

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

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ABSTRACT

Following the controversy that accompanied Zimbabwe's declaration that it would not comply with the decision of the SADC Tribunal against it in the Campbell case and the refusal of the Zimbabwean municipal courts to implement the decisions of the SADC Tribunal, the Tribunal faces threats to its existence. While some of those threats are external, others are located within the founding instruments of the Tribunal. Specifically, certain ambiguities in some provisions have been raised to challenge the legality, competence and legitimacy of the SADC Tribunal. This article examines the concept of ambiguity in international legal drafting and analyses the relevant instruments of the SADC Tribunal. The article takes the view that most of the ambiguities currently found in the relevant instruments are not fatal. However, it stresses the need for Treaty amendments to address them in order to prevent future disruptive challenges to the Tribunal's existence.

I INTRODUCTION

Since the conclusion of the now famous (or some would prefer notorious) case of *Campbell (Pvt) Ltd v Zimbabwe (Campbell case)*¹ by the SADC Tribunal² in 2007, lawyers, human rights activists and prospective litigants

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1 (2008) AHRLR 199 (SADC 2008).

2 The SADC Tribunal is the main judicial organ of the Southern Africa Development Community (SADC). The SADC Tribunal is established in arts 9 and 16 of the Consolidated SADC Treaty. The composition, powers, functions and procedures of the Tribunal are contained in the Protocol on the Tribunal and Rules of Procedure (2000). The SADC Tribunal began operation in 2005

have come to perceive the Tribunal as a potentially viable international forum for vindicating alleged violations of human rights within the territories of member states of the Southern Africa Development Community (SADC). Perhaps as a result of the proximity of the SADC Tribunal to prospective litigants in Southern Africa and the challenge of limited individual access to the African Court on Human and Peoples' Rights (African Human Rights Court), the SADC Tribunal became a symbol of hope for acclaimed victims of human rights in states with a less than flattering human rights record.

It is in the face of such growing sense of expectation from the SADC Tribunal that challenges to the legality of the Tribunal's existence have begun to surface from certain quarters.³ In reality, the attack on the scope of the Tribunal's jurisdiction began almost as soon as the interim proceedings in the *Campbell* case were instituted. Reacting to the claim against it, Zimbabwe argued that there was nothing in the SADC Treaty or any other instrument of the Community that empowered the Tribunal to exercise jurisdiction in the field of human rights.⁴ Following the delivery of final judgment in the *Campbell* case, the finding that Zimbabwe had violated its SADC Treaty obligations and the subsequent finding by the Tribunal that Zimbabwe had failed to comply with the decision of the Tribunal, the matter was referred to the SADC Summit.⁵ Zimbabwe's reaction to the events that followed the referral was to contend that the operationalisation of the Tribunal itself was illegal and unconstitutional as the conditions precedent to the coming into effect of the SADC Protocol on the Tribunal were never met. It is against this background that this article seeks to review the provisions of the Treaty and the Protocol relating to the SADC Tribunal.

Such a review also provides an opportunity for a critical analysis of the founding instruments of the Tribunal to identify actual and perceived problematic provisions that threaten the existence and functioning of the Tribunal especially from a human rights perspective. Proceeding on the thesis that any existing gaps and ambiguities in the relevant instrument could easily be cured

following the appointment of its first set of judges.

- 3 The Republic of Zimbabwe has brought a politico-legal challenge to the existence of the Tribunal.
- 4 *Campbell & Another v Zimbabwe (Campbell interim 2007)*, SADC (T) Case No 2/2007, ruling of 13 Dec 2007, 2. Also see SADC (T) Case No 2/2007 whose judgment was delivered on 28 Nov 2008.
- 5 The SADC Summit consists of the Heads of State or Government of the SADC member states, which is the supreme policy making organ of the organisation. The first referral to Summit by the Tribunal took place in July 2008. It related to Zimbabwe's refusal to comply with the interim ruling of the Tribunal. A second referral was made in 2010 following Zimbabwe's refusal to comply with or implement the final judgment of the Tribunal.

by further legislative activity or judicial construction and interpretation, this article undertakes a modest but probing evaluation of the most important provisions relating to the existence and operations of the SADC Tribunal. It argues that although there is no ambiguity or lacuna in the relevant instruments that is fatal, it nevertheless recommends that Treaty be amended to address those ambiguities and lacunae to prevent future disruptive challenges to the Tribunal's existence.

II A CONTENTIOUS FOUNDATION OF THE SADC TRIBUNAL

Although Zimbabwe participated fully in the proceedings leading to the judgment of the SADC Tribunal in the *Campbell* case, its government did not hesitate to declare its intention to ignore or disobey the orders made by the SADC Tribunal in that case.⁶ Political and legal authorities in Zimbabwe, applying different routes, arrived at the same conclusion that there were justifications for Zimbabwe to decline to comply with or implement the decision of the Tribunal.⁷ Zimbabwe's refusal to comply with the interim order of the SADC Tribunal resulted in proceedings culminating in two distinct referrals from the SADC Tribunal to the SADC Summit.⁸ Upon receipt of the initial referral, the SADC Summit mandated the Ministers of Justice and Attorneys General of SADC member states in August 2008 to consider the referral and report back. In response, the government of Zimbabwe prepared and presented a discussion paper in which it raised fundamental challenges to the existence and functioning of the SADC Tribunal.⁹

One of the high points of the discussion paper presented by the government of Zimbabwe was the call for a review of the founding instruments of the

6 There are a plethora of newspaper reports on the subject. However, the most compelling evidence of Zimbabwe's position was a letter dated 12 August 2009 from the Zimbabwean Minister Justice and Legal Affairs addressed to the SADC Tribunal in which Zimbabwe declared that it was no longer participating in the proceedings of the Tribunal. The letter is quoted in *Fick & Others v Zimbabwe* SADC (T) Case No 01/2010.

7 Certain distinguished commentators contend that there is a difference between the obligation to comply with the decision of an international court and the obligation to implement such a decision.

8 According to art 32(4) & (5) of the Protocol on the SADC Tribunal, the failure of a state to comply with a decision of the Tribunal may be brought before the Tribunal. In the event of establishment by the Tribunal of such failure to comply, the Tribunal is required to report to the Summit for 'appropriate action'. This point will be revisited later in this work.

9 See the Discussion paper prepared by the Government of Zimbabwe on the Agenda Item titled 'Execution and Enforcement of the Judgments of the SADC Tribunal' submitted to the SADC Meeting of Ministers of Justice/Attorneys General (on file with author).

SADC Tribunal.¹⁰ On 17 August 2010, the SADC authorities in apparent deference to the request by Zimbabwe issued a communiqué to announce that a review of the ‘role, functions and terms of reference of the SADC Tribunal’ would be undertaken and concluded within six months. The communiqué also announced a freezing of the operations of the SADC Tribunal to the extent that it directed the Tribunal not to receive any new cases pending the conclusion of the proposed review process. Furthermore, the SADC Summit announced that the expired tenure of office of members of the Tribunal would not be renewed during the period of the review.¹¹

Fundamental questions were raised by Zimbabwe to sway the decision to embark on a review of the instruments of the Tribunal. For instance, Zimbabwe denied that the Tribunal could claim any human rights jurisdiction on the basis of the existing Consolidated SADC Treaty. There was also a question as to whether the Protocol of the SADC Tribunal ever entered into force in accordance with the provisions of the relevant SADC Treaty documents. Zimbabwe also questioned the meaning of the term ‘appropriate action’ in article 32(5) of the Protocol of the SADC Tribunal.¹² These issues pose a threat to the existence and functioning of the Tribunal.

III AMBIGUITY IN INTERNATIONAL LEGAL DRAFTING

The view has been expressed that ‘ambiguities’ defy any generally acceptable definition ‘precisely because of their ambiguous nature’.¹³ Notwithstanding this perception, there have been attempts to capture the essence of the term ‘ambiguity’. The Oxford Dictionary defines the word ‘ambiguity’ to mean something of ‘uncertain or inexact meaning’.¹⁴ Munson defines ambiguity as an expression ‘... that has more than one meaning and ... is used in a situation or context in which it can be understood in at least two different ways’.¹⁵ Apparently dissatisfied with Munson’s definition, Pehar adds certain elements to the definition of ambiguity. He contends that ‘in order to qualify as ambiguity, an expression must generate not only “at least two

10 As above.

11 As at 31 March 2011, the review process was almost concluded as a draft report was known to be in existence.

12 Generally see the Zimbabwe discussion paper, above note 9.

13 D Pehar ‘Use of ambiguities in peace agreements’ *Language and Diplomacy* 167, available at www.diplomacy.edu/Books/language_and_diplomacy/texts/.../pehar2.pdf (accessed 13 February 2011).

14 *Oxford Paperback Dictionary, Thesaurus and Wordpower Guide* (Oxford: Oxford University Press, 2001) 25.

15 R Munson, ‘The ways of Words’ (1976) 74 (cited by Pehar, above note 13, 164).

meanings”, but also have two incompatible and unrelated meanings’.¹⁶ Explaining his ideas further, Pehar argues that:¹⁷

Ambiguities are pieces of language that 1) can be interpreted as meaning A, 2) can be interpreted as meaning B, and 3) cannot be interpreted as meaning A and B simultaneously, but eventually as a natural (re)source from which, under specific focuses of vision/interpretation, both A and B might at separate times spring.

Basically, it would emerge from the limited exploration of definitions above that the whole essence of ambiguities in language is that they create the possibility of contradictory yet probable meanings from a given word, sentence or text. In this context, ambiguity could very well arise from an unintended but wrong choice of words as much as from a deliberate use of equivocal words or group of words. Thus, in international legal drafting as in diplomacy, ambiguity could be either deliberate or accidental, depending on whether it was foreseen at the time of drafting an instrument. Similarly, ambiguity could be constructive or destructive depending on how the relevant actors ultimately interpret and give meaning to the equivocal words or groups of words. In the context of diplomacy, it is suggested that the concept of constructive ambiguity, which is often traced to Henry Kissinger, ‘refers to the deliberate use of ambiguous language on a sensitive issue in order to advance some political purpose’.¹⁸ As international legal drafting cannot neatly be separated from international diplomacy, arguably, international legal drafters may occasionally find the need to engage in the deliberate use of constructive ambiguity in the drafting of international instruments.

According to Pehar, ambiguities could be broadly classified in three main categories. First, he alludes to what he terms ‘referential ambiguity’, which is essentially ambiguity based on the equivocal nature of a word.¹⁹ Second, he refers to ‘syntactical ambiguity’ which he sees as ambiguity arising from the ‘vagaries of syntactical relations within a sentence’. In other words, the ambiguity arises more as a result of an equivocal sentence than merely of specific words.²⁰ Finally, Pehar refers to ‘cross-textual ambiguity’ which he links with a text comprising of several sentences some of which may or may appear to

16 Pehar, above note 13, 164.

17 As above.

18 B Donaghy ‘Constructive ambiguity in neighbour – neighbour mediation’, available at <http://www.mediate.com/articles/donaghy B3.cfm> (accessed 13 February 2011).

19 Pehar, above note 13, 165.

20 As above 166.

present contradictory meanings.²¹ Without engaging in a debate as to the correctness of Pehar's analysis (something beyond the scope of this article), I take the liberty of adopting his definition for this article. It is contended that all these ambiguities can be found in the SADC instruments relating to the SADC Tribunal. In the following sections, the relevant instruments are discussed to expose these ambiguities.

IV AN AMBIGUOUS EXISTENCE OR TOO AMBIGUOUS TO EXIST

Perhaps the most critical challenge to the existence of the SADC Tribunal is the contention that the Protocol on the Tribunal was never ratified by SADC member states and thus, the Tribunal is illegal or at least not legally constituted.²² An extended version of this challenge also contends that a 'SADC Agreement Amending the Treaty of SADC', which was signed in 14 August 2001 and which is considered as the basis for the view that the Protocol on the Tribunal does not require any separate ratification process, is also of no effect as it has not entered into force.²³

Arguably, at least two main issues arise here for consideration vis-à-vis the question of ambiguity of the provisions of a treaty. First, there is the issue concerning what rules are applicable for the amendment of SADC instruments, and the connected question as to when an amendment enters into force in the SADC regime. Second, there is the question concerning whether, and how, the Protocol on the Tribunal relates to the Consolidated Treaty of the Southern Africa Development Community (Consolidated SADC Treaty), assuming that that Treaty and not the original 1992 SADC Treaty is the prevailing Constitutive document of the SADC.

In the consolidated SADC Treaty,²⁴ article 36 deals with the amendment of the Treaty. By that provision, an amendment of the SADC Treaty occurs when a decision to that effect is adopted by three-quarters of all members of the SADC Summit. It is not clear whether this provision means that SADC leaders have decided to do away with the ratification requirement generally associated with international treaty making. Clearly, as far as the rules of treaty

21 As above 167.

22 See the Zimbabwe Government Discussion paper, above note 9, 5. Also see T Hondora 'The establishment of the SADC Tribunal: Troubled beginnings' (17 December 2010), available at <http://ssm.com/abstract=1727342> (accessed 26 January 2011).

23 See the Zimbabwe Government Discussion Paper (as above) 37–39.

24 The original SADC Treaty was adopted in 1992 and entered into force on 30 September 1993. Since then, the Treaty has been amended at least two times. The Consolidated Treaty is the version circulated by the legal department of SADC among SADC member states.

making in international law are concerned, it is within the competence of states to decide on the manner in which their treaty can enter into force.²⁵ However, Zimbabwe's challenge suggests that not all SADC member states agree with the idea of doing away with the ratification requirement. A reading of the article 36 provision also fails to indicate whether 'adoption' includes authentication by signature or whether it merely requires a failure to object to the amendment proposed. In the circumstances, a variety of interpretations could be ascribed to article 36 of the Consolidated SADC Treaty. The one option would be to consider that the failure to add words such as 'signature' and 'ratification' are accidental omissions more in the character of lacunae that should be read into the provision. Another option would be to read in a requirement of 'signature' without reading in a necessity for 'ratification'. This option is possible when it is considered that a treaty need 'not be subject to ratification, approval or acceptance', in which case 'signature creates an obligation of good faith and establishes consent to be bound'.²⁶ A third possible interpretation is that, contrary to the more popular practice in international law, but within the competence of the contracting states to so elect, SADC member states have made a conscious decision not to require either a formal signature or ratification for an amendment to take effect.²⁷ In view of the fact that more than one meaning can be deduced from the provision and the possible meanings are potentially contradictory, it can be said that this provision is ambiguous.

There are other reasons why article 36 of the Consolidated SADC Treaty is problematic. As Zimbabwe points out in its challenge, in its current formulation, if article 36 is interpreted as not requiring either signature or ratification, it would mean that as soon as three-quarters of member states adopt an amendment, it binds the remaining ones – quarter, whether or not they consent to the amendment.²⁸ Considering the voluntary nature of international 'law making', the effect of such a regime is anyone's guess. Hence, the question could be posed whether article 36 of the Consolidated Treaty envisages a regime of consensus especially taking into account the provisions of article 10 of the Consolidated Treaty.²⁹ In other words, it could mean that in the process leading up to the adoption by the three-quarter of member states,

25 Article 24(1) of the Vienna Convention on the Law of Treaties, Done at Vienna on 23 May 1969, entered into force on 27 January 1980, 1155 UNTS, 331 ('VCLT').

26 I Brownlie *Principles of international law* (Oxford: Oxford University Press, 2008) 610.

27 This is a possibility within the boundaries of art 11 of the VCLT which allows states the latitude to choose the means by which they intend to be bound by a treaty.

28 See Zimbabwe Government Discussion paper, above note 9, 39.

29 Article 10 provides that decisions of the SADC Summit shall be by consensus unless the Treaty expressly provides otherwise.

the one-quarter member states that do not join in the adoption should expressly be opposed to the adoption. Here again, the air of equivocation is evident.

In relation to the SADC Tribunal, it is not clear if article 36 of the Consolidated SADC Treaty is the applicable provision to address the question of the legality of its existence. It has to be noted that the Consolidated Treaty and hence its article 36 proceed from the 2001 Agreement Amending the Treaty of SADC. That being the case, it could very well be that the more appropriate provision to be analysed is the amendment regime in the original 1992 SADC Treaty. There appears to be no difference between the relevant provisions of the 1992 SADC Treaty and the Consolidated SADC Treaty. Article 36 in the Consolidated Treaty is a verbatim reproduction of the corresponding provision in the 1992 SADC Treaty. While articles 39 to 41 of the 1992 Treaty (article 40 to 42 of the Consolidated Treaty) speak to issues of signature and ratification for the Treaty to enter into force, those provisions are not transferred to the provisions on amendment. One ambiguity that emerges from this state of the provisions is the question whether the signature and ratification requirements in the relevant provisions of both Treaty regimes are intended to apply to the process of amending the SADC Treaty. Consequent upon this ambiguity and the possibility of logical yet radically contradicting interpretations, there is room for a party to assert that the 'Agreement Amending the Treaty of SADC' is in force just as there is room for asserting that the Agreement could never have entered into force.

A crucial question that needs to be answered is whether judicial interpretation can cure this ambiguity. In other words, would all parties be satisfied to leave the determination of the intention of the drafters to the SADC Tribunal? Assuming that the ambiguity identified is intentional, was it a constructive ambiguity deliberately made to allow for the acceptance and adoption of the SADC Treaty by all parties? If so, what can be done now that the provision has emerged to haunt the SADC? Put differently, what is the way out of this quagmire? It would appear that state practice up until July 2010 points to an acceptance of (or at least the absence of objection to) the view that the requirements of formal signature and ratification do not apply to amendments of the Treaty. In the face of state practice, a judicial organ would find it relatively easy to interpret article 46 as the product of a deliberate decision to omit both signature and ratification requirement. As earlier pointed out, this would result in the imposition of obligations on an unwilling and non-consenting state, which position may somewhat be tempered if the decision to amend is reached through consensus. Alternatively, a court could read in at the very least, a requirement that states need to sign a proposed amendment for it to

become valid and binding. Naturally, this would lead to the question whether the contentious Agreement Amending the SADC Treaty either was reached by consensus or attracted the signature of member states. Even if positive judicial interpretation is possible, it would still be preferable that this particular ambiguity is resolved through a legislative process.

If the ambiguity referred to above is resolved, SADC is still faced with the second issue concerning the relation of the Protocol on the Tribunal to the Consolidated Treaty. The relevance of this issue lies in the argument that the Protocol is intended to form an integral part of the Consolidated SADC Treaty and, by reason of that, does not require any separate ratification and existence.³⁰ There is no dispute regarding the fact that, although it is article 9 (and therefore the Treaty) that establishes the Tribunal, it is the Protocol envisaged in article 16(2) of the Treaty that operationalises the Tribunal. The problem emerges from article 16(2) which states that the Protocol shall 'notwithstanding article 22 of this Treaty, form an integral part of this Treaty'. The confusion relates to the import of this phrase vis-à-vis the said article 22.

It must be observed that article 22 of the Consolidated SADC Treaty relates to 'Protocols' and sets out the procedure for the adoption of protocols. A crucial point to note is that by article 22(3) and (4), protocols adopted by the SADC Summit require signature and ratification and should enter into force 30 days after the submission of the ratification instrument of two-third of the member states. At least one commentator makes a strong issue of the use of 'shall' in those provisions and consequently classifies the 'signature and ratification' requirement as 'peremptory procedures'.³¹ Such a position has support from a article 10(3) of the Consolidated SADC Treaty which provides that 'Subject to Article 22 of this Treaty, the Summit shall adopt legal instruments for the implementation of the provisions of this Treaty'. On the face of it, these two articles impose a regime requirement that all SADC protocols should undergo signature and ratification. However, an ambiguity arises when in the same Treaty an exception appears to be made to the applicability of these provisions.

As already shown above, article 16(2) of the Consolidated Treaty provides that 'notwithstanding article 22', the Protocol on the Tribunal forms an integral part of the Treaty. The question is: 'what is the import of that phrase'? It appears that one can attribute more than one meaning to it. One interpretation (which the present author subscribes to) is that the Protocol on the Tribunal ought to pass through the processes of signature and ratification as

30 The Legal Department of the SADC Secretariat and much of civil society tow this line.

31 Hondora, above note 22.

contained in article 22, read together with article 10(3) of the Consolidated SADC Treaty. In other words, even though (or if) the Protocol has not or does not pass through those processes, it would still claim legal existence through its connection to the Treaty adopted by the Summit. Another plausible interpretation is that favoured by Hondora which holds that the 'notwithstanding' phrase relates to the Protocol's attachment to the Treaty rather than to the abandonment of the signature and ratification requirement.³² A third possible interpretation is that presented by the Government of Zimbabwe in the challenge contained in its Discussion Paper. According to this third view, by article 22, SADC ought to conclude protocols 'as may be necessary in each area of cooperation'. Since the Protocol on the Tribunal is not one of those areas of 'cooperation', it cannot be said to be binding on member states.³³

A perusal of the old article 22 in the 1992 Treaty indicates that it contemplates the annexure of protocols as integral parts of the Treaty (article 22(2)) and the requirement to sign and ratify such protocols (article 22(3)). It would be observed that the annexure envisaged in the old article 22(2) was never transferred to the Consolidated Treaty. However, it would also be noted that the new article 22 does not also expressly or impliedly forbid or prohibit the annexure of protocols to the Treaty. Had that been the case, the exception created in article 16(2) of the Consolidated Treaty would very easily have been interpreted as reference to the annexure prohibition. Hence, if any exception is created in article 16(2) of the Consolidated SADC Treaty, it should relate to an existing (not abandoned) Treaty requirement. Assuming that the foregoing is considered as the criterion for excluding the interpretation to article 16(2) as put forward by Hondora, it certainly does not exclude the interpretation put forward by the Government of Zimbabwe. This is because that interpretation relates to an existing statement (and perhaps requirement) in article 22. This having been said, there is logic in any of these three possible interpretations but all of them cannot be correct simultaneously. Consequently, there is ambiguity here and it threatens the continued existence of the Tribunal.

Textual ambiguities in article 22 of the Consolidated SADC Treaty continue to the extent that the provisions in sub-articles (9) and (10) suggest that only parties to protocols – meaning those who have signed and ratified or acceded to protocols – can take part in activities relating to such protocols. If that is actually the case, the practice around the SADC Tribunal (at least in relation to the nomination of members of the Tribunal) seems to suggest that all SADC members (including those who did not at any time sign or ratify the Protocol)

32 Hondora, above note 15, 9.

33 See Zimbabwe Government Discussion Paper, above note 19, 41.

have participated actively in the affairs of the Tribunal. This state of affairs can be interpreted in two different ways. On the one hand, it could mean that article 16(2) of the Consolidated Treaty does indeed create an exception to the signature and ratification requirement in article 22. This would translate into subsequent state practice that should count as context in which the SADC Treaty should be interpreted by the judicial organ.³⁴ Accordingly, every SADC member state that defers to the Consolidated Treaty is automatically a party to the Protocol on the Tribunal. If this is the case, the existence of the Tribunal is ambiguous but suffices for continuity. On the other hand, it could mean that the entire activities around the Tribunal since its inception have been a nullity. In this latter case, there is no legally existing Tribunal as the ambiguity takes on a fatal character. The former is a more compelling interpretation. However, the important point for the purposes of this contribution is to demonstrate that an ambiguity exists, which can result in contradicting yet logical interpretations by opposing sides. Again, either judicial interpretation or legislative action could cure the ambiguities. The difficulty that arises in the specific context of SADC is that in the face of the freezing of the operations of the Tribunal by the SADC Summit, no new action brought to seek an interpretation will be accepted by the registry of the Tribunal.³⁵

V FINDING THE JURISDICTION TO ADJUDICATE HUMAN RIGHTS

Assuming that the debate on the existence of the Tribunal is resolved in favour of the Tribunal's continued existence, there is still the question whether under the prevailing Treaty regime, the Tribunal can claim and exercise human rights jurisdiction. In relation to human rights competence, concerns relate more to gaps than to the ambiguity of the provisions. Hence, the crucial question is whether express provisions should have been added to give the Tribunal express human rights jurisdiction. Notwithstanding the foregoing position, it still remains to be considered whether within the existing provisions of the Consolidated SADC Treaty and the Protocol on the Tribunal, there is a sufficient basis to support the Tribunal's assumption of human rights jurisdiction.

34 See art 31(3)(a) of the VCLT.

35 Considering that the Tribunal is an organ of SADC just as the Summit is an organ of SADC, it would be interesting to pose the question whether one organ (even if it is the supreme policy making organ) can exercise powers to suspend or freeze the operations of another organ. In municipal law, one arm of government does not have the power to interfere with the existence and functioning of another arm. It is not clear whether this is the case in the law of international institutions.

In order to address these issues, articles 4, 5 and 6 of the Consolidated SADC Treaty as well as articles 14 and 15 of the Protocol on the Tribunal deserve particular attention. Article 4 of the Consolidated Treaty, which lays out the principles in accordance with which SADC and its member states are expected to act in the pursuit of integration, expressly includes human rights, democracy and the rule of law.³⁶ In article 5, which sets out the objectives of SADC, the Consolidated Treaty makes clear reference to the promotion of 'common political values ... transmitted through institutions which are democratic, legitimate and effective',³⁷ as well as an objective to 'consolidate, defend and maintain democracy, peace, security and stability'.³⁸ In article 6(1), SADC members undertake to 'adopt measures to promote the achievement of the objectives of SADC and ... refrain from taking any measures likely to jeopardise *the sustenance of its principles...*' (emphasis added). It should also be noted that article 33(1)(b) threatens sanctions for member states that promote policies which undermine the principles of SADC. Although there are other provisions which touch on human rights in the Treaty, these represent the general provisions upon which a human rights regime in the SADC framework could be based.³⁹

On their own, articles 4, 5, 6 and 33 of the Consolidated SADC do not do much for the assertion of a claim to human rights jurisdiction by the SADC Tribunal. In fact, some could argue (as indeed they have done) that it is not even clear if these provisions impose any concrete obligations on states in the field of human rights. Thus, one view would be that, without more, there is no way the SADC Tribunal can claim human rights jurisdiction under the prevailing Treaty regime. In specific terms, the Government of Zimbabwe has argued that 'principles are not an end in themselves but a means to an end', and consequently that 'they cannot create legally enforceable obligations in themselves in the absence of explicit language to that effect'.⁴⁰ This is not a contention to be taken lightly as international organisations and their organs can only exercise powers expressly or impliedly conferred on them by consenting states.⁴¹ Arguably, it is both the inadequacy of the existing provisions and the absence of other provisions that have created the lacuna surrounding the

36 See art 4(c) of the Consolidated SADC Treaty.

37 Article 5(1)(b) of the Consolidated SADC Treaty.

38 Article 5(1)(c) of the Consolidated SADC Treaty.

39 The human rights jurisprudence of the SADC Tribunal has hinged largely on all or most of these provisions.

40 Zimbabwe Government Discussion Paper, above note 9, 5.

41 See generally the *Reparation for Injuries Suffered in the Service of the United Nations*, (Advisory Opinion of 11 April 1949) ('*Reparation Case*') (1949) ICJ Reports 174.

human rights jurisdiction of the SADC Tribunal.

In article 16(1), the Consolidated SADC Treaty empowers the Tribunal to 'ensure adherence to and the proper interpretation of the provisions of this Treaty ... and to adjudicate on such disputes as may be referred to it'. In relation to the provisions of articles 4, 5, and 6 as well as article 33, the competence of the Tribunal could be interpreted as having jurisdiction over all issues contained in the Treaty including human rights. This view has apparent support from articles 14 and 15 of the Protocol of the Tribunal. However, it has to be noted that article 14 of the Protocol requires that all disputes and applications so referred need to be in accordance with the Treaty and the Protocol. This raises the necessity to locate human rights within the Treaty framework.

Perhaps it is this additional requirement that may push a positivist lawyer to make the argument that, in the absence of an unequivocal conferment of competence (similar to the ECOWAS regime⁴²), the Tribunal cannot claim competence. Put differently, it is debatable whether the statement of fundamental principles in the SADC Treaty confers rights on citizens or imposes obligations on states. Those in favour of human rights jurisdiction under the current treaty arrangement may argue that a cumulative reading of articles 4, 5, 6 and 33 of the Consolidated Treaty as well as articles 14 and 15 of the Protocol can only be interpreted in favour of the existence of a human rights jurisdiction. This position was given a judicial backing in the *Campbell* case. However, that decision alone has not extinguished the contending view. Indeed, it is possible to confront the principle of 'human rights, democracy and rule of law' with other equally accepted principles of international law. It is in this context that further qualification of the 'principles of human rights, democracy and rule of law' would be desirable.

A further ground on which one may deny the Tribunal's jurisdiction in human rights relates to the absence of a human rights catalogue within the framework of SADC. It could be contended that in the absence of a SADC-specific human rights instrument, all reference to human rights and democracy in the Treaty amount to mere rhetoric. This argument is given some weight by the fact that the different generations of SADC Treaty fail to link their reference to human rights to any particular instrument and certainly not the African Charter on Human and Peoples' Rights (African Charter).⁴³ The opposing view may be that the allowance granted the Tribunal in article

42 Art 9(4) of the 2005 Supplementary Protocol of the ECOWAS Community Court of Justice confers competence on the Court to 'determine case of violation of human rights that occur in any member state'.

43 Adopted 27 June 1981, OAU Doc CAB/LEG/67/3 Rev 5, 21 ILM 58 (1982), entered into force 21 October 1986.

21 of the Protocol to develop 'its own community jurisprudence' is sufficient to cover any lacuna created by the absence of a human rights catalogue. It could be argued further (as some have done) that SADC member states are already obligated to themselves insofar as they are all already parties to instruments such as the African Charter. However, even in article 21, there is room for competing interpretations. On the one hand, 'general principles and rules of public international law and any other rules and principles of the laws of states' clearly include human rights. On the other hand, the fact that 'international human rights law or rules' is not expressly mentioned can be interpreted by those opposed as an intention to exclude it. Although this latter interpretation, if made, would fall short of prevailing understanding of international law as encompassing human rights law, the very fact that it can be made is evidence of the existence of the lack of clarity within the SADC regime. In relation to this ambiguity, judicial interpretation ought to cure any defects. However, legislative action would put a permanent end to any opposing viewpoint.

VI TO SANCTION OR NOT TO SANCTION

Another seemingly unsettled area in the SADC Treaty and the Protocol on the SADC Tribunal that has an impact on the functioning of the Tribunal relates to the Community's sanction regime. Articles 16(5) and 33 of the Consolidated SADC Treaty and articles 24(3) and 32 of the Protocol on the Tribunal must be considered in any analysis of Tribunal's judgment and sanctions regime of SADC. Both article 16(5) of the Consolidated Treaty and article 24(3) of the Protocol affirm that decisions of the Tribunal are 'final and binding'. Yet, article 32 of the Protocol appears to subject the decisions of the Tribunal to the review of municipal courts of member states by its provisions requiring the Tribunal's judgments to be enforced in accordance with the Foreign Judgment Enforcement Procedures of the relevant states.

In the provisions above, there is a clear existence of ambiguity as more than one interpretation is possible. On the one hand, the argument can be made that 'final and binding' as used in the relevant provisions relates to the absence of an appeal structure within the SADC framework and before any other international court or tribunal. This view may allow for judicial transformative processes in accordance with national law. Taken from that perspective, there would be no contradiction between the 'final and binding' provisions and the article 32 provision in the Protocol requiring the Tribunal's judgment to pass through national judicial processes. On the other hand, the argument could be made that 'final and binding' is absolute and the article 32

provision violates the spirit of those ‘final and binding’ provisions. A third view may be that the article 32 provisions in the Protocol speak to decisions of a monetary nature and therefore are inapplicable to ‘final and binding’ judgments of a human rights nature. It is even possible for some to argue that in the domestic sphere, municipal law is supreme and therefore the ‘final and binding’ provisions need to be subjected to municipal processes insofar as they are to be enforced at the municipal level. Without going into the debate whether any or all of these views are correct, it can be seen that there is ambiguity in these provisions. This is one area where judicial interpretation may not cure the existing ambiguity. Legislative action is needed to clarify the relevant provisions.

In relation to the sanctions regime of SADC, there is confusion concerning the nature of the sanctions that may be imposed under article 33(2) of the Consolidated Treaty. This provision, on the face of it, suggests that a deliberate decision was made to leave space for the SADC Summit to decide on appropriate sanctions on a case-by-case basis. While this may appear reasonable, it opens the door for uncertainty and whimsical application of sanctions according to the popularity or strength of an offending regime or government. More importantly, it gives the impression that violations of financial obligations owed to SADC are more abominable than violations of other obligations such as obligations to comply with decisions of the Tribunal or to refrain from undermining the principles of integration. It must also be observed (as Zimbabwe did) that article 32(5) of the Protocol on the Tribunal refers to ‘appropriate action’ to be taken by the SADC Summit in the event of a report from the Tribunal against a state for noncompliance. It is not clear what constitutes ‘appropriate action’, especially since this is not a phrase that is open to judicial interpretation in its present context.

VII CONCLUDING REMARKS

This article has made a very modest analysis of some of the most important instruments relating to the existence and functioning of the SADC Tribunal. Hopefully, the contribution has shown that in their present formulations, a number of provisions open room for two or more conflicting and competing interpretations. Some of these ambiguities are not fatal and could be easily cured by the SADC Tribunal itself through interpretation, if it is given the opportunity to do so. However, some of these issues require the attention of SADC states to resolve. Whatever is done, stakeholders need to bear in mind that institutions like the SADC Tribunal are some of the few institutions in the African integration process that create a window of opportunity for ordinary citizens to be involved in an otherwise elitist process.