The Direct Applicability of SADC Community Law in South Africa and Zimbabwe: A Call for Supranationality and the Uniform Application of SADC Community Law

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Abstract

The Southern African Development Community Tribunal (SADC Tribunal) became operational in 1992 and delivered several judgments against Zimbabwe. Some of those decisions are yet to be enforced. The attempt to enforce them contributed to the demise of the SADC Tribunal. This was due to the existence of various approaches to the reception of community law into domestic law. The tension between community law and domestic law, international law and domestic law, and community law and international law is as old as the hills. The monist and dualist theories of international law assist in attempting to clarify the nature of the relationship between international law and municipal law, but there is no guidance when it comes to community law and national law. This paper will explore how the SADC Community law can be applied uniformly by South Africa, Zimbabwe and all other SADC member states. This will be done by looking at decided cases with specific reference to South Africa and Zimbabwe. In order to establish the best practices in other jurisdictions, reference will be made to the East African Court of Justice, the European Union (EU) and the European Court of Justice (ECJ). The discourse will conclude by advocating the adoption of a revised Protocol on the SADC Tribunal in order to clarify the nature of the relationship between the SADC Community law and the domestic laws of SADC member states.

Keywords

SADC Tribunal; SADC Community Law; direct applicability; supranationality.

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1 Introduction

The SADC Tribunal is one of Africa's sub-regional courts established in terms of article 9(g) as read with article 16 of the *Treaty of the Southern African Development Community* (the SADC Treaty). The mandate of the SADC Tribunal was *inter alia* to ensure adherence to and the proper interpretation of the provisions of the SADC Treaty and subsidiary instruments, including adjudicating over disputes that might be referred to it.[1] The inauguration of the SADC Tribunal and the swearing in of its staff took place on 18 November 2005 in Windhoek, Namibia, where the Tribunal is situated.[2] The Tribunal became operational on 22 November 2006. It was suspended in August 2010 by the SADC Heads of State and Government.[3] The decisions of the suspended Tribunal were supposed to be final and binding on the parties in dispute.[4] However, most of its decisions were never implemented.[5] Instead, on 18 August 2014 the Summit adopted and signed the 2014 *Protocol on the Tribunal in the Southern African Development Community* (2014 Protocol) at Victoria Falls, Zimbabwe.[6] The 2014 Protocol limits the jurisdiction of the SADC Tribunal to disputes relating to those between member states only.[7]

The Zimbabwean and South African courts currently adopt different approaches to recognise and enforce the decisions of the SADC Tribunal. For example, in the matter between *Gramara (Pvt) Ltd v The Government*

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1 See art 2 of the *Southern African Development Community Protocol on Tribunal and Rules of Procedure Thereof* (SADC Protocol on the Tribunal) read with art 16(1) of the SADC Treaty.

2 Hansungule 2013 *SRSA* 135.

3 De Wet 2013 *ICSID Review* 1.

4 See art 16(5) of the SADC Treaty and art 32(3) of the SADC Protocol on the Tribunal.

5 See for example, *Mike Campbell (Pvt) Ltd v Republic of Zimbabwe* (2/2007) 2008 SADCT 2 (28 November 2008); *Mike Campbell (PVT) Limited v Republic of Zimbabwe* (2/07) 2007 SADCT 1 (13 December 2007); and *Fick v Republic of Zimbabwe* (SADC (T) 01/2010) 2010 SADCT 8 (16 July 2010).

6 *Protocol on the Tribunal in the Southern African Development Community* (2014), hereinafter referred to as the 2014 Protocol. Nine SADC countries have to date signed the 2014 Protocol. These states are Zambia, Tanzania, Zimbabwe, Namibia, Mozambique, Malawi, Lesotho, South Africa and the Democratic Republic of Congo.

7 Article 33 of the 2014 Protocol.

of Zimbabwe[8] the applicants unsuccessfully attempted to register and enforce a judgment of the SADC Tribunal in the domestic court of Zimbabwe. However, the South African courts recognised and enforced the Tribunal's aforementioned decision.[9] In both these cases, the applicants had sought the courts of South Africa and Zimbabwe respectively to directly apply undomesticated provisions of the SADC Treaty and the SADC Protocol on the Tribunal in their jurisdictions. This application was made in order to bring about the recognition and enforcement of the decisions of the SADC Tribunal. These different judgments highlighted the tension between the SADC Community law and domestic law when enforcing decisions of sub-regional courts that uphold states' regional obligations.[10]

There is currently no provision in the SADC Treaty and the SADC Protocol on the Tribunal that deals with the nature of the relationship between international law and the national law of member states. Furthermore, the SADC Treaty and the SADC Protocol on the Tribunal fail to regulate the relationship between community (SADC) law and the domestic law of member states, or the relationship between the community itself and international law. The clarification of these relationships is important in order to "make community law effective in national legal systems".[11] As a result of the existence of this gap in the SADC Treaty, one needs to consider the provisions of the member states' national constitutions in this instance together with the approach taken by national courts in dealing with the

8 *Gramara (Private) Limited v Government of the Republic of Zimbabwe* HC 33/09 (hereafter the *Gramara* case).

9 *Government of the Republic of Zimbabwe v Fick* 2012 ZASCA 122 (20 September 2012); *Government of the Republic of Zimbabwe v Fick* 2013 5 SA 325 (CC).

10 States in this regard follow either the monism or the dualism theories of law. The former means that international law becomes applicable in domestic law upon ratification. In other words, the monism theory views international law and domestic law as one legal system. In the latter model international law and domestic law are regarded as two distinct legal systems. Therefore, ratified international treaties still need to be incorporated into domestic law before they can have the force of national law. For a detailed discussion on the monism and dualism theories of international law, see *inter alia* Brierly 1935 *Law Q Rev* 24; Kunz 1953 *AJIL* 662; Starke 1936 *BYIL* 70; Dugard *International Law* 42; Marian 2007 http://revcurentjur.ro/arhiva/attachments_200712/recjurid071_22F.pdf.

11 Oppong 2008 http://www.kas.de/upload/auslandshomepages/namibia/MRI2008/MRI2008_07_Oppong.pdf 2.

lacuna.[12] To this end, the monist-dualist debate is useful, as it provides answers as to how domestic legal systems should incorporate treaty law.[13]

In order to understand the relationship between the SADC Community law and national law, this discourse will look into the status of the SADC Community law in South Africa and Zimbabwe. In cases where the constitution of either of the countries does not provide a solution, there is a need to clarify the relationship between the SADC Community law and national law in order to prevent legal uncertainty. This is so because presently there is uncertainty as to which system is applicable when a conflict arises between the SADC Community law and national laws of SADC member states. Hence, in order to ensure that the status of the SADC Community law in national laws is clearly defined and given effect to, it is imperative that these deficiencies be resolved.

The aim of this paper is to discuss the relationship between the SADC Community law and the national law of member states; the relationship between international law and the national law of member states; and the relationship between the SADC Community law and international law, with specific reference to South Africa and Zimbabwe. The argument presented in this discussion is that there is a need for a uniform application of the SADC Community law in South Africa and Zimbabwe for the proper functioning of the SADC Community, the SADC Community law and the future SADC Tribunal. Further, the paper will discuss the traditional theories on the reception of international law in national law to ascertain whether these can provide guidance on the nature of the relationship between the SADC Community law and national law. In order to search for answers, the paper will also study the national constitutions[14] of South Africa and Zimbabwe, the law and legal instruments applicable to the SADC Tribunal, and the approach taken by the national courts of South Africa and Zimbabwe in giving SADC Community law the force of domestic law. In order to establish the best practices in other jurisdictions, the paper will make reference to the treaties and decided cases establishing the East African Court of Justice and the ECJ.

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12 Oppong 2008 http://www.kas.de/upload/auslandshomepages/namibia/MRI2008/MRI2008_07_Oppong.pdf 2

13 Oppong 2008 http://www.kas.de/upload/auslandshomepages/namibia/MRI2008/MRI2008_07_Oppong.pdf 11.

14 This analysis is limited to determining how the SADC Community law is given the force of local law.

2 The reception of international law in the national laws of Zimbabwe and South Africa

> This is because states are sovereign and, for the "intrusion" of foreign laws into their legal systems to be accommodated, the sovereign's imprimatur is necessary.[15]

The legal systems of South Africa and Zimbabwe are similar in that they are both dualist in nature since the two countries are former British colonies.[16] In terms of the dualist theory, international law may be applied by national courts only if it has been transformed into national law through legislation.[17] In other words, international law and national law are viewed as two distinct separate legal systems.

However, the monist theory views international law and domestic law as a single system of law.[18] Consequently, international law need not be incorporated into national law, because the act of ratification (followed by the publication) of an international treaty immediately transforms the treaty law into national law.[19] Unlike the situation in the dualist model, upon its ratification and publication the treaty obtains the force of national law, and its status in local law is settled in that international law takes precedence over national law.[20] This means that international law is applicable as law in the national legal system and may be invoked directly before the national courts.[21] However, it must be noted that this is not automatically the position in all countries whose legal systems are monist. The precedence of international law over national law largely depends on how the constitution of a particular country determines the status of international law. Therefore, the fact that international law may be directly applied by the courts, does not mean that it automatically takes precedence over domestic law.

There is an observation that can be made about the traditional theories on the reception of international law in national law. In cases of conflict between

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15 Oppong 2008 http://www.kas.de/upload/auslandshomepages/namibia/MRI2008/MRI2008_07_Oppong.pdf 2.

16 Oppong 2008 http://www.kas.de/upload/auslandshomepages/namibia/MRI2008/MRI2008_07_Oppong.pdf 11.

17 Section 231 of the *Constitution of the Republic of South Africa*, 1996, which deals with domestication of international law into South African domestic law. See also Olivier *International Law in South African Municipal Law* 36.

18 Starke 1936 *BYIL* 70; Katz 2003 *AHSR* 27; Marian 2007 http://revcurentjur.ro/arhiva/attachments_200712/recjurid071_22F.pdf.

19 Tanoh and Adjolohoun "International Law and Human Rights Litigation" 114.

20 Tanoh and Adjolohoun "International Law and Human Rights Litigation" 114.

21 Tanoh and Adjolohoun "International Law and Human Rights Litigation" 114.

21 Tanoh and Adjolohoun "International Law and Human Rights Litigation" 111.

international law and municipal law, there is no clarity about which law should prevail unless a specific country has expressly indicated so in its constitution (e.g. that the national legal system shall have the same status as international law, or that the latter shall enjoy superior status where a conflict between the two legal systems arises). Tshosa has observed that the monist and dualist theories must be "approached with caution" as they may not "in practical terms purely determine the relationship between national and international law".[22] The South African jurisprudence, as will be shown later, supports Tshosa's assertion. He further submits that the applicability of international law in the national sphere is "always conditioned by a rule of municipal law". In addition, the application of treaties in many legal systems is mainly "governed by domestic constitutional law".[23] Further, Tshosa points out that the practical approach of the national courts is different as at times even monist countries fail to apply treaties that are applicable in a particular case.[24] Despite these observations, Tshosa agrees that both theories on the reception of international law into domestic law are useful in helping to understand the relationship between international law and municipal law. Indeed, despite the obvious gaps in the monist and dualist theories, they are nonetheless valuable in identifying how a particular legal system treats international law within its national law. Thosa's views have merit and it is submitted that they should also apply to regional law, because community law and international law are created through state consent and member states decide the manner in which these two legal systems will be given the force of law in their own territories.[25] Further, as Barents correctly points out, "there is no fundamental difference between community law and international law, as various characteristics of the community legal order such as direct effect … [and] primacy are also recognised in international law".[26] I concur with Barents' sentiments because, in reality, international law and community law (such as the SADC Community law, the East African Community Law and the European Community law) are adopted and operationalised in the same manner. Even though the latter laws operate in different spheres, their characteristics are to a large extent similar to those of international law. Therefore, one could argue that community law could also be regarded as international law. For

22 Tshosa 2010 *NLJ* 6.
23 Tshosa 2010 *NLJ* 6.
24 Tshosa 2010 *NLJ* 6.
25 Barents *Autonomy of Community Law* 184.
26 Barents *Autonomy of Community Law* 184; Wyatt 1982 *E L Rev* 147. It must nonetheless be noted that under the European Union system, community law is regarded as a separate legal order. This is due to the fact that the European Union is a distinct regional organisation where the decisions of the European Court of Justice have direct effect in the territory of member states.

example, community law is also created through state consent and regulates relations *inter alia* among member states for the common good. To this end, it is submitted that community law should be treated as international law when it comes to domestic law.

2.1 The decision of the Zimbabwean court

Section 111B of the *Constitution of Zimbabwe* deals with the reception of international law in domestic law.[27] The relevant provision provides that "any convention, treaty or agreement acceded to, concluded or executed by or under the authority of the President with one or more foreign states or governments or international organizations— (a) shall be subject to approval by Parliament; and (b) shall not form part of the law of Zimbabwe unless it has been incorporated into the law by or under an Act of Parliament".[28] The reading of the above provision is clear in that international law obligations have to be incorporated into local law through legislation. This section was the main point of contention in the *Gramara* case where the applicants sought to register and enforce the SADC Tribunal's judgment in *Campbell v Republic of Zimbabwe*.[29] In that case, Zimbabwe challenged the registration and enforcement of the decision of the SADC Tribunal on the basis that it had not yet ratified the SADC Protocol on the Tribunal.[30] Zimbabwe argued that the SADC Tribunal did not have jurisdiction to receive and adjudicate over the *Campbell* case. Further, it contended that the judgment in the *Campbell* case could not be registered and enforced in its territory.[31] The High Court found that the SADC member states including Zimbabwe had signed the amended SADC Treaty which repealed the requirement of two-thirds of SADC member states to ratify an additional protocol. Therefore, the SADC Protocol on the Tribunal became binding on member states, including Zimbabwe, without the need for further ratification.[32] This also gave the Tribunal jurisdiction over Zimbabwe.[33] Despite the preceding positive remarks, the High Court emphasised that a foreign judgment could not be registered and enforced if it would be contrary to public policy. It cautioned, however, that by submitting to the jurisdiction

27 *Constitution of Zimbabwe* (as amended on 14 September 2005, up to and including Amendment No 17).
28 Section 111B of the *Constitution of Zimbabwe* (as amended on 14 September 2005, up to and including Amendment No 17).
29 *Campbell v Republic of Zimbabwe* (SADC (T) 03/2009) 2009 SADCT 1 (5 June 2009) (hereinafter referred to as the *Campbell* case).
30 *Gramara* case para 9.
31 *Gramara* case para 9.
32 *Gramara* case para 12.
33 *Gramara* case para 12.

of the SADC Tribunal through being party to the SADC Treaty and the SADC Protocol on the Tribunal, Zimbabwe "created an enforceable legitimate expectation" that it would abide by the decisions of the Tribunal.[34] The court nonetheless said that registering and enforcing the SADC Tribunal's decision in Zimbabwe entailed reversing a constitutionally mandated land reform programme that had been endorsed by Parliament[35] and the Supreme Court of Zimbabwe.[36] In this instance, Patel J observed that in his view this "simply cannot be countenanced as a matter of law, let alone as an incident of public policy".[37] The High Court indicated that the *Constitution of Zimbabwe* is the supreme law of Zimbabwe and that any other law that is inconsistent with it is void.[38] According to the Court, this has two implications, namely (1) if common law is used to enforce a foreign judgment, it must be "construed and applied so as to conform with the Constitution and any feature of the judgment that conflicts with the Constitution cannot, as a matter of public policy, be recognised or enforced in Zimbabwe".[39] Furthermore, Patel J held that public policy could not be covered by common law to circumvent the Constitution. In his view, it was contrary to public policy for Zimbabwe to require the government to act against a constitutionally mandated programme. I do not agree with the reasoning of Patel J because international law would be meaningless if international law were to be enforced only at the mercy of a state concerned. Further, there would be no use in states' concluding treaties, as they could discharge their obligations only as and when they wished. Hence, in terms of international law, Zimbabwe or any other country may not rely on its domestic laws to evade its international obligations.[40] This principle was affirmed in the matter between the *Treatment of Polish Nationals and Other Persons of Polish Origin or Speech in the Danzig Territory* where the court said "…a State cannot adduce as against another State its own Constitution with a view to evading obligations incumbent upon it under international law

34 *Gramara* case para 15.

35 G*ramara* case para 18.

36 *Gramara* case para 17. Also see *Campbell (Pvt) Ltd v Minister of National Security Responsible for Land, Land Reform and Resettlement* SC 49/07.

37 *Gramara* case para 18.

38 Section 2 of the *Constitution of Zimbabwe Amendment (No 2),* 2013.

39 *Gramara* case para 18.

40 Article 27 of the *Vienna Convention on the Law of Treaties* (1969), which entered into force on 27 January 1980. The exception to art 27 is set forth in art 46(1) of the *Vienna Convention on the Law of Treaties* which provided that "[A] 1. A State may not invoke the fact that its consent to be bound by a treaty has been expressed in violation of a provision of its internal law regarding competence to conclude treaties as invalidating its consent unless that violation was manifest and concerned a rule of its internal law of fundamental importance".

or treaties in force…".[41] To this end, this international law principle is applicable in this case because community law should be treated as international law when it comes to domestic law.[42] The basis for this proposition is that both community law and international law systems are created through state consent and therefore have similar characteristics. Therefore, it is submitted that the High Court of Zimbabwe ought to have applied this principle of international law, as its domestic laws contradicted the provisions of the SADC Treaty.

The High Court further noted that the repercussions of the Tribunal's decisions would affect not only those who were applicants before the SADC Tribunal but would also extend to all those whose land had been expropriated by the government since 2000. In other words, the government would be required *inter alia* to return the land of all the people affected from the year 2000. Finally, Patel J said:

> As for the doctrine of legitimate expectation, the applicants before the Tribunal and others in their position are absolutely correct in expecting the Government of Zimbabwe to comply with its obligations under the SADC Treaty and to implement the decisions of the Tribunal. However, I take it that there is an incomparably greater number of Zimbabweans who share the legitimate expectation that the Government will effectively implement the land reform programme and fulfil their aspirations thereunder. Given these countervailing expectations, public policy as informed by basic utilitarian precept would dictate that the greater public good must prevail. In the result, having regard to the foregoing considerations and the overwhelmingly negative impact of the Tribunal's decision on domestic law and agrarian reform in Zimbabwe, and notwithstanding the international obligations of the Government, I am amply satisfied that the registration and consequent enforcement of that judgment would be fundamentally contrary to the public policy of this country.[43]

Hansungule has in my view correctly noted with concern that these words "raise controversial questions".[44] The judge seems to be indicating that even though Zimbabwe has not taken any measures to incorporate the SADC Protocol on the Tribunal in its domestic laws, it cannot rely on its domestic laws to evade international obligations. As a result, Zimbabwe has a duty to carry out its treaty obligations in good faith. However, despite these positive observations from the learned judge, he indicated that recognising the decision of the SADC Tribunal in Zimbabwe would be contrary to public policy as the enforcement would reverse a constitutionally approved land

41 *Treatment of Polish Nationals and Other Persons of Polish Origin or Speech in the Danzig Territory*, Advisory Opinion of 4 February, 1932 PCIJ Series A/B No 44 21 at 24.

42 See page 6 para 1 of this discourse.

43 *Gramara* case para 18.

44 Hansungule 2013 *SRSA* 137.

reform programme. Furthermore, emphasis was placed on the fact that land acquisition by the government commenced in 2000 and as such there were practical consequences for implementing the decision as it would affect everyone whose land had been expropriated without compensation. This raises a number of questions such as the following: does it mean that if the land reform programme were in its early stages of implementation and none of the land had already been taken by the government, the High Court would have recognised and enforced the aforesaid decision? The reasoning of the Court is somehow contradictory in various respects. This is evident as the Court seemed to be placing more emphasis on international obligations but eventually applied national law. In addition, the Court said that international law and domestic law are distinct and enjoy supremacy in their respective domains. Therefore, neither law enjoys supremacy over the other. This dilemma is what this analysis seeks to resolve. It is submitted that the court failed to properly articulate its position in considering established principles of international law when there is a conflict between domestic and international law. Further, that the Court's observation is incorrect to the extent that although national constitutions contain clauses indicating that they prevail over all domestic laws, such clauses cannot be applied if such an application allows member states to evade their international obligations.[45] Therefore, this decision is a clear case of international law being disregarded on the grounds that it is contrary to the domestic law that sanctioned the expropriation of land without compensation. It further shows that there is a conflict between two legal systems that are said to be independent in their own spheres and have no possibility of unification, at least in this case.

2.2 The decision of the South African court

South Africa follows a dualistic approach. This means that treaties are not directly enforceable in the domestic sphere unless parliament gives such treaty law the force of national law under section 231(4) of the *Constitution of the Republic of South Africa*, 1996 (the Constitution).[46] Section 231(4) of the Constitution reads as follows:

> Any international agreement becomes law in the Republic when it is enacted into law by national legislation but a self-executing provision of an agreement

45 Article 27 of the *Vienna Convention on the Law of Treaties*; *Treatment of Polish Nationals and Other Persons of Polish Origin or Speech in the Danzig Territory*, Advisory Opinion of 4 February, 1932 PCIJ Series A/B No 44 21 at 24 (hereinafter the *Treatment of Polish Nationals* case).

46 See Schlemmer 2004 *SAYIL* 134.

> that has been approved by Parliament is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament.[47]

Schlemmer asserts that the WTO agreements are binding on South Africa only at an international level because they have been ratified.[48] However, since the provisions of the WTO treaties have not yet been incorporated into national law through an act of parliament, they are not part of South African national law.[49] The statutory enactment of international law in domestic law is the final step in the procedure triggering the applicability of international law in national law. In this regard I align myself with Schlemmer because South Africa is a dualist state. For dualist states, the assumption of treaty obligations at an international level which require to be applied in the national sphere is not completed by the act of ratification alone.[50] There is an additional requirement, which is to transfer that particular treaty obligation through legislation in the domestic legal system.[51] The South African courts dealt with this requirement in the matter between *International Trade Administration Commission v SCAW South Africa*.[52] The Court was clear the *General Agreement on Tariffs and Trade* of 1994 and WTO Agreements had been incorporated into South African law and therefore had the force of local law. The Court said:

> [South Africa's] international obligations on tariffs and trade arise from the WTO Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 ...These obligations are honoured through domestic legislation … [which] consists of the International Trade Administration Act, 2000 ... The Act [International Trade Administration] is the primary domestic legislation ...[53].

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47 Section 231(4) of the *Constitution of the Republic of South Africa*, 1996.

48 Schlemmer 2004 *SAYIL* 134; Olivier *International Law in South African Municipal Law* 57.

49 Schlemmer 2004 *SAYIL*134; Olivier *International Law in South African Municipal Law* 57. Even though the South African Constitution provides a procedure for domesticating international law, the section is not totally clear and has generated diverse views among scholars. A provision of a treaty is said to be self-executing if it can be applied by the courts without the need for further legislation to give it the force of national law. Some scholars view the inclusion of a self-executing treaty in the Constitution of South Africa as serving no real purpose. Others think that the inclusion was "nonsensical" and "farcical". See for example, Botha 2008 *SAYIL* 265; Leary *Labour Conventions* 39 and Dugard 1997 *EJIL* 83.

50 Killander and Adjolohoun "International Law" 11.

51 Ambani "Navigating Past the 'Dualist Doctrine'" 26.

52 *International Trade Administration Commission v SCAW* South Africa (Pty) Ltd *2012 4 SA 618 (CC) (hereafter the* SCAW *case).*

53 *SCAW* case paras 2, 31.

The aforesaid position reflects the jurisprudence that has been applied by the courts through a series of cases.[54] However, despite the well-developed jurisprudence on the process of transforming treaty obligations into municipal law, the Constitutional Court of South Africa seems to be adopting a monist approach in its recent decisions. For example, in the matter between the *Government of the Republic of Zimbabwe v Fick* the Court applied the provisions of the SADC Treaty and the SADC Protocol on the Tribunal despite the fact that they had not been into domesticated in South African laws.[55] The main issue in this case was whether the South African courts have jurisdiction to register and enforce the decision of the SADC Tribunal against Zimbabwe even though the provisions of the SADC Treaty and the Tribunal Protocol had not been domesticated in South African laws. Zimbabwe's main argument has been the same before both the Zimbabwean and the South African courts. Zimbabwe contended that the South African Parliament has not transformed the SADC Treaty and the SADC Protocol on the Tribunal into its municipal law as required by section 231 of the *Constitution of the Republic of South Africa*, 1996.[56] Consequently, the decisions of the Tribunal cannot be registered and enforced by South African courts. The Court dismissed this argument on the basis that South Africa "approved" the SADC Treaty in 1995 and therefore the Treaty is "binding on South Africa, at least on the international plane".[57] It indicated that SADC member states are required to take all the necessary measures to ensure the execution of the judgments of the SADC Tribunal. This leads to the conclusion that "both Zimbabwe and South Africa effectively agreed that their domestic courts would have jurisdiction to recognize and enforce orders of the Tribunal made against them".[58] The Court applied the undomesticated provisions of the SADC Treaty and the SADC Protocol on the Tribunal and enforced the judgment of the SADC Tribunal.

The decision of the Constitutional Court means that when South Africa and Zimbabwe ratified the SADC Treaty and the SADC Protocol on the Tribunal, they undertook to implement the decisions of the Tribunal in their respective countries. Further, that there was no need for these countries to transform such obligations into national law through enabling legislation, although,

54 *Azanian Peoples Organization (AZAPO) v President of the Republic of South Africa* 1996 8 BCLR 1015 (CC) para 26 and *Government of the Republic of South Africa v Grootboom* 2001 1 SA 46 (CC) para 26.

55 *Government of the Republic of Zimbabwe v Fick* 2013 5 SA 325 (CC) (hereinafter the *Fick CC* case).

56 *Fick* CC case para 29.

57 *Fick* CC case para 30.

58 *Fick* CC case para 48.

their constitutions require them to do so. Therefore, this obliges these two countries to take all the necessary measures to give effect to the Tribunal's judgments. It is interesting to note the court's proactive role in applying undomesticated treaty law in South Africa without even venturing into the dualist nature of the South African legal system. This approach is acknowledged by a scholar who correctly points to the court's failure to refer to traditional theories of the reception of international law into national law as follows:

> The Court unfortunately did not say anything about the dualistic nature of the South African legal system especially with regard to the incorporation of international law into domestic law. Instead, it merely said that Parliament had approved the SADC Treaty. This could be read as implying that international obligations are automatically binding in South Africa without the need for incorporation.[59]

The author submits that the court ought to have fully elaborated on this crucial aspect as it has implications for the relationship between the SADC community law and national law. To this end, the court was expected at least to rely and/or mention the provisos of the *Vienna Convention on the Law of Treaties*[60] that the consent of the state to be bound by a treaty shall be effective,[61] that "[e]very treaty in force is binding on the parties to it",[62] and that a party may not rely on its internal laws to evade its international obligations.[63] It is further submitted that the court failed to properly interpret and apply the dualist theory, which requires international law to be incorporated through national legislation in order for it to bind South Africa at a domestic level. The court incorrectly applied an undomesticated law and by doing so departed from its own jurisprudence, which had clarified the status of international law (the SADC Community law) in South Africa. It could be argued that by doing so the court adopted a monist approach, which does not comply with the provisions of section 231 of the Constitution that deal with the incorporation of treaty law into the South African jurisdiction.

It is submitted that it was not sufficient for the court to merely state that SADC member states have obligations under the SADC Treaty and the SADC Protocol on the Tribunal to ensure that the judgments of the Tribunal are enforced in the territories of member states.[64] For the court to say that

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59 Phooko 2016 *SA Merc LJ* 12.
60 *Vienna Convention on the Law of Treaties* (1969).
61 Article 17 of the *Vienna Convention on the Law of the Treaties*.
62 Article 26 of the *Vienna Convention on the Law of the Treaties*.
63 Article 27 of the *Vienna Convention on the Law of the Treaties*.
64 *Fick* CC case para 59.

"South Africa has essentially bound itself to do whatever is legally permissible" to ensure that the authority of the Tribunal is respected without relying on any legal authority leaves more questions unanswered than answers given.[65] The court's reasoning, which essentially "gives unincorporated treaties the force of national law, is problematic, as it is contrary to section 231(4) of the Constitution of South Africa, which deals specifically with treaty law".[66] It is submitted that this means that the SADC Treaty and the SADC Protocol on the Tribunal are directly applicable in South Africa without the need for further incorporation in South Africa's national law. The Courts' following of a monist approach has the potential to create legal uncertainty, something that is undesirable for relationship between South Africa's domestic law with the SADC Community law and/or international law. The effect of this decision is that undomesticated SADC Community law and/or international law has the force of law in South Africa. Furthermore, future litigants may directly invoke the provisions of undomesticated treaty law before the national courts.

3 General observations from the South African and Zimbabwean cases

The first observation that can be drawn from the above discussion is that although South Africa's and Zimbabwe's legal systems are dualist in nature, the courts of these two countries arrived at different conclusions when dealing with a case that involved the enforcement of an undomesticated treaty law in the domestic domain. In this instance, the Zimbabwean court declined to register and enforce a judgement of the SADC Tribunal, while a South African court registered and enforced the decision.

A further observation is that the South African court placed more emphasis on the commitments of SADC member states to honour their treaty obligations by enforcing a decision of the SADC Tribunal. Given the fact that this matter was adjudicated in the South African courts, one would have expected the Constitutional Court to rule in favour of Zimbabwe, because "Constitutional supremacy is also regarded as sacrosanct".[67] The court ought to have adopted the dualist approach and dismissed the application. The basis for this is that SADC Community law, international law and domestic law are distinct and regarded as supreme in their own spheres of

65 *Fick* CC case para 59.
66 Phooko *SADC Tribunal* 132.
67 Ebobrah and Nkhatha 2010 *CILSA* 85.

operation.[68] The only acceptable departure from the dualist approach is the application of a constitutionally approved noncompliance.

In addition, the High Court of Zimbabwe noted that Zimbabwe had not taken any measures to transform the SADC Treaty and the SADC Protocol on the Tribunal into its domestic laws.[69] Therefore, the court placed more emphasis on the *Constitution of Zimbabwe* and ruled that for reasons that included public policy and the supremacy of the Constitution, it was unable to register and enforce the SADC Tribunal's decision. The Zimbabwean Court was to a large extent correct in declining to directly apply the provisions of the SADC Treaty and SADC Protocol on the Tribunal as they did not have the force of local law. However, it is also possible for one to argue that the decision was incorrect because in terms of international law, a state may not rely on its domestic laws to evade its SADC Community law and/or international law obligations.[70] The fact of the matter is that if a constitution of a particular country provides for a procedure for the domestication of international law in the local sphere, such a procedure should be adhered to.

Finally, and more controversially, as both countries have legal systems that are dualist in nature, one would have expected the courts of these countries to dismiss the cases and give the legislatures an opportunity to align their local laws with the SADC Community law obligations. The Zimbabwean courts should have given the legislature an opportunity to align its local laws with her SADC Community law obligations, including an opportunity to incorporate the SADC Community law into the domestic laws of Zimbabwe. Whether or not this would have happened had the court provided such an opportunity is something that can only be speculation at this moment in time. South African courts should have given the legislature an opportunity to incorporate the SADC Community law obligations into municipal law. The writer is also mindful of the doctrine of separation of powers in all these instances. In fact, it appears that the South African court to a large extent usurped the powers of the legislature when it applied undomesticated treaties in the South African jurisdiction. It is submitted that the emergence of these different decisions from the two jurisdictions has caused further

68 Ebobrah and Nkhatha 2010 *CILSA* 85.

69 *Gramara* case para 4.

70 See, *inter alia,* the *Treatment of Polish Nationals* case 24. The Court said that "[a] State cannot rely, as against another State, on the provisions of the latter's Constitution, but only on international law and international obligations duly accepted. On the other hand and conversely, a State cannot adduce as against another State its own Constitution with a view to evading obligations incumbent upon it under international law or treaties in force…".

confusion about the status of the SADC Community law in the domestic laws of South Africa and Zimbabwe. It is submitted that this legal uncertainty has the potential to extend to other SADC countries which follow either a dualist or a monist approach, unless something is done to remedy the confusion created by the courts

4 Where to from here?

The emergence of regional organisations such as the EU has created an additional sphere of law that is known as community law. This is an area of law that is additional to the already existing international law and national law systems. In my view, there are therefore three spheres of laws in this regard, namely international law, community law and national law. These laws are unique, operate in different spheres, and are supreme in their own domains. This presents a difficulty when, for example, domestic courts have to apply the SADC Community law in their own spheres.

As there are three spheres of laws that I have identified above, this entails that there exist three relationships in these areas of law, namely:

- the relationship between community law and the domestic laws of member states, that is sometimes defined in the constitutive documents of regional or sub-regional organizations;[71]

- the relationship between international law and the domestic law of member states; and

- the relationship between community law and international law.[72] I have already indicated earlier that community law and international law should be treated the same because *inter alia* they are adopted and operationalized in the same manner.

However, these relationships are often not determined in constitutions of the countries concerned and/or in international and community laws. It is submitted that due to factors such as globalisation and regional integration, these relationships should be clarified by states in their national constitutions and/or the treaties that they have concluded, as this would be significant for legal certainty.

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71 Oppong "Making Regional Economic Community Laws Enforceable" 2.
72 Ferreira and Ferreirra-Snyman 2014 *PELJ* 1485-1489.

The term "SADC Community law" refers to legal principles and undertakings that are contained in the SADC Treaty and its protocols.[73] It must be noted that regulations and other treaties of the community also form part of community law.[74] These community laws regulate the conduct of states and non-state actors. They are binding and/or persuasive. The SADC Treaty and the SADC Protocol on the Tribunal are silent about the nature of the relationship between the SADC Community law and international law.[75] The provision dealing with international law empowers the Tribunal to develop "Community jurisprudence having regard to applicable treaties, general principles and rules of public international law".[76] The sources for the development of the SADC Community law reproduce already known sources of public international law. To this end, it submitted that the sources of "public international law serve as persuasive legal authority in the SADC Community law, and that [the] SADC Community law should be in line with international law".[77] This observation is important as it forms the crux of my argument that the sources of international law are a useful tool in ensuring the convergence of the SADC Community law and international law, and that the national legal regimes of South Africa and Zimbabwe are aligned with the SADC Community law. In this regard, South Africa, Zimbabwe or any SADC member state may not do something that is contrary to the spirit of the SADC Community law.

It must be noted that South Africa and Zimbabwe have clear provisions on the status of the SADC Community law and international law and the processes for their domestication in national law.[78] This is what Oppong refers to as being "international law-friendly".[79] South Africa and Zimbabwe have ratified[80] but not domesticated the SADC Treaty or the SADC Protocol on the Tribunal. The two countries have taken what is referred to as a "a wait and see approach", or there is some lack of political will when it comes to the domestication of the aforesaid instruments.[81] The effect of this is that

73 Article 21(a) of the SADC Protocol on the Protocol.
74 Oppong "Making Regional Economic Community Laws Enforceable" 1.
75 Phooko *SADC Tribunal* 18.
76 Article 21(b) of the SADC Protocol on the Protocol.
77 Phooko *SADC Tribunal* 114.
78 Section 111B of the *Constitution of Zimbabwe* (as amended on 14 September 2005, up to and including Amendment No 17); s 231 of the *Constitution of the Republic of South Africa,* 1996.
79 Oppong 2006 *Fordham Int'l LJ* 296.
80 The 2000 Tribunal Protocol has been ratified by all SADC member states. See SADC 2006 http://www.paulroos.co.za/wpcontent/blogs.dir/12/files/2011/uploads/20060621_status_SADC_protocols.pdf
81 Scholtz and Ferreira 2011 *Heidelberg Int'l LJ* 352, 357.

the SADC Treaty and SADC Protocol on the Tribunal cannot be applied by national courts of either country.

It is now well known internationally that domestic law cannot be used to invalidate or evade international obligations.[82] For this reason, it is submitted that international law (and thus the SADC Community law) should override domestic law when a conflict between the two legal systems arises. Further it is submitted that this should apply only if the constitutions of South Africa and Zimbabwe are clear that the SADC Community law takes precedence over domestic law. As a result, once a state becomes a party to a treaty, and that treaty is domesticated such as treaty should acquire a status superior to national law if the constitution of the state concerned so provides.[83] Where there is no provision indicating the solution in the case of conflict between two legal systems, the state concerned should strive as far as possible to accord the SADC Community law superior status. Accordingly, when there is a conflict between the SADC Community law and national law, the former should be preferred.[84] This is to allow the law-making body at the national level to bring the state's national law in line with its community obligations. This would also bring legal certainty between the two legal systems.[85] It is submitted that the aforesaid approach should be borrowed from a well-established principle of international law which obliges a state party to any international agreement to ensure that they discharge their treaty obligations in good faith.[86] The then Permanent Court of International Justice correctly declared in its Advisory Opinion in the matter between *Exchange of Greek and Turkish Populations*[87] that there is

> … a 'self-evident' principle in international law, according to which a state which has contracted valid international obligations is bound to make in its legislation such modifications as may be necessary to ensure the fulfilment of the obligations undertaken.

In this light it is submitted that when the SADC Community law imposes obligations on South Africa and Zimbabwe, these countries should honour

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82 For example, in *Treatment of Polish Nationals* case, the Court ruled that "[a] State cannot rely, as against another State, on the provisions of the latter's Constitution, but only on international law and international obligations duly accepted. On the other hand and conversely, a State cannot adduce as against another State its own Constitution with a view to evading obligations incumbent upon it under international law or treaties in force …".

83 Capaldo *Pillars of Global Law* 200.

84 Capaldo *Pillars of Global Law* 200.

85 Capaldo *Pillars of Global Law* 200.

86 Capaldo *Pillars of Global Law* 200.

87 *Exchange of Greek and Turkish Populations* No 10 (Feb 21, 1925), PCIJ, Series B, No 10 10.

their obligations by ensuring that their domestic laws are in harmony with their community obligations.[88] Unfortunately this rarely happens,[89] even though the law of treaties requires that treaty obligations be discharged in good faith by signatory states.[90] Even though they followed an unpersuasive approach, the South African courts ensured that South Africa discharged its SADC Community law obligations in good faith.[91]

In accordance with the EU system in which community law is regarded as a separate legal order which *inter alia* takes precedence over the conflicting laws of member states,[92] three key arguments are advanced to justify the supremacy of community (regional) law over the national law of member states. These are:

- the international legal obligation to observe treaties;
- ensuring the efficacy and uniform application of community law; and
- the autonomous character of the community legal order (this is not applicable in the current SADC legal system).[93]

These arguments are supported as they justify the supremacy of community law over national law. Another noticeable feature of the EU system is the autonomous character of the EU community law, which makes community law supreme over the laws of member states.[94] It is submitted that these characteristics should also apply in the SADC region and the SADC Community law because it would be a futile exercise for SADC member states to embark on a lengthy and expensive process of negotiating and adopting treaties whose provisions would thereafter be ignored. It is nonetheless conceded that community law, just like international law, is largely based on state consent. Therefore, states may negotiate and thereafter opt to be part of a treaty, decide to make reservations on certain provisions, or choose not to be a party to such a treaty. Notwithstanding, when it is clear that the SADC Community law takes precedence over the national law of member states, there will be legal certainty. This will also

88 Cassese *Realizing Utopia* 88.
89 Cassese *Realizing Utopia* 188.
90 Shaw *International Law* 104.
91 The *Fick* CC case.
92 Ferreira-Snyman 2009 *CILSA* 201-202.
93 Kwiecien 2005 *Ger Law J* 1481.
94 *Costa v Enel* (Case 6/64) [1964] ECR 585. The principle of supremacy is not contained in the *Treaty Establishing the European Economic Community* (1957). It was developed by the European Court of Justice in the case of *Costa v Enel*. Also see Czuczai 2012 *YEL* 452.

prevent a situation whereby national law and the SADC Community law regulate similar issues differently.[95] In addition, it is submitted that for the better effectiveness of SADC Community law, SADC states should accept that by becoming state parties to the SADC Treaty and the SADC Protocol on the Tribunal, they have ceded certain portion of their sovereignty to the SADC Community legal order. Accordingly, they are bound to observe and respect the community legal order.

The jurisprudence of the ECJ also warrants a discussion, as it has been very useful in clarifying the relationship between community law and the national law of EU member states.[96] Accordingly, it is necessary to discuss the concept of direct application as developed by the ECJ. Direct application means that community law does not require the legislature to enact any legislation in order to make EU law applicable in member states. Immediately on coming into operation, community law is binding and applicable in EU member states.[97] The ECJ has correctly stated that the operation of community law is "… independent of any measure of reception into national law …" and that member states are under an obligation to respect the direct applicability of community law.[98] In the event of a conflict between the EU law and the national law of member states, community law will prevail.[99] This was affirmed in the matter *Flaminio Costa v ENEL*:

> [B]y creating a Community of unlimited duration, having its own institutions, its own personality, its own legal capacity and capacity of representation on the international plane and, more particularly, real powers stemming from limitation of sovereignty or transfer of powers from the States to the

95 See for example *Gramara* case. In this case the applicants sought to register and enforce a judgment of the SADC Tribunal in Zimbabwe. The *Zimbabwean Constitution* authorises the expropriation of land without compensation. As a result, the applicants were evicted from their farms and their farms were expropriated. They then went to the SADC Tribunal to challenge the constitutionality of the land reform programme. The SADC Tribunal ruled in their favour and *inter alia* ordered that Zimbabwe pay a fair compensation to the applicants. The SADC Tribunal had ruled that Zimbabwe was in breach of its obligations *inter alia* to act in accordance with human rights, democracy, the rule of law and the principle of non-discrimination. The High Court of Zimbabwe declined to honour the judgment of the SADC Tribunal because it was contrary to public policy as it sought to annul a constitutionally mandated land reform programme. On the one hand Zimbabwe has its own domestic laws, which sanction the expropriation of white famers' lands without compensation. On the other hand, the SADC has its own laws, such as human rights (which include a right to be compensated in cases of expropriation), which require Zimbabwe to respect and not to discriminate. The SADC law protects the rights of people not to be evicted from their homes.

96 Ferreira and Ferreira-Snyman 2014 *PELJ* 1485.

97 Winter 1972 *CML Rev* 433; Oppong *Economic Integration in Africa* 42.

98 *Fratelli Variola Spa v Amministrazione delle finanze dello Stato* Case 34/73 (judgment of 10 October 1973) 10.

99 *Costa v ENEL* (Case 6/64) [1964] ECR 585.

> Community, the Member States have limited their sovereign rights, albeit within limited fields, and have created a body of law which binds both their nationals and themselves.[100]

The ECJ's decision in the aforesaid case basically means that the EU law, as regards order of precedence, enjoys a status superior to that of the laws of the member states.[101] The doctrine of supremacy has been the main driving force in achieving European integration.[102] As a result, it has been said that the ECJ has gone beyond its interpretative role and entered into the realm of policy-making.[103] The idea of the supremacy of EU law is not mentioned in any of the EU Treaties but was developed by the ECJ through its jurisprudence. Direct applicability does not mean the same thing as direct effect. The latter pertains to when an individual may invoke community law in a case before a national court and that court will be bound to follow the community law.[104]

The approach taken by the ECJ is commended, as the community legal order has to be effective and provide protection when community law is threatened. Indeed, the ECJ is tasked with the responsibility of interpreting the community law and is the backbone of the community legal order. It is an integral part of the EU legal order.

The *Treaty Establishing the East African Community* may also provide guidance on the relationship between community law and the national law of member states of SADC countries (such as South Africa and Zimbabwe). This treaty specifically provides that "[c]ommunity … laws shall take precedence over similar national ones on matters pertaining to the implementation of this Treaty".[105] There is no doubt that this provision clearly defines the nature of the relationship between the East African Community law and the national law of member states. Community law is superior to the national law of member states. The drafters of the Treaty Establishing the East African Community presumably foresaw the need for this provision to prevent a situation in which community law would be challenged on the basis of its incompatibility with the national law of member states. In addition, with regard to the relationship between community law and national law, it is clear that the position in the East African Community

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100 *Costa v ENEL* (Case 6/64) [1964] ECR 585.

101 Ferreira-Snyman 2009 *CILSA* 204; Stiernstrom 2005 http://www.as.miami.edu/eucenter/papers/Stiermstromfinal.pdf.

102 Ferreira-Snyman 2009 *CILSA* 204.

103 Ferreira-Snyman 2009 *CILSA* 204.

104 *Van Gend en Loos v Nerderlandse Administratie der Belastingen* (Case 26/62) [1963] ECR1; Ferreira-Snyman 2009 *CILSA* 201-202.

105 Article 8(4) of the *Treaty Establishing the East African Community* (1999).

is similar to that in EU community law. The only difference is that the relationship between community law and national law in the former is contained in the Treaty establishing the East African Community, whereas the relationship in the latter community was developed by the ECJ. The SADC Treaty does not provide clear guidance on this critical issue.

The possibility that the future SADC Tribunal could decide that the SADC Community law has direct effect in the national courts of member states cannot be ruled out. It is submitted that there is also a probability that in time, as happened with the EU community legal order, the SADC Tribunal could develop a jurisprudence in terms of which the SADC Community law enjoys precedence over the national laws of member states. It is conceded, however, that it is most unlikely that African states will easily accept the direct applicability of the SADC Community law. This is especially the case since the relationship between the SADC Community law and domestic law is not clear.

According to international law, it is now a settled principle that states may not ignore their international law obligations on the basis of national law or national constitutions.[106] In addition, under international law the conduct of institutions such as judicial organs is imputed to the state and so becomes an act of the state.[107] In other words, when a national court rules that a national law which, for example, discriminates against people on the basis of race, is not contrary to the community law because the national law is

106 *Treatment of Polish Nationals* case. The issue before the Permanent Court of International Justice was *inter alia* whether the treatment of Polish nationals and other persons of Polish origin or language in the territory of the Free City of Danzig had to be decided only with reference with the provisions of the *Treaty of Versailles* (1919) and the *Treaty of Paris* (1920) or also by reference to the *Constitution of the Free City* (1920). Before answering the question, the Court indicated that a "state cannot rely, as against another State, on the provisions of the latter's Constitution, but only on international law and international obligations duly accepted, on the other hand and conversely, a State cannot adduce as against another State its own Constitution with a view to evading obligations incumbent upon it under international law or treaties in force". It therefore ruled that that the question of the treatment of Polish nationals or other persons of Polish origin or language must be dealt with exclusively in terms of international law and the treaty provisions in force between Poland and Danzig. See also art 46(1) of the *Vienna Convention on the Law of Treaties* (1969).

107 *Draft Articles on Responsibility of States for Internationally Wrongful Acts (Reflecting Customary International Law)* in *Report of the International Law Commission on the Work of its Fifty-third Session* UN GAOR 56th Session, Supp No 10, UN Doc A/56/10 (2001). Art 4(1) provides "[t]he conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organization of the State, and whatever its character as an organ of the central Government or of a territorial unit of the State".

supreme, such conduct is regarded as that of the state. Accordingly, national laws need to be in line with the nation's international law obligations, and the state must modify its laws accordingly.[108] Acknowledging the good practice of the EU community, where community law is superior to the national law of member states, it is submitted that that this should also be followed in the SADC legal order. The views of Kwiecien relating to the principle of the supremacy of the SADC Community law over the national law of member states are supported. These views are that such supremacy:

- prevents national agencies from challenging the validity of community law;
- prohibits states or organs of state from applying national law that is incompatible with the provisions of community law;
- prohibits states or organs of state from enacting laws that are contrary to community provisions; and
- imposes obligations on member states to amend their national laws that conflict with contrary provisions in community law.

The above principles are important as they ensure that the SADC Community law has a uniform meaning and effect in the national legal systems of member states.[109] In the SADC context, where such supremacy would prevent a situation in which courts interpret and apply the SADC Community law differently, as was the case with South Africa and Zimbabwe. It is submitted that leaving the reception of the SADC Community law in national law to the discretion and mercy of South Africa and Zimbabwe would negatively affect the functioning of the future SADC Tribunal and the SADC community as whole. The rationale for making this statement is that the SADC Community law would be subject to the national laws of the aforesaid countries.[110] Upon ratification, the SADC Community law should have an impact on the local legal system of member states. The basis for this submission is to prevent a situation where community law would be applied where it suits member states.[111] As observed by Ferreira-Snyman, European community law favours a monist approach, since

108 Bartels 2011 https://www.scribd.com/doc/115660010/WTIA-Review-of-the-Role-Responsibilities-and-Terms-of-Reference-of-the-SADC-Tribunal-Final-Report (on file with author).

109 Kwiecien 2005 *Ger Law J* 1481.

110 Tillotson *et al Texts, Cases and Materials* 79.

111 The *Gramara* case.

dualism would cause "divergences in member states' relations *vis-à-vis* Community law".[112]

This discussion has revealed that South Africa and Zimbabwe have not taken measures to give effect to the provisions of the SADC Treaty or the SADC Protocol on the Tribunal in their national laws. Oppong muses on the negative attitude of the non-incorporation of ratified treaties as follows:

> [T]he fact of unincorporation may be a manifestation of parliamentary resistance to the treaty. By giving effect to it absent a national implementing measure, the judiciary may be indirectly setting itself up against the will of an elected branch of government or upsetting the balance of power between the various organs of government.[113]

The aforesaid position arose in *Gramara (Pvt) Ltd v Government of the Republic of Zimbabwe*[114] where the Zimbabwean court observed that it was common cause between the parties that the SADC Treaty and the SADC Protocol on the Tribunal were not domesticated in Zimbabwe and therefore inapplicable. Zimbabwe has not been friendly towards the reception of international law in its domestic laws. It still strongly relies on state sovereignty and/or the supremacy of its own laws as the justification for "non-compliance with certain or all rules of international law".[115]

The proposed autonomy and supremacy of the SADC Community law will address issues such as those that were confronted by the Zimbabwean and South African courts. In contradistinction, as we saw above, the South African Constitutional Court recognised and registered the SADC Tribunal's decision even though the SADC Treaty and the SADC Protocol on the Tribunal had not been domesticated in South Africa.[116]

In this light, there is a need to adopt the approach of the EU community legal order, to give guidance on the application of the SADC Community law so that the latter has a direct effect and is directly applicable in South Africa, Zimbabwe and other SADC member states. Therefore, it is submitted that South Africa, Zimbabwe and all other SADC member states should consider adopting the *Supplementary Protocol to the Treaty of the Southern African Development Community* in order to pave the way for the autonomy and supremacy of community law. The aforesaid *Supplementary Protocol to the*

112 Ferreira-Snyman 2009 *CILSA* 204.
113 Oppong 2006 *Fordham Int'l LJ* 315.
114 *Gramara* case 4-5.
115 Mude 2014 *JPPG* 80.
116 The *Fick* CC case.

Treaty of the Southern African Development Community should contain the following provisions:

1. Article 1: Obligations of Member States

    (1) Each Member State to this Supplementary Protocol has the *obligation* to respect, protect and promote the principles of democracy, human rights and the rule of law in their territories.

2. Article 2: Incorporation of Community law into national law

    (1) Each member state undertakes to incorporate the provisions of this treaty and the Revised Protocol on the SADC Tribunal into its national laws within six months of the ratification of the Treaty.

3. Article 3: Autonomous legal order and supra-nationality

    (1) The SADC Community legal system is an autonomous legal order.

    (2) The SADC Community legal system is superior to the legal systems of member states and in case of irreconcilable differences, the SADC Community law shall take precedence over conflicting provisions in the national systems of member states.

4. Article 4: Applicability of the SADC Community law in member states

    (1) Member states, individuals and NGOs shall have access to the Tribunal and may invoke the provisions of the SADC Community law directly before the domestic courts of their national states, and domestic courts are obliged to consider and apply community law.

The aforesaid proposed provisions will obviously have an impact on the state sovereignty of all SADC member states. Sovereignty is something that has always been a politically sensitive issue for many African states due to their colonial history. Although political considerations may be an obstacle to realising the above recommendations, it is submitted that in the interest of regionalism, economic integration, the rule of law, democracy and human rights, SADC Heads of State or Government should seriously consider these proposals. The success and proper functioning of the future SADC Tribunal will depend on the political will of all SADC members. It must also

be emphasised that "the creation of the SADC regional order presupposes that states intended to create an authority superior to those of national law".[117] If such an authority is not respected, the relevance of the SADC Community law will be non-existent.

5 Conclusion

This paper has revealed that South Africa and Zimbabwe have not domesticated the provisions of the SADC Treaty and the SADC Protocol on the Tribunal in their domestic laws. Even though this is the case, the South African court registered and enforced a decision of the SADC Tribunal. Zimbabwe declined to register the decision of the SADC Tribunal. Learning from other jurisdiction such as the East African Community, the EU and the ECJ, the paper discovered that the aforesaid institutions played a pivotal role in ensuring that community law is superior to domestic laws. In other instances such as the East African Community the drafters of the Treaty establishing the East African Community clearly spelt out the nature of the relationship between the laws of the East African Community and the laws of member states. Therefore, it is important for SADC to learn from the aforesaid jurisdictions for the proper functioning of the SADC Community law and legal certainty. The courts also play a major role in enforcing the SADC Community law as seen in the South African case. Ultimately, for the purposes of the effective functioning of the SADC, the SADC Community law and the SADC Tribunal, SADC member states should consider making the SADC Community law superior to the national laws of member states. In the event of a conflict between the SADC Community law and the national law, the former should prevail. It must be mentioned that all these recommendations are to a large extent dependent on the political will of the SADC member states.

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List of Abbreviations

AHSR	African Human Security Review
AJIL	American Journal of International Law
BYIL	British Yearbook of International Law
CILSA	Comparative and International Law Journal of Southern Africa
CML Rev	Common Market Law Review
E L Rev	European Law Review
ECJ	European Court of Justice
EU	European Union
EJIL	European Journal of International Law
Fordham Int'l LJ	Fordham International Law Journal

JPPG	Journal of Power, Politics & Governance
Ger Law J	German Law Journal
Heidelberg Int'l LJ	Heidelberg International Law Journal
Law Q Rev	Law Quarterly Review
NLJ	Namibia Law Journal
SA Merc LJ	South African Mercantile Law Journal
SADC	Southern African Community Development
SADC Tribunal	Southern African Development Community Tribunal
SRSA	Strategic Review for Southern Africa
SAYIL	South African Yearbook of International Law
PELJ	Potchefstroom Electronic Law Journal
YEL	Yearbook of European Law