

Chapter 8

The SADC Tribunal: a legal analysis of its mandate and role in regional integration

Oliver C. Ruppel and Francois X. Bangamwabo

One of the vital components for sustainability of regional integration processes is the legitimacy and effectiveness of the dispute settlement mechanisms.¹

1. Introduction

Established under Article 9 of the Southern African Development Community (SADC) Treaty, the Southern African Development Community Tribunal (SADC Tribunal) became operational in 2005. The establishment of the SADC Tribunal is a major event in the history of SADC as an organisation and in the development of SADC law and jurisprudence. The Tribunal was established in 1992 by Article 9 of the SADC Treaty as one of the institutions of SADC. The Summit of Heads of State which is the Supreme Policy Institution of SADC pursuant to Article 4(4) of the Protocol on the Tribunal appointed the members of the Tribunal during its Summit of Heads of State and Government held in Gaborone, Botswana, on 18 August 2005. The inauguration of the Tribunal and the swearing-in of the members took place on 18 November 2005 in Windhoek, Republic of Namibia. The seat of the Tribunal was designated by the Council to be Windhoek. Article 22 of the Protocol on the Tribunal provides that the working languages of the Tribunal shall be English, Portuguese and French.²

Currently, a linkage exists between the political situation in Zimbabwe (which is internationally observed with interest and concern) and the Tribunal's activities. In 2007 the Tribunal received its first cases. One of these cases is related to the ongoing land reform in Zimbabwe and highlights the relevance of the new Tribunal for SADC and its potential significance *inter alia* for the protection of human rights. The regional expectations with regard to the Tribunal's future influence are high and the outcome of the above case is an indicator for its future relevance.

¹ As held by the workshop on *Specific Aspects of the Experiences of the European Union and the Andean Community* held in São Paulo, Brazil in October 2004. See Vos (2005).

² See <http://www.sadc.int/tribunal/> (20 July 2008).

No doubt, the SADC Tribunal is expected to serve as a key actor in the SADC legal and institutional integration process. The European Union experience has demonstrated that such dispute settlement bodies can indeed play a significant role in regional integration. However, in order to develop the current SADC dispute settlement system into an ideal model, improvements may have to be considered.

African states have historically resisted supranational judicial supervision of their sovereignty. The belief that a state is independent and free from any other exterior influence has stifled growth and the realisation of the interdependence among states has been rather slow. In the early days of decolonisation, economic problems to be faced by young independent African nations were explored and discussed. Consensus gradually emerged that the smallness and fragmentation of young and underdeveloped African markets constitute an obstacle to the creation of modern and competitive enterprises in the era of globalisation. It is a pressing reality that a century of change has tied the people of the earth in unprecedented intimacy of contact, interdependence of welfare and vulnerability. Thus, it was agreed that new African countries should promote economic cooperation through regional integration. In this regard, two options were advocated: a pan-Africanist approach, that is, a regional continental arrangement comparable to the European Union model, or, alternatively, a narrow approach that will have its roots at the sub-regional levels and built on sub-regional groupings and cooperation. Most African countries favoured the narrower approach of sub-regional economic integration and cooperation. It is against this backdrop that many sub-regional arrangements were put in place.

Southern Africa was not immune to the above developments and consequently joined forces in creating *inter alia* the Southern African Development Community. To ensure the effectiveness of its mandate there was a need for another instrument whose primary objective was to adjudicate over disputes that might arise among the member states or in relation to the provisions of the SADC Treaty – a step forward, though tentative, to the achievement of a more internationally oriented judicial system. In the light of the above, the jurisdictional scope of the SADC Tribunal, applicable laws in this jurisdiction, enforcement of its decisions, its judicial independence and impartiality, its role in advancing and protecting human rights and contributing to economic regional integration will be monitored.

2. The first cases

Although the SADC Tribunal became operational in 2005, its jurisprudence remains meagre in that so far only a few cases have been filed with the Tribunal. The authors are not aware of cases which might have been brought to this jurisdiction, but may have been rejected in terms of the admissibility provisions.³ Meanwhile, during the course of 2008, a number of new cases were filed at the Tribunal. In the ensuing paragraphs, only the first two cases filed with the Tribunal will be examined in their chronological order.

2.1 Ernest Francis Mtingwi v the SADC Secretariat⁴

This case involved a labour dispute which arose between Ernest F. Mtingwi, a national of Malawi (herein applicant), and the SADC Secretariat (herein respondent). From the facts and submissions by both parties, three issues for the determination of the dispute were identified, namely: (a) the existence or otherwise of a contract of employment between the parties; (b) whether the respondent was in breach of contract; and (c) whether the remedies sought are available to the parties.

The applicant approached the SADC Tribunal seeking following reliefs: (a) an order or declaration that the decision to terminate his employment was done in breach of the rules of natural justice; (b) an order or declaration that the respondent's decision was contrary to applicant's legitimate expectation; (c) an order that the respondent's decision was illegal, arbitrary, capricious, unreasonable, made in bad faith, and therefore *ultra vires* and *void ab initio*; (d) an order or declaration that the applicant was still in the employ of the respondent as a Senior Programme Manager, Customs Cooperation and Modernisation; (e) alternatively, an order or declaration reinstating the applicant in this position; (f) punitive and/or exemplary damages for breach of contract; (g) or in the alternative, compensation in lieu of reinstatement; (h) any relief as the Tribunal may deem fit and necessary; and finally, (i) costs.

The respondent opposed the application and in addition made a counter-claim relating to costs incurred on account of the applicant.

³ See Article 15 of the Protocol.

⁴ SADC(T) Case No. 1/2007.

With regard to the competence of the Tribunal to adjudicate in the matter, the Tribunal invoked the SADC Protocol on the Tribunal and Rules of Procedure thereof.⁵ Article 18 of the Protocol reads:

Subject to the provisions of Article 14 of this Protocol, the Tribunal shall have exclusive jurisdiction over all disputes between natural or legal persons and the Community. Such disputes may be referred to the Tribunal either by the natural or legal person concerned or by the competent institution or organ of the Community.

After deliberation, the Tribunal was satisfied that there were an offer and acceptance of employment between the parties, subject, however, to other future (uncertain) events such as those contained in Rule 14.2.6 of the SADC Administrative Handbook. The Tribunal therefore held that this was a conditional contract of employment in terms of which applicant was to report at the duty station to make it effective (*Ernest Francis Mtingwi v the SADC Secretariat SADC (T) Case No. 1/2007:13*). The Tribunal further found that the applicant deliberately failed to fulfil this condition, and that no binding employment contract had therefore come into existence between the parties. The Tribunal agreed with the respondent's contention that the applicant was still a candidate as long as he did not report at the duty station for commencement of duties. The Tribunal (in *Ernest Francis Mtingwi v the SADC Secretariat SADC (T) Case No. 1/2007:14-15*) further held:

As a candidate, the applicant was neither an employee nor a staff member of the respondent. Consequently, he was not entitled to the rights that accrue to the employees or staff of the respondent under the Treaty or other instruments made thereunder.

Having resolved the issue of whether or not there was a contract of employment between the parties in the negative, it was not necessary for the Tribunal to address the remaining issues, viz issues (b) and (c). With regard to the respondent's counter-claim, the Tribunal found that the respondent had failed to adduce sufficient evidence as to the alleged loss. The counter-claim was also dismissed. No order as to costs was made.

⁵ For convenience, the SADC Protocol on the Tribunal and Rules of Procedure thereof will be referred to simply as the (SADC) Protocol.

The above case is a historical one, simply in that it was the first case to date to be filed with and finalised by the SADC Tribunal.

2.2 Campbell v the Republic of Zimbabwe⁶

On 11 October 2007 Mike Campbell (Pvt) Limited, a Zimbabwean registered company, instituted a case with the Tribunal to challenge the expropriation of agricultural land in Zimbabwe by the government of Zimbabwe. The matter was also pending in the Supreme Court of Zimbabwe at the time.⁷ As a result, an application was brought in terms of Article 28 of the SADC Protocol for an interim measure to interdict the government of Zimbabwe from evicting Mike Campbell (Pvt) Limited *et al.* from the land in question until the main case has been finalised. This is referred to as *interlocutory relief*.

The claimant argued that the Zimbabwean land acquisition process was racist and illegal by virtue of Article 6 of the SADC Treaty and the African Union Charter that outlaw arbitrary and racially motivated government action. The SADC Treaty in its Article 4 stipulates that SADC and its member states shall act in accordance with the principles of human rights, democracy and the rule of law as well as equity, balance and mutual benefit; and the peaceful settlement of disputes, *inter alia*. According to Article 6 (2) of the SADC Treaty, ‘SADC and member states shall not discriminate against any person on grounds of gender, religion, political views, race, ethnic origin, culture or disability’.

It was brought forward that the constitutional amendments behind the farm seizures were contrary to SADC statutes and that the Supreme Court of Zimbabwe failed to rule on an application by Campbell and 74 other Zimbabwean commercial white farmers to have the race-based acquisition declared unlawful (‘Klāgerschar vervielfacht’ 2003). The claimant alleged that he had suffered a series of invasions on his farm. The defendant state in turn argued that the land must be given back to even out colonial imbalance and that Campbell had not exhausted local remedies. The central problem of this case seems to be the relationship between the legal regime of SADC on the one side and Zimbabwe’s national law on the other.

⁶ See SADC (T) Case No. 02/2007.

⁷ See Mike Campbell (Pvt) Ltd *et al.* v The Minister of National Security responsible for Land, Land Reform and Resettlement and the Attorney-General (2007).

The Constitution of Zimbabwe in its Section 23 states: ‘No law shall make any provision that is discriminatory either of itself or in its effect; and no person shall be treated in a discriminatory manner by any person acting by virtue of any written law or in the performance of the functions of any public office or any public authority’.

In 2005, however, the Constitution of Zimbabwe was amended. The Constitutional Amendment Act No. 17 of 2005 allows the government of Zimbabwe to seize or expropriate farmland without compensation and bars courts from adjudicating over legal challenges filed by dispossessed and aggrieved white farmers. Section 2(2) of the above amendment provides that ‘all agricultural land – (follows the description of such agricultural land identified by the Government)...is acquired by and vested in the State with full title therein...; and...no compensation shall be payable for land referred to in Paragraph (a) except for any improvements effected on such land before it was acquired’.

The practical implications of the Constitutional Amendment Act No. 17 resulted in farm seizures, where the majority of the approximately 4000 white farmers were forcibly ejected from their properties with no compensation being paid for the land, since, according to Harare, it was stolen in the first place. The government has compensated some farmers only for developments on the land such as dams, farm buildings and other so-called *improvements*.⁸

On 13 December 2007 the SADC Tribunal ruled that Campbell should remain on his expropriated farm until the dispute in the main case had been resolved by the Tribunal:

The Tribunal grants the application pending the determination of the main case and orders that the Republic of Zimbabwe shall take no steps, or permit no steps to be taken, directly or indirectly, whether by its agents or by its orders, to evict from or interfere with the peaceful residence on and beneficial use of the farm known as Mount Campbell in the Chetugu District in Zimbabwe, by Mike Campbell Ltd and William M Campbell, their

⁸ These land reform measures have, as a side note, plunged Zimbabwe into severe food shortages.

employees and the families of such employees and of William Michael Campbell.⁹

The above interim relief was also applied for by and granted to other applicants/interveners on 28 March 2008.¹⁰

On 22 January 2008, the Zimbabwean Supreme Court (sitting as a Constitutional Court) dismissed the application by the white commercial farmers challenging the forcible seizure and expropriation of their lands without compensation. The Court ruled that 'by a fundamental law, the legislature has unquestionably said that such an acquisition shall not be challenged in any court of law. There cannot be any clearer language by which the jurisdiction of the courts is excluded'.¹¹

On 23 January 2008 the Zimbabwean government announced that it would seize the farm. Land Reform Minister Dydimus Mutasa said the farm would be handed over to a black owner as part of state land reforms and following the ruling by the Zimbabwean Supreme Court.¹²

The main hearing before the SADC Tribunal was scheduled for 28 May 2008, but postponed until 16 July 2008. In the meantime the claimant, Campbell, and members of his family were brutally beaten up on their farm in Zimbabwe and allegedly forced to sign a paper declaring that they would withdraw the case from the SADC Tribunal ('Simbabwe: Brutaler Überfall' 2008). On 18 July 2008, applicants and other interveners in the Campbell case made an urgent application to the Tribunal seeking a declaration to the effect that the respondent state was in breach and contempt of the Tribunal's orders. After hearing the urgent application, the Tribunal found that the respondent state was indeed in contempt of the Tribunal's orders. Consequently, and in terms of Article 32(5) of the Protocol, the Tribunal decided to report the matter to the Summit for the latter to take appropriate action.

⁹ See: Mike Campbell (Pvt) Ltd & one other v The Republic of Zimbabwe SADC (T) Case No. 02/2007 (Interim order granted on 13 December 2007).

¹⁰ See Cases SADC(T) No. 03/08; 04/08 and 06/08.

¹¹ See the following website:

http://www.thezimbabwean.co.uk/index.php?option=com_content&view=article&id=13001:campbell-case-heads-of-argument-summary&catid=31:top%20zimbabwe%20stories&Itemid=66

(18 June 2008).

¹² See also article in this publication by Dube (2008).

Meanwhile, a significant number of recently resettled indigenous farmers filed an application seeking an order to allow them to intervene in the main case.¹³ This application was, however, dismissed with costs. In the Tribunal's view, the applicants/interveners could not be allowed to intervene in the main case for the following reasons:

- The present application to intervene was filed out of time and no good reason was advanced to justify the inordinate delays;¹⁴
- the alleged dispute in the present application is between present applicants and applicants in the main case (Campbell case) and not between persons (either natural or juristic) and a state;¹⁵ and
- the applicants in the present application have failed to demonstrate any legal right or interests which are likely to be prejudiced or affected by the Tribunal's decision in the Campbell case.¹⁶

The hearing of the Campbell case was finalised on 28 November 2008.¹⁷ The SADC Tribunal in its final decision ruled in favour of the applicants Mike and William Campbell and 77 other white commercial farmers.¹⁸

In conclusion, the Tribunal held that the Republic of Zimbabwe is in breach of its obligations under Articles 4(c) and 6(2) of the SADC Treaty and that:¹⁹

- the Applicants have been denied access to the courts in Zimbabwe;
- the Applicants have been discriminated against on the ground of race,²⁰

¹³ See *Nixon Chirinda et al v Campbell Ltd et al. and the Republic of Zimbabwe* (2008).

¹⁴ In fact, Rule 70 (2) of the Tribunal provides that an 'application in terms of this Rule (application to intervene) shall be made as soon as possible and not later than the closure of the written proceedings in the main case...'

¹⁵ The Tribunal based its reasoning on the content of Article 15(1) of the Protocol which reads: 'The Tribunal shall have jurisdiction over disputes between States, and between natural or legal persons and States'. Thus, where a dispute involves only persons (either natural or juristic), the Tribunal shall not be competent to adjudicate upon such dispute.

¹⁶ The Tribunal further held that the applicants/interveners had failed to adduce any evidence showing that they had indeed been denied access to justice and had suffered racial discrimination or loss. See *Nixon Chirinda et al. v Campbell Ltd et al* (2008).

¹⁷ It has to be noted that this article was submitted for final editing in October 2008. Due to the high relevance of the Tribunal's final ruling, the editors of this volume, however, granted permission to the authors of this article to subsequently include the following paragraph on the Tribunal's main findings.

¹⁸ *Mike Campbell (Pvt) Ltd & one other v the Republic of Zimbabwe SADC (T) Case No. 2/2007*.

¹⁹ *Mike Campbell (Pvt) Ltd & one other v the Republic of Zimbabwe SADC (T) Case No. 2/2007:57f*.

- fair compensation is payable to the Applicants for their lands compulsorily acquired by the Republic of Zimbabwe.

The Tribunal furthermore directed the Republic of Zimbabwe to take all necessary measures to protect the possession, occupation and ownership of the lands of the applicants who had not yet been evicted from their lands, and to pay fair compensation to those three applicants who had already been evicted from their farms.

The ruling is considered to be a landmark decision which will without any doubt influence the legal landscape in the region.

3. Access to and Jurisdiction of the SADC Tribunal

The SADC Protocol on the Tribunal and Rules of Procedure thereof circumscribes the Tribunal's jurisdiction. Article 16(1) of the SADC Treaty provides that the primary mandate of the Tribunal is as follows:

The Tribunal shall be constituted to ensure adherence to and the proper interpretation of the provisions of this Treaty and subsidiary instruments and to adjudicate upon such disputes as may be referred to it.

The SADC Tribunal was set up to protect the interests and rights of SADC member states and their citizens, and to develop the community jurisprudence also with regard to applicable treaties, general principles and rules of public international law.²¹ Subject to the principle of exhaustion of local remedies, the Tribunal has the mandate to adjudicate disputes between states, and between natural and legal persons of the Community (Protocol Art. 15(2)).

In the Campbell Case the Tribunal raised the issue of jurisdiction *mero metu* where it ruled that it had jurisdiction since the dispute in this case involves a member state

²⁰ The issue of racial discrimination was decided by majority of four to one. Judge Tshosa in his dissenting opinion concluded that 'Amendment 17 does not discriminate against the applicants on the basis of race and therefore does not violate the respondent obligation under Article 6(2) of the Treaty'. He argues that 'the target of Amendment 17 is agricultural land and not people of a particular racial group' and that – although few in number – not only white Zimbabweans have been affected by the amendment. See *Mike Campbell (Pvt) Ltd and others v The Republic of Zimbabwe (2007)*: dissenting opinion of Hon. Justice Dr Onkemetse B. Tshosa.

²¹ See Chidi (2003).

and a natural and legal person. The Tribunal has, however, made it clear that it is not competent to adjudicate in disputes involving only natural or juristic persons.²² Further, the Protocol states that the Tribunal shall have jurisdiction over all matters provided for in any other agreements that member states may conclude among themselves or within the community and that confer jurisdiction to the Tribunal (Hugo 2007). Finally, the Tribunal has exclusive jurisdiction in disputes between organs of the community or between community personnel and the community (Protocol Art. 18-19). It is on this ground that the Tribunal exercised its jurisdiction in the case of Ernest Francis Mtangwi v. SADC Secretariat (2007). The dispute in this case arose between the SADC Community Secretariat and one of its staff members [*sic*].

Apart from jurisdiction in contentious proceedings, the tribunal also has advisory jurisdiction at the request of the Summit or the Council of Ministers (Protocol Art. 20). At this stage, it is worth noting that Article 16 of the SADC Treaty provides that the decisions of the Tribunal are final and binding. The subject-matter jurisdiction (*ratione materiae*) of the Tribunal is laid down in Article 14 of the Protocol as follows:

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

4. Locus standi in iudicio

Article 15(1) of the SADC Protocol makes it clear that both natural and juristic persons have the right of audience to the Tribunal.²³ Once local remedies have been

²² See the ruling in the case of Albert Fungai Mutize et al. v Mike Campbell (Pvt) Ltd et al (2008:4).

²³ This right of audience is, however, subject to certain requirements, namely the exhaustion of local remedies, and the fact that the dispute also involves a member state. The question whether the SADC Tribunal will also recognise and apply public complaint, the so-called *actio popularis* has not yet plagued the Tribunal, but it is anticipated that it may be of importance in the long run. The International Court of Justice (ICJ) has refused to entertain any action brought by a member state that has no vested interest in the matter. In the light of the foregoing, and considering the fact that the Protocol

exhausted, such persons have *locus standi* before the Tribunal when the dispute at hand involves the state's obligations under community law (Protocol Art. 15(2)). It is contended that the requirement of exhaustion of local remedies leads to the conclusion that the SADC Tribunal can be considered as a *final court of appeal* rather than a court of first instance.

5. Exhaustion of local remedies

Article 15(2) of the SADC Protocol regulates that 'no natural person shall bring an action against a State unless he or she has exhausted all available remedies or is unable to proceed under the domestic jurisdiction'.

The SADC Tribunal's admissibility stage requires litigants to have exhausted local remedies unless they are unduly prolonged, ineffective or unavailable. The rule of exhaustion of local remedies is not peculiar to the SADC Tribunal.²⁴ There are two legs to the principle of local remedies: first, there may not be any breach of international law at all until all legal remedies have been exhausted, that is, the breach only consists in the failure to afford a remedy. Secondly, the breach can be established independently of the action of local tribunals, but in that event a bar to the admissibility of any international claim in respect of the breach continues so long as any remedies afforded by the local law have not been exhausted (Fitzmaurice 1993:686).

It follows that failure to exhaust local remedies will not constitute a bar to a claim if it is clearly established that in the circumstances of the case, an appeal to a higher municipal tribunal would have had no effect. Nor is a claimant against another state required to exhaust justice in that state where there is no justice to exhaust. According to Dugard (2003:293), where the local remedies are futile or provide no reasonable possibility of effective redress there is no need to attempt to exhaust

establishing the SADC Tribunal is silent on the issue, it is difficult to determine whether the Tribunal will entertain *locus standi in judicio* based on *actio popularis*.

²⁴ In fact, all major human rights instruments (both regional and international) do provide for the rule on the exhaustion of local remedies: e.g. Article 35(1) of the European Convention on Human Rights, 1950; Article 46 (1) of the American Convention on Human Rights, 1969; 56(5) of the African Charter on People's and Human Rights, 1981; and Articles 2 and 5(2)(b) of the Optional Protocol to the International Covenant on Civil and Political Rights, 1966. In regard to the Rome Statute of the International Criminal Court, the principle of exhaustion of domestic remedies is substituted by the *complementarity principle* as laid down in Article 17 (a) of the ICC Statute. This article makes it clear that the International Criminal Court will only accept a case where a state which has jurisdiction over it is unwilling or unable to genuinely carry out the investigation and/or prosecution.

them. Additionally, local remedies need not be exhausted where the responsible state has waived compliance with this requirement. Such a waiver, if any, must be express and not implied.²⁵

Courts and scholars have propounded the so-called *reasonable possibility test* in order to assess the existence or otherwise of local remedies in any given jurisdiction. The reasonable possibility test holds that wherever a *possible* remedy exists, recourse must be had to it, even if this is in fact highly unlikely to be successful. As a rule, it is for the applicant (claimant) to prove that there are no effective remedies to which recourse can be had; no such proof is required if legislation exists which on the face of it deprives the private claimants of a remedy (Dugard 2003:293).

The issue of non-exhaustion of local remedies was raised in the first hearing of the Campbell Case. In fact, when the applicants in this case approached the SADC Tribunal seeking an interim order in terms of Article 28 of the Protocol as read with Rule 61(2) and (5) of its Rules of Procedure, the respondent state argued that the application was not properly placed before the Tribunal in that the applicants had not exhausted local remedies in terms of Article 15(2) of the Protocol.²⁶

When the matter was filed with the Tribunal in October 2007 the Supreme Court of Zimbabwe, sitting as a Constitutional Court, was still dealing with the constitutional challenge of Section 16B of the Zimbabwean Constitution brought by the same applicants as in the Campbell Case.²⁷ The relief which was being sought from the Zimbabwean highest court is similar to the one applicants were seeking from the SADC Tribunal. However, the Tribunal held as follows:

Referring to the issue of failure to exhaust local remedies by applicants, we are of the view that the issue is not of relevance to the present application but that it may only be raised in the main case. It may not be

²⁵ See International Court of Justice (1989:42).

²⁶ Mike Campbell (Pvt) Ltd and others v the Republic of Zimbabwe. SADC (T) Case No. 2/2007. Interim order dated 13 December 2007, p. 6.

²⁷ Mike Campbell (Pvt) Ltd et al. v The Minister of National Security responsible for Land, Land Reform and Resettlement and the Attorney – General. Constitutional Application No. 124/06 (unreported case: Supreme Court of Zimbabwe).

raised in the present case in which applicants are seeking an interim measure of protection pending the final determination of the matter.²⁸

In February 2008, the Zimbabwean Constitutional Court ruled that the Constitutional Amendment No. 17 of 2005 was valid and therefore constitutional in that its purpose is to acquire the land for public purpose. It follows that the issue of non-exhaustion of local remedies was no longer relevant. In any event, it is worth noting that new Section 16B of the Zimbabwean Constitution, which is the creation of Constitutional Amendment No. 17 of 2005, deprives affected landowners of their right to seek remedy within domestic courts.²⁹

6. Judicial independence of the SADC Tribunal

6.1 Appointment of the judges

Article 16(3) of the SADC Treaty and Article 4 of the SADC Protocol provide for the appointment of judges. Ten judges are appointed for five years renewable by the common accord of the governments of the member states. For obvious practical reasons, the number of judges cannot be equal to that of the states. However, Article 3(5) of the Protocol provides that if it eventually becomes apparent that there is need for an increase in the ten judges initially chosen, the Council of Ministers may increase the number at the proposal of the Tribunal.

Once the ten judges have been appointed, the Council has to designate five as regular members who have to sit regularly. The remaining five constitute a pool from which the President may invite a member to sit on the Tribunal whenever a regular member of the Tribunal is temporarily absent or otherwise unable to carry out his or her functions (SADC Protocol Art. 3(2)). At all times the Tribunal will be constituted of three members – this forms the ordinary sitting. In cases where the Tribunal decides to constitute a full bench, the members should be five in number (SADC Protocol Art. 3(3)).

²⁸ Mike Campbell (Pvt) Ltd and others v the Republic of Zimbabwe. SADC (T) Case No. 2/2007. Interim order dated 13 December 2007.

²⁹ In fact, Section 16B(3) of the Zimbabwean Constitution reads: ‘... a person having any right or interest in the land (expropriated land) shall not apply to court to challenge the acquisition of the land by the state, and no court shall entertain such challenge...’

The Tribunal may not include more than one national from the same state (SADC Protocol Art. 3(6)). In the unlikely event that it happens that two judges are in fact chosen, it might be worth adopting the position taken by the ICJ according to which, if two candidates of the same nationality are elected at the same time, only the elder is considered to have been validly elected. At most, a judge may only serve for two consecutive terms after which he or she ceases to qualify for holding office (SADC Protocol Art. 6).

Article 6 of the Protocol provides that

of the members initially appointed, the terms of the two (2) of the regular and two of the additional members shall expire at the end of three years. The members whose term is to expire at the end of three years shall be chosen by a lot to be drawn by the Executive Secretary immediately after the first appointment.

It is submitted that the above provision is included in order to ensure a certain measure of continuity. Two-fifths of the court, that is four judges, are elected every three years and the other three-fifths are left until their five years lapse. The same method was also adopted by the ICJ, whose judges run for a maximum term of nine years, but a third of them are elected every three years (Muller et al. 1997:67).

Member states have great latitude in choosing whom to nominate for the Tribunal. All state parties to the Treaty have the right to propose a candidate. The only limitation is that they should qualify for appointment to the highest offices in their respective states or who are jurists of recognised competence (Protocol Art. 3(1)).

It should be emphasised that, once elected, a member of the Tribunal is a delegate neither of the government of his own country nor of that of any other state. Unlike most other organs of international organisations, the Tribunal is not composed of representatives of governments. Members of the Tribunal reach their decisions with complete independence and impartiality. However, in some way or other they represent their legal system, that is, the judges' professional experience and their background obviously have a way of showing in their decisions. This is in no way a weakness; in fact, this has the valuable consequence that the Tribunal operates as a comparative law jurisdiction, merging experiences and understandings of lawyers

skilled in the wide range of different legal (civil and common law) systems and indeed families of law.

6.2 Independence and impartiality of the Tribunal

Judicial independence can be defined as:

The degree to which Judges believe they can decide and do decide consistent with their own personal attitudes, values and conceptions of judicial role (in their interpretation of the law), in opposition to what others, who have or are believed to have political or judicial power, think about or desire in like matters, and particularly when a decision adverse to the beliefs or desires of those with political or judicial power may bring some retribution on the Judges personally or on the power of the court (Becker 1970:15).

In order to effectively fulfil its functions it is essential that the culture of judicial independence is sustained by procedures for appointment which must be fair, transparent and reasonable.³⁰

Certainly, a proper and concrete assessment of the judicial independence and impartiality of the SADC Tribunal is not easy without reference to its jurisprudence. This, however, is not possible given the fact that the Tribunal is still in its infancy stage. Several provisions have been included in the Protocol to guarantee the independence and impartiality of the judges. Before taking up their duties, the members of the Tribunal are required to make a solemn declaration in open session that they will exercise their powers independently, impartially and conscientiously (SADC Protocol Art. 5). The implication and essence of this solemn declaration by all members is that the Tribunal should only act on the basis of the law, independently of all outside influence or interventions whatsoever, in the exercise of its judicial function entrusted to it alone by the SADC Treaty and the Protocol.

In order to guarantee judicial independence, no member of the court can be dismissed unless in accordance with the rules (SADC Protocol Art. 8(3)). Members

³⁰ See Ruppel's conference paper (2008). The conference was organised by the Konrad Adenauer Foundation: Rule of Law Programme for Sub-Saharan Africa.

of the Tribunal may not hold any political or administrative office in the service of a state, community, or any other organisation (SADC Protocol Art. 9). This provision seeks to protect the judges from the influences of member states and other institutions. In addition, it fosters the general public's confidence in the Tribunal as a separate and independent judicial entity.

While the European Court of Justice (ECJ) forbids its judges from engaging in any occupation, whether gainful or not, the judges of the SADC Tribunal, for practical reasons, are employed on a part-time basis and can therefore hold other judicial offices (Hunnings 1996:52). With regard to the well known principle of *nemo iudex sua causa est*, Article 9(2) of the Protocol stipulates that 'no member of the Tribunal should participate in the decision of any case (dispute) in which he was previously involved'.³¹

Another feature relevant to the independence of the Tribunal is the fixed term of office of its judges (five years renewable). It has been argued that the possibility of renewal of their appointment could encourage judges to try to please their governments in order to get another renewal nomination (Hunnings 1996:53). While this might pose a problem with the ECJ where each member state nominates one candidate, this does not apply to the SADC Tribunal. The selection process is such that not all member states can have a candidate sitting on the bench. The result is that the Summit is forced to consider the qualifications of the candidates recommended by the Council in order to make their choice. In the end, the judge on the bench will not feel compelled to please his/her government to ensure another term in office. Furthermore, when engaged in the business of the Tribunal, the judges enjoy privileges and immunities to ensure that their decisions are not tainted with the fear of being held accountable at the end of their tenure (Protocol Art.10).

7. Applicable law

Article 21 of the Protocol specifically deals with the applicable law by the SADC Tribunal. It provides that the Tribunal shall apply the SADC Treaty, its Protocols and all subsidiary instruments adopted by the Summit, by the Council or by any other institution or organ of the community pursuant to the Treaty or Protocols.

³¹ This may happen in many ways, e.g. where the judge has acted previously in the dispute at hand as an agent, an attorney or advocate, a legal adviser or as a judge at domestic level.

Table 1: SADC Legal instruments

- Declaration and Treaty of SADC
- Amended Declaration and Treaty of SADC
- Protocol Against Corruption
- Protocol on Culture, Information and Sports
- Protocol on Combating Illicit Drugs
- Protocol on Education and Training
- Protocol on Energy
- Protocol on Extradition
- Protocol on Control of Firearms, Ammunition and Other Related Materials
- Protocol on Fisheries
- Protocol on Forestry
- Protocol on Health
- Protocol on Immunities and Privileges
- Protocol on Legal Affairs
- Protocol on Mutual Legal Assistance in Criminal Matters
- Protocol on Mining
- Protocol on the Facilitation of Movement of Persons
- Protocol on Politics, Defence and Security CoOperation
- Protocol on the Development of Tourism
- Protocol on Trade
- Amended Protocol on Trade
- Protocol on Transport, Communications and Meteorology
- Protocol on Tribunal and the Rules of Procedure Thereof
- Agreement Amending the Protocol on Tribunal
- Protocol on Shared Watercourse Systems
- Revised Protocol on Shared Watercourses
- Protocol on Wildlife Conservation and Law Enforcement
- SADC Mutual Defence Pact

Source: SADC Parliamentary Forum, 2007 Compendium of SADC Protocols and other legal instruments

While the Tribunal has the mandate to develop its own jurisprudence, it must also give regard to applicable treaties, general principles and rules of public international law and any rules and principles of the law applicable in member states (Protocol Art. 21(b)). This exhortation indicates a clear desire for the Tribunal to influence the direction and speed of the integration process for the community. It also reflects a

desire to create a truly supranational law applicable to the Community Member States: law that is now a pure reflection of the political agreements and consensus at the level of the heads of states in the region.

Unlike the East African Community treaty law (EAC Treaty Art. 8(4) and 33(2)), the treaty law of SADC does not contain any provisions dealing with the relationship between community law and domestic law. In addressing this issue, the SADC Tribunal could, however, resort to Article 21 of its Protocol.³²

Corollary to the issue of applicable law is the interrelationship between (SADC) community laws and municipal laws. Differently put, in the event that there is a conflict or inconsistency between community law and domestic laws of member states, which law should prevail? The answer to this question also depends on the various national constitutions and the status (legal force) of conventional law in member states, and on the relationship between domestic laws and conventional law in particular (e.g. monist or dualist approach³³).

8. Effect and review of the Tribunal's judicial decisions

According to Article 24(3) of the Protocol, the Tribunal's decisions and rulings are final and binding. As to the finality of decisions the provision implies that there is no further instance of appeal within the legal regime of SADC to review a decision or ruling issued by the Tribunal. This may be subject to criticism but can be justified on various grounds. Regarding cases brought by natural or legal persons, the rule of exhaustion of local remedies does play a significant role in the context of the lack of an appeal instance. Taking into account that, in principle, a case can only be brought before the Tribunal if all available remedies under domestic jurisdiction have been exhausted, the Tribunal itself can in these cases be regarded as an instance of appeal, since a national court has already ruled on the case.

³² As mentioned earlier, this provision permits the Tribunal to apply general principles and rules of public international law and any rules and principles of the law of states. In the view of the authors, this would include jurisprudence of other regional or international courts or tribunals.

³³ As to the Namibian approach in respect of the reception of international law into the national legal system, cf. Erasmus (1991:81ff.) See also Bangamwabo (2008:166ff.).

The fact that there is no appellate body in the classical sense does not mean that SADC Tribunal decisions cannot be subject to review at all. Article 26 of the Tribunal's rules of procedure provides as follows:

An application for review of a decision may be made to the Tribunal if it is based upon the discovery of some fact which by its nature might have had a decisive influence on the decision if it had been known to the Tribunal at the time the decision was given, but which fact at the time was unknown to both the Tribunal and the party making the application.

Different is the situation found in the European Union, where, with the implementation of the Court of First Instance (CFI) on 31 October 1989, a major change occurred in the judicial system of the European Communities. Article 225 of the EC Treaty (*ex* Article 168 A EEC) became the legal foundation for the new CFI.³⁴ The main reason for establishing a new court in the Judicial System of the European Communities was the rapidly growing workload and the increasing complexity of the cases before the Court of Justice of the European Communities (ECJ), which led to a great backlog of cases and a general increase in the average time the ECJ was taking to complete the cases submitted to it. Since the SADC Tribunal became active only in 2007, it is to be seen how the court will manage its workload in future. With the transfer of jurisdiction to the CFI, the ECJ took on a new role as an appellate court in the identified areas of jurisdiction. Article 225 Par. 1 of the EC Treaty provides that the CFI exercises its jurisdiction subject to a right of appeal to the ECJ, on points of law only and in accordance with the conditions laid down by the Statute of the Court.

Also the conflict resolution mechanism in the World Trade Organisation (WTO) in comparison to its predecessor GATT (General Agreement on Tariffs and Trade) has been shown to become more effective once the WTO dispute settlement system is introduced an appellate review of panel decisions. This not only enhanced the enforceability of all commitments but ensured greater confidence in the quality of legal finding. The WTO Appellate Body was established in 1995 under Article 17 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU). The Appellate Body can uphold, modify or reverse the legal findings and

³⁴ This was based on Decision 88/591/ECSC, EEC, EURATOM (1989) C 215/1.

conclusions of a panel, and Appellate Body Reports, once adopted by the Dispute Settlement Body (DSB), must be accepted by the parties to the dispute. The improved structure of this two-tier system has given WTO members an ability to defend their rights. The review mechanism presented in the appellate body allows conflicting parties to show how determined they are to fight their case.³⁵

Regardless of the question whether the principle of *res judicata* is to be applied by the judicial organ of the African Union, which is hopefully operational in due course (Viljoen 2007:502), the SADC rules of procedure clearly state that the decisions of the Tribunal are of a binding nature. However, it may be discussed whether the decisions are binding only *inter partes*, meaning upon the parties to the dispute, or whether the binding effect also unfolds to the national courts of other SADC member states, i.e. a binding effect *erga omnes*. Article 32(3) of the Protocol addressing the issue of enforcement of the Tribunal's decisions clearly states that '[d]ecisions of the Tribunal shall be binding upon the parties to the dispute in respect of that particular case and enforceable within the territories of the States concerned'.

Decisions by the Tribunal therefore do not have an *erga omnes* effect in its classical sense. The consequence of judicial acts by the SADC Tribunal for national jurisdictions can nonetheless be subject to discussion. Whether or not such rulings have an influence on national jurisdictions is generally to be determined by the national law of each SADC member state.³⁶ In summary, especially in common law countries, the Tribunal's rulings will at least have a guiding effect upon the jurisdiction of national courts. In order to warrant a higher degree of transparency, legal certainty and predictability, it is, however, recommended that provision be made within the legal framework of SADC that actually imposes a duty on national judges to adhere to the jurisdiction of the Tribunal.

³⁵ For the WTO dispute settlement system, see report by Sutherland et al. (2005:49).

³⁶ Taking the example of Namibia, the Constitution in its Article 81 declares the decisions of the Supreme Court as binding on all other courts and all persons in Namibia. In all other cases, the answer to the problem of the binding nature of court decisions is to be found in Article 78 of the Namibian Constitution which states that the Namibian courts are independent and that they are subject only to the Namibian Constitution and the law. The latter implies that each judge is independent in his or her decision and not bound to judicial acts of other judicial organs whether national decisions or decisions of other – possibly higher ranked – judicial organs.

9. Enforcement of the Tribunal's judicial decisions

Article 16(5) of the Treaty of SADC provides that the decisions of the SADC Tribunal shall be final and binding on the parties of the dispute. Were the Tribunal's decisions not binding, i.e. enforceable and executable by member states, the whole purpose of creating such a court would be a nullity. The primary responsibility to enforce and execute the SADC Tribunal's decisions and rulings lies with member states to the SADC Treaty and the Protocol on the Tribunal. This is buttressed by the well-rooted principle of international law *pacta sunt servanda*, i.e. obligations undertaken in international or regional treaties or conventions must be honoured in good faith. True, the bulk of international law and its enforcement are based on consent and good faith among states.

Provision for the enforcement of the Tribunal's decisions is made in Article 32 of the Protocol. According to this provision, enforcement and execution of judgments are governed by the law and rules of civil procedure for the registration and enforcement of foreign judgments in force in the territory of the state in which the judgment is to be enforced. It is furthermore the obligation of member states to take all measures necessary to ensure execution of decisions of the Tribunal. In the event that a state fails to comply with a decision, such failure can be referred to the Tribunal by any party concerned, and if the Tribunal is satisfied that such failure of compliance exists, the latter is to be reported to the SADC Summit³⁷ to take appropriate action. These are the theoretical steps in terms of enforcement of the Tribunal's decisions, which may be considered to be inadequate and ambiguous for the reason that they are ineffective. This is so as member states can escape their international obligations by invoking rulings of domestic courts in their favour (Erasmus and Coleman 2008).

Due to the fact that so far only one case has just recently reached the initial stage of enforcement, it cannot be determined how the enforcement mechanisms are put into practice. Ultimately, it is upon the SADC Summit to decide whether the SADC dispute resolution mechanism is a *tiger with or without teeth*. According to Article 33(1) and (2) of the SADC Treaty, the Summit is the institution within SADC that has to decide on a case-by-case basis whether and which sanctions are to be imposed against a

³⁷ Consisting of the Heads of States or Government of all Member States: cf Article 10 of the SADC Treaty.

member state in case a state fails to comply with its obligations. Article 33 does not, however, mention any possible sanctions that may be imposed. It would seem appropriate to include a provision containing at least a non-exhaustive list of possible coercive measures. In the style of the United Nations legal framework, such a list could include complete or partial interruption of economic relations, interruption of rail, sea, air, postal, telegraphic, radio, and other means of communication, as well as the severance of diplomatic relations.³⁸ Further possible measures could be the freezing of those assets belonging to the defaulting state that are to be found in the territory of the state which is the successful party, as well as in that of third states, or the suspension of voting rights or other rights and privileges.³⁹ It is upon the SADC Summit to ensure respect for its legal instruments. Without doubt, the Council's activities in this regard are closely connected to the political and economic problems and diplomatic aspects play a significant role in these cases (Erasmus and Coleman 2008). It is hoped that the SADC Summit will in present and future cases be progressive enough to take appropriate initiatives where necessary in order to guarantee an effective regional mechanism ensuring stability in the region.

The issue of failure or refusal to comply with and execute the SADC Tribunal's judgments has already plagued the SADC Tribunal in the case of *Mike Campbell (Pvt) Ltd et al. v The Republic of Zimbabwe* (2008). When the applicants in this case approached the Tribunal in October 2007, they not only sought to challenge the legality of the expropriation of land in and by the respondent state, but they also sought and were granted an interim order or interdict in terms of which the respondent state was ordered not to evict, or interfere with, the peaceful occupation of the applicants in their respective farms until the finalisation of the main dispute on 13 December 2007.⁴⁰ This same interim order was sought by and granted to other applicants/interveners on 28 March 2008.⁴¹ On 18 July 2008, applicants made an urgent application to the Tribunal seeking a declaration to the effect that the

³⁸ Those are the measures that the United Nations Security Council may impose with respect to threats to the peace and acts of aggression: cf. Article 41 of the UN Charter.

³⁹ An example of an effective enforcement mechanism is the World Trade Organisation's system of imposing limited trade sanctions in the form of the suspension of concessions or other obligations as provided for in Art. 22 of the Dispute Settlement Understanding (DSU). Due to the great political and economic significance, such sanctions are suitable to ensure compliance with the rulings of the WTO judicial organ, DSB.

⁴⁰ See Cases SADC(T) No. 2/07, 02/08, 03/08/, 04/08, and 06/08.

⁴¹ *Ibid.*

respondent state is in breach and contempt of the orders of the Tribunal. After deliberations, the Tribunal found that the respondent state was indeed in contempt of Tribunal's orders as it had not only failed to execute the Tribunal's orders, but, more surprisingly, it was in the process of prosecuting the applicants for remaining on their lands, and subsequently evicting them upon conviction.⁴²

In the circumstances, and in terms of Article 32(5) of the Protocol, the Tribunal decided that the breach and contempt of court by the respondent state should be reported to the Summit for the latter to take *appropriate action*. The meaning of the phrase *appropriate action* in this regard is unambiguous. One would expect the heads of states, viz the Summit, to order and instruct the recalcitrant state to comply and execute the Tribunal's decisions, for failure of which the same state would face sanctions as stipulated by Article 33 of the SADC Treaty. Article 33(1)(a) provides that 'sanctions may be imposed against any Member State that persistently fails, without good reason, to fulfil obligations assumed under Treaty...'

In the light of the above, it can be observed that, without the political will and good faith on the part of the SADC member states to meet and comply with their obligations as spelled out in ratified treaties and conventions, a concrete economic regional integration is likely to remain a pie in the sky. When compared to the European system (where the ECJ can also order penalty payments for the members that have not complied with its rulings), the difference becomes obvious.

10. Between regional integration and state sovereignty?

Regional integration in Southern Africa can in general terms be described as a path towards gradually liberalising the trade of developing countries and integrating them into the world economy (Andresen et al. 2001:3). Recognising that each SADC country on its own would have little chance to attract *inter alia* the necessary financial transfers and technology, the concern about achieving regional integration started to increase in the 1990s (Hansohm and Shilimela 2006:7). The SADC reforms agreed upon in 2001 can be seen as a milestone in this context. The Heads of State and Governments agreed to restructure SADC in order to strengthen the community as a supranational organisation responsible for the economic, political and social

⁴² See Ruling in Case SADC(T) No. 11/08, p. 3.

dimensions of the integration process within the region.⁴³ Focal point of this structural modernisation by the way of institutional and market-related reforms, infrastructure development, human resources development and a strengthening of social capital was the opening-up of the member countries to create an enlarged economic space through trade integration and gradual harmonisation of regulatory environments, as well as economic and social conditions.

The recent Summit of SADC Heads of State and Government of SADC was held in Sandton, South Africa, 16–17 August 2008. The Summit launched the SADC Free Trade Area (FTA) which is the first milestone in the regional economic integration agenda. Summit recognised that free trade in the region would create a larger market, releasing potential for trade, economic development and employment creation. The SADC regional integration programme includes the establishment of the Free Trade Agreement⁴⁴ to be followed by a Customs Union by 2010, a Common Market by 2015, a monetary Union by 2016 and a single currency by 2018.⁴⁵

During the same meeting the Summit (SADC 2008) recognised that

the region had managed to consolidate peace and democracy in SADC. With regard to the challenges in Zimbabwe, Summit noted the outcomes of the Extraordinary Summit of the Organ held in the course of the Summit and reaffirmed its commitment to work with the people of Zimbabwe in order to overcome the challenges they are facing. Summit called for the acceleration of interventions to further deepen the regional integration agenda through the development of a programme of cooperation aimed at expanding regional production capacity which entails provision and rehabilitation of regional infrastructure to facilitate efficient movement of goods and people in a more open regional economy. In addition, Summit emphasised the need for full implementation of the SADC Protocol on Trade in order to ensure that the FTA is sustainable and the envisaged Customs Union in SADC is attainable.

⁴³ For details on the restructuring process see Hansohm and Shilimela (2006:7ff.).

⁴⁴ While 12 member states (Botswana, Lesotho, Madagascar, Malawi, Mauritius, Mozambique, Namibia, South Africa, Swaziland, Tanzania, Zambia and Zimbabwe) have already ratified the SADC Protocol on Trade, Angola and the Democratic Republic of the Congo (DRC) will join the SADC Free Trade Area (FTA) at a later stage.

⁴⁵ See SADC (2008).

The fear of loss of state autonomy, the fear of loss of identity, socio-economic disparity among members, historical disagreement, lack of vision and unwillingness to share resources are, *inter alia*, obstacles when it comes to regional integration. It is therefore necessary to look at some of these major obstacles to the integration process and subsequently to the determination of the role the SADC Tribunal can play with regard to the latter.

The controversy around sovereignty is often encountered, especially when it comes to concepts of regional integration. In the so-called Sutherland Report (Sutherland et al. 2005:29), sovereignty is described as one of the ‘most used and also misused concepts of international affairs and international law’.⁴⁶ The Report (Sutherland Par. 111) continues as follows:

Acceptance of almost any treaty involves a transfer of a certain amount of decision-making authority away from states, and towards some international institution. Generally this is exactly why “sovereign nations” agree to such treaties. They realise that the benefits of cooperative action that a treaty enhances are greater than the circumstances that exist otherwise.

Sovereignty has an external and internal dimension and cannot be understood only as a right but also as a right that brings obligations. But how does all this affect regional integration in SADC? It is undeniable that discrete territorially bound state units no longer have exclusive control over the process of governance pertaining to the societies that live in the territory. In this context, governance has come to be conceptualised in multilevel terms as power has become widely dispersed amongst a range of institutions and actors. The dispersion of power and the increase in integration activities leading to multiple levels of governance are also challenges faced by SADC. With the Campbell Case the question immediately arose how, within SADC, can state sovereignty be reconciled with the universal recognition of inalienable human rights deriving from respect for human dignity and popular sovereignty? How far can the universal recognition of human rights change the subjects, structures, general principles, interpretative methods and object and

⁴⁶ The concept of sovereignty and its relevance to the WTO is discussed in depth in the report by Sutherland et al. (2005:29).

purpose of international law and actually limit state sovereignty to renounce human rights treaties and to refuse domestic implementation of international obligations for the benefit of domestic citizens? No doubt regional integration is intended to provide for increased opportunities through the creation of multiple institutional frameworks accessible to individuals and groups. It will, however, be seen how the SADC Tribunal will deal with the issue of multilevel protection of individual rights and how SADC members will respond in protecting their national sovereignty in spite of being a signatory to a treaty that requires a certain amount of sovereignty transfer to the Tribunal (Petersman 2008).

11. Regional integration and legal harmonisation

Another challenge of the regional integration process was and still is the heterogeneity of SADC countries. This heterogeneity is not only reflected by surface area, population figures, size of the domestic markets, per capita incomes, the endowment with natural resources and the social and political situation, but also by the variety of legal systems applied in different member states.

Comparative law is the interdisciplinary science that since its beginnings tended to classify the legal systems of the world into various legal families or categories which describe the juristic philosophy and techniques shared by a number of nations with broadly similar legal systems by recognising the important relationship between law, history and culture. Over the centuries several main categories of legal system have been described in the course of the world's legal history. Main categories include civil (or Romano-Germanic) and common law, socialist law (which has obviously forfeited relevance since the fall of the iron curtain) and several religious legal systems (Menski 2006).

Due to the broad variety of applied legal systems on the African continent, African legal systems have always been an object of fascination to comparative lawyers as well as to legal ethnologists and sociologists. In the states of sub-Saharan Africa, the concept of legal pluralism is predominant, describing a situation in which two or more types of law or legal traditions operate simultaneously in the same country. Despite the legal influences of the ex-colonial powers, a large number of Africans still live under indigenous customary law (Hinz 2002).

Table 2: Heterogeneity of nonreligious legal systems within SADC⁴⁷

Country	Legal Systems		
Angola	Civil Law		Customary Law
Botswana	Roman Dutch Law	Common Law	Customary Law
DR Congo	Civil Law		Customary Law
Lesotho	Roman Dutch Law	Common Law	Customary Law
Madagascar	Civil Law		Customary Law
Malawi		Common Law	Customary Law
Mauritius	Civil Law	Common Law	
Mozambique	Civil Law		Customary Law
Namibia	Roman Dutch Law	Common Law	Customary Law
Seychelles	Civil Law	Common Law	
South Africa	Roman Dutch Law	Common Law	Customary Law
Swaziland	Roman Dutch Law	Common Law	Customary Law
Tanzania		Common Law	Customary Law
Zambia		Common Law	Customary Law
Zimbabwe	Roman Dutch Law	Common Law	Customary Law

Source: Author's composition

The above table demonstrates the heterogeneity of applied legal systems within SADC. This is why it is much easier, for instance, for a lawyer from Malawi to understand a lawyer from Tanzania, Zambia or even from England, than a lawyer from Mozambique, a country geographically located right next door. In view of the heterogeneity of legal systems within SADC but also with regard to a harmonious jurisdiction, the SADC Tribunal can play a key role in the integration process. It thus appears useful to divide potential cases to be brought before the Tribunal into two categories: the first category describes all cases typically occurring between member states or community institutions with regard to community related issues in the first place. These cases will have an impact on the national level if they are decided by the Tribunal, but they arise on community level. One example for this first category of cases might be a dispute over export or import restrictions according to the SADC

⁴⁷ Of course, this is a very rough categorisation. Each of the SADC countries has its very own particularities in terms of its legal system. It would go beyond the scope of this paper to go into more detail for each country. The source used for this table is the University of Ottawa (<http://www.droitcivil.uottawa.ca/world-legal-systems/eng-monde.php>) with adaptations made by the authors of this paper where necessary.

Protocol on Trade. The second category of cases relates to those that have their roots on the national level and which after the exhaustion of national remedies are taken one step higher to the community level. An example of this second category of cases is the Campbell Case. While the first category of cases *per se* contributes to regional integration due to the nature of the conflict, the second category is also relevant for the integration process in the sense that it appears to be essential for a harmonious jurisdiction to exist in cases that stripe principles laid forward by the community. Taking into consideration the heterogeneity of applied legal systems within the community, this seems to be a major challenge. It could be argued that in the long run, the legal systems within the community should be unified (Latigo 2008).

As a recommendation from the International Conference on Regional Integration and SADC Law held in Maputo in April 2008⁴⁸ a Regional Centre of Studies on Integration and SADC Law was established.⁴⁹ The main tasks of this Centre of Study will be: (i) to promote investigation on regional integration and legal systems, (ii) to coordinate the investigation and the activities of the Regional Academic Partnership Network, (iii) to collect and disseminate all legal material on SADC institutions and member countries, (iv) to organise debates, training, research, seminars, workshops, and conferences on specific issues (harmonisation of laws in various areas and publication of compendiums on trade laws, economic laws, investment codes, taxation laws, intellectual property laws, transport laws, and so forth). Even though legal issues are the core business of the Regional Centre of Studies on Integration and SADC Law, considering that the integration process involves economic, political and institutional features, the centre should be multidisciplinary and take on board contributions from other faculties. The Regional Centre of Studies on Integration and SADC Law will be based at the Eduardo Mondlane University (UEM), Maputo, Mozambique. It will have an autonomous statute and have the legal capacity to raise funds and to receive grants and donations.⁵⁰

In order to achieve effective harmonisation and unification of national legal systems, the establishment of a Regional Academic Partnership Network in SADC countries was recommended at the above conference. As the national legal systems in the

⁴⁸ One of the authors of this paper personally attended this historical conference.

⁴⁹ See the following website: http://knowledge-sharing.uneca.org/uneca/member-states/copy_of_trade-ministerial-conference-of-african-and-south-american-countries (8 August 2008).

⁵⁰ *Ibid.*

region are fairly different it is necessary that all operators in the legal profession and civil society participate in the debate on the harmonisation and unification of legal systems in order to achieve a more adequate synthesis and/or compromise for the elaboration of an efficient SADC legal system.⁵¹ The main objective of the Regional Academic Partnership Network will be to boost research on regional integration and run regional capacity building programmes. It has been recommended that the Faculties of Law of each country should be the driving force of the process and should take on board all the relevant players and stakeholders including the civil society.⁵²

Of increasing significance for SADC member states will be the harmonisation of law working by the implementation and transformation of protocols and guidelines and aiming to reduce or eliminate the differences between the national legal systems by inducing them to adopt common principles of law. In terms of regional integration, the conformation of law is one central instrument to reduce normative barriers within the community. Unified law promotes greater legal predictability as well as legal certainty, both essential for the investment climate and economic development in general. However, the extent and method of harmonisation is problematic as national positions have to be taken into consideration and, as a matter of fact, the differences that exist in respect of legal traditions in different countries of the world must also be respected, even in times of globalisation. The process of harmonisation of law therefore has to take place in small steps.⁵³

Instead of radically equalising the legal systems applied in the community, the SADC Tribunal can in this regard contribute to towards integration if its decisions are properly enforced on the national level and if they serve as guidelines for national courts when deciding on questions that might also be relevant on the regional level. This in turn enhances the harmonisation of SADC relevant jurisprudence. Community law is typically jacketed by the various instruments of national law and affects national law in the shape of a unifying Trojan horse. In practice, this reflects the application of community law by national judges. Harmonisation, however, can

⁵¹ *Ibid.*

⁵² In this respect, the Faculty of Law of the University of Namibia (UNAM) and the Faculty of Law of Eduardo Mondlane University (UEM) in Maputo have expressed mutual interest in engaging in a future partnership.

⁵³ See the following website: http://knowledge-sharing.uneca.org/uneca/member-states/copy_of_trade-ministerial-conference-of-african-and-south-american-countries (8 August 2008).

only take place if the application of law by national courts in comparable cases leads roughly to the same results – because only in cases of comparable results do the same competitive conditions prevail for all member states.⁵⁴ National courts therefore have to consider community law when ruling on community relevant issues. One essential precondition for such consideration of community law by the national courts is that there should be a common understanding of community law in order to guarantee legal certainty in terms of the predictability of legal decisions. With the SADC Tribunal a central institution was created that can give impulses and guidelines for a community-wide common understanding of community law. In the light of the integrative effect of the Tribunal's function, the Tribunal can become similar to the ECJ – a 'motor of integration' (Schwarze 1988:13ff.).

Domestication of the regional integration agenda means introducing 'a certain way of thinking and acting into the mainstream and to let it develop into a natural behaviour in order to penetrate and lead to change of mentality in the mainstream' (Minega 2007). Regional integration issues should thus become a key component of the basic training in the curriculum of SADC university education. The education systems of SADC member states are still based on their colonial model. Many SADC countries have gone through some reform process to adapt the system to the needs of the society. The academic authorities have to decide how to harmonise the system. In various cases it may even become necessary to revise the curricula of the law faculties and to include regional integration issues as a basic component of lawyers' training.

During the SADC Lawyers Association Conference and Annual General Meeting held in Dar Es Salaam, Tanzania, 21–24 June 2007, the SADC Bar Associations and Law Societies expressed their desire to share the same vision, beliefs and aspirations with regard to upholding the rule of law, promoting the respect for human rights and the development of their respective legal systems in order to ensure the proper administration of justice, and generally to work towards the harmonisation of their respective legal systems and to advance the interests of the members. The above example demonstrates harmonisation effort.⁵⁵

⁵⁴ *Ibid.*

⁵⁵ See the following website:

12. Regional Indicative Strategic Development Plan

In March 2001, the Heads of State and Government met at an Extraordinary Summit in Windhoek and approved the restructuring of SADC institutions by means of a Regional Indicative Strategic Development Plan (RISDP). The RISDP reaffirms the commitment of SADC member states to good political, economic and corporate governance entrenched in a culture of democracy⁵⁶, full participation by civil society, transparency and respect for the rule of law. With regard to monitoring the implementation of the RISDP, the Summit will exercise continuous oversight using progress reports from the Secretariat.⁵⁷

The focal point of the RISDP is thus to provide strategic direction with respect to SADC programmes and activities, and to align the strategic objectives and priorities of SADC with the policies and strategies for achieving its long-term goals. The RISDP is indicative in nature, merely outlining the necessary conditions that should be realised towards achieving those goals. The purpose of the RISDP is to deepen regional integration in SADC. The RISDP has identified gaps and challenges in the current policies and strategies, and used them to reorient those policies and strategies. In the light of the identified gaps and challenges, Chapter 4 focuses on a number of priority intervention areas of both cross-sectoral and sectoral nature that are critical for the achievement of SADCs objectives, in particular in promoting deeper regional integration, integrating SADC into the world economy, promoting balanced, equitable and balanced development, eradicating poverty and promoting gender equality. The RISDP focuses on promoting trade, economic liberalisation and development as a means of facilitating trade and financial liberalisation, competitive and diversified industrial development and increased investment through the establishment of a SADC Common Market. In order to attain this goal, SADC will *inter alia* need to harmonise policies, legal and regulatory frameworks for the free movement of factors of production and to implement policies to attain macroeconomic stability and build policy credibility.⁵⁸

<http://www.lssa.org.za/LinkClick.aspx?link=SADC+2007+Concluding+Statement.doc&tabid=53&mid=403> (18 September 2008).

⁵⁶ For an analysis of the state of democracy in the SADC region, see Breytenbach (2002).

⁵⁷ See the following website: <http://www.sadc.int/index/browse/page/106> (19 September 2008).

⁵⁸ See the following website: <http://www.sadc.int/index/browse/page/106> (19 September 2008).

The RISDP is a strategic plan which can be adapted. However, It is not binding and makes no specific reference to the SADC Tribunal. Yet, at every Summit in recent years member states reaffirmed their commitment to regional integration as per the RISDP. Despite this political commitment to RISDP regional integration, there is growing agreement in the region that the RISDP milestones are unrealistic, and, indeed, the linear model of regional integration which underpins this strategic plan does not address the real challenges of regional integration and sustainable development of the region (Hartzenberg 2008).

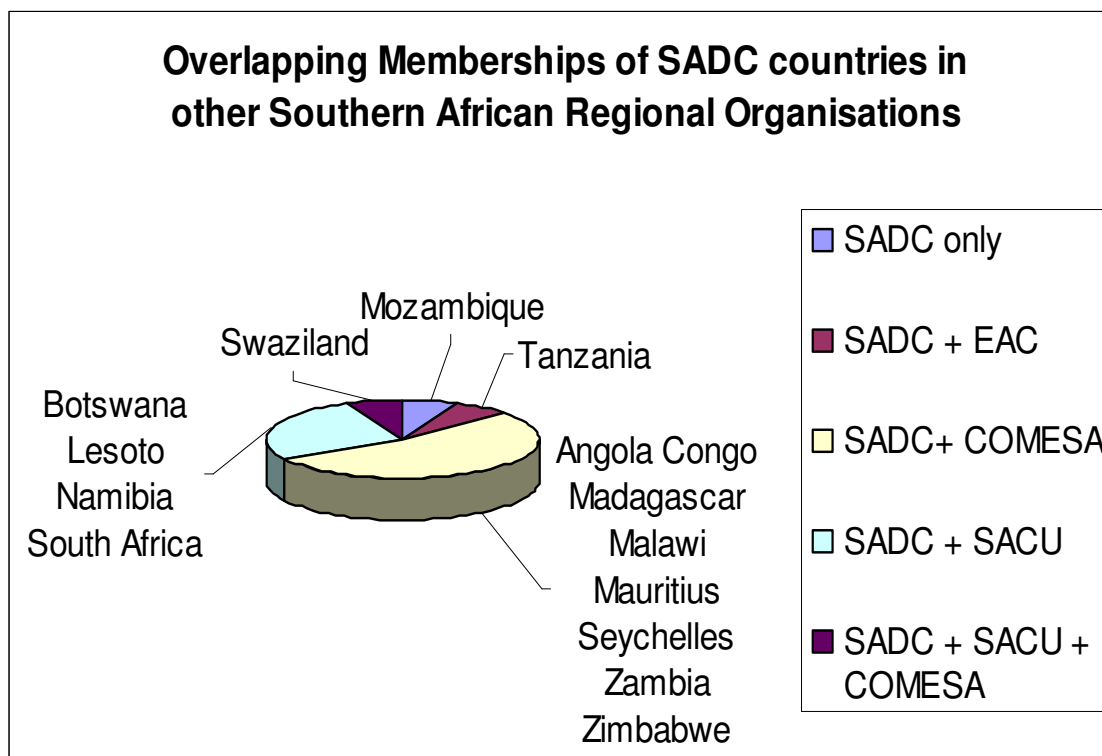
13. Concurrent jurisdiction and overlapping membership

From a long-term perspective and with a view to their merging into a single institution, regional economic communities such as SADC must be strengthened and consolidated. However, the fact that many African states are members of various regional economic communities can be regarded as a hurdle in respect of the integration process (Viljoen 2007:525).

Except Mozambique, all SADC countries are at the same time members of at least one other trade agreement in the region.⁵⁹ Eight SADC members are also members of the Common Market of Eastern and Southern Africa (COMESA), four countries are members of SADC and the Southern African Customs Union (SACU), Swaziland is a member of SADC, SACU and COMESA, and Tanzania is a member of SADC and the East African Community (EAC). Various bilateral free-trade agreements as well as the membership of all SADC countries in the African Union (AU) may be regarded as obstacles to deeper integration in many respects. Multiple memberships raise problems such as multiple costs for membership contributions and negotiation rounds, the application of different external tariffs, or the eventual lack of identification with SADC as the one integration project (Brandt et al. 2001:11). The question of concurrent jurisdiction of different judicial organs is one further problematic issue with regard to multiple memberships which needs to be addressed.

⁵⁹ For a detailed discussion on overlapping memberships in COMESA, EAC, SACU and SADC see Jakobeit et al. (2005).

Figure 1: Overlapping memberships



Source: Authors' composition

All aforementioned organisations have judicial organs, at least to some extent.⁶⁰ The SACU Agreement provides for a Tribunal (SACU Tribunal), an independent body of experts, yet to be established.⁶¹ Plans include adjudication on any issue concerning the application or interpretation of the 2002 SACU Agreement or any dispute arising thereunder at the request of the Council.⁶²

COMESA established the COMESA Court of Justice in 1994 as one of the organs of COMESA. The COMESA Court of Justice has jurisdiction to hear disputes to which member states, the Secretary General, residents of member states (individuals and legal persons) may be parties. The court has jurisdiction to adjudicate upon all matters which may be referred to it pursuant to the COMESA Treaty. The seat of the court was temporarily hosted within the COMESA Secretariat from 1998, but in

⁶⁰ For a more detailed discussion see Ruppel (2009).

⁶¹ It is anticipated that it will be operational by March 2009.

⁶² See the following website: <http://www.sacu.int/main.php?include=about/tribunal.html> (28 July 2008).

March 2003 the COMESA Authority decided that the seat of the court should be moved to Khartoum in the Republic of Sudan.⁶³

The East African Court of Justice is the judicial arm of the East African Community. The court has jurisdiction over the interpretation and application of the EAC Treaty and may have other original, appellate, human rights or other jurisdiction upon conclusion of a protocol to realise such extended jurisdiction.⁶⁴ Reference to the court may be by legal and natural persons, member states and the Secretary General of the community. The East African Court of Justice is the replacement for the East African Court of Appeals that shut its doors upon the dissolution of the East African Community in 1977. Upon the revival of the East African Community in 1999, the Treaty for the Establishment of the East African Community provided for a different kind of regional court. Rather than the Court of Appeals, which acted as a high court for criminal and civil matters incorporated within the legal system of each partner state, the treaty created the supranational Court of Justice situated in Arusha, Tanzania.⁶⁵

Further judicial organs of relevance for all SADC member states are the judicial bodies on the level of the African Union. The African Court on Human and Peoples' Rights (ACHPR) which is to be merged with the African Court of Justice was established in 2002. The Court is located in Arusha, Tanzania.⁶⁶ Although the first eleven judges were elected in 2006, the court has not yet become operational. The merged court will have jurisdiction over all disputes and applications referred to it which *inter alia* relate to the interpretation and application of the AU Constitutive Act or the interpretation, application or validity of Union Treaties, as well as human rights violations. To date, the African Commission on Human and Peoples' Rights, a quasi-judicial body established by the African Charter on Human and Peoples' Rights is responsible for monitoring compliance with the African Charter on Human and Peoples' Rights.

From the above it becomes clear that, in the near future, the issue of conflicting jurisdiction of regional courts on the African continent will become a prominent one.

⁶³ See the following website:

http://www.comesa.int/institutions/court_of_justice/Multi-language_content.2003-08-21.2608/view (28 July 2008).

⁶⁴ For some recent decisions of the Court see Mutai (2007:177-203).

⁶⁵ See http://www.aict-ctia.org/courts_subreg/eac/eac_home.html (28 July 2008).

⁶⁶ *Ibid.*

For the time being, the consequence of overlapping jurisdiction is that a claimant may in fact choose to which judicial body a case is to be submitted⁶⁷, as a competent court may not decline jurisdiction – the argument being that another court may as well be competent. In terms of regional integration, the absence of a judicially integrated Africa is, however, undeniably a problem for the reason of divergent interpretation of one normative source by different judicial bodies (Viljoen 2007:502).

14. The SADC Tribunal and human rights

No doubt, the protection of human rights plays an essential role in economic development as it has an impact on the investment climate, this again contributing to growth, productivity and employment creation – all essential for sustainable reductions in income poverty. At the first glance, the promotion and protection of human rights might not be in the focus of SADC as an organisation furthering socioeconomic cooperation and integration as well as political and security cooperation among the 15 Southern African states. However, the community's territory is home to approximately 240 million inhabitants and many human rights related provisions can be found within the legal framework of SADC. Although primarily set up to resolve disputes arising from closer economic and political union rather than human rights, the Campbell Case impressively demonstrates that the Tribunal can also be called upon to consider human rights implications of economic policies and programmes (Viljoen 2007:503).

The SADC Treaty itself refers to regional integration and to human rights directly or indirectly at several stages. In its preamble, the treaty *inter alia* determines to ensure, through common action, the progress and well-being of the people of Southern Africa and recognises the need to involve the people of the region centrally in the process of development and integration, particularly through the guarantee of democratic rights, observance of human rights and the rule of law. The preamble's corner points are given even more substantiality within the following provisions of the SADC Treaty. Under Chapter 3 of the treaty, which deals with principles, objectives, the SADC common agenda and general undertakings, it is provided that SADC and its member state shall act in accordance with the principles of human rights, democracy and the rule of law (SADC Treaty Art. 4(c)). Moreover, the objectives of SADC

⁶⁷ Referred to as *forum-shopping*: see Viljoen (2007:502).

(SADC Treaty Art. 5) in one way or another relate to human rights issues: poverty alleviation, for instance, with the ultimate objective of its eradication being one of SADC's objectives contributing to ensure a decent standard of living, adequate nutrition, health care and education (UNDP 2000:8). Other SADC objectives such as the maintenance of democracy, peace, security and stability refer to human rights such as the sustainable utilisation of natural resources and effective protection of the environment, known as third generation human rights (Ruppel 2008:101).

There is also growing evidence that the European Union (EU) is becoming more involved in human rights protection and has the capacity to turn into an unprecedented post-national human rights protection institution. The EU institutional framework presents advantages that fit the general criteria of institutional design in the human rights context. Of course, many doubts and critiques may be raised against an entity which started primarily as a functional and economic institution (Besson 2006:323-360). Since their inception the ECJ and the European Court of Human Rights (ECHR) have built a remarkable record in the field of international dispute settlement. With regard to the interpretation of human rights standards, there is certainly a potential for conflict between the two courts. However, the process of European integration and the shared political, social, economic and legal values of the states concerned have favoured the dialogue and interaction between the two judicial bodies, minimising possible discrepancies and contributing to their success as dispute settlement mechanisms in Europe (Lebeck 2007:195-236). In this respect SADC still has a long way to travel.

15. Concluding remarks

The SADC Tribunal is a judicial dispute settlement organ that can still be considered to be in its infancy. The Tribunal can therefore not yet be expected to offer ideal procedures and solutions. Criticism has been expressed when it comes to a lack of an appeal instance. Thus, SADC can perhaps learn from other experiences. The conflict resolution mechanism in the WTO in comparison to its predecessor GATT is shown to have become more effective after its Appellate Body was established in 1995. In the European Union, with the implementation of the Court of First Instance (CFI), the ECJ took on a new role as an appellate court in the identified areas of jurisdiction.

Further obstacles must be overcome within SADC: the lack of harmonised laws, endangerment of judicial independence through national executive influence, national sovereignty, the lack of coercive measures in case of non-compliance, and overlapping of regional legal regimes.

One aspect that is particularly problematic is that compliance with the SADC Tribunal's decisions depends on the political will of the Summit. This differs from the European system, which reflects the division of power also on the supranational level. When a SADC member state fails to comply with a decision of the Tribunal, such failure can again be referred to the Tribunal. If the Tribunal confirms that such failure has occurred, it can report its finding to the Summit for the latter to take the appropriate action (Tribunal Protocol, Article 32). However, the general rule is that the Summit operates on a basis of consensus. This means that also a member that has not been able to conform to the decision of the Tribunal has to condemn its own action if the Summit is to make any official decision on the matter.

Formal supranational bodies like the SADC Tribunal alone cannot create regional integration. Intergovernmental and inter-parliamentary action are equally important and of common concern. However, what becomes clear is that the SADC Tribunal can serve as a key actor in promoting the SADC legal and institutional integration process. The European Union experience has demonstrated how such dispute settlement bodies can promote regional integration. As a supranational institution in the region, the SADC Tribunal is a part of a complex system of multilevel governance. The effectiveness of supranational action depends crucially on the strength of interdependence between the supranational and national levels.

The very fact that the first cases before the SADC Tribunal deal with human rights issues and have been brought by private parties contains a particular message. This needs further exploration because it tells us other things about the state of integration (or lack of it) in Southern Africa – neglect of internal rule of law and the absence of more effective interstate mechanisms for protecting human rights. The absence of litigation about, for example, trade, institutional matters, division of power and commercial cross-border issues (the areas typically associated with regional integration) is another significant indicator. Human rights issues are not of the first

ranking when it comes to traditional regional integration debates and normally follow later (as happened in EU).

In conclusion, it is hoped that the SADC Tribunal will be able to heal domestic failures in human rights matters even though such matters are not the general aim of the institution or its mandate for regional integration. It remains to be seen not only what types of cases will become pending in future but also whether SADC is advanced enough to apply necessary lessons from sophisticated and well developed systems such as the European Union. Meanwhile, Zimbabwean land reform is feared to affect its neighbouring countries. If SADC and its institutions continue to fail to respond to member states protecting their national sovereignty although being a signatory to the SADC Treaty which requires a certain amount of sovereignty transfer to the Tribunal, its judgements will not have the expected effect in promoting regional integration. The recent ruling of the Tribunal making the Zimbabwean land reform subject of discussion and the increasing number of cases pending have shown that the Tribunal is growing towards a regional legal institution of the utmost importance. The question, however, of how SADC member states cope with the decisions delivered by its own legal body remains open for the time being.

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