper interpretation and application of the SADC Treaty¹⁵²³ and has provided access to international justice.¹⁵²⁴

The suspension of the SADC Tribunal is a major setback for access to international justice, human rights and the rule of law. The importance of the suspended SADC Tribunal has been shown to lie in its ability to allow private actors to file cases before it.¹⁵²⁵ The study's analysis' leads to the following conclusion: the SADC Tribunal provided a forum for victims of human rights violations to expose human rights violations and crimes committed by their government against their citizens. Consequently, the decision to suspend the SADC Tribunal operations proved a significant blow to the rule of law in the SADC region and denied victims of human rights access to justice.

The fourth finding highlights the important lesson for the SADC to learn from the ECJ, namely that there must be appropriate political and legal conditions for the SADC Tribunal to succeed. The main lesson for the SADC Tribunal is that internal and external factors influence the institutional effectiveness of ICs. The evidence from this study supports this view.¹⁵²⁶ Institutional support at both international and domestic levels is important if the SADC Tribunal is to have a significant impact on the SADC regional integration process. As this research showed, the ECJ's success is due to the support of supranational institutions such as the EC and the support of domestic institutions such as the domestic courts.¹⁵²⁷ These conditions allowed the ECJ to develop its jurisprudence and made EU member states and domestic courts embrace the legal doctrine developed by ECJ.¹⁵²⁸ The general conditions found in the EU and the support that the ECJ enjoyed from EU member states contributed to its success.¹⁵²⁹ Therefore, the political and legal culture of the EU was the main reason for the success of the ECJ. Consequently, if the SADC Tribunal is to have success and have transformative impact, it must have the support of various actors at both international and domestic levels. SADC institutions such as the SADC Secretariat and domestic institutions

¹⁵²³ Ibid.

¹⁵²⁴ See section 3.7.3.

¹⁵²⁵ Ibid.

¹⁵²⁶ See sections 4.5.2, 4.6. and 4.8.

¹⁵²⁷ Ibid.

¹⁵²⁸ See section 4.5.2.

¹⁵²⁹ Ibid.

such as the domestic courts, including civil society, are significant in this regard. The tribunal alone cannot drive social and political change.¹⁵³⁰

A fifth key finding to emerge from this study is that the EAC suffers from design flaws, affecting the way in which its court systems operate.¹⁵³¹ Notably, the reluctance of the EAC partner states to cede their sovereignty to community institutions affects how the EACJ operates.¹⁵³² Moreover, the lack of clear legal status of the EAC community law before the domestic legal systems of EAC member states makes it difficult for EACJ to rely on the EAC Treaty when there is a conflict between EAC laws and the domestic legal systems of EAC partner states.¹⁵³³ The EACJ has often relied on the VCLT to resolve conflicts between EAC community law and domestic legal systems.¹⁵³⁴ The court has generally avoided declaring the EAC community law supreme over domestic legal systems of EAC member states, partly because the national constitution of EAC partner states places limits on the courts.¹⁵³⁵

This study found that EACJ judgments have had an indirect impact on EAC partner states' domestic legal systems and, in general, they have complied with EACJ judgments. Many EACJ judgments have declaratory orders that do not call for EAC partner states to take specific actions.¹⁵³⁶ However, one of the more significant findings to emerge from this study is that the EACJ has started to issue awards for general damages in human rights-related cases.¹⁵³⁷ This suggests that the EACJ is ready to play a more prominent role and ensure that its judgments are not reduced to mere declaratory orders. An important lesson from the EAC is that regional integration requires political commitment to be successful. Therefore, politicians must establish institutions and grant them the necessary power to implement community goals. This requires a system of shared governance in which political leaders cede certain aspects of their sovereignty to regional institutions. This will ensure that the political leaders are not the only role players in the regional integration process and that the success and survival of the EAC community are independent of politicians.

¹⁵³⁰ See section 3.7.

¹⁵³¹ See sections 5.3 and 5.4.

¹⁵³² *Ibid.*

¹⁵³³ See section 5.4.

¹⁵³⁴ See section 5.4.3.

¹⁵³⁵ *Ibid.*

¹⁵³⁶ See section 5.4.

¹⁵³⁷ See section 5.6.2.

6.4 Recommendations

This section makes recommendations in order to improve the general understanding of the work of the SADC Tribunal and enhance the study of the utility of the tribunal. These recommendations provide ideas on how this study can be implemented not only as a policy of the SADC but also as a guideline for general civil society. Since the SADC Tribunal is suspended, the following recommendations will place greater emphasis on the actions that need to be taken to ensure that the SADC Tribunal is reinstated to its original jurisdiction.

First, it is recommended that scholars studying the utility of ICs dealing with human rights issues and questions of the rule of law must avoid the tendency to view ICs' decisions through the prisms of winning and losing, since these are not the only important aspects of human rights court decisions.¹⁵³⁸ Instead, it is suggested that scholars must consider the impact and importance of court decisions, not only for the parties to the dispute, but for the broader society. ICs' decisions relating to human rights transcend nation states including individual circumstances and affect the entire international community.¹⁵³⁹ For purposes of this study, it is recommended that the value of the SADC Tribunal should be viewed beyond the focus on compliance measures without necessarily negating their importance.

The value of the SADC Tribunal can further be underscored by evaluating the multiple roles of the tribunal, its contributions towards development of international human rights law, improving access to international justice and the advancement of international rule of law.¹⁵⁴⁰ Therefore, since the impact of the SADC Tribunal is negligible at the domestic level of SADC member states, it is recommended that scholars investigate the contributions of SADC Tribunal to the advancement of the rule of law at the international level. Issues of the rule of law such as respect for human rights, access to courts and justice, concern not only SADC countries but also the entire international community.¹⁵⁴¹ If the debate on the utility of the SADC Tribunal is to move forward, there is a greater need to study and understand its multiple roles and functions, including its contributions to international rule of law. This is likely to broaden the

¹⁵³⁸ See Chapter 1, section 1.1.

¹⁵³⁹ See sections 2.7.5, 2.7.6 and 3.7.2.

¹⁵⁴⁰ See section 3.7.

¹⁵⁴¹ See sections 2.7.5 and 3.7.

understanding of how the SADC Tribunal functions and enable one to see the actual value of the SADC Tribunal beyond compliance-based mechanisms.

Secondly, in view of the current global challenges facing ICs, it is recommended that there must be ‘join efforts take place’ from governments, working together with business, civil society organisations and international institutions including ICs, to address the underlying causes of political backlash and rising populism.¹⁵⁴² If the ICs are to survive these challenges, they must be reformed in light of growing politicisation of their jurisprudence and the increase in populism.

The third recommendation is that international law and international relations scholarship must be reformed and decolonised to give voices to countries in the Global South, particularly African countries. International law and international relations theories as showed in this study explain Western experiences but do not fully capture the experiences of countries in the Global South.¹⁵⁴³ It is recommended that both international law and international relations be reformed and decolonised to open space for new scholarship that is inclusive and takes into account the experiences of countries in the Global South.

One of the ways in which this can be achieved is by giving preference to African jurisprudence which includes reference to African scholars, African legal instruments and case law. Where African jurisprudence is silent on a particular question, it is recommended that the jurisprudence of Third World countries should be preferred. This recommendation should in no way be construed as calling for the exclusion of Western jurisprudence and scholarship but for preference of more African jurisprudence. This approach will not only give voice to African countries and Third World countries but will allow them to share their experiences and accordingly to learn from each other.

Fourthly, since compliance measures ignore the role of ICs in international relations, there is a need to find alternative theories that consider the increasing role of ICs in global politics.¹⁵⁴⁴ It is recommended that the institutional design approach adopted by this study be utilised as a

¹⁵⁴² See section 1.1.4.

¹⁵⁴³ See Chapter 2, sections 2.2 and 2.6.

¹⁵⁴⁴ See Chapter 2, section 2.6.

method to explain the multiple roles played by ICs in international law and global politics.¹⁵⁴⁵ As stated in section 2.7.3 of the thesis, the institutional design approach views the roles of ICs beyond their traditional role of dispute settlement and accepts that ICs are actors in global politics and are not limited by state consent.

The fifth recommendation offered by this study is that the SADC must develop a process of nominating and appointing SADC Tribunal judges that is transparent and open to public scrutiny, for example conducting televised interviews made available to all social media channels and national broadcasters.¹⁵⁴⁶ It is also important that the SADC nomination and appointment process ensures fair gender representation to ensure credibility and legitimacy of the tribunal as an institution. More importantly, it is critical that the nomination and appointment process of the SADC Tribunal involves institutions such as the National Judicial Service Commissions and an independent body comprising members of law associations and members of civil society to interview candidates and make the necessary recommendations to the SADC Summit on the fitness of a particular candidate to hold the relevant tribunal office.

A sixth recommendation is that greater efforts should be applied to reinstate the SADC Tribunal to its initial format to allow individual access. Revival efforts — particularly the litigation strategies employed by civil society organisations such as the Tanganyika Law Society, the Law Society of South Africa and other NGOs — have yet to show any positive influence on the status of the SADC Tribunal.¹⁵⁴⁷ Steps should be taken to engage with the SADC leaders and sensitise them to the importance and role of the SADC Tribunal. Therefore, continued efforts and dialogue between the SADC leaders and civil society organisations are needed to solve the SADC Tribunal impasse. It is recommended that civil society organisations embark on a comprehensive public campaign to complement their litigation strategies, which have proven unsuccessful in restoring the SADC Tribunal. A reasonable approach to pressure the SADC leadership to reinstate the SADC Tribunal is to use strategies such as advocacy, public demonstrations, media coverage and litigation to raise awareness of the importance of individual access to the SADC Tribunal. Therefore, civil society organisations, particularly law associations, must pursue advocacy and mobilisation strategies for the SADC governments,

¹⁵⁴⁵ See Chapter 2, section 2.7.3.

¹⁵⁴⁶ See Chapter 3, section 3.3.2.

¹⁵⁴⁷ See Chapter 1, section 1.1.

regional institutions, media, and the general population. They must also engage with a sympathetic group of government Ministers and opposition political parties and encourage them to raise the issue of the SADC Tribunal before their domestic parliaments. Civil society organisations should draw important lessons from the experience of NGOs within EAC and ECOWAS in their attempt to restore SADC Tribunal.¹⁵⁴⁸

The seventh recommendation arising from this study is that other SADC member states follow South Africa and withdraw their signatures from the proposed new SADC Protocol of 2014 since it denies individual access and will have negative implications for protecting individual human rights and the rule of law.¹⁵⁴⁹ Important lessons must be drawn from the experience of South African civil society organisations that successfully forced the South African government to withdraw its signature from the 2014 SADC Tribunal.

In addition, it is recommended that SADC Tribunal decisions should be enforced in all SADC member states and granted the necessary binding legal status; domestic institutions such as Attorneys-General and the domestic courts should be directed to enforce these decisions. The SADC Summit as an institution and the respective national institutions of SADC member states such as Attorneys-General and the judiciary should play a more forceful role in ensuring compliance with SADC Tribunal judgments.¹⁵⁵⁰

A ninth study recommendation is that the procedure for the enforcement of the SADC Tribunal judgments under section 32 of the SADC Tribunal Protocol of 2001 be clarified since there are many challenges with enforcing SADC Tribunal decisions as foreign judgments and through the SADC Summit.¹⁵⁵¹ In order to ensure effective functioning of the SADC Tribunal, it is suggested that Article 32 on the Protocol on Tribunal and Rules of Procedure is revised to read as follows as follows:

- 1. The SADC Tribunal judgments shall be enforceable in the territory of all the SADC Member States in the same manner as any other judgments issued by domestic courts of SADC Member States*

¹⁵⁴⁸ See Chapter 2, section 2.7.6.

¹⁵⁴⁹ See Chapter 1, section 1.1.

¹⁵⁵⁰ See Chapter 3, sections 3.4 and 3.4.1.

¹⁵⁵¹ Ibid.

2. *SADC institutions and domestic institutions of SADC Member States shall take forthwith all measures necessary to ensure the execution of decisions of the Tribunal.*
3. *The decisions of the Tribunal are binding upon all SADC Member States and enforceable in any of the territories of the SADC Member States.*
4. *The SADC Tribunal shall proposed appropriate sanctions against any party who fails to comply with a decision of the court.*
5. *The SADC Summit shall impose punitive and/or economic sanctions against any Member State that persistently fail to comply with the SADC Tribunal.*

Alternatively, the SADC member states should amend their domestic legislation to extend recognition to the SADC Tribunal or develop a harmonised binding protocol that will ensure that the SADC Tribunal judgments are enforceable before all SADC member states.

The tenth suggested recommendation of this study is that the SADC Treaty should be amended to provide for specific sanctions in case of violations by any SADC member state of their obligations under the SADC legal instruments.¹⁵⁵² Article 33 of the SADC Treaty should be amended to direct the SADC Summit to impose specific sanctions such as cutting all diplomatic, economic and political ties with the recalcitrant state, and it should provide a timeframe according to which member states are to comply with the tribunal decisions. It is recommended that in deciding the type of sanction to impose, the recalcitrant state should not participate or engage in such process. It is also suggested that Article 33 of the SADC Treaty should be revised to read as follows:

1. *The SADC Summit shall impose punitive and/or economic sanctions against any Member State that:*
 - (a) *persistently fails, without good reason, to fulfil obligations assumed under this Treaty.*
 - (b) *Implements policies which undermine the principles and objectives of the SADC Treaty.*

¹⁵⁵² See Chapter 3, section 3.4.2.

2. *The sanction referred to in paragraph 1 shall include the following:*
 - (a) *Penalty payment determined by the SADC Secretariat*
 - (b) *Suspension of Member State from all activities of the SADC*
 - (c) *Cutting of all economic and diplomatic relations/ties*
 - (d) *Any other measure that the Summit deems appropriate.*
3. *The SADC Secretariat in collaboration with civil society organisations shall monitor the implementation of sanctions and report back to the Summit on the progress made.*
4. *The sanctions mentioned in paragraph 2 shall be implemented within a period of 90 days.*

It is also recommended that Article 10(9) of the SADC Treaty be amended to ensure that in the application of the consensus decision-making, the recalcitrant state does not participate in the decision-making.¹⁵⁵³ Therefore Article 10(9) of the SADC Treaty should be amended to read as follows:

10(9). *[u]nless otherwise provided in this Treaty, the decisions of the Summit shall be adopted and unconditionally accepted by the members of the Summit without the involvement of the Member State with a direct interest in a matter. Where Member States cannot reach consensus, the majority voting system should be preferred.*

In order for the SADC community laws and the SADC Tribunal judgments to have any significant impact before the domestic legal systems of SADC member states, it is further recommended that the SADC Summit as an institution and the individual SADC member states must show the necessary political will to implement SADC Treaty norms and comply with the SADC Tribunal judgments.¹⁵⁵⁴ The support of political actors and government officials is vital for the successful implementation of SADC Treaty and effective functioning of the SADC Tribunal.

¹⁵⁵³ Ibid.

¹⁵⁵⁴ Ibid.

6.5 Contribution of the study

This research has contributed to several critical issues in the study of international adjudication, particularly regarding the SADC Tribunal. It clarifies how the tribunal works and has identified the importance and legal value of the SADC Tribunal and ICs beyond compliance measures.

The study has implications for scholarship on the SADC Tribunal, in particular for policymakers, legal practitioners, NGOs and academia interested in protecting individual human rights, the rule of law, the right of access to courts and access to justice in the SADC region. This study demonstrates that the SADC Tribunal had achieved its goals of settling disputes between SADC member states and individuals and clarifying treaty interpretation. It was also able to confirm that the tribunal achieved its implicit goals of human rights protection, promotion of the rule of law and access to justice for victims of human rights violations. This is due to its institutional design compulsory jurisdiction, which allowed individual access before the tribunal. Therefore, reinstating the SADC Tribunal to its initial jurisdiction is necessary to protect not only victims of human rights violations in the region but also business actors in the absence of adequate remedies before domestic courts.

More importantly, the work of the SADC Tribunal is vital since the rule of law and human rights protection is inadequate in many SADC countries. This study established a framework for measuring the effectiveness of the SADC Tribunal and adds to the growing body of literature demonstrating that ICs are important beyond compliance measures. It is one of the first attempts to thoroughly examine the utility of the SADC Tribunal outside compliance measures. The insights gained from this study may assist SADC policymakers, judges, legal practitioners, NGOs and academia. This study lays the groundwork for future research on the effectiveness of the SADC Tribunal beyond compliance measures.

6.6 Future research

Literature on the effectiveness of ICs abounds, but it tends to focus on courts outside the African continent. More information is needed about the effectiveness of the SADC Tribunal apart from compliance measures. There needs to be further research on the effects of the SADC Tribunal and its jurisprudence on different actors and on its contribution towards broader goals of promoting human rights, the rule of law and improving access to international justice.

More studies are required to measure the utility and legal value of the SADC Tribunal in addition pure compliance. The next chapter contains thesis conclusion.

CHAPTER 7: THESIS CONCLUSION

This study sought to assess the utility and legal value of the SADC Tribunal beyond state compliance measures. Given the problem of non-compliance with IC judgments in general and with SADC Tribunal judgments in particular, the aim of this study was not to dismiss the importance of compliance with SADC Tribunal judgments. On the contrary, it sought to reveal how the SADC Tribunal works and to suggest ways in which to study ICs such as the SADC Tribunal, which deal with human rights issues and rule of law questions. This study acknowledged that the Tribunal judgment have not been complied with by Zimbabwe. It showed that SADC Summit as an institution and SADC member states as a collective failed to ensure that Zimbabwe compliance with the Tribunal judgments for various reasons including legal and political reasons such as lack of political will, and ineffective provisions for enforcement and compliance with court judgments. Although the tribunal judgments have had no real impact on the domestic legal systems of SADC member countries, its decisions have contributed to the promotion of human rights, rule of law and access to international justice. This study has demonstrated that the Tribunal and its decisions were important from the perspective of human rights, rule of law and access to international justice. The tribunal managed to contribute to the human rights, rule of law and access to justice due to its institutional setup such as broad access rules or compulsory jurisdiction. However, the Zimbabwe's challenge to SADC Tribunal jurisdiction shows that not all SADC states voluntarily accept the compulsory jurisdiction of the tribunal in matters involving serious national interests such as the land question.

While the tribunal and its rulings may be viewed as insignificant by proponents of compliance, it caught the attention of the international community. The tribunal decisions were the first attempt of holding Zimbabwe accountable at international level for its land reform that was conducted in a violent manner. The tribunal decisions exposed the impunity of the Zimbabwean government to international community and placed the government of the time under international pressure for the way it handled the issue of land reform. The decisions undermined Zimbabwe's international standing while it ensured that the complainants gained international support. It also helped civil society groups to mobilise and call for the restoration of the

Tribunal. This is why the overly focus on compliance overlooks the importance of filing cases and the significance of the court rulings in human rights related cases.

But the tribunal poor reasoning in relation to the land question also made it difficult for Zimbabwe to comply with the Tribunal ruling. It also made it impossible for other SADC member states to compel Zimbabwe to comply with tribunal decision. As this study shown, the land question in Southern Africa is a sensitive issue that needs to be handled in a delicate manner. It appears that the Tribunal judges never considered the implications and impact of their decisions concerning the land issue. By rejecting and delegitimising the land reform policy of Zimbabwe, the Tribunal missed an opportunity to act as an agent of social change. The tribunal should have made better use of international laws to promote access to land and address the unequal patterns of land ownership in Zimbabwe and beyond. The SADC Tribunal should have considered the sensitive nature of the land question, including the historical, political and economic context of the land question in Zimbabwe. As this study has shown, there is a link between colonial dispossession of African lands and unequal patterns of land ownership in Southern African region between indigenous Africans and white colonial settlers. Consequently, the issue of land reform could not be viewed in isolation or interpreted without an understanding of this broader context. The tribunal could not simply interpret the SADC Treaty or use formalists legal language without the historical and social context of the land issue in the region. The tribunal should have gone beyond what is contained in SADC treaty and acknowledged the importance and legitimacy of the land reform policy. It should have rather criticised the process in which the Zimbabwean government implemented Fast Track Land Reform. Thus, the court should have adopted a more balanced approach on the issue of land question.

Nevertheless, this study has concluded that the SADC is an effective judicial institution that is ready and willing to serve the people of the SADC region. Evidence was presented that the SADC Tribunal is prepared to make adverse decisions against the ruling political elites and hold them accountable for their action without any fear of government reprisal. Through its innovative interpretation of the SADC Treaty and international norms, the tribunal has set the standard that must be followed by all SADC member states. The tribunal decisions and its

interpretation of SADC legal instruments has been indirectly accepted by domestic courts of South Africa.

The prospects and potential of the SADC Tribunal should serve as a continuous incentive for reinstatement to its initial jurisdiction. Of course, this does not mean that the SADC Tribunal has had a transformative impact on the domestic politics of SADC member states or on their domestic rule of law. As this study has shown, the utility and legal value of the SADC Tribunal does not lie in its ability to address all the domestic challenges facing many SADC states relating to democracy and problems of the rule of law. It is clear that the SADC Tribunal cannot drive social and political change on its own. Therefore, it should not be viewed as a panacea for poor governance and flouting the law. It is rather through the efforts of various actors such as civil society organisations, human rights activists and the international community, that democratic governance and respect for the rule of law can be achieved in the SADC.

Despite the important contribution made by the tribunal towards the protection of human rights, the advancement of the rule of law and access to justice, impunity and violence against populations, particularly opposition leaders and civil society groups continue to reign. Many SADC governments continue to intimidate, threaten and arrests their citizens and members of civil society groups. Therefore, the suspension and disbandment of the tribunal was a major setback for those who continue to face violence and are denied access to justice at the domestic level. The suspension of the tribunal has been heavily criticised by civil society groups and other human rights activists which shows the significance and importance of the tribunal from a human rights law perspective.

On the other hand, this study has shown that the ECJ has played a significant role in developing the constitutional law of European Union (EU) through its establishment of the principles such as direct effect and supremacy. The ECJ jurisprudence has had a positive impact and many countries within the EU have been greatly influenced by the ECJ case law. In particular, EU countries' domestic courts have relied on the ECJ jurisprudence. In other words, the EU Commission and domestic courts of EU member countries have acted as allies of the court and have traditionally supported the work of the court. The court's influence and contribution would not have been possible without the support of EU institutions such as the

European Commission and domestic courts of EU member states. The EU Commission in collaboration with the ECJ is mandated to enforce ECJ judgments and impose penalties payments for non-compliance with the court judgments. The EU enforcement mechanisms ensure that there is homogenous implementation of EU law and court judgments across the EU Member States. Many ECJ judgments have been implemented and enforced in all EU member states.

Despite its initial success, ECJ finds itself faced with new challenges relating to its legitimacy, weakening of democracy and the rule of law problems within the EU member states. This study showed that there is an increasing discontent and backlash by EU member countries against the ECJ. Many countries including Hungary, Poland and Britain have expressed their concerned about the increasing power of the court and its interference in matters that they view as part of their policy autonomy. As a results, these countries have refused to accept the doctrines of supremacy of EU Law and have even rejected some of the EU judgments. The backlash against the ECJ is a clear demonstration that democracy and the rule of law in Europe is in decline while populism is on the rise.

On the other hand, this study showed that despite the EAC Treaty following the basic doctrines of Community Law as developed by the ECJ, the EACJ has not contributed to the development of EAC Community Law. This study showed that the status of the EAC Community Law within the domestic legal systems of EAC Partner States is unclear. This affects the effective functioning of the court. Notably, the absence of clear legal status of the EAC community law before the domestic legal systems of EAC member states makes it difficult for the EACJ to rely on the EAC Treaty when there is a conflict between EAC laws and the domestic legal systems of EAC partner states. As a result, the court has often relied on the VCLT to resolve conflicts between EAC community law and domestic legal systems. The relationship between EAC and domestic laws is strange in the sense that the EAC Partner States and their court system are required to give direct effect and grant supreme status to EAC Laws while in terms of international there is no such obligation. Despite the above, the EACJ has produced several important human rights decisions and made bold decision against the governments of EAC. This study demonstrated that the EACJ judgments have had an indirect impact on the domestic legal systems and, in general, they have complied with EACJ

judgments. It showed that the EACJ is willing to move beyond making declaratory judgments and act as an agent of social and political change. This is achieved through the innovative interpretation of the EAC legal framework as living documents. The way the court has dealt with allegations of violations of human rights and impunity has allowed it to contribute to the development of human rights norms and thus promote social and political change. Thus, the court is proactive in its rulings and has become more emboldened in its human rights jurisprudence. This is demonstrated by its expansive interpretation of its human rights jurisdiction and its recent imposition of general damages against EAC Partner States. EAC Partner States have generally complied with the EACJ judgments, and this is evidenced by some legislative amendments and changes that have been made by EAC governments after the court rulings.

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