A SIN COMMITTED BY THE (SUSPENDED) SADC TRIBUNAL: THE EROSION OF STATE SOVEREIGNTY IN THE SADC REGION

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Abstract

State sovereignty was once the sacrosanct and unquestionable characteristic of statehood under international law. International law prohibited any form of intervention by one state in the domestic affairs of another state without the latter's consent. However, this is no longer the position. It appears that state sovereignty is gradually losing its once inviolable character due to the emergence of human rights, subregional organisations and judicial organs such as the Southern African Development Community (SADC) and the SADC Tribunal. The aim of this article is to critically discuss the impact of the decisions of the SADC Tribunal on state sovereignty within the context of SADC. I argue that by ratifying the Treaty of the Southern African Development Community (SADC Treaty), SADC member states have given away a certain portion of their sovereignty.

Keywords: Sovereignty; SADC; SADC Tribunal; jurisdiction; human rights; Zimbabwe; South Africa; enforcement

1 Introduction

State sovereignty constitutes 'the backbone of the world order'[1] and 'acts as a shield for smaller states against interference and bullying by powerful states'.[2] The concept of sovereignty remains one of the most topical, elusive, emotive and controversial topics in international law.[3] Sometimes the term sovereignty is even misused by states in order

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1 MMTA Brus *Third Party Dispute in an Interdependent World: Developing a Theoretical Framework* (1995) 3.

2 MR Phooko *The SADC Tribunal, its Jurisdiction, Enforcement of its Judgments and Sovereignty of its Member States* (2016) 70.

3 D Sarooshi *International Organizations and their Exercise of Sovereign Powers* (2005) 3.

to pursue unjustified acts, such as acting against the principles of democracy, the rule of law and human rights.[4] It is thus not surprising that government officials would publicly proclaim the sovereignty of their state, asserting that it should, therefore, be allowed to determine its own internal affairs. Perhaps it is in this regard that Schrijver noted that:

> Few subjects in international law and international relations are as sensitive as the notion of sovereignty. Steinberger refers to it in the Encyclopaedia of Public International Law as 'the most glittering and controversial notion in the history, doctrine and practice of international law.' On the other hand, Henkin seeks to banish it from our vocabulary and Lauterpacht calls it a 'word which has an emotive quality lacking meaningful specific content,' while Verzijl notes that any discussion on this subject risks degenerating into a Tower of Babel. More affirmatively, Brownlie sees sovereignty as 'the basic constitutional doctrine of the law of nations' and Alan James sees it as 'the one and only organising principle in respect of the dry surface of the globe, all that surface now … being divided among single entities of a sovereign, or constitutionally independent kind.' As noted by Falk, 'There is little neutral ground when it comes to sovereignty'.[5]

These divergent approaches to the concept of sovereignty highlight the difficulties associated with understanding or defining the concept. Despite these difficulties, scholars have developed working definitions. It has been argued elsewhere that sovereignty involves an exclusive 'exercise in and control of absolute power over something in order to maintain a particular status'.[6] This understanding is similar to the one coined by Bodin during the 16th century where he defined sovereignty as an 'absolute and perpetual power'.[7] Bodin's characterisation of sovereignty could be understood as the power to do anything with no form of accountability. Since Bodin offered his definition, other definitions have found their way to assist in defining sovereignty.[8] For the purpose

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4 P Sutherland, J Bhagwati, K Botchway *et al* 'The future of the WTO: Addressing institutional challenges in the new millennium' para 110 http://www.ipu.org/splz-e/wto-symp05/future_WTO.pdf (accessed 30 September 2019).

5 N Schrijver 'The changing nature of state sovereignty' (1999) 70 *British Yearbook of International Law* 69–70.

6 Phooko (n 2 above) 64.

7 J Bodin 'On sovereignty' in H Julian & JH Franklin (eds) *On Sovereignty* (1992) 345.

8 See eg P Winston & C Hammber 'The changing character of sovereignty in international law and international relations' (2004) 43 *Columbia Journal of Transnational Law* 141 and 143–145. Winston & Hammer have identified at least 13 different overlapping meanings of sovereignty. According to them, 'sovereignty may refer to a personalized monarch (real or ritualized), a symbol for absolute, unlimited control or power, as a symbol of political legitimacy, a symbol of political authority, a symbol of self-determined, national independence, a symbol of governance and constitutional order,

of the present article, however, the definition by Bodley is preferred. In Bodley's view:

> Sovereignty is the most extensive form of jurisdiction under international law. In general terms, it denotes full and unchallengeable power over a piece of territory and all the persons from time to time therein.[9]

Bodley's definition is favoured because it captures the common theme from other definitions; that is to say, the exercise of control over something to the exclusion of others. In other words, sovereignty, under international law, entails the exercise of control by a state over a territory in order to maintain a particular status. Bodley's definition is only supported to the extent that it envisages the exercise of control over a territory. In the author's view, Bodley's definition represents the traditional view of state sovereignty, which is no longer upheld today. The view that the sovereign exercise of power cannot be challenged has no place in modern international law.[10]

There are numerous and widely accepted factors in contemporary scholarship that have largely redefined how state sovereignty is understood.[11] The factors that have eroded state sovereignty include the emergence of human rights, globalisation and the transfer of power to subregional economic communities, such as the Southern African Development Community (SADC).[12] Accordingly, the purpose of this article is to discuss the erosion of state sovereignty within the SADC region with specific reference to the decision of the SADC Tribunal in *Mike Campbell v Republic of Zimbabwe*[13] and the subsequent decisions by

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a criterion of jurisprudential validation of all law, a symbol of the juridical personality of sovereign equality, a symbol of recognition, a formal unit of legal system, a symbol of powers, immunities, or privileges, a symbol of jurisdictional competence to make and/or apply law, and a symbol of basic governance competencies'. See also N Walker 'Late sovereignty in the European Union' in N Walker (ed) *Sovereignty in Transition* (2003) 6. He defines sovereignty as 'the discursive form in which a claim concerning the existence and character of a supreme ordering power for a particular polity is expressed, which supreme ordering power purports to establish and sustain the identity and status of the particular polity qua polity and to provide a continuing source and vehicle of ultimate authority for the juridical order of that polity'.

9 A Bodley 'Weakening the principle of sovereignty in international law: The International Criminal Tribunal for the Former Yugoslavia' (1999) 31 *New York University Journal of International Law and Politics* 419.

10 B Sirota 'Sovereignty and the Southern African Development Community' (2006) 6 *Chicago Journal of International Law* 344.

11 MP Ferreira-Snyman *The Erosion of State Sovereignty in Public International Law*: *Towards a World Law*? (LLD thesis University of Johannesburg 2009) 43.

12 R Schwarz & O Jütersonke 'Divisible sovereignty and the reconstruction of Iraq' (2005) 26 *Third World Quarterly* 652.

13 *Campbell* SADC case (2/2007) SADCT 2 (28 November 2008).

both Zimbabwean[14] and South African courts.[15] The aim of the analysis is to ascertain the implications and impact of those decisions on the sovereignty of Zimbabwe, South Africa and other SADC member states. Part 2 briefly deals with the impact of human rights on the notion of state sovereignty, while part 3 discusses the notion of state sovereignty in the SADC region. Building on that, part 4 deals with the concept of state sovereignty through a series of cases in the context of SADC and their effect on state sovereignty. Parts 5 and 6 constitute recommendations and the conclusion, respectively.

2 The Impact of Human Rights on State Sovereignty

The gross violations of human rights that occurred during World War II forced the international community to concede that those who commit heinous crimes in their states should be held accountable for their actions.[16] Accountability is an important concept in international law because states can no longer treat people or citizens as they wish, but rather in a manner that protects human rights of their citizens and advances their development. It is these developments that have, to a large extent, affected and changed the understanding of sovereignty under international law.

It is a well-established principle that any conduct of a state that violates human rights attracts international intervention, and can no longer be viewed as a purely domestic matter.[17] For example, the International Criminal Tribunal for the former Yugoslavia had the opportunity to deal with the concept of state sovereignty when it was invoked as a defence to avoid international intervention in the matter of *Prosecutor v Duško Tadić*.[18] In this case, the appellant challenged the jurisdiction of the Tribunal to adjudicate over crimes that had been committed in Bosnia-Herzegovina. He argued that the Tribunal had been created to 'invade an area essentially within the domestic jurisdiction of States' and thus violated the principle of state sovereignty'.[19] In rejecting this argument, the Tribunal reasoned that:

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14 *Gramara v The Republic of Zimbabwe* HC 33/09 [2010] ZWHHC 1 (26 January 2016).

15 *Government of the Republic of Zimbabwe v Fick and Others* 2013 (5) SA 325 (CC).

16 A Ferreira-Snyman 'The evolution of state sovereignty: An historical overview' (2006) 12 *Fundamina* 1.

17 Ferreira-Snyman (n 11 above) 43; L Henkin 'That "S" word: sovereignty, and globalization, and human rights, et cetera' (1999–2000) 68 *Fordham Law Review* 4; Ferreira-Snyman (n 16 above).

18 Decision on Jurisdiction (Appeals Chamber) Judgment of 2 October 1995, 105 ILR 453.

19 Id para 55.

> ... [i]t would be a travesty of law and a betrayal of the universal need for justice, should the concept of State sovereignty be allowed to be raised successfully against human rights violations. Borders should not be considered as a shield against the reach of the law and as a protection for those who trample underfoot the most elementary rights of humanity ...[20]

Based on the above reasoning, the Tribunal dismissed the appellant's challenge to its jurisdiction. The appellant was unsuccessful in his appeal against this decision. There are three observations that can be made from this ruling: first, it shows that the international community's interest in protecting, respecting and promoting human rights has significantly eroded the traditional view of state sovereignty. Second, states are expected to promote and protect human rights within their territories and hold accountable anyone who violates these rights. This also entails that a state that violates human rights in its territory will be held accountable by the international community. Finally, it demonstrates (indeed confirms) that the concept of state sovereignty, as an absolute legal proposition, can no longer be accepted in modern international law.[21]

3 State Sovereignty Within the SADC Region

African states are very protective of their right to sovereignty. This is understandable, given that the rationale behind the formation of the Organisation of African Unity was to defeat all forms of colonialism in Africa.[22] Therefore, reliance on absolute sovereignty was inevitable as African states sought to protect their hard-earned independence from Western states.[23] However, it appears that their reliance on absolute state sovereignty is being subordinated to the continent's relatively new legal order that embraces human rights, democracy and the rule of law. Since the formation of the African Union (AU) in 2001, the protection of human rights and intervention in the territory of other states to protect human rights has been at the core of the AU's agenda.[24] Furthermore, where gross violations of human rights, such as genocide, have been committed, the Constitutive Act of the AU permits the organisation to

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20 Id para 58.

21 Henkin (n 17 above) 4 and 8.

22 See the Preamble to and art II(c) of the Charter of the Organization of African Unity 479 UNTS 39 (entered into force 13 September 1963).

23 NJ Udombana 'Can the leopard change its spots? The African Union Treaty and human rights' (2002) 17 *American University International Law Review* 1208.

24 The human rights agenda in the African Union can be traced to the Preamble to the Constitutive Act of the African Union, 2000. The African heads of state and government expressed their commitment 'to promote and protect human and peoples' rights, consolidate democratic institutions and culture, and to ensure good governance and the rule of law'.

intervene in a member state pursuant to a decision of the Assembly to prevent further violations.[25] The Constitutive Act further recognises the right of any member state to request intervention from the AU in order to restore peace.[26] It is submitted that the aforesaid exceptions are a major shift from the times of absolute non-interference in the domestic affairs of other states. State sovereignty has been reformed.

Despite the aforesaid erosion of state sovereignty, it is conceded that some African states are to a certain extent still protective of their sovereignty and do not want to be held accountable for human rights violations. Substantiating this perspective is the continued suspension of the SADC Tribunal, which was viewed as a threat to state sovereignty.

Following the demise of colonialism, and the formation of the AU, one would have hoped that African states would accept that state sovereignty is no longer absolute. Despite this, the prevailing view is that 'not even the least viable state in the [SADC] region is willing to contemplate the loss of sovereignty'.[27] States thus remain very protective of their sovereignty regardless of their regional commitments that presumably limit their autonomy.[28] These issues will be dealt with in detail below.

When it became clear during the 1990s that apartheid and economic dependence on the then apartheid South Africa had been defeated, members of the Southern African Development Coordination Conference (SADCC) changed the name of the regional organisation from SADCC to SADC.[29] In so doing, heads of state and/or government reaffirmed to uphold human rights in their territories through the adoption of the SADC Treaty.[30]

The SADC Treaty was adopted in Windhoek, Namibia on 17 August 1992 and paved the way for the creation of a SADC judicial organ to protect human rights.[31] Indeed, article 9(f) of the SADC Treaty established the SADC Tribunal for this purpose. The SADC Tribunal was established as one of the SADC institutions in terms of article 2 of the SADC Protocol on the Tribunal and Rules of Procedure 2000 (SADC

25 Art 4(h) of the Constitutive Act.

26 Id art 4(j).

27 LA Swatuk & P Vale 'Why democracy is not enough: Southern Africa and human security' in N Poku (ed) *Security and Development in Southern Africa* (2001) 38.

28 L Hartwell 'Zimbabwe: Sovereignty comes with responsibility' *allafrica.com* 29 September 2019 http://allafrica.com/stories/201109301004.html (accessed 29 September 2019).

29 A Saurombe 'The role of South Africa in SADC regional integration: The making or breaking of the organization' (2010) 5 *Journal of International Law and Technology* 124–125.

30 The text of the treaty can be accessed at http://www.sadc.int/documents-publications/sadc-treaty/ (accessed 28 September 2019).

31 Oliver C Ruppel 'Regional economic communities and human rights in East and Southern Africa' in A Bösl & J Diescho (eds) *Human Rights in Africa* (2009) 296.

Protocol on the Tribunal).[32] The SADC Tribunal is situated in Windhoek. Its judges were appointed in Gaborone, Botswana on 18 August 2005.[33] The inauguration of the SADC Tribunal and the swearing-in of judges took place on 18 November 2005 in Windhoek.[34]

The role and powers of the SADC Tribunal emanate from article 16(1) of the SADC Treaty, which provides that the Tribunal must, inter alia, 'ensure adherence to and the proper interpretation of the provisions of this treaty and subsidiary instruments and to adjudicate upon such disputes as may be referred to it'. The decisions of the SADC Tribunal are final and binding on the parties to the dispute.[35] In other words, the SADC Tribunal is the final court and its decisions are not subject to appeal.

The SADC Tribunal began its work during 2007 and delivered several judgments against the state of Zimbabwe. Some of those decisions include *Mike Campbell v Republic of Zimbabwe*[36] and *Fick and Another v Republic of Zimbabwe*.[37] These decisions have caused a number of legal and political tensions between member states (South Africa and Zimbabwe). To illustrate, since the *Campbell* case was decided against Zimbabwe, the state of Zimbabwe has continuously challenged the jurisdiction of the SADC Tribunal. This challenge resulted in a political decision by the heads of state to suspend the SADC Tribunal in 2010.[38] Since then, the SADC Tribunal has remained non-functional. To add to the uncertainty regarding the future role of the SADC Tribunal, the Summit subsequently adopted the Protocol on the Tribunal in the Southern African Development Community (2014 Protocol), which limits access to the envisaged new SADC Tribunal to inter-state disputes only.

It is submitted that SADC member states relinquished part of their sovereignty when the SADCC was established during the 1980s as a tool to reduce economic dependence from the previous dispensation in South Africa and to oppose apartheid.[39] To this end, there was a need to create a regional body and surrender some of their sovereign rights

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32 The protocol can be found at http://www.sadc.int/documentspublications/show/Protocol_on_the_ Tribunal_and_Rules_thereof2000.pdf (accessed 27 September 2019).

33 Ruppel (n 31 above) 296.

34 Ibid.

35 See art 32(3) of the SADC Protocol on the Tribunal.

36 *Campbell* SADC case (n 13 above).

37 SADC (T) 01/2010.

38 SADC 'Communiqué by the Southern African Development Community Heads of State on the 30th Jubilee SADC Summit' 19 August 2010 http://www.zimeye.org/?p=20977 (accessed 30 September 2019).

39 See the SADC website at http://www.sadc.int/index/browse/page/52 (accessed 28 September 2019). The SADCC was formed by Angola, Botswana, Lesotho, Malawi, Mozambique, Swaziland, Tanzania, Zambia and Zimbabwe. Namibia joined at a later stage.

to it for a certain level of authority that would serve their collective goals. Writing about sovereignty in the context of the European Union (EU), Fremuth is of the view that 'Member States remain sovereign but they accept restrictions on their sovereign rights to benefit from working together in the supranational EU'.[40] This view is applicable to the SADC context because of the fact that member states agreed to work together. It follows that each state has to abide by the principles of the SADC Tribunal and act in the interests of the regional body. In this way, state sovereignty is limited because a member state cannot do as it wishes or act against the collective interests of the regional body.

SADC has 15 member states, namely: Angola, Botswana, Democratic Republic of the Congo, Lesotho, Madagascar, Malawi, Mauritius, Mozambique, Namibia, Seychelles, South Africa, Swaziland, Tanzania, Zambia and Zimbabwe.[41] All these member states undertook to act in accordance with the principles of 'human rights, democracy and the rule of law'.[42] By ratifying the SADC Treaty, they also agreed that the SADC Tribunal would be the judicial organ responsible for ensuring that member states discharged their treaty obligations, including to protect human rights in their respective territories.

4 Discussion of the Cases before the SADC Tribunal, Zimbabwean and South African Courts

This section deals with a case delivered by the SADC Tribunal, including the subsequent domestic decisions by Zimbabwe and South Africa, which sought to enforce the initial decision of the SADC Tribunal. The selected cases are important because they demonstrate the erosion of state sovereignty within SADC while simultaneously illustrating Zimbabwe's continued reliance on state sovereignty.

4.1 Mike Campbell v Republic of Zimbabwe (Campbell *SADC* case)

The applicants in this case challenged the land reform policy in Zimbabwe, which had sanctioned the expropriation of land without compensation and barred national courts from hearing any disputes arising from such land expropriation.[43] The issues for determination by the SADC Tribunal were whether the Tribunal had jurisdiction to adjudicate the

40 This is the view of L Fremuth who presented a paper titled 'Sovereignty – (quo) vadis? Reflections on a lasting concept' at the University of Pretoria on 3 February 2016 (paper on file with author).

41 See http://www.sadc.int/member-states (accessed 1 October 2019).

42 Art 4(c) of the SADC Treaty.

43 *Campbell* SADC case (n 13 above) para 14.

case; whether the applicants had been denied access to the courts in Zimbabwe; whether the applicants had been discriminated against on the ground of race; and whether compensation was required to be paid for the expropriated land.

In advancing their case, the applicants argued that Zimbabwe, in implementing the land reform programme, was acting against the principles of democracy, the rule of law and human rights as provided for in the SADC Treaty. They further argued that they had been unfairly discriminated against on the ground of race.

From the outset, the respondent state insisted that the SADC Tribunal lacked jurisdiction to adjudicate the matter. In response to the challenge to its jurisdiction, the SADC Tribunal took a flexible approach and invoked its implied powers to assume jurisdiction over human rights.[44] In particular, it relied on principle 4(c) of the SADC Treaty that requires member states to act in accordance with the principles of human rights, democracy and the rule of law. The SADC Tribunal reasoned that this principle gave it the power to adjudicate human rights cases.[45] The SADC Tribunal further reasoned that, although the land reform policy did not mention any targeted race, its effects were only felt by white farmers, who owned the majority of agricultural land in Zimbabwe. Based on this reasoning, it ruled that the applicants had been discriminated against on the basis of their race.

The SADC Tribunal also observed that, since the law that sanctioned land expropriation ousted the jurisdiction of local courts from adjudicating cases involving the expropriation of agricultural land,[46] the applicants were clearly unable to institute legal proceedings in the courts of Zimbabwe. The limitation on the ability of the affected farmers to litigate their rights in the courts of Zimbabwe was confirmed by a decision of a

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44 Implied powers are recognised under international law as long as their application is necessary to achieve the object and purpose of the treaty. See *Katabazi and 21 Others v Secretary General of the East African Community and Another* (Ref No 1 of 2007) [2007] EACJ 3 (1 November 2007); LN Murungi & J Gallinetti 'The role of sub-regional courts in the African human rights system' (2010) 7 *Human Rights Law Journal* 119–143; and *Reparation for Injuries Suffered in the Service of the United Nations, Advisory Opinion* 1949 ICJ Reports 174. Even though such powers are widely recognised under international law, there are those who are of the view that a judicial body that exercises powers that are not contained in the constitutive document exceeds its mandate. See, inter alia, D Sarooshi 'The powers of the United Nations International Criminal Tribunals' http://www.mpil.de/files/pdf2/mpunyb_sarooshi_2.pdf (accessed 1 October 2019); and MJ Nkhata 'The role of regional economic communities in protecting and promoting human rights in Africa: Reflections on the human rights mandate of the Tribunal of the Southern African Development Community' (2012) 20 *African Journal of International and Comparative Law* 97.

45 *Campbell* SADC case (n 13 above) paras 24–25.

46 Id para 23.

Zimbabwean court.[47] In light of the above reasoning and findings, the SADC Tribunal ordered Zimbabwe to compensate the applicants for the land that had been expropriated. The applicants attempted to register and enforce this decision in the territory of Zimbabwe in the *Gramara* case (discussed at 4.2 below).

The decision in the *Campbell* SADC case has generated considerable debate among scholars and has been welcomed by many as a progressive decision in the human rights arena in Zimbabwe and beyond.[48] Indeed, despite the noble objective of the land reform programme, its implementation should not have flouted human rights norms. It is submitted that the manner in which the land reform programme was implemented (through violence) compromised several human rights norms. Hence, the *Campbell* case demonstrated and enforced the principle that a sovereign state is not allowed to act contrary to its obligations under the SADC Treaty. To put it differently, the *Campbell* case reinforces the notion that state sovereignty may not be used to trample fundamental human rights and freedoms, and serves as a signal to other states that the treatment of citizens in their territories is subject to the SADC legal order.

4.2 Gramara v the Republic of Zimbabwe

In the *Gramara* case, the applicants sought to register and enforce the SADC Tribunal's decision (*Campbell*) in the domestic courts of Zimbabwe. The SADC Tribunal had ordered the government of Zimbabwe to compensate those whose farms had been expropriated without compensation. The issues for determination before the High Court of Zimbabwe were whether the Tribunal had jurisdiction to adjudicate the case; and whether the recognition and enforcement of the Tribunal's decision would be contrary to public policy in Zimbabwe.[49] With regard to the first issue, the court found that the jurisdiction of the Tribunal 'encompasses all disputes between States and between natural and legal persons and States relating to the interpretation and application of the [SADC] Treaty'.[50] Additionally, the High Court explained that Zimbabwe and other SADC states had adopted the amended SADC

47 See *Campbell (Pvt) Ltd & Another v Minister of National Security Responsible for Land, Land Reform and Resettlement & Another* SC 49/07 [2008] ZWSC 1 (22 January 2008) (unreported).

48 See, among others, A Moyo 'Defending human rights and the rule of law by the SADC Tribunal: Campbell and beyond' (2009) 9 *African Human Rights Law Journal* 590; P Ndlovu 'Campbell v Republic of Zimbabwe: A moment of truth for the SADC Tribunal' (2011) 1 *SADC Law Journal* 63; and Nkhata (n 44 above) 93.

49 *Gramara* case (n 14 above) 8.

50 Ibid.

Treaty that repealed the requirement that two-thirds of SADC member states had to ratify an additional protocol in order to confer human rights jurisdiction on the SADC Tribunal. In light of this, the SADC Protocol on the Tribunal is binding on member states without the need for ratification of further instruments.[51] Therefore, it concluded that the SADC Tribunal had jurisdiction over Zimbabwe.[52]

In addressing the registration of the Tribunal's judgment, the court embarked on a lengthy discussion and explicated that a foreign judgment cannot be registered and enforced if it would be contrary to public policy. The court emphasised that the Constitution of Zimbabwe is the supreme law and, therefore, any law that is inconsistent with it is void. It is submitted that by emphasising that the Constitution is the supreme law of the country, the court was in fact invoking aspects of Zimbabwe's sovereignty. In other words, according to the court, Zimbabwe as a sovereign state was entitled to apply its own laws regardless of other laws that may have been applicable to the dispute. This is supported by the court's statement that international law and domestic law operate in different spheres, are distinct from each other and enjoy supremacy in their respective domains. The court further stated that neither law enjoys supremacy over the other. The court was nonetheless cautious not to completely ignore or undermine the ruling of the SADC Tribunal. It indicated that by submitting to the jurisdiction of the SADC Tribunal, Zimbabwe had 'created an enforceable legitimate expectation' that it would abide by the decisions of the Tribunal.[53] Despite this positive remark, the court noted that:

> This [land] programme, despite its administrative and practical shortcomings, is quintessentially *a matter of public policy* in Zimbabwe, conceived well before the country attained its sovereign independence (own emphasis).[54]

Based on the above reasoning, the court found that the registration and subsequent enforcement of the SADC Tribunal's decision would undermine a constitutionally mandated land reform programme, which had also been approved by the Supreme Court of Zimbabwe.[55] In conclusion, the court held that it was 'amply satisfied that the registration

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51 Id 12.

52 Ibid.

53 *Gramara* case (n 14 above) 15.

54 Id 19.

55 Id 17. In *Campbell v Minister of National Security Responsible for Land* (n 47 above) the Supreme Court of Zimbabwe found the land reform programme constitutionally permissible and dismissed the applicant's challenge – that his land had been unlawfully taken from him.

and consequent enforcement of that judgment would be fundamentally contrary to the public policy of this country'.[56] The application was therefore dismissed.

It is submitted that the decision of the High Court in the *Gramara* case was contradictory. On the one hand, it recognised that Zimbabwe had submitted itself to the authority of the SADC Tribunal and had to respect its decisions, yet, on the other hand, it ruled in favour of Zimbabwe. Overwhelmingly, the court placed emphasis on Zimbabwe's sovereignty, the attainment of sovereign independence and the supremacy of the Constitution. It is difficult not to speculate that the court may have taken into account the political atmosphere in Zimbabwe at the time of the decision.[57] Arguably, the court was to a certain extent politically pressured to reach a particular outcome. This is supported by the fact that Mr Didymus Mutasa, a former Minister of State for National Security, Lands, Land Reform and Resettlement, declared public war against the SADC Tribunal immediately after it had delivered its decision.[58] Mr Mutasa said that the SADC Tribunal was 'day-dreaming' because they were 'not going to reverse the land reform exercise'.[59] This is a clear case where a sovereign state had voluntarily agreed to be part of a regional order, and in so doing, abandoned a portion of its sovereignty, yet had gone on to act contrary to its own undertakings. It is submitted that this conduct is unacceptable and SADC member states ought to have taken appropriate action[60] against Zimbabwe to comply with the ruling of the Tribunal.

4.3 Government of the Republic of Zimbabwe v Fick and Others[61]

After a failed attempt to register and enforce the decision of the SADC Tribunal in Zimbabwe, the applicants successfully approached the South

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56 *Gramara* case (n 14 above) 20.

57 N Banya 'Zimbabwe says it will defy land seizure ruling' *Reuters* 1 December 2008 https://uk.reuters.com/article/uk-zimbabwe-land/zimbabwe-says-it-will-defy-land-seizure-ruling-idUKTRE4B00YA20081201 (accessed 1 October 2019).

58 Ibid.

59 Ibid.

60 Article 32(5) of the SADC Protocol on the Tribunal does not prescribe what appropriate action entails. However, it is generally accepted under international law that such action may include diplomatic or political action, sanctions or isolating Zimbabwe from participating in the activities of SADC. See RF Oppong 'Making regional economic community laws enforceable in national legal systems – Constitutional and judicial challenges' *Monitoring Regional Integration in Southern Africa Yearbook* 2008 http://www.kas.de/upload/auslandshomepages/namibia/MRI2008/MRI2008_07_Oppong.pdf (accessed 1 October 2019).

61 *Government of the Republic of Zimbabwe v Fick and Others* (657/11) [2012] ZASCA 122 (20 September 2012) (unreported).

African High Court to register and enforce the costs order issued by the SADC Tribunal.[62] Zimbabwe tried to rely on sovereign immunity as a defence, without any success. A writ of execution was issued to attach and sell Zimbabwe's property in order to fulfil the SADC Tribunal's costs order. Zimbabwe appealed the aforesaid decision in the Supreme Court of Appeal (SCA).[63]

Zimbabwe's challenge before the SCA was that the SADC Treaty and the SADC Protocol on the Tribunal were not domesticated in South Africa and were therefore not enforceable. It is important to highlight that when Zimbabwe was served with the summons to appear in court, it filed a notice of intention to defend.[64] However, it later withdrew the notice on the basis that 'it was advised that, as a sovereign state, it was judicious that it does not subject itself to the courts of another sovereign state'.[65] In response to the challenge concerning the non-enforceability of undomesticated treaties, the SCA explained that Zimbabwe had participated in all the processes that led to adoption of the SADC Treaty and SADC Protocol on the Tribunal.[66] Consequently, Zimbabwe had submitted itself to the jurisdiction and enforcement processes of the SADC Tribunal.[67] The SCA emphasised the commitment of member states to discharge their treaty obligations, including abiding by the decisions of the SADC Tribunal.

On the issue of sovereign immunity, the SCA noted that Zimbabwe enjoyed immunity from civil proceedings under the Foreign States Immunities Act 87 of 1981. It nonetheless indicated that it was clear in the present case '... that Zimbabwe forfeited such immunity as it might have had by expressly submitting itself to the SADC Treaty and the Protocol'.[68] The application was therefore dismissed by the SCA. Zimbabwe lodged a further appeal to the Constitutional Court.

It is submitted that the SCA correctly exercised its authority as the custodian of human rights to hold Zimbabwe accountable for its obligations flowing from the SADC regional order. However, it is a concern that the SCA was silent on the issue of applying undomesticated treaty law in South Africa. The basis for this is that South Africa follows a dualist system: treaties have to be incorporated into the domestic law through enabling legislation in order to give them the force of local law.[69] It is submitted that decisions that do not provide sufficient clarity on how

62 Ibid.
63 Ibid.
64 Id para 13.
65 Ibid.
66 Id paras 36–41.
67 Id para 45.
68 Id para 20.
69 See s 231 of the Constitution of the Republic of South Africa, 1996.

they were arrived at, have the potential to cause dissatisfaction and consequently have a negative impact on the enforcement of such a decision, especially where a state is a party to the dispute.

4.4 Government of the Republic of Zimbabwe v Fick and Others *(Constitutional Court)*

Zimbabwe lodged an appeal to the Constitutional Court against the decision of the SCA that had recognised and registered the judgment of the SADC Tribunal for enforcement in South Africa. The main issue before the Constitutional Court was whether South African courts have jurisdiction to register and enforce the decision of the SADC Tribunal made against Zimbabwe even though the aforesaid treaties governing the SADC Tribunal were not incorporated into South African Law. Other issues were: first, whether Zimbabwe as a foreign sovereign state was immune from being subjected to civil proceedings in South Africa and, second, whether Zimbabwe was able to challenge the ruling of the SCA on the basis that the SADC Tribunal did not have jurisdiction over it, including the costs order that had to be enforced in South Africa.

Zimbabwe's main argument to advance its case centred on the concept of state sovereignty and jurisdiction. Zimbabwe argued that it was not entitled to be brought before the South African courts because it enjoyed sovereign immunity from civil proceedings, and that it had not made any express waiver of that immunity.[70] Therefore, such immunity prevailed and the decision of the Tribunal could not be registered and enforced by South African courts.

The court dismissed this argument on the basis that, pursuant to article 32(5) of the SADC Protocol on the Tribunal,[71] SADC member states had undertaken to take all the necessary steps in their respective states to 'facilitate the enforcement of judgments and orders of the Tribunal'.

Regarding the jurisdictional challenge, the court noted that Zimbabwe based its argument on the ground that a two-thirds majority had not been reached to ratify the SADC Protocol on the Tribunal and that three-quarters of the members had not adopted the Amending Agreement. Zimbabwe also maintained that it was not bound by the SADC Treaty and the SADC Protocol on the Tribunal because it had not ratified them as required by the Constitution of Zimbabwe. The court highlighted that these objections were novel and that they had never been raised before the SADC Tribunal.[72] In addition, the court indicated that Zimbabwe did not object to the Tribunal's jurisdictional capacity but

70 *Fick* (n 15 above) para 33.
71 Id para 32.
72 Id para 41.

to the power to adjudicate over human rights issues. According to the court, '[i]t was jurisdiction over an issue, not the very authority of the tribunal to entertain disputes within the region, that was objected to'.[73] In other words, the objection was not that the SADC Treaty or the SADC Protocol on the Tribunal had not been ratified by the required number of states, as this would have rendered the Tribunal incapable of hearing the case. In light of these reasons, the court found that the objections raised by Zimbabwe lacked merit because Zimbabwe had submitted to the jurisdiction of the Tribunal.[74]

On the issue of the enforceability of undomesticated treaties in South Africa, the court noted that South Africa had 'approved' the SADC Treaty in 1995. In addition, the court indicated that the overall objectives behind the creation of SADC was to 'guarantee democratic rights, observance of human rights and the rule of law'.[75] The court emphasised that SADC member states 'bound themselves' when they ratified the SADC Treaty to act in accordance with the principles of democracy, human rights and the rule of law.[76] Furthermore, the court explicated that member states undertook not to act in any manner that violated the SADC Treaty. Importantly, the court found that member states had undertaken to domesticate the SADC Treaty into national law to assist the SADC Tribunal to enforce its judgments.[77] The court therefore concluded that the SADC Treaty is 'binding on South Africa, at least on the international plane',[78] and dismissed the appeal.

Even though the court's decision is progressive in the sense that it promotes human rights and recognises the limits of state sovereignty, the court's failure to address how undomesticated laws are enforceable in South Africa is a concern. This is something that the SCA had also overlooked. This omission should not be taken lightly because it has implications for the application of international law at the domestic level in South Africa. The court had correctly noted that the SADC Treaty was binding on South Africa at least at the international plane. Despite this positive observation, it nonetheless applied the provisions of undomesticated treaties.

It is submitted that the court's decision has created legal uncertainty to the status of ratified (but undomesticated) international treaties in South Africa. In essence, the decision entails that upon ratification, any treaty is enforceable in the local courts without the need for incorporation.

73 Id para 42.
74 Id para 43.
75 Id para 5.
76 Id para 6.
77 Id para 7.
78 Id para 5.

This is contrary to the provisions of section 231(4) of the Constitution of the Republic of South Africa, which states that '[a]ny international agreement becomes law in the Republic when it is enacted into law by national legislation'. It is submitted that this is not only a departure from well-established jurisprudence of the court but also an erosion of South Africa's sovereignty and separation of powers.[79] The basis for this is that the court encroached on the powers of the executive because even other undomesticated treaties could henceforth be enforced in the domestic courts of South Africa. It is submitted that this also ignores the dualist nature of South Africa's legal system, which requires international treaties to be incorporated into domestic law prior to being enforced in the domestic courts.[80] Finally, the judgment could also be interpreted as implying that South Africa now follows a monist approach in that upon ratification, treaty law is automatically binding before the local courts.[81]

Despite the author's reservations pertaining to the court judgment, the court's ability to expand the common law procedure for the recognition and enforcement of a foreign judgment to include the SADC Tribunal's ruling is commended. Unfortunately, this had been overlooked by the SCA because it treated a foreign judgment as if it were that of an international court.

In light of the above decision, it is clear that sovereign immunity or state sovereignty can no longer be used by a state to evade claims arising from its wrongful conduct. The state is no longer viewed as having absolute sovereign immunity but is held accountable for wrongful acts committed within its territory. This is supported by the subsequent sale of Zimbabwean property in Cape Town.[82]

4.5 Analysis of the Impact of the SADC Tribunal Decisions and Other Factors on State Sovereignty

The commitment to promote and protect human rights requires that states transfer certain competencies to a regional body such as SADC in order to act as a collective. Therefore, states cannot at a later stage

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79 See, inter alia, *Glenister v President of the Republic of South Africa and Others* 2011 (3) SA 347 (CC); *Azanian Peoples Organization (AZAPO) and Others v President of the Republic of South Africa and Others* 1996 (4) SA 67; and *International Trade Administration Commission v SCAW South Africa (Pty) Ltd* 2012 (4) SA 618 (CC).

80 ME Olivier *International Law in South African Municipal Law: Human Rights Procedure, Policy and Practice* (2002) 3.

81 J Dugard *International Law*: *A South African Perspective* 4 ed (2011) 42; JG Starke 'Monism and dualism in the theory of international law' (1936) 17 *British Yearbook of International Law* 70.

82 E Evans 'Zim govt property in Cape Town sold for R3.7m' *News24* 21 September 2015 https://www.news24.com/SouthAfrica/News/Zim-govt-property-in-Cape-Town-sold-for-R37m-20150921 (accessed 3 October 2019).

disregard their regional or subregional obligations as and when they wish, as occurred in the *Campbell* case where the SADC Tribunal ordered Zimbabwe to discharge its obligations flowing from the SADC Treaty and the SADC Protocol on the Tribunal to protect human rights. The state of Zimbabwe refused to comply with the SADC Tribunal's decision by refusing to recognise and register the judgment of the Tribunal in its territory.

Even before the South African case, Zimbabwe went all out to resist compliance with the SADC Tribunal's decision as it unsuccessfully tried to defend itself at every level on the basis that it was a sovereign state. On the one hand, this illustrates that, although Zimbabwe surrendered some of its sovereignty through the acceptance of obligations arising from the SADC Treaty, in practice it continued to view sovereignty through the lens of Bodley's definition.[83] On the other hand, the *Fick* case signifies that other states such as South Africa have accepted that their sovereignty is limited by several factors, including human rights norms. Therefore, as a matter of principle, states cannot hide behind their sovereignty (or be complicit with another state) to evade their treaty obligations. As a result of a commitment to discharge treaty obligations, South African courts went to the extent of attaching immovable property belonging to a sovereign state (Zimbabwe).[84] The said property was sold at auction to honour the judgment made in the *Campbell* case. This decision is a victory for human rights and demonstrates that sovereign power is not absolute and is therefore subject to the regional order.

It is submitted that the *Fick* case has the potential to influence other SADC states to accept that their sovereignty is subject to the SADC legal order. It is further submitted that this decision may also serve as persuasive authority in the domestic courts of SADC member states. It is in this regard that I agree with the sentiments of Mud that:

> SADC member states must feel compelled to properly institutionalize the shared sovereignty concept in the context of highlighting to each other the importance of surrendering parts of their sovereignty to the regional judicial body as it is necessary to strengthen their domestic governance.[85]

Indeed, once member states acknowledge that they have given away a certain portion of their sovereignty, they are more likely to comply with the decisions of the SADC Tribunal. States should not view this as relinquishing all their sovereignty. Rather, they should view the SADC legal

83 Bodley (n 9 above) 419.
84 Ibid.
85 *Fick* (n 15 above) para 98.

order as a system that is complementary to their domestic legal system.[86] Obviously, by subjecting themselves to a regional order, this implies that states are 'surrendering a layer of sovereignty to the international legal system and institutions' for the common good.[87]

There is one more thing that deserves attention regarding Zimbabwe's reliance on state sovereignty. The new President of Zimbabwe, Emmerson Mnangagwa, appears to be a fervent proponent of international law because he indicated his governments' 'commitment to compensate farmers who were forced off their land during the fast-track land reform programme of the 2000s'.[88] This is in principle an enforcement of the decision in the *Campbell* SADC case.

In light of the above exposition, it is submitted that SADC member states have transferred some of their sovereign power to protect their citizens when they signed the SADC Treaty and the SADC Protocol on the Tribunal. They cannot therefore later decide to ignore the rulings of the SADC Tribunal based on state sovereignty. State sovereignty has been (legitimately) eroded by many factors, such as human rights.

5 Recommendations

It is recommended that SADC states should acknowledge that they have ceded part of their sovereignty to the SADC regional order and should therefore unconditionally accept the obligations arising from the SADC Treaty (unless they have entered reservations thereto) and the SADC Protocol on the Tribunal, including abiding by the decisions of the SADC Tribunal.

It is further recommended that, in order to avoid future reliance on state sovereignty by SADC member states in order to evade regional obligations, an additional protocol titled 'Supplementary Protocol to the SADC Treaty on State Sovereignty of Member States' should be adopted. The proposed protocol should, among other things, contain a clause indicating that by becoming a signatory to the Supplementary Protocol to the SADC Treaty on Sovereignty of Member States, each member state acknowledges that its sovereignty is not absolute and therefore agrees to act in the collective interests of the region and not hide behind the veil of state sovereignty. This may not occur overnight given the sensitivity of

86 Id para 87.

87 Id para 85.

88 S Sibeko 'Settling the land compensation issue is vital for Zimbabwe's economy' *The Conversation* 7 January 2018 http://theconversation.com/settling-the-land-compensation-issue-is-vital-for-zimbabwes-economy-89384 (accessed 1 October 2019).

state sovereignty. However, such a possibility should not be completely ruled out.

6 Conclusion

The discussion above has revealed that state sovereignty was once viewed as a core characteristic of statehood and no external interference was allowed without the particular state's consent. However, the emergence of various factors such as regional tribunals and human rights have eroded the notion of state sovereignty. The duty of absolute non-interference in the domestic affairs of a state by other states has become an outdated concept.

Furthermore, SADC member states yielded a certain portion of their authority to the SADC Treaty and the SADC Tribunal. It is in this regard that the author concludes that, by creating the SADC regional order, SADC member states transferred a portion of their sovereignty to these institutions. Therefore, the decisions of the SADC Tribunal have to be registered and enforced by SADC member states; especially by the state party that has received an unfavourable decision. Decisions of this nature may also be enforced in any SADC member state by the successful litigant as per the *Fick* decision.

Regarding the adoption of an additional protocol to the SADC Treaty on Sovereignty of Member States, the author concedes that states may be reluctant to sign the protocol given the unpleasant history of colonialism in Africa. In fact, SADC states and most other African states are still very protective of their sovereignty, despite its constant erosion. However, such a possibility should not be ruled out as countries such as South Africa, through the recognition and enforcement of the *Fick* decision, have by implication accepted that state sovereignty cannot be used to escape regional commitments.

Finally, it can be said that Zimbabwe has historically been one of those states that does not really recognise the important role of international law in domestic jurisdiction. The country in all respects still values Westphalia sovereignty as something that needs to be protected at all costs. However, all is not lost; there is hope. The new President of Zimbabwe appears to be willing to respect the SADC legal order. It nonetheless remains to be seen whether his commitment to compensate the farmers will translate into action. The day this occurs will signal victory for all those who have been litigating for compensation in the cases discussed earlier.