

The Constitutional Court's Judgment in the *SADC Tribunal* Case: International Law Continues to Befuddle

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ABSTRACT: This article considers the Constitutional Court judgment in the *SADC Tribunal* judgment from the perspective of the methodology of international law. The judgment came to the conclusion that the President's conduct in participating in the SADC's decisions to remove its Tribunal's jurisdiction over complaints from individuals was unlawful and unconstitutional. This conclusion was based on two international law propositions: first, on the proposition that the SADC decisions were in breach of international law; second, that the decisions of SADC can be imputed to the South African government. The article shows that the judgment does not apply the methodology of international law in arriving at these propositions. It argues that in keeping with South Africa's reputation as a having an 'international law-friendly' framework, our pinnacle Court should do more to respect the methodology of international law.

KEYWORDS: methodology of international law, relation between international law and domestic law, SADC Tribunal, State responsibility, treaty interpretation

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I INTRODUCTION

In the immediate aftermath of the adoption of the Constitution (and the Interim Constitution), international lawyers were excited by the Constitution's openness and friendly disposition towards international law.¹ The excitement was, however, soon peppered by misgivings from some quarters. Some observers questioned whether the Court really 'considered' international law or merely referred to international instruments.² Others questioned the substance of the Court's decisions on international law.³ One issue that has not been in focus, at least not until recently, has been whether the Court in applying international law has faithfully applied the *methodology* of international law.⁴ By the methodology (in contrast to the content of the rules), I mean the *manner* in which the rules are identified and the *manner* in which the content of such rules are determined.

In its judgment in *Law Society of South Africa v President of South Africa*⁵ (the *SADC Tribunal* judgment) of 11 December 2018, the Court decided that the participation of the President of the Republic of South Africa in stripping away the powers of the Southern African Development Community (SADC) Tribunal to hear individual claims was unconstitutional.⁶ This judgment provides an opportunity to review the areas of critique mentioned above, i.e. whether the Court did more than just refer to instruments of international law or whether it acknowledged international law by giving meaning to the international law instruments it referred to by making pronouncements on *the state* of those laws (as opposed to ad hoc references to international instruments)? Did the Court, in its search for the meaning of instruments of international law and in determining the state of that international law, apply the correct approach and methodology? To be clear, the *SADC Tribunal* judgment was not based on the application of international law as an independent source of law. Instead, the Court used international law in the application of South African constitutional provisions. Thus, the Court, in the *SADC Tribunal* judgment was not concerned, at least not primarily so, with whether the President

¹ D Tladi 'The Interpretation and Identification of International Law in South African Courts' (2018) 135 *South African Law Journal* 708, 708–709.

² HA Strydom & K Hopkins 'International Law' in S Woolman, M Bishop & J Brickhill (eds) *Constitutional Law of South Africa* vol 2 (2nd Ed, 2013) 30–11, stating that '[a]lthough evidence of real *consideration* and application of international law is scant, there has been significant *reference* to international human rights jurisprudence'. (Emphasis in the original.)

³ For example, see N Botha 'Justice Sachs and the Interpretation of International Law by the Constitutional Court: Equity or Expediency?' (2010) 25 *SA Public Law* 235; L du Plessis 'Interpretation' in Woolman et al (ibid) 32–176; J Dugard & A Coutsooudis 'The Place of International Law in South African Municipal Law' in J Dugard, M du Plessis, T Maluwa & D Tladi (eds) *Dugard's International Law: A South African Perspective* (5th Ed, 2018) 94–95, discussing *Azanian Peoples Organization (Azapo) & Others v President of the Republic of South Africa & Others* [1996] ZACC16; 1996 (4) SA 672

⁴ See Tladi (note 1 above). See also D Tladi 'Interpretation of Treaties in an International Law-Friendly Framework: The Case of South Africa' in H Aust & G Nolte (eds) *The Interpretation of International Law by Domestic Courts: Uniformity, Diversity, Convergence* (2016) 135.

⁵ *Law Society of South Africa & Others v President of the Republic of South Africa & Others* [2018] ZACC 51; 2019 (3) SA 30 (CC) ('*SADC Tribunal*').

⁶ The High Court of Tanzania in *Tanganyika Law Society v Ministry of Foreign Affairs and International Cooperation of the United Republic of Tanzania & Another*, Miscellaneous Civil Cause No 23 of 2014 judgment of 4 June 2019, came to largely the same conclusion on the basis of the same reason. That judgment, however, depends less on international law and much more on Tanzanian domestic law. However, to the extent that the international law conclusions of that Court add anything to (or detract from) the analysis in this chapter, these will also be considered briefly.

violated international law. Rather, it was preoccupied with whether the President's participation in SADC processes that led to the removal of the competence of the SADC Tribunal to hear complaints from private persons was unconstitutional, irrational and therefore unlawful. It came to the conclusion that the President's conduct was unconstitutional, irrational and therefore unlawful. Yet in coming to this conclusion about the constitutionality of the President's conduct — the Court's main preoccupation — the Court relied on international law. In particular, the Court determined that the President's conduct had been unconstitutional because it was in breach of South Africa's international law obligations.

At its core, the *SADC Tribunal* judgment concerns the intersection between the Constitution and international law. It falls within what, in the American tradition, is referred to as foreign relations law — a tradition which is ever-expanding. This area of law addresses, inter alia, aspects such as the distribution of competences between the different branches of government in the conduct of international relations. I consider the foreign relations aspects of the *SADC Tribunal* judgment in more detail in a forthcoming chapter in a book⁷ In this contribution, I therefore focus only on the international law analysis of the judgment, assessing not only whether the Court came to the correct conclusion about whether the President's conduct violated South Africa's international law obligations, but, more importantly, whether the Court followed the correct methodology.

The *SADC Tribunal* judgment has already received some praise in academic literature.⁸ The approach of the majority to the role of international law in the determination of whether the Constitution had been violated was, however, criticised by JJ Cameron and Froneman in their concurring judgment in *SADC Tribunal*.⁹ My concern is not only that the Court is wrong in the manner in which it identified the existence and content of the international law obligations it put forward, but also that its reasoning was illogical. It is this aspect — the determination by the Court of the existence, content and breach of international obligations — that is at the heart of this article. Thus, the questions that will likely arise from a purely constitutional law perspective such as whether the Court deferred to the executive sufficiently, whether there was a constitutional right at issue or whether the Court applied the correct constitutional standard of review are not addressed in this article. Similarly, the subject of the separate judgment's critique of the majority, i.e. the appropriateness of determining a constitutional breach *on the basis of a breach of international law* — as opposed to using international law as an interpretative tool — is also not at issue in this

⁷ The chapter is tentatively titled 'A Constitution Made for Mandela, A Constitutional Jurisprudence Developed for Zuma: The Erosion of Discretion of the Executive in Foreign Relations' and will appear in a collection of essays edited by H Aust & T Kleinlein, titled *Bridges and Boundaries: the Various Encounters between Foreign Relations Law and International Law*. The chapter looks at two Constitutional Court judgments, namely the *SADC Tribunal* judgment and the *Democratic Alliance v Minister of International Relations and Cooperation & Others* [2017] ZAGPPHC 53; 2017 (3) SA 212 (GP) concerning the government's failed withdrawal from the Rome Statute. While the latter judgment is easily defensible, the chapter's main conclusion is that while the courts have continued to pay lip service to the discretion afforded to the Mandela/Mbeki administrations in the conduct of foreign relations, any such discretion has all but been eroded in the Zuma years.

⁸ See M du Plessis & A Coutsoudis 'We are all International Lawyers Now: The Constitution's International Trifecta Comes of Age' (2019) 136 *South African Law Journal* 433, although, in fairness, this article is focused more on the fact that the Constitutional Court used international law rather than on the way in which the content of the rules of international law were used.

⁹ *SADC Tribunal* (note 5 above) (Separate concurring opinion of JJ Cameron and Froneman with JJ Mhlantla and Petse concurring.

article. My concern is solely with the approach of the Court in determining the existence of an international law obligation, what the content of that obligation is and whether the President breached that obligation.

II THE SADC TRIBUNAL JUDGMENT

The *SADC Tribunal* judgment concerned an application by the Law Society and other applicants for a declaratory order that the decisions of President of the South Africa to support a resolution suspending the operation of the SADC Tribunal in 2011 and to sign the subsequent Protocol in 2014 were unconstitutional. The 2011 resolution and the 2014 Protocol, according to the application, together sought to take away the Tribunal's power to adjudicate individual disputes against State parties.

The 2011 resolution of SADC, and the subsequent decision to adopt the 2014 Protocol, had a particular political context, namely Zimbabwe's infamous land reform policy, which by most accounts had disastrous consequences for that country, and some negative impacts for the region. In response to adverse findings by the SADC Tribunal against Zimbabwe, which were confirmed and deemed enforceable in South Africa by the South African Constitutional Court,¹⁰ the government of Zimbabwe led a charge to disempower the SADC Tribunal, which eventually led to the adoption of the 2014 Protocol. Prior to that decision, SADC took three successive decisions which led to the disempowerment of the Tribunal to deal with individual complaints against States. The first set of decisions, adopted in August 2010 and May 2011, had the effect of preventing appointments of judges and, thus, preventing the Tribunal from functioning.¹¹ Second, in May 2011, the SADC Summit decided that SADC Tribunal would not be permitted to hear any cases or complete any existing cases. Third, in August 2012, the Summit took an in-principle decision that a new Protocol would be adopted establishing a new SADC Tribunal which would only have jurisdiction to hear interstate disputes. This was followed by the 2014 decision to adopt a new Protocol replacing the 2000 Protocol.

The Court found that the President's participation in these decisions, which resulted in the suspension, dissolution and eventual replacement of the SADC Tribunal by a new one, had been 'unconstitutional, unlawful and irrational' and, as a consequence, the President was 'directed to withdraw his signature from the 2014 Protocol'.¹² The Court's conclusions that the President's conduct was irrational, unlawful and unconstitutional were all based on a similar pillar, namely that the decisions were inconsistent with South Africa's obligations under international law. The concurring judgment of Judges Cameron and Froneman, in which Judges Mhlantla and Petse joined, agrees with the majority in all respects except that their opinion judgment was not based on international law. According to them, the 'irrationality and [...] unlawfulness [of the President's conduct] spring not from any affront the President

¹⁰ The South African Constitutional Court decided that the judgment of the SADC Tribunal was enforceable in South Africa in *Mike Campbell & Others v The Republic of Zimbabwe* [2008] *SADC Tribunal* Case No. 2/2007; *The Government of the Republic of Zimbabwe v Louis Karel Fick & Others* Case CCT 101/12 [2013] (10) BCLR 1103 (CC) (*Zimbabwe v Fick*).

¹¹ As an aside, the WTO Appeals is in a similar position and has been unable to hear any new appeals since the US refused to cooperate in the appointment of members of the Appellate Body. See A Beattie 'WTO to Suffer Heavy Blow as US Strymies Appeals Body', *Financial Times* (8 December 2019), available at <https://www.ft.com/content/f0f992b8-19c4-11ea-97df-cc63de1d73f4>.

¹² *SADC Tribunal* (note 5 above) para 97.

directly inflicted on international law, but from the infringement of our own Constitution.¹³ According to the concurring judgment '[t]he unlawfulness of the President's conduct derives from its breach of sections 7(2) and 8 of the Constitution' and 'does not derive directly from any violation of international treaty provisions.'¹⁴ Moreover, '[i]t is [...] in the Constitution alone that we should ground the finding that the President behaved irrationally and unlawfully, and not directly under international law or treaty provisions.'¹⁵

Early on in the judgment, the Court had made it clear the importance of international law in our constitutional dispensation, recalling, inter alia, its 'centrality in shaping our democracy' and its 'well-deserved prominence in the architecture of our constitutional order.'¹⁶ Then, having described the three ways that international law can be relevant in our constitutional adjudication — i.e. to interpret the Bill of Rights under s 39, to interpret any legislation under s 233 and, through direct application of customary international law in s 232 (one could add direct application under s 231(4) of the Constitution) — the Court stated that this triad of international law that was used implies that 'consistency with our Constitution is a critical requirement for the acceptability and applicability of international law to our country'.¹⁷ In my view this statement is incorrect and falls foul of the basic rule of international law embodied in arts 27 and 46 of the Vienna Convention on the Law of Treaties (Vienna Convention).¹⁸ The validity of international law, or its applicability, does not depend on its consistency with the South African Constitution or any other constitution.

Having established the importance of international law for our constitutional framework, the Court then stated that, though the President has extensive powers, the 'principle of legality entails [...] that the President may only exercise power that was lawfully conferred on her'.¹⁹ From this unassailable statement, the Court made the following observation:

Both Houses of our Parliament resolved, in terms of the predecessor of section 231(2) of the Constitution, to ratify the [SADC] Treaty. For this reason, no constitutional office-bearer, including our President may act ... contrary to its provisions. They are all, as agents of the State, under an international law obligation to act in line with its commitment made in terms of that Treaty. And there was and still is no legal basis for the President to act contrary to the unvaried provision of a binding Treaty.²⁰

According to the Court, 'when our President decided to be party to the suspension of the Tribunal and to actually sign the [2014] Protocol, he was acting in a manner that undermined our international law obligations under the Treaty'.²¹ In its view, and based on

¹³ Separate concurring judgment (note 9 above) para 98.

¹⁴ *Ibid* at para 101. See also para 102: 'The same reservation applies to the approach of the majority judgment to irrationality. This likewise appears to apply the principle of irrationality to the President's conduct in the setting of international law, rather than in the sole context of domestic law [...] But this same conduct, irrational and irregular within our own constitutional framework, did not constitute an international law violation on the part of the President himself.'

¹⁵ *Ibid* at para 103.

¹⁶ *SADC Tribunal* (note 5 above) at para 4.

¹⁷ *Ibid* para 5.

¹⁸ Article 27 of the 1969 Vienna Convention on the Law of Treaties states that a party to a treaty 'may not invoke the provisions of its internal law as justification for its failure to perform a treaty'. Article 46 has less to do with the substance of the law and more to do with the procedure for entering into treaties.

¹⁹ *SADC Tribunal* (note 5 above) at para 48.

²⁰ *Ibid*.

²¹ *Ibid* para 53.

art 26 of the Vienna Convention — the *pacta sunt servanda* rule — South Africa is under an obligation not to undermine the SADC Treaty.²² The essence of the Court’s contention is thus that by participating in the decision by SADC, the President violated the SADC Treaty and thus acted unconstitutionally.

There are two assumptions concerning the relationship between South African law and international law falling outside the scope of the article on which the Court’s judgment is based that need to be mentioned. First, the Court appeared to assume that the decision by Parliament to approve ratification establishes international obligations on the President with regard to the assumption of future international obligations.²³ This assumption, which will not be tested here, is consistent with the High Court judgment in *Democratic Alliance v Minister of International Relations* in which the Court determined that approval by Parliament appears to have some consequence for what the executive may and may not do on the international plane.²⁴ Second, it suggests that international law obligations have direct effect on the domestic plane.

The conclusion that the President’s participation was in breach of international law obligations, the focus of this article, is itself based on a number of assumptions. First, it assumes that the SADC Treaty (or perhaps general international law) established *some* obligation on SADC and its member States to create or maintain a Tribunal to which individuals would have access. Second, it assumes that the *decision by the SADC Summit itself* was in violation of this obligation under international law. Third, assuming the decision by SADC was indeed a breach of some international rule, it assumes that this decision was attributable to the South African President, or more accurately the South African government. Alternatively, it assumes that there was a legal obligation on South Africa *under international law* to take measures to prevent SADC from adopting a decision doing away with individual access. The correctness of these assumptions is evaluated in the next section.

III THE PRESIDENT’S PARTICIPATION IN THE SADC SUMMITS: A BREACH OF INTERNATIONAL LAW?

A General observations

The *SADC Tribunal* judgment is based on a determination that the President’s participation at the SADC meetings that did away with the competence of the SADC Tribunal to hear individual claims against States was a breach of South Africa’s obligations under international law. A determination that there has been a breach of an international obligation should not be arrived at lightly. It has to be shown by first viewing the source of the legal obligation — whether treaty or customary international law; then recounting the content of the obligation

²² Ibid para 54.

²³ For a contrary position, see F Sucker ‘Approval of an International Treaty in Parliament: How Does Section 231(2) “Bind the Republic”?’ (2013) 5 *Constitutional Court Review* 417, e.g. at 422 (‘compliance with such internal constitutional requirements is utterly irrelevant for the entering into force of international treaties and does not influence whether an international treaty is binding for South Africa at the international level’).

²⁴ *Democratic Alliance v Minister of International Relations and Cooperation* (note 7 above).

and the conduct that it is alleged to have breached.²⁵ There are, under international law, no exceptions to this basic principle.²⁶ Applying the methodology of international law, this section assesses each of the assumptions necessary to justify the conclusion that the President's conduct constituted a breach of international law.

Before addressing the assumptions, I should point out that the decisions of the SADC Summit concerning the SADC Tribunal have served before other international tribunals (judicial and quasi-judicial bodies) prior to the *SADC Tribunal* judgment of the Constitutional Court. While judicial decisions are not, in and of themselves, binding under international law and only serve as subsidiary means for the determination of rules of international law,²⁷ one would have expected the Court to have taken them into account. The openness to international jurisprudence is, after all, one of the reasons that the South African constitutional framework acquired the label of being 'international law-friendly'.²⁸ Yet the Court does not consider them at all. Given that these other decisions are not considered at all in the *SADC Tribunal* judgment, it is worthwhile describing them briefly.

The first matter of direct relevance to the *SADC Tribunal* judgment is the decision of the African Commission on Human and Peoples' Rights (African Commission) in *Luke Munyandu Tembani and Benjamin John Freeth (represented by Norman Tjombe) v Angola and Thirteen Others* (incidentally, the applicant in that matter is the second applicant in the *SADC Tribunal* judgment before the Constitutional Court).²⁹ As in the *SADC Tribunal* judgment, the applicants sought to declare invalid the decision of the SADC Summit to remove the Tribunal's competence to hear individual complaints. The *Luke Munyandu Tembani* matter was different from the *SADC Tribunal* judgment in that it did not concern the consistency of the SADC Summit decisions with the SADC Treaty but rather the consistency of the decisions with the African Charter on Human and Peoples' Rights (African Charter) and, in particular, the right of access to the court under arts 7 and 26 the African Charter. The Constitutional Court, as will be seen below, postulated that the SADC Treaty provides for the right of access to the courts.³⁰ Thus, while the source of the obligation is different, the right claimed in *Luke Munyandu Tembani* decision is the same as the one at issue in the *SADC Tribunal* judgment. In *Luke Munyandu Tembani*, the African Commission determined that the right of access

²⁵ Article 2 of the Articles on the Responsibility of States for Internationally Wrongful Acts *Yearbook of the International Law Commission* (Vol II (Part II) 2001) 20. See especially para 7 of the commentary to art 2 ('The second condition for the existence of an internationally wrongful act is that the conduct attributable to the State should constitute a breach of an obligation of that State. The terminology of breach of an international obligation of the State is long established and is used to cover both treaty and non-treaty obligations.')

²⁶ *Ibid* at para 9 of the commentary art 2 ('there is no exception to the principle stated in article 2').

²⁷ Article 38(1)(d) of the Statute of the International Court of Justice.

²⁸ See generally Botha (note 3 above).

²⁹ *Luke Munyandu Tembani & Benjamin John Freeth (represented by Norman Tjombe) v Angola & Thirteen Others* Communication 409/12, 2013. The thirteen others are the 13 other members of SADC, including South Africa.

³⁰ *SADC Tribunal* (note 5 above) paras 29 ('The right in the Bill of Rights and the [SADC] Treaty that is being threatened here is the right to access to justice'). See also paras 15 and 53 amongst several others where the Court refers to the right of access to justice or access to the courts as the right being violated by the decisions of the SADC Summit.

to justice ‘applied to national courts’ and not to international courts.³¹ I am not suggesting that the Constitutional Court ought to have followed the Commission’s decision, but in keeping with *Makwanyane* and the general trend of South African constitutional jurisprudence to consider decisions of regional human rights bodies, the Constitutional Court ought to have considered the African Commission’s decision in *Luke Munyandu Tembani*. While *Luke Munyandu Tembani* does not constitute an authoritative interpretation for either the South African Constitution or the SADC Treaty (the two instruments at issue in the *SADC Tribunal* judgment), it does offer an interpretation of a generally recognised right at issue in the matter, which could, as described below, serve as an interpretative tool for the SADC Treaty and related instruments under art 31(3)(c) of the Vienna Convention.

The second case of relevance to the *SADC Tribunal* judgment is an investor State arbitration concerning a South African diamond mining company, Swissbourgh, whose mineral rights in Lesotho had allegedly been expropriated to make way for the Lesotho Highlands Water Project. Prior to the impugned decisions, the owner of the mining company, Mr Josias van Zyl, a South African national, approached the South African courts seeking diplomatic protection, but was ultimately unsuccessful.³² Subsequent to the impugned decision of the SADC Summit concerning the Tribunal, Swissbourgh filed an investment claim with the Permanent Court of Arbitration (PCA) against the government of Lesotho claiming that Lesotho’s participation in the decision-making processes of SADC — referred to in all the relevant papers in those arbitral proceedings as the ‘shuttering of the Tribunal’³³ — constituted a violation of its rights under the SADC Treaty regime, including the Investment Protocol. Thus, unlike *Luke Munyandu Tembani*, the *Swissbourgh* arbitration was based on exactly the arguments as those of the Law Society, i.e. the SADC decisions were a violation of the right of access to justice or access to the courts under the 2000 SADC Protocol and that such decisions were attributable to Lesotho.³⁴

In a majority judgment of two to one, the arbitral tribunal determined that Lesotho’s participation in the decision-making process to ‘shutter the Tribunal’ did constitute a violation of international law and that Lesotho could be held liable for the damages.³⁵ Incidentally, the

³¹ *Luke Munyandu Tembani* decision (note 29 above) at paras 139, 144, 146. Incidentally, the High Court of Tanzania was aware of the *Luke Munyandu Tembani* decision and sought to take it into account. However, the High Court of Tanzania sought to dismiss *Luke Munyandu Tembani* by implying that the Commission’s decision was based on a jurisdictional technicality. See *Tanganyika Law Society* (note 6 above) at 9. In truth, however, the Commission does consider the substantive argument of whether a right of access to international courts exists under international law. The fact that the Commission feels fit only to look at the right from the perspective of the rights contained in the African Charter and not the SADC Treaty is neither here nor there, particularly since the right of access to courts is explicitly provided for in the African Charter while it is not explicitly provided for in any SADC instrument. In other words, the contention of the Court in Tanzania would carry *some* weight if there was an indication that the SADC instruments sought to go further than the African Charter. But, to the contrary, the SADC instruments provide for even less since they do not, in any of the cited instruments, contain an express provision on the right of individual access to courts, let alone international courts.

³² *Van Zyl & Others v The Government of the Republic of South Africa & Others* 2008 (3) SA 294 (SCA).

³³ *Swissbourgh Diamond Mines & Others v The Kingdom of Lesotho*, Permanent Court of Arbitration Case-2013-29, Partial Final Award on Merits and Jurisdiction, 18 April 2016 (the judgment remains confidential but is on file with the author).

³⁴ In the interest of transparency, I state that I served as an expert witness in the arbitration, focusing on the rules of State responsibility under international law and the decision-making processes in SADC, providing both a written report and being cross-examined by counsel for Swissbourgh. In putting together this section, I have not included any confidential material that is not readily available.

³⁵ *Swissbourgh Diamond Mines v Lesotho* (note 33 above).

one dissenting opinion came from a former South African judge of appeal, Judge Nienaber.³⁶ The Arbitral Tribunal took a similar decision to that adopted by the Constitutional Court. However, since the arbitration was held under the PCA rules, the decision was not final, and the courts of Singapore had jurisdiction to review the arbitration award. Lesotho had argued, *inter alia*, that the Arbitral Tribunal had not had jurisdiction precisely because its participation in the decision-making process did not establish its international responsibility. In other words, Lesotho had argued that its participation in the impugned SADC decisions was not unlawful. After an earlier high court judgment in Singapore had affirmed Lesotho's arguments, Singapore's Court of Appeal, also affirmed Lesotho's argument and finally overturned the arbitral award on the basis, *inter alia*, that the participation of Lesotho in the SADC decisions did not breach the relevant rules of international law.³⁷

Thus, two decisions handed down under international instruments — the Singapore judgment, though handed down by a national court, counts as one under an international instrument since its jurisdiction derived from the PCA rules — determined that participation in the SADC decisions did not violate the right of access to the courts. It is, thus, a surprise that the Constitutional Court, as a court whose jurisprudence is renowned for being 'international law-friendly', did not even mention, let alone consider the interpretation of these courts on the position in international law. At any rate, since these decisions themselves are not binding, it is necessary to independently evaluate whether the President's participation in the SADC decisions violated the right of access to the courts. I first consider whether the SADC decisions breached *any* rule of international law and then proceed to consider whether, if there had been a breach of an international law rule, such a breach can be attributed to the South African government.

B Do the decisions breach a rule of international law

1 *General*

It is important to begin this analysis by making explicit a fact which might be obvious: an act is unlawful under international law if it breaches a rule under international law. An act is *not* unlawful under international law merely because it violates a rule of domestic law. Thus, the assessment of the lawfulness of an act under international law must be determined on the basis *only* of international law and not on the basis of domestic law. In this respect, the International Law Commission (ILC) has made the following observation:

[T]he characterisation of a given act as internationally wrongful is independent of its characterisation as lawful under the internal law of the State concerned. There are two elements to this. First, an act of a State cannot be characterised as internationally wrongful unless it constitutes a breach of an international obligation, *even if it violates a provision of the State's own law*.³⁸ (Emphasis added)

It is important to make this point explicitly in order to exclude the arguments that the decisions of SADC Summit were contrary to international law *under the South African Constitution* — whatever such an assertion might mean. The decisions of the SADC Summit are either lawful under international law or unlawful under international law. Domestic

³⁶ *Ibid.*

³⁷ *Swissbourgh Diamond Mining Company & Others v The Kingdom of Lesotho*, judgment of the Court of Appeal of Singapore of 27 November 2018. For an accessible summary, see KC Vijayan 'Top Court Dismisses Arbitration Award' *The Straits Times* (Nov 30, 2018), available at <https://www.straitstimes.com/singapore/courts-crime/top-court-dismisses-appeal-on-arbitration-award>.

³⁸ Para 1 of the commentary to art 3 of the Articles on State Responsibility (note 25 above).

law plays no role whatsoever in the determination of the lawfulness of the decisions under international law.

The judgment of the Court in the *SADC Tribunal* case presupposes that there is, under international law, a right of access to justice that has been breached by the impugned decisions. Indeed, at several places, the Court points to the way in which the decision removed the rights of nationals of South Africa and the region to have access to courts. For example, early on in the judgment the Court stated that the ‘*only avenue open* to those [in Zimbabwe] aggrieved by having been deprived of their land in that constitutionally sanctioned manner was the Tribunal.’³⁹ The Court then stated that the ‘President, together with leaders of other SADC [states], *decided to* eviscerate the possibility of States *ever* being held to account for perceived human rights violations, non-adherence to the rule of law or undemocratic practices.’⁴⁰ More directly, according to the Court, the President was therefore ‘party to denying citizens of South Africa and other SADC countries access to justice at a regional level in relation to their disputes including those relating to human rights, democracy and the rule of law.’⁴¹

All these assertions were made before *any* analysis of the content of the right or the nature of the breach. More importantly, the denial of access to justice is, as the Court itself observed, accurate only to the extent that it related to ‘justice at a regional level’. The fact is that for most States in the region, certainly for South Africa, the right of access to justice is already guaranteed under domestic law. In South Africa, the Constitutional Court itself is the pinnacle of a system that guarantees the right of access to justice. While there may be some States in the region that do not have similarly strong constitutional democracies, with a strong court system, this is not as a result of the impugned decisions of SADC. The claim underpinning the Court’s conclusion must therefore be that there is, under international law, a right of access to justice *in the form of international or regional courts*. But what is the source of this right? There are at least two possible sources of such a right and these are discussed below. The obvious source, and the one apparently relied on by the Court, is that such a right exists under the SADC Treaty and was taken away by the impugned decisions. Although not advanced by the Court, it is worth pointing out that the right of access to justice may also potentially be based on other treaty regimes, for example the African Charter and the International Covenant on Civil and Political Rights (ICCPR).⁴² Although it *might* be argued that the right of access to justice through international tribunals may also exist under customary international law, such

³⁹ *SADC Tribunal* + at para 11 (emphasis added).

⁴⁰ *Ibid* at para 14 (emphasis added).

⁴¹ *Ibid* at para 15. See also para 31, where the Court stated that South Africa’s participation in the decisions ‘signif[ied] that access to justice, a commitment to the rule of law and the promotion of human rights would no longer be a paramount feature of our national vision and international relations.’

⁴² These two treaty regimes, which all the SADC members are party to, are highlighted simply for illustrative purposes since space does not permit the consideration of all treaties that may contain such a right.

a claim would be hard to substantiate. I have not been able to find *any* practice accompanied by *opinio juris* supporting such a claim.⁴³ It is therefore to the treaty bases that I turn.

2 *A right of access to international courts under international human rights treaties*

For the sake of convenience, I begin with the possible basis for a right of access to justice through international courts being in the other treaty regimes such as the African Charter and the ICCPR. As noted above, the African Commission has already determined that the rights relevant to access to justice in the African Charter, namely art 7 (access to justice) and art 26 (independence of the courts), apply to national courts and not to international courts.⁴⁴ The same situation holds true under the ICCPR. Article 14 of the ICCPR provides that 'everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law'. The Human Rights Committee, the body established to interpret the ICCPR, has also used domestic law-related concepts in its statements about the content of the right.⁴⁵ It has, for example, noted that the guarantee in art 14 —

⁴³ Draft Conclusion 2 of Draft Conclusions on the Identification of Customary International Law, *Report of the International Law Commission, Seventieth Session, General Assembly Official Records (A/73/10)* ('To determine the existence and content of a rule of customary international law, it is necessary to ascertain whether there is a general practice that is accepted as law [*opinio juris*]'). In the commentary to this draft conclusion, the Commission states, for example, that 'Draft conclusion 2 sets out the basic approach, according to which the identification of a rule of customary international law requires an into two distinct, yet related questions: whether there is a general practice, and whether such general practice is accepted as law (that is, accompanied by *opinio juris*).' The commentary relies on the normal case law of the International Court of Justice that is referred to in the standard international law textbook on the subject of sources which need not be repeated here.

⁴⁴ *Luke Munyandu Tembani* decision (note 29 above) at paras 139, 144, 146.

⁴⁵ Human Rights Committee, General Comment No 32, 'Art 14: Right to equality before courts and tribunals and to a fair trial' CCPR/C/GC/32 (August 2007). At para 4, e.g. the Human Rights Committee notes 'that it cannot be left to the sole discretion of domestic law to determine the essential content of Covenant guarantees'. Needless this question is only relevant in the context of domestic application. See also para 9, which states: 'The right of access to courts and tribunals and equality before them is not *limited to citizens of States parties*, but must also be available to all individuals, regardless of nationality or statelessness, or whatever their status, whether asylum seekers, refugees, migrant workers, unaccompanied children or other persons, *who may find themselves in the territory or subject to the jurisdiction of the State party*' (emphasis added). See also para 10, which states: 'The availability or absence of legal assistance often determines whether or not a person can access the relevant proceedings or participate in them in a meaningful way. While art 14 explicitly addresses the guarantee of legal assistance in criminal proceedings in paragraph 3 (d), *States are encouraged to provide free legal aid in other cases*, for individuals who do not have sufficient means to pay for it.' (Emphasis added). See also para 18, which states: 'The notion of a 'tribunal' in article 14, paragraph 1 designates a body, regardless of its denomination, that is established by law, *is independent of the executive and legislative branches of government* or enjoys in specific cases judicial independence in deciding legal matters in proceedings that are judicial in nature' (emphasis added); and the 'failure of a State party to establish a competent tribunal to determine such rights and obligations or to allow access to such a tribunal in specific cases would amount to a violation of article 14 if such limitations *are not based on domestic legislation*, are not necessary to pursue legitimate aims such as the proper administration of justice, or are based on exceptions from jurisdiction deriving from international law such, for example, as immunities, or if the access left to an individual would be limited to an extent that would undermine the very essence of the right.' (Emphasis added).

not only applies to courts and tribunals addressed in the second sentence of this paragraph of article 14 but must also be respected whenever *domestic law* entrusts a judicial body with a judicial task.⁴⁶ (Emphasis added)

The texts of other international instruments seem to confirm that, as a general matter, the right of access to courts refers to domestic courts and not to international courts and tribunals. Article 8 of the Universal Declaration of Human Rights is instructive in this respect. It provides that everyone 'has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights'. Similarly, art 13 of the European Convention provides for the right to an 'effective remedy before a national authority'. Thus, the right of access to courts is generally viewed in international instruments as being applicable to domestic courts and processes and not to international courts and tribunals. This does not mean that such international courts cannot exist, but when they do, they exist not as a fulfilment of a right of access to courts under general international law but rather as a voluntary choice of the parties establishing such courts, i.e. a treaty rule which, subject to the rules of the treaty, can be done away with.

3 *A right of access to international courts in the SADC Treaties*

While the African Charter and the ICCPR do not catalogue a right of access to international courts, an argument can be made that the SADC Tribunal itself provides for such a right and that the impugned decisions are in breach of the treaty obligations implied by the right in the SADC Treaty. There are potentially two distinct but related arguments in support of the contention that there is a right of access to international courts under the SADC Treaty. The first argument could be based on arts 4(c) and 6(1) of the SADC Treaty that relate to human rights, democracy and the rule of law, and the duty not to jeopardise the fulfilment of SADC's principles. While the Constitutional Court did not rely on this ground, the Tribunal in the *Swissbourgh* arbitration matter did. The second argument, and the one relied upon by both the Constitutional Court and the court in *Swissbourgh* in its arbitral proceeding against Lesotho, is that since the SADC Treaty provides for a right of individuals to access the Tribunal, such a right can only be taken away by procedurally correct amendment of the Treaty. The first argument presupposes a fundamental right which would require more than a technical amendment of the provisions dealing with the Tribunal, while the second is less fundamentalist in nature and sees the right in question as a mere treaty obligation subject to the normal amendment provisions of the relevant instruments. I now turn to the first, more fundamental, argument.

Article 4(c) of the SADC Treaty provides that 'SADC and its Member States shall act in accordance with [...] human rights, democracy and the rule of law.' Relying on the famous *Campbell* decision of the SADC Tribunal,⁴⁷ it may be tempting to argue that art 4(c) of the SADC Treaty sets forth a right of individuals for access to international courts, and a corresponding duty on SADC members States to provide such access. Yet, by its clear terms, the *Campbell* decision was concerned with the rule of law at the national level, the availability

⁴⁶ Ibid at para 7. See also para 16 in which "suit at law" or its equivalents in other language texts is based on the nature of the right in question rather than on the status of one of the parties or the particular forum provided by *domestic legal systems* for the determination of particular." (Emphasis added).

⁴⁷ *Campbell v Zimbabwe* (note 10 above).

of domestic remedies and the right of access to domestic courts.⁴⁸ *Campbell* does not, under even the most generous reading, stand for the proposition that art 4(c) establishes a right of access to international courts and tribunals.

An application of the rules of interpretation similarly leads to the conclusion that art 4(c) does not establish a right of access to international courts. The general rule of interpretation, contained in art 31 of the Vienna Convention, requires that the terms of a treaty be given their ordinary meaning, in context and in the light of the treaty's object and purpose.⁴⁹ Article 31 of the Vienna Convention is generally accepted as customary international law and as being applicable to the interpretation of treaties by South African courts.⁵⁰ The Constitutional Court has, itself, in *SADC Tribunal* judgment confirmed that many provisions of the Vienna Convention apply in South Africa as part of customary international law.⁵¹ It is these rules that must be applied to determine whether art 4(c) of the SADC Treaty establishes a human right of access to the courts.

First, the ordinary meaning of the terms of art 4(c), namely the promotion of the rule of law, do not indicate a right of access to the courts, let alone that such a right requires the existence of international or regional courts. Second, the context of the terms in art 4(c) indicates that it does not establish a right of access to courts, let alone international or regional courts. Article 4(c) is contained in the section of the treaty dealing with principles that should guide State conduct. Those principles do not, in and of themselves, establish content specific obligations, but rather spell out general principles which should guide the parties.⁵² I should pause to note this is not the same as saying these provisions are not binding, for surely they are. But they are 'binding' not in the sense of a hard and fast rule.⁵³ Nor does it mean that all provisions contained in principles section of a treaty do not create binding obligations. Ultimately, it depends on the language used. Often, as is the case with art 4(c), principles governing a treaty are formulated in

⁴⁸ Ibid at 16, where the issue related to access to courts is described as follows: 'whether or not the Applicants have been denied access to *the courts in Zimbabwe*.' (Emphasis added). In its lengthy and generally accurate analysis at 26–41, the SADC Tribunal in *Campbell* does not assess whether there is a right of access to courts internationally, but rather assesses whether Zimbabwean law, which deprives persons of the right of access Zimbabwean courts in connection with the land restitution programme, was a violation of the right of access to courts.

⁴⁹ Article 31(1) of the Vienna Convention on the Law of Treaties provides as follows: 'A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.'

⁵⁰ The 2018 International Law Commission Draft Conclusions on Subsequent Agreements and Subsequent Practice in Relation to the Interpretation of Treaties, draft conclusion 2. See for the view that the customary international law rule embodied in art 31 of the Vienna Convention on the Law of Treaties is applicable in South African courts, Tladi (note 1 above) 714.

⁵¹ *SADC Tribunal* (note 5 above) para 36 *et seq*.

⁵² R Dworkin *Taking Rights Seriously* (1977) at 20 notes that principles, unlike rules, do not operate 'in an all or nothing fashion', noting rather that they are to be 'taken into account [...] as a consideration inclining in one way or another.'

⁵³ D Tladi *Sustainable Development in International Law: An Analysis of Key Enviro-Economic Instruments* (2007) at 101–102 argues that sustainable development, relying on Dworkin's distinction between rules and principles to argue that sustainable development, though flexible, is, indeed, a binding *principle* of international law ('If Lowe's objection to sustainable development as a (traditional) principle of international law hinges on the uncertainty regarding its application, its flexibility or lack of fixed content (as I think it does), then the objection can be overcome by a distinction made famous by Ronald Dworkin. Certainly because of flexibility, sustainable development cannot be a rule [...] That does not mean, as I think Lowe's contribution may imply, that the application of the principle of sustainable is an elective').

broad and general terms, not specifying specific obligations, but general principles relevant for the application of the treaties.⁵⁴ Furthermore, as part of context, art 16 of the SADC Treaty has detailed provisions addressing some of the fundamental features of the, at that stage, yet-to-be-established Tribunal. In none of these provisions is the right of individuals to have access to the Tribunal mentioned, suggesting that such a right does not flow from art 4(c) of the Tribunal. Finally, it should be recalled, as part of object and purpose analysis, that the SADC Treaty is not a human rights treaty. Rather, it is a constitutive treaty of an international organisation, providing for regional integration and requiring its members to ensure the protection of human rights, democracy and the rule of law in order to promote regional integration. It does not specify how this should be done, and certainly does not, on its terms, require the establishment of a right of access to international courts. Out of more than thirty arts, only one makes any reference to human rights, and it does so in broad terms without any detail. Not a single individual human right that is customarily contained in human rights treaties is referred to. Moreover, under art 31(3)(c) of the Vienna Convention other rules of international law are to be taken into account in the interpretation of treaties.⁵⁵ The general rules of international law described above, including under the African Charter and the International Covenant on Civil and Political Rights, contribute to the conclusion that art 4(c) of the SADC Treaty does not establish a right of access to international courts which was breached by the impugned decisions of the SADC Summit. None of these factors are individually determinative of the interpretation. All of them taken together indicate that art 4(c) does not establish a right of access to international or regional courts.

Although the Constitutional Court referred to art 4(c) of the SADC Treaty, the Court did not rely on it.⁵⁶ Instead, the Court seemed to rely on a rather technical argument concerning amendment procedures. It correctly noted that the Protocol of 2000 establishing the SADC Tribunal (2000 Protocol) was an integral part of the SADC Treaty. According to the Court, the adoption of the new 2014 Protocol was unlawful because ‘the [SADC] Treaty has never been amended so as to repeal its provisions relating to individual access to the Tribunal, human rights, the rule of law and access to justice’.⁵⁷ In the view of the Court, the jurisdiction of the Court could only be ‘lawfully tampered with in terms of the provisions of the [SADC] Treaty that regulate its amendment’.⁵⁸ While the Court assumed that, because the Protocol was an integral part of the Treaty, it could only be ‘tampered with’ in accordance with the rules of the SADC Treaty, the 2000 Protocol had its own amendment procedures and, as the *lex specialis*, it

⁵⁴ For example, art 3 of the UN Framework Convention on Climate Change. As an example of a section in treaty containing principles, which does, based on the formulation of its terms, contain hard obligations is art 2 of the Charter of the United Nations.

⁵⁵ Article 31(3)(c) provides that in, addition to context ‘any relevant rules of international law’ shall be taken into account in the interpretation of treaty.

⁵⁶ In contrast, the High Court of Tanzania in *Tanganyika Law Society* (note 6 above) did rely on art 4(c) (at 42–48). While comprehensive, at least in terms of the length of analysis, *Tanganyika* did not engage in the interpretation of the SADC Treaty and did not rely on *any of the recognised tools of interpretation* as discussed above, i.e. ordinary meaning, context and object and purpose, the Court simply stated that it was ‘not in agreement’ with the argument that the right of access to courts applies to national courts (at 42) but offered little in the way of application of the methodology of international law to substantiate its claim. To give an example, while the Court stated, at 43, that the SADC Treaty ‘entrenches human rights and the rule of law’, it did not explain why this must mean access to an international court.

⁵⁷ *SADC Tribunal* (note 5 above) at para 53.

⁵⁸ *Ibid* at para 49.

is the amendment procedure in the Protocol that would apply.⁵⁹ This oversight by the Court is, however, immaterial since under both the SADC Treaty and the 2000 Protocol amendments are to be adopted by a two-thirds majority of the parties.⁶⁰ Similarly, while the Court focused solely on amendments, it did not consider the possibility that legally what had occurred was not an amendment but a dissolution of the old Tribunal and the creation of a new Tribunal by means of a new Protocol which, once it enters into force, would terminate the previous one.⁶¹ From a procedural perspective, this distinction is, however, too immaterial since dissolution also required a two-thirds majority.⁶²

While the Court seemed convinced that the Protocol had not been duly amended, nowhere in the judgment was this position tested. The Court simply asserted that the 2000 Protocol was never amended (or properly amended). At least at face value, since a formal decision had been contained in a resolution to disband the SADC Tribunal with a subsequent decision to adopt a new one, the Court ought to have made a determination as to whether these decisions, contained in formal resolutions, were somehow procedurally defective. (I leave outside of this assessment the decisions not to renew the mandates of the judges, since in the final analysis those decisions did not have lasting legal effect.)

It is useful to refer to *Tanganyika Law Society* here since it addressed the relationship between the 2000 and 2014 Protocols. The *Tanganyika* Court's assessment of the legal relationship between the two protocols establishing the Tribunal, i.e. 2000 and 2014 Protocols, was concerned with whether the latter has entered into force, noting that to date, only 'nine States had signed the Protocol'.⁶³ This concern, however, is immaterial to the lawfulness of the decision and goes only to the effectiveness of the Protocol. Treaties, particularly multilateral treaties, do not generally become effective, or enter into force, immediately. Indeed, the High Court of Tanzania determined, on this basis that 'until ratification of the "new SADC Tribunal Protocol" by Parliament, the existing Tribunal is still valid.'⁶⁴ This position, which to my mind is legally defensible, does not, at all, impact on the question of the legality of adoption of the 2014 Protocol.

It is the case that at various places the Court makes the assertion that the relevant treaties were not duly amended because it could only be amended by a three-quarters majority. Having stated that the jurisdiction of the SADC Tribunal may only be lawfully altered on the basis of the SADC Treaty amendment procedures, the Court stated that instead of a 'three quarters majority', the Summit 'sought to amend the Treaty through a protocol, thus evading

⁵⁹ Article 37(3) of the 2000 Protocol.

⁶⁰ Article 36(1) of the SADC Treaty provides that an amendment of the treaty 'shall be adopted by a decision of three-quarters of all members of the Summit'. Article 37(3) of the 2000 SADC Protocol states that an 'amendment to this Protocol shall be adopted by a three (3) quarters of all the members of the Summit.' Moreover, the SADC Treaty provides that Art 22(11) provides that '[a]n amendment to any Protocol that has entered into force shall be adopted by a decision of three-quarters of the Member States that are Party to the Protocol.'

⁶¹ The Malawi High Court in *Tanganyika* (note 6 above) at 26, correctly acknowledged this process. According to the Court in *Tanganyika* this was not helpful to the government of Tanzania only because the 2014 Protocol had not yet entered into force.

⁶² For example, art 35 of the SADC Treaty ('The Summit may decide by a resolution supported by three-quarters of all members dissolve SADC or any of its institutions').

⁶³ *Tanganyika* (note 6 above) at 28.

⁶⁴ *Ibid* at 29.

compliance with the Treaty's more rigorous threshold of three-quarters of all of its Members.⁶⁵ Yet nowhere did the Court actually embark on an interpretation of the relevant provisions to determine the requirements for amendment or dissolution. The Court stated, without more, that the decision of SADC 'evidences a failure to adhere to the provisions or proper meaning of the Treaty',⁶⁶ without applying the methodology for treaty interpretation under international law. Nowhere did the Court assess whether the process by which the 2014 Protocol had been adopted was consistent with the interpretation of the relevant treaty provisions. In fact, the Court did not even describe the process by which SADC arrived at its decision. The closest the Court came to contrasting the process used by the SADC Summit and the requirements under the SADC treaties was to draw a distinction between the three-quarters requirements and what it referred to as 'the protocol route'.⁶⁷ The Court never told us what it meant by the 'protocol route' except that it required 'the support of ten members'.⁶⁸ But if the 'support of ten members' is a lower threshold does the fact that the resolutions themselves were adopted by consensus, which could be interpreted as unanimity, not meet the higher threshold of two-thirds? And has SADC adopted any of its decisions by this 'support of ten members' threshold in the past?⁶⁹ These questions are all, for reasons I describe below, relevant to proper interpretation and none them of have been discussed.

The relevant treaty provisions under which the decisions *could* have been adopted, i.e. SADC Treaty and the 2000 Protocol, all have in common that any amendment — and for that matter dissolution of SADC Institutions — should be adopted by a resolution of a two-third majority. The resolutions under which all decisions under consideration were taken — and indeed the resolutions under which all SADC decisions are taken — were taken not by recorded vote but by consensus. It may thus well be argued that by adopting the relevant decisions by consensus, and not by two-thirds majority, the Summit acted contrary to the SADC Treaty and the 2000 Protocol — perhaps this is the basis of the Court's conclusion. The question would thus be whether consensus is inconsistent with a two-thirds majority or whether consensus can be read into the amendment or dissolution procedures under the SADC Treaty.

The requirement for a two-thirds majority in the various provisions is not necessarily inconsistent with consensus decisions.⁷⁰ Consensus decisions, like decisions by a two-thirds majority, indicate substantial support for a decision. In some instances, a decision by consensus

⁶⁵ *SADC Tribunal* (note 6 above) at para 49. See also at para 52 ('More importantly, the Tribunal is an institution of SADC and the Treaty requires a "resolution supported by three-quarters of all members to dissolve [...] any institution"').

⁶⁶ *Ibid* at para 51.

⁶⁷ *Ibid* at para 49 ('And it cannot be properly be amended in terms of a protocol. It may only be amended by three-quarters of the SADC Members. The Summit, however, sought to amend the Treaty through a protocol, thus evading compliance with the Treaty's more rigorous threshold of three-quarters of all its Member States.').

⁶⁸ *Ibid*.

⁶⁹ For the view that the 'protocol route' requires only the support of ten members, the Court refers to art 53 of the Protocol. However, the 2000 Protocol does not have an art 53. The 2014 Protocol, which does have an art 53, could not be the basis for the decision for its adoption since it had not (and still has not) entered into force at the time of its adoption. Moreover, art 53 of the 2014 Protocol does not deal with adoption of amendments but rather with its own entry and, at any rate, also requires a two third-majority for its entry into force ('This Protocol shall enter into force thirty (30) days after the deposit of the Instrument of Ratification by two-thirds of the Member States.').

⁷⁰ The meaning of consensus was discussed in a now famous report by Lorand Bartels *Final Report of the Review of the Role, Responsibilities and Terms of Reference of the SADC Tribunal* of March (2011).

may even indicate unanimous support. In this respect, the Bartels report on the SADC Tribunal has stated that the consensus rule in SADC instruments means that 'normally, any SADC Member State can veto a Summit decision'.⁷¹ This would seem to suggest, contrary to the import of the Constitutional Court's view, that consensus is more onerous than a two-thirds majority since it would require the support, or at least acquiescence, of all 15 members.⁷² Yet from a purely technical, literal reading of the two-thirds majority requirement, an argument can be made that any decision to amend (or dissolve) an institution under the SADC instruments has to be by a two-thirds majority, and that a consensus decision, even if indicating a larger level of support, does not meet this technical requirement. Here, the customary international law rules on interpretation, contained in art 31 of the Vienna Convention, play an important role. Article 31(3)(b), also accepted as reflecting customary international law, provides that when interpreting treaty provisions 'subsequent practice in the application of the treaty' shall be taken into account.⁷³ As the ILC has noted, subsequent practice under art 31(3)(b) 'may serve to clarify the meaning of a treaty by narrowing, widening or otherwise determining the range of possible interpretations, including any scope for the exercise of discretion which the treaty accords to the parties'.⁷⁴ Thus subsequent practice under the Vienna Convention would help clarify whether consensus may be relied upon when amending the Protocol.

Perhaps the most well-known example of the effect of subsequent practice on treaty interpretation concerns the exercise of the so-called 'veto' by the permanent members of the UN Security Council (UNSC) under the UN Charter. Under art 27(3) of the UN Charter, decisions of the UNSC on substantive matters require the 'concurring votes of the permanent members'. Technically, a literal reading of this provision would mean that an abstention by a permanent member would be regarded as a 'veto' since an abstention is hardly 'concurrence'. Yet, in the practice of the UN, decisions of the UNSC have been accepted as validly adopted even in the face of abstentions by permanent members. The International Court of Justice (ICJ) relied on this subsequent practice 'extending over a long period' to reject apartheid South Africa's argument that the UNSC resolution requesting the Court's advisory opinion on the lawfulness of the application of apartheid in Namibia had not been validly adopted since two members of the UNSC, the United Kingdom and the USSR, had abstained.⁷⁵ Thus, the practice of SADC in its decisions should guide any interpretation concerning the procedures for the adoption of decisions.

⁷¹ Ibid at 127.

⁷² The report does add a cautionary note that consensus, under the law of international organisations, means 'adoption without formal opposition', *ibid*. I am in agreement with this more cautious discussion. For the record, in my own report to the arbitral panel, I argued that consensus did not mean unanimity but was a much more complex concept. For the purposes of these articles, not much turns on that rather lengthy analysis, so I will not reproduce those arguments.

⁷³ Article 31(3)(b) of the Vienna Convention on the Law of Treaties.

⁷⁴ ILC Draft Conclusions on Subsequent Agreements and Subsequent Practice (note 50 above) Draft Conclusion 7.

⁷⁵ *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding UN Security Council Resolution 270(1970)*, Advisory Opinion, *ICJ Reports* (1971) at 21, para 22 ('However, the proceedings of the Security Council extending over a long period supply abundant evidence that presidential rulings and the positions taken by members of the Council, in particular its permanent members, have consistently and uniformly interpreted the practice of voluntary abstention by a permanent as not constituting a bar to the adoption [...] This procedure followed by the Security Council, which has continued unchanged [...] has been generally accepted by Member of the United Nations and evidences a general practice of the Organisation.').

As a practical matter, SADC adopts decisions by consensus, even where a particular threshold is required. This practice is also apparent from the decisions of SADC Summits. As mentioned above, amendments to the SADC Treaty and the 2000 Protocol, for example, are to be amended by a three-quarter majority. Yet, in the Decisions of SADC on the several amendments of these two instruments, there is no record of a vote, only that Summit ‘approved and signed’.⁷⁶ This constitutes subsequent practice that the Court ought to have taken into account in determining whether amendments can be effected by means of consensus. It is worth mentioning that the Constitutional Court itself, in *Zimbabwe v Fick*, accepted without question the amendment to art 16 of the SADC Treaty (concerning the Tribunal), even though that amendment was adopted by consensus and not by a recorded vote.⁷⁷ All of this indicates that there is a settled practice, over an extended period of time, in which SADC member States have made decisions by consensus, even where the requisite treaty provides for a threshold of two-third majority. This would indicate that the impugned decisions were adopted consistently with the ‘authentic’⁷⁸ interpretation of parties to the SADC instruments. As such the Constitutional Court’s determination that the impugned decisions were a breach of the SADC Treaty without taking into account subsequent practice of the parties, as required by art 31(3)(b) of the Vienna Convention, is questionable at best. As Hafner has noted, once a subsequent practice under 31(3)(b) is established, ‘it cannot be set aside as not having the slightest legal effect.’⁷⁹

In addition to not considering the role of subsequent practice, the Court also failed to consider that adopting a new treaty, even one inconsistent with a previous treaty is not unlawful under international law. As a general matter, rules of international law, including treaty rules, are *jus dispositivum* and can be derogated from or modified by subsequent rules of international law.⁸⁰ This includes treaty rules concerning access to courts and certainly includes rules of amendments. The only exception to this basic rule of international law is the operation of

⁷⁶ For example, para 8.2.4.1 of the Records of the Summit Decision of August 2007 amending the Tribunal Protocol to ‘facilitate trade disputes in the SADC Region’; Decision 6 of the Records of the Summit Decision of August 2008 amending the Treaty to provide for two Deputy Executive Secretaries and the abolition of the Integrated Committee of Ministers; Decision 10 on the Amendment of Article 6 of the Tribunal Protocol; Summit Decision 15 on the amendment of SADC Treaty so as not to provide for a specific number of Deputy Executive Secretaries.

⁷⁷ *Zimbabwe v Fick* (note 10 above) at para 10 (‘The amendment alluded to above was effected by the Summit in terms of the Agreement Amending the Treaty of the Southern African Development Community (Amending Agreement). Article 16(2) of the Treaty was amended to provide for the Tribunal Protocol to be an integral part of the Treaty, obviously subject to the adoption of the Amending Agreement’). See art 18 of the 2001 Agreement Amending the Treaty of the Southern African Development Community. The Agreement was adopted on 14 August 2001. See Communiqué of the SADC Summit of 2001 August, Malawi Blantyre, para 23.

⁷⁸ Draft conclusion 3 of the ILC Draft Conclusions on Subsequent Agreements and Subsequent Practice (note 50 above) (‘Subsequent agreements and subsequent practice under article 31, para 3 (a) and (b) [of the Vienna Convention], being objective means evidence of the understanding of the parties as to the meaning of the treaty, are authentic means of interpretation, in the application of the general rule of treaty interpretation in article 31.’).

⁷⁹ G Hafner ‘Subsequent Agreement and Practice: Between Interpretation, Informal Modification and Formal Amendment’ in G Nolte (ed) *Treaties and Subsequent Practice* (2013) 120.

⁸⁰ *North Sea Continental Shelf cases (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands)*, ICJ Reports (1969) at 3, para 72. See for discussion *First Report of Special Rapporteur (Dire Tladi) on Jus Cogens* (A/CN.4/793) at paras 66–67.

peremptory norms of general international law (*jus cogens*).⁸¹ It is clear that the Court does not believe that the right of individual access to the SADC Tribunal is a peremptory norm since it accepts that the provisions could have been amended through the correct procedure. Nor does the Court assert that the amendment provisions themselves are of a peremptory character. This being the case, the normal rules of successive treaties laid out in the Vienna Convention would, even if in the absence of the application of art 31(3)(b), be relevant. Article 59 of the Vienna Convention provides for the termination of one treaty by entry into force of another if 'it appears from the later treaty or is otherwise established' that the parties to the previous treaty intend for it to be replaced.⁸² This rule is not subject to the provisions of the previous treaty.⁸³ The 2014 Protocol is explicit that the 2000 Protocol 'is replaced with effect from the date of entry into force of the 2014 Protocol.'⁸⁴ Even though the 2014 Protocol has yet to enter into force,⁸⁵ it is hard to imagine how the adoption of a subsequent treaty repealing an old treaty — a scenario contemplated by the Vienna Convention — could be unlawful. At any rate, the problem with the Court is not only its conclusion but also its failure to engage with the methodology of international law by addressing this and other rules of interpretation.

4 *There is no rule of international law that is breached by the SAD decisions*

From the analysis above, several points can be made. First, there is no obligation under general international law for States to provide access to international courts and tribunals. Second, the general human rights principles in the SADC Treaty do not contain a right of access to international courts, whether by the ordinary meaning of the terms of those principles or in the application of other means of interpretation. Third, the impugned decisions were adopted pursuant to the relevant SADC treaties as interpreted through practice by the parties to those treaties. Fourth, whatever the outcome of the interpretation of the provisions under the existing SADC treaties, the 2014 Protocol constitutes a later treaty with the effect, once it enters into force, of terminating the 2000 Protocol. The conclusion from all of this is that the impugned decisions, in particular the President's decision to adopt and sign the 2014 Protocol, did not breach any rule of international law as asserted by the Constitutional Court in the *SADC Tribunal* decision.

As a matter of international law, this should be the end of the analysis. If a breach of a rule of international law cannot be established, the *SADC Tribunal* judgment should fall on its head. Nonetheless, for completeness' sake and in order to cover all bases, I turn now, albeit very briefly, to the second element of the responsibility, namely attribution.

⁸¹ Tladi *First Report on Jus Cogens*, at para 67. See also generally, Draft Conclusions on Peremptory Norms of General International Law (*Jus Cogens*), *Report of the International Law Commission*, General Assembly Official Records (A/74/10) 147.

⁸² Article 59 of the Vienna Convention on the Law of Treaties ('A treaty shall be considered terminated if all the parties to it conclude a later treaty relating to the same subject and [it] appears from the later treaty or is otherwise established that the parties intended that the subject matter be governed by that treaty').

⁸³ *Ibid.*

⁸⁴ Article 48 of the 2014 Protocol.

⁸⁵ *Tanganyika* (note 6 above) at 26.

C Are the decisions attributable to the South African Government

The *SADC Tribunal* judgment did not only assert that the SADC breached its international law; it also asserted that, on the basis of the unlawful decisions of SADC, South Africa (or its President) acted contrary to its international law obligations. For this assertion to stand, it has to be shown, that the decisions of SADC can be attributed to the South African government.

The point of departure for addressing South Africa's responsibility for the conduct of SADC is that SADC is an international organisation with international legal personality.⁸⁶ It is, thus, responsible for its own acts.⁸⁷ In the *Reparations for Injuries* Advisory Opinion, the ICJ stated that one of the consequences of independent legal personality is that the international organisation 'occupies a position in some respects in detachment from its Members.'⁸⁸ Thus, a State does not automatically assume responsibility for the decisions of an organisation, including the decision that it may have positively voted in favour of. I leave aside, for now, that South Africa did not positively vote for the decisions in question. The Articles on State responsibility set out specific circumstances, none of which apply to the SADC decisions, under which an act may be attributed to a State.⁸⁹ For example, art 4 provides that the acts of an organ of the State are attributable to the State. To be clear, and to avoid misunderstanding, it is the unlawful conduct in question to which these articles refer. Thus, for art 4, it is not sufficient that an organ of the South African State was present (or even engaged in *some* conduct). What would be required in this case is that the unlawful conduct, in this case the SADC decisions, can be classified as the conduct of the organ of the State. The articles provide three other grounds, equally inapplicable, for an act of another State to be attributable to a State. These are where the State in question directs,⁹⁰ coerces⁹¹ and assists⁹² another State in the commission of a wrongful act. Leaving aside that these provisions are concerned with acts of other States and not of international organisations, none of them apply to the case at hand.

The ILC, in putting together this text, was well aware that there may be special considerations that apply in the case of attribution of the conduct of international organisations.⁹³ Even so, the articles emphasise that an international organisation 'possesses separate legal personality under international law' and as such 'is responsible for its own acts.'⁹⁴ The situation of an international organisation being responsible for its own acts is contrasted with that 'where a

⁸⁶ Article 3(1) of the SADC Treaty.

⁸⁷ Article 3 of the Articles on the Responsibility of International Organisations *Yearbook of the International Law Commission* vol II part II (2011) 46 ('Every international wrongful of an international organisation entails the international responsibility of that organisation.'). See also *Tanganyika Law Society* (note 6 above) at 29.

⁸⁸ *Reparations for Injuries Suffered in the Service of the United Nations*, Advisory Opinion of 11 April 1949, *ICJ Reports* (1949) 174 at 179. See also at 185.

⁸⁹ Articles on State Responsibility (note 25 above) art 4 (conduct of an organ of the State), art 5 (conduct of persons exercising governmental authority), art 6 (conduct of organs placed at the disposal of the State), art 8 (conduct directed or controlled by the State), art 9 (conduct carried in the factual exercise of governmental authority even in the absence of official authority), art 10 (conduct of an insurrectional movement) and art 11 (conduct acknowledged by the State as its own).

⁹⁰ *Ibid* art 17.

⁹¹ *Ibid* art 18.

⁹² *Ibid* art 16.

⁹³ *Ibid* art 57. ('These articles are without prejudice to any question of the responsibility under international law of an international organisation, or of any State for the conduct of an international of an international organisation.')

⁹⁴ *Ibid* at para 2 of commentary to art 57.

number of States act together through their own organs'.⁹⁵ It is in the latter case that the States themselves can be held responsible:

[W]here, a number of States act together through their own organs as distinct from those of an international organisation, the conduct in question is that of the States [...].⁹⁶

In 2011, the ILC adopted the Articles on the Responsibility of International Organisations, in which the possibility of a State's responsibility for the acts of an international organisation were considered. The general point of departure in those articles, as is the case in the Articles on State Responsibility, is that the State is responsible for its own conduct and not for the conduct of an international organisation of which it is a member. For example, a State may be responsible for aid or assistance given by it to an international organisation in the Commission of an internationally wrongful act by the organisation.⁹⁷ The State would, in such a case, not be responsible for the unlawful conduct of the international organisation but for its own conduct in assisting the international organisation in breaching a rule of international law.⁹⁸ What is clear, however, is that the act of participating in the decision-making processes of an international organisation does not render the State in question responsible for the act of the international organisation.⁹⁹ At any rate, and in keeping with the view that the State in question would be responsible for its own conduct, an assertion that a State is responsible for a position it has adopted within an international organisation would have to be justified, not on the basis of aid or assistance to an international organisation, but on the basis of the Articles on State Responsibility.¹⁰⁰

Even if the decisions of SADC were unlawful under international law, and there is little basis for that conclusion, it would be incorrect to conclude that the South African government was itself in breach of international law since the acts in question are not attributable to it. The conclusion that can be reached from this analysis is that, first, the decisions of SADC do not constitute an internationally wrongful act and, second, even if they did, they are not attributable to South Africa. As such it is incorrect to determine, as the Constitutional Court, did that the President breached international law by participating in the SADC decisions.

D Normative and other considerations

It seems clear that the Constitutional Court in delivering its judgment was motivated by normative concerns regarding the decision of SADC and the government's failure to distance itself from it. Early on in the judgment, the Court stated that the 'President, together with leaders of other SADC nations, decided to eviscerate the possibility' of being held accountable for 'perceived human rights violations, non-adherence to the rule of law or

⁹⁵ Ibid.

⁹⁶ Ibid.

⁹⁷ For example art 58 of the Articles on the Responsibility of International Organisations (note 87 above)

⁹⁸ This much is made clear in the example given by the Commission to illustrate responsibility for aid or assistance: a State is responsible if it transfers nuclear weapons to an organisation prohibited from acquiring such weapons. See para 2 of commentary to art 58.

⁹⁹ Commentary on art 58 *ibid* at para 4 ('an act by a member State which is done in accordance with the rules of the organisation does not as such engage the international responsibility of that State for aid or assistance').

¹⁰⁰ *Ibid* at para 5 of the commentary to art 58 ('Should a breach of an obligation be committed by a State in [its capacity as a member of an international organisation], the State would not incur international responsibility under the present article, but rather under the Articles on Responsibility of States for Internationally Wrongful acts.').

undemocratic practices.¹⁰¹ More stingingly, the Court stated that South Africa was therefore ‘party to denying citizens of South Africa and other SADC countries access to justice at a regional level’.¹⁰² These normative concerns are valid and irreproachable. It is difficult to defend, normatively, the decision of SADC to disband the SADC Tribunal and replace it with a tribunal not having the competence to hear individual petitions. The decision is all the more indefensible (normatively), because, it appears, the underlying reason was to protect Zimbabwe from accountability for the human rights violations accompanying its land reform process.

The normative indefensibility of the SADC’s decisions does not, however, translate to their unlawfulness under international law. These decisions have been questioned in both political and legal literature.¹⁰³ Naldi and Magliveras pull no punches in decrying the decision:

The story of the SADC Tribunal is a shameful one. A feasible case can be made that in *Mike Campbell* the Tribunal engaged in inappropriate law making due to the rather limited references in SADC instruments pertaining to its human rights mandate. [...] Irrespective of the validity of that argument, the fact remains that the Summit’s response was an overreaction which brought SADC no credit but merely called its integrity into question. The suspension of the Tribunal reveals an utter lack of understanding, or total cynicism and opportunism, among SADC leaders of the basic precepts of liberal democracy and good governance, the rule of law, the independence of the judiciary, and respect for human rights.¹⁰⁴

Yet, as strongly worded as the critique of the decisions by Naldi and Magliveras are, they do not suggest that the decisions were unlawful under international law for there is simply no basis for such a conclusion. Even Meckler, who seems positively disposed to the idea that the SADC decisions were unlawful, ultimately bases his criticism of SADC decisions on normative and political consideration and not on legal grounds.¹⁰⁵ In the section titled ‘The Illegality of the Suspension and What the Future Holds’, the article refers to charges of illegality made elsewhere, but does not, itself, make an assessment of the legality nor come to any firm conclusions about the legality of the decisions, stating only that ‘many *would argue* “the legality of the purported suspension *can be challenged*.”’¹⁰⁶ This could hardly be a basis for defending the Court’s methodological approach to international law. Moreover, even the main article invoked by Meckler to support the contention of illegality does not seem

¹⁰¹ *SADC Tribunal* (note 5 above) at para 14.

¹⁰² *Ibid* at para 15.

¹⁰³ For example, MJ Nkhata ‘The Short Happy Life of the SADC Tribunal: The Perils of Regional Integration in Southern Africa’ (2018) 11 *African Journal of Legal Studies* 1.

¹⁰⁴ GJ Naldi & KD Magliveras ‘The New SADC Tribunal: Or the Emasculation of an International Tribunal’ (2016) 63 *Netherlands International Law Review* 133, at 156. See also Nkhata (not 103 above) 31 (‘Clearly, the decisions in pursuit of the dismantling of the Tribunal, and its actual dismantling, were all ‘political’ decisions borne out of a contrived political exigency within the region. There was no legal imperative justifying the dismantling of the Tribunal [...] The result is that there is little room for a vibrant regional body to impartially and rigorously enforce common standards in such areas as human rights and democratic governance.’)

¹⁰⁵ S Meckler ‘A Human Rights ‘Monster’ that Devoured No One: The Far-Reaching Impact of Dismantling the SADC Tribunal’ (2016) 48 *New York University Journal of International Law and Policy* 1007, especially 1038 (‘With the progress southern Africa has made in human rights over the past several decades, the dismantling of the SADC Tribunal that once had a human rights and individual access to the court is a serious step in the wrong direction.’)

¹⁰⁶ *Ibid* at 1029 (emphasis added).

to support the conclusion of unlawfulness under international law.¹⁰⁷ Although scathing in its criticism of the decision,¹⁰⁸ the main argument advanced by Jonas is that the closure of the Tribunal has ‘blighted [SADC’s] good track record as an agent for democratisation and institution for human rights.’¹⁰⁹ Notwithstanding that it has been quoted as a basis for questioning the legality of the Summit decisions, nowhere in the 38 page article does Jonas make any conclusions about the lawfulness or not of the decision and certainly the article does not undertake any legal analysis of the SADC instruments to determine consistency of the decisions with those instruments.

A second normative point is that the judgment of the Court is, in some ways, counter-intuitive and it, seems retributive. It is unclear what purpose, from a normative perspective, is served by requiring the President to withdraw his signature from the 2014 Protocol. This all or nothing approach — or cutting off your nose to spite your face — does not seem consistent with the desire to promote justice and the rule of law. The Court seems to be saying, *you can either have justice the way we demand it or none at all!* Surely some justice is better than none at all? Undermining the entry into force of the new Protocol is not, as a legal or political matter, going to bring back the old Tribunal with individual access. Why should neighbouring States in the SADC region lose a judicial forum to hold South Africa to account for, for example, its failure (assuming there is culpability) to prevent xenophobic attacks against their nationals? Why should the South African government, in the event that there are unlawful reprisals directed at South African nationals or South African owned enterprises by SADC States for the xenophobic attacks, not have a regional court to have its cause ventilated? Is it appropriate, normatively, for the Court to decide that if individuals cannot have *this* forum, then States will also not be entitled to have a forum? After all, the SADC treaty system is principally a regional integration project. Is the Court really making the policy determination that the principal aim should not be underpinned by a dispute settlement mechanism consistent with the principles of the UN,¹¹⁰ if it is not expanded to (another) human rights mechanism? Can SADC members not decide, as a policy matter, that having (and strengthening) the African Court is a better option than having (yet another) human rights court in the sub-region?

This latter point leads me to address a more sensitive aspect, which I am sure will not earn me brownie points. As a normative proposition, we should not forget that the SADC Treaty system is principally about enhancing regional integration. It is not a human rights system. The *Campbell* decision pushed the envelope, as courts tend to do, and attempted to turn it into one,

¹⁰⁷ O Jonas ‘Neutering the SADC Tribunal by Blocking Individual’s Access to the Tribunal’ (2013) 2 *International Human Rights Law Review* 294.

¹⁰⁸ *Ibid* especially at 321 (‘Such palpably grotesque deviation from paths of accountability and virtue by the SADC leaders implicitly means that the principles of democracy, human rights and the rule of law in the region are not sacrosanct ethos for the “protection of the citizens, but merely irritating obstacles to the people who govern them.”’)

¹⁰⁹ *Ibid* at 395.

¹¹⁰ Article 2(3) of the UN Charter.

this much is accepted even by detractors of the SADC Summit decisions.¹¹¹ Indeed, even the Constitutional Court, while eager to have the SADC Tribunal hold the executive accountable for human rights violations, is quick to point out that it itself should be exempt from the Tribunal's reach.¹¹² States, having determined that the treaty that they agreed to was being interpreted in a manner not intended by the body established to interpret it (SADC Tribunal), are entitled, as a matter of law and policy, whether through interpretative declaration, subsequent agreements, amendments or termination, to seek the result initially intended. Tribunals with the mandate to interpret treaties may have the final say in interpretation, but the makers of the treaties — the States — have other means at their disposal to ensure their voices are not lost. Progressive development of law takes place when there is a delicately balanced dance between States and the tribunals established by them. The establishment of tribunals does not mean that States lose all control over international law-making.

IV CONCLUDING REMARKS

The argument advanced in this article is unambiguous and makes no attempt at nuance: the determination by the Constitutional Court in the *SADC Tribunal* judgment that the decisions of the SADC Summit constituted a breach of international law is wrong! There may well be, under constitutional law, a basis for finding the decision unlawful, but to the extent that any determination is dependent on international wrongfulness, such a determination cannot be justified, neither by the reasoning of the Court nor the methodology of international law. What is most troubling about the judgment, however, is not the conclusion that South Africa's participation in the decisions was unlawful. What is most troubling about the judgment is the fact that there is no attempt — none whatsoever — to apply the methodology of international law in coming to the conclusions about the wrongfulness of the SADC decisions under international law and the wrongfulness of South Africa's participation in those decisions. Ostensibly, the decision is based on the breach of a treaty text. Yet, there is not a single reference to the rules of treaty interpretation. At issue is the adoption of a treaty that conflicts with an earlier treaty, yet the rules of international law concerning the possible modification or even termination of treaties by later treaties is never alluded to, let alone analysed. This critique

¹¹¹ Naldi & Magliveras (note 104 above) at 140 ('The Tribunal [in its first ever judgment] was thereby proclaiming its activist credentials, making it evident that it was prepared to read non-enumerated rights into the SADC Treaty and to hold Member States to account. It is open to debate whether the Tribunal may have exceeded its mandate due to the non-elaborate provisions on the protection of human rights in the SADC instruments.'). See also F Cowell 'The Death of the Southern African Development Community Tribunal's Human Rights Jurisdiction' (2013) 13 *Human Rights Law Review* 155, 164 who, having criticised severely the SADC decisions, states, '[y]et in relation to the Tribunal there is a need to contextualise what happened, as the operations of the Tribunal were hamstrung by its structural weakness and *intensely fragile human rights mandate*' noting further that this weakness could 'convince states that the Tribunal was overstepping its role even though the Tribunal had affirmed its human rights competence'. Cowell adds that the dispute between the members of SADC and the Tribunal could 'at a political level' — and I would add legal level — only ever be won by the States because 'they alone could plausibly account for their intentions'. He concludes this line of thought by making the following observation about the Tribunal's approach in the *Campbell* decision: 'Given this, it is probably best to construct a somewhat narrower interpretation of the references to human rights.' See also MJ Nkhata 'The Role of Regional Economic Communities in Protecting and Promoting Human Rights in Africa: Reflections on the Human Rights Mandate of the Tribunal of the Southern African Development Community' (2012) 20 *African Journal of International and Comparative Law* 87.

¹¹² *SADC Tribunal* (note 5 above) at paras 59–60.

of the judgment should not be interpreted as a defence of the SADC decisions. It is merely a call for faithfulness to the methodology of international law.

