

ENFORCING JUDGMENTS IN INTERNATIONAL LAW:

An analysis of the Southern African Development Community (“SADC”) Tribunal’s decision in the case, *Mike Campbell, Ltd., & Others v. The Republic of Zimbabwe and Robert Gabriel Mugabe, N.O.*, in his capacity as President of Zimbabwe

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I. QUOTE REGARDING THE NECESSITY OF GREATER DEFERENCE TO THE DECISIONS AND ENFORCEMENT OF TRIBUNALS IN INTERNATIONAL LAW

Systematic Disarmament [of a nation] within a short period is only possible with the guarantee of all nations for the security of the individual one, based on a permanent court...independent of governments.... [Plus an] unconditional obligation of all countries not merely to accept the decisions of the court...but also to carry them out....¹

II. BASIS OF DISCUSSION FOR THE CASE OF *CAMPBELL v. ZIMBABWE*

Civilized countries generally base their claims to civility upon the idea that they believe in and adhere to the rule of law. Most civilized countries claim sovereignty from other countries; therefore, the rule of law to which their citizens and business entities follow comes from within. Each has a judicial system in place that assures laws are properly interpreted *and* enforced. In the grander scheme of things, it is also believed that these same countries which govern themselves by law can also create laws which govern

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¹ MATH NOORTMAN, *ENFORCING INTERNATIONAL LAW*, 82 (Ashgate Publishing Company) (2005) (Quote by Albert Einstein depicting the need for international tribunals that have the ability to create binding and forceful judgments using international law, emphasis added).

actions between and among civilized nations. Based upon these ideals, some of these civilized countries have created international treaties—laws which guide or bind their interactions with each other. The modern trend has even been to create international governments and tribunals with authority to oversee and adjudicate issues arising from these international laws. However, the question arises as to how effectively an international tribunal can enforce an adversely perceived decision upon one of these sovereign civilized nations.

This article chronicles the judgments of one such international tribunal, the Southern African Development Community (“SADC”) Tribunal. The SADC Tribunal was created for the purpose of adjudicating cases properly brought before it on matters which pertain to the governing treaty. Zimbabwe is an original signer of the SADC Treaty. In this case, *Campbell v. Zimbabwe*, historical racial tensions have led a predominantly black government to systematically remove white farmers from lands legally purchased in Zimbabwe. It is interesting to note that this article could just as easily have been about an international tribunal deciding a case on the systematic removal of black farmers from their land in Zimbabwe had such a tribunal existed in southern Africa 110 years earlier—the time when the white English imperialist and diamond mogul, Cecil Rhodes, authored the Glen Gray Act, which systematically removed black farmers from their agricultural, hunting, and tribal lands in the same region.² Crimes against humanity, especially those that are racially charged, are odious

² Cecil Rhodes, http://en.wikipedia.org/wiki/Cecil_Rhodes (last visited Oct. 20, 2011, Section entitled, “Politics in South Africa”).

independent of which ethnicity is committing crimes against the other, but the instant case was chosen due to its unique procedural posture as a case adjudicated in international court formed by treaty, and not because of the underlying human rights decision.

Tragically, the international court in *Campbell v. Zimbabwe* has proven to be ineffective at enforcing its judgment against Zimbabwe; therefore, I posit that this international tribunal and others similarly situated should be given more power over willing member-states so that their decisions will actually be enforceable with consequences. A permanent tribunal should have binding authority, but international tribunals, such as the SADC Tribunal lack enforceable power over sovereign nations.

III. BACKGROUND LEADING UP TO THE LITIGATION OF *CAMPBELL v. ZIMBABWE* BEFORE AN INTERNATIONAL TRIBUNAL

A. THE STRUGGLE FOR INDEPENDENCE AND LAND REFORM

In December of 1979, Zimbabwe ended a long and bloody struggle against a white minority government and simultaneously achieved official independence from the United Kingdom with the signing (and subsequent U.K. parliamentary approval) of what is commonly referred to as the Lancaster House Agreement, but is more formally known as the Constitutional Conference held at Lancaster House, London September-December

1979.³ According to the official Lancaster House Report, “The purpose of the Conference was to discuss and reach agreement on the terms of an Independence Constitution, and that elections should be supervised under British authority to enable Rhodesia [Zimbabwe’s former name] to proceed to legal independence and the parties to settle their differences by political means.”⁴

Zimbabwe’s emerging leader, Robert Mugabe, made stern comments at Lancaster House regarding the desired autonomy, he said, “We have always said that we will leave no stone unturned in our struggle for the total liquidation of colonialism in Zimbabwe,” and “Zimbabwe must be a sovereign republic in which the sovereign nation pursues its own destiny, totally unshackled by any fetters or constraints,” and “We are irrevocably committed to the position that the Zimbabwean people, by whose blood and sacrifice colonialism was exorcised from the land, must themselves be the perpetual guarantors of sovereignty in the face of all challenges, domestic or foreign.”⁵ Despite this hard stance, Mr. Mugabe made a binding concession in the new Constitution that created a willing buyer-willing seller program in the place of land reform and that could not be changed for at least ten years.⁶ This concession was important, as it ensured the political and economic stability of the country for at least ten years.⁷ The willing buyer-willing seller program which was included in the Declaration of Rights section of the new constitution

³ Constitutional Conference Held at Lancaster House, London September – December 1979, U.K.-Zimb., Dec. 21, 1979, [hereinafter, Lancaster] www.zwnews.com/Lancasterhouse.doc, available at http://en.wikipedia.org/wiki/Lancaster_House_Agreement.

⁴ *Id.*

⁵ *Id.*

⁶ Robert Mugabe, http://en.wikipedia.org/wiki/Robert_Mugabe (Last visited Oct. 20, 2011, Section entitled, “Lancaster House Agreement”).

⁷ MARTIN MEREDITH, THE FATE OF AFRICA: FROM THE HOPES OF FREEDOM TO THE HEART OF DESPAIR : A HISTORY OF FIFTY YEARS OF INDEPENDENCE, 619 (PublicAffairs)(2005).

gave current landowners the right to maintain land and receive just compensation if eminent domain were necessary.⁸ Despite the assurances of stability to the nation, the concession made by Mr. Mugabe was a difficult one that almost led to the failure of the Lancaster House Agreement and subsequent independence of Zimbabwe.⁹

Land reform remained a sore subject for Mugabe after independence, especially in the economic sense because Zimbabwe's strongest GDP producer was the mostly white-owned agricultural industry.¹⁰

When Zimbabwe gained independence, 46.5% of the country's arable land was owned by around 6,000 commercial farmers and white farmers, who made up less than 1% of the population, [and who] owned 70% of the best farming land.¹¹

Unsuccessful market reform attempts based on land reform were started in the 1990s and the economy stagnated.¹² One reform attempt made by the Zimbabwean government was called the 1992 Land Acquisition Act which eliminated parts of the willing buyer-willing seller program from the Zimbabwe Constitution and implemented a wider form of eminent domain with just compensation as a way of speeding up land reform.¹³ In 1997, the Zimbabwean government published a list of "1,471 farmlands it intended to buy compulsorily for redistribution."¹⁴ In 1998, the Zimbabwe government published a plan

⁸ Lancaster, *supra* note 3.

⁹ Lancaster House Agreement, http://en.wikipedia.org/wiki/Lancaster_House_Agreement (last visited Oct. 20, 2011).

¹⁰ Mugabe, *supra* note 6, at section entitled, "Land Reform".

¹¹ *Id.*

¹² *Id.* at section entitled "Economy".

¹³ Land Reform in Zimbabwe, http://en.wikipedia.org/wiki/Land_reform_in_Zimbabwe (last visited Oct. 20, 2011, section entitled, "1990s").

¹⁴ *Id.*

for the “compulsory purchase over five years of 50,000 square kilometres from the 112,000 square kilometres owned by white commercial farmers...”.¹⁵

On the 6th of April, 2000, Zimbabwe’s Parliament passed a constitutional amendment “allowing the seizure of white-owned farmlands without due reimbursement or payment.”¹⁶ Soon after the 2000 amendment was passed, the government began the forceful, systematic, bloody, and often deadly removal of white farmers from their commercial lands.¹⁷ The forced removal of white landowners was triggered as a result of the little change brought about by the constitutionally mandated willing buyer-willing seller program in the constitution. This left many of the people of Zimbabwe who had suffered through war to achieve political freedom, hungry for faster economic and land reform change, which they felt was stagnated by the constitutions protections to the pre-independence economic status quo. The compulsory land reform led white farmers to bring civil actions in Zimbabwe seeking protection; however, nothing came out of the litigation to offer help to the white farmers losing their land.¹⁸

Since 2000, GDP has declined by roughly 40% due, in part, to the more aggressive land reform taken from white commercial farmers which brought production on those farms to a halt.¹⁹ In most cases, the owners of the lands taken by commercial farmers did not know how to use the equipment, and therefore, rather than farm, they sold

¹⁵ *Id.*

¹⁶ Mugabe, *supra* note 6, at section entitled, “Land Reform”.

¹⁷ MUGABE AND THE WHITE AFRICAN, directed by ANDREW THOMPSON and LUCY BAILEY [hereinafter WHITE AFRICAN] (Arturi Films 2009). See also, <http://news.bbc.co.uk/2/hi/africa/692638.stm>.

¹⁸ Land Reform, *supra* note 13.

¹⁹ Mugabe, *supra* note 6, at section entitled, “Economy”.

the equipment for parts.²⁰ Without staple crops being farmed, thousands of blacks lost their farming jobs on white-owned farms, and the country's exports declined.²¹

Another constitutional amendment in 2005 only served to strengthen Zimbabwe's position on land reform by removing all chances of compensation and denying all access to the courts.²² "The amendments [of 2000 and 2005], among other things, nationalized Zimbabwe's farmland and deprived landowners of the right to challenge in courts the government's decision to expropriate their land."²³ In 2005, the IMF issued a report making the following statements regarding Zimbabwe's economic situation at the time that the majority of land reform via hostile takeover was happening:

*Zimbabwe's economic and social conditions have deteriorated sharply this year... While inflation slowed from a peak of 623 percent in early 2004 to around 130 percent in early 2005, it has picked up again to 164 percent in June... absent decisive policy action, the outlook appears bleak. Staff projects a further decline in real GDP of 7 percent in 2005, mainly due to difficulties in agriculture.*²⁴

Zimbabwe has experienced hyperinflation for a decade that reached a climax in 2008 at 500 billion percent.²⁵ It is among this continuing land reform and economic turmoil that the dispute *Campbell v. Zimbabwe* arises.

²⁰ WHITE AFRICAN, *supra* note 17.

²¹ *Id.*

²² *Zimbabwe's President Signs Controversial Constitutional Amendments into Law*, VOICE OF AMERICA NEWS, September 12, 2005, available at <http://www.voanews.com/english/news/a-13-2005-09-12-voa36-66395147.html?CFOKEN=35884117&CFID=18138884>.

²³ *Id.*

²⁴ STAFF TEAM OF THE INT'L MONETARY FUND, ZIMBABWE: 2005 ARTICLE IV CONSULTATION—STAFF REPORT; PUBLIC INFORMATION NOTICE ON THE EXECUTIVE BOARD DISCUSSION; AND STATEMENT BY THE AUTHORITIES OF ZIMBABWE 4 (International Monetary Fund 2005), available at <http://www.imf.org/external/pubs/ft/scr/2005/cr05360.pdf>.

B. THE SIMULTANEOUS DEVELOPMENT OF INTERNATIONAL RELATIONS WITH OTHER SOVEREIGN SOUTHERN AFRICAN NATIONS

During the same period that Zimbabwe was going through the pains of establishing itself as an independent country and implementing internal changes, it was also reaching out to its sovereign neighbors by developing new international relations. The most important development after Zimbabwe gained international recognition in 1980 as a sovereign nation took place on August 17, 1992, when Zimbabwe became one of the original signers to a treaty creating the Southern African Development Community (“SADC” or “SADC Treaty”).²⁶

Prior to the signing of the SADC Treaty, other southern African countries that had already gained independence from foreign powers or minority ruled governments had begun forming a political partnership as early as April 1, 1980, designed to help other southern African nations gain independence.²⁷ With the signing of the SADC Treaty, the purpose of these Southern countries shifted from helping each other establish independence to making economic improvements in the region.²⁸ SADC, the newly formed entity, painted a picture of globalization for its member-states with a mission to “promote sustainable and equitable economic growth and socio-economic development through efficient productive systems, deeper co-operation and integration, good

²⁵ NELSON BANYA, *Zimbabwe Economy Bouyant, more reform needed:IMF*, REUTERS, November 8, 2010, (citing to the IMF, yes, that’s billion with a “b”) available at <http://af.reuters.com/article/topNews/idAFJJOE6A70C320101108?pageNumber=1&virtualBrandChannel=0>.

²⁶ Southern African Development Community Treaty and Declaration, Aug. 17, 1992, <http://www.sadc.int/key-documents/declaration-and-treaty-of-sadc/> [hereinafter Treaty] (last visted Oct. 20, 2011).

²⁷ Southern African Development Community, <http://www.sadc.int/> (last visited Oct. 20, 2011).

²⁸ *Id.*

governance, and durable peace and security, so that the region emerges as a competitive and effective player in international relations and the world economy.”²⁹

The SADC Treaty developed a quasi-federal government in the international realm, complete with the implementation of eight government institutions, namely, “(1) the Summit of Heads of State & Government, (2) *SADC Tribunal*, (3) Council of Ministers, (4) Organ on Politics, Defence & Security Cooperation, (5) Sectoral/Cluster Ministerial Committees, (6) SADC Secretariat, (7) Standing Committee of Senior Officials, and (8) SADC National Committees.”³⁰ Key among these institutions was the inclusion of the SADC Tribunal, which is comprised of five standing member judges appointed by the Heads of Government of the SADC Treaty’s member-states.³¹ A SADC Tribunal publication states that “SADC makes its own laws through protocols which are similar to Acts of Parliament in the domestic law sense” and this protocol is an integral part of the SADC Treaty without reservations.³² Further, all member states are to be automatically bound to SADC protocols by the SADC Treaty. And last but not least, the SADC Tribunal is to be considered an international court “just like the European Court of Justice or the East African Court of Justice,” permanent in nature and able to make binding decisions.³³

Zimbabwe became bound by the treaty and its institutions after President Mugabe first signed it in August of 1992, and then Zimbabwe’s Parliament ratified it November,

²⁹ *Id.*

³⁰ *Id.* (Emphasis added).

³¹ S. AFR. DEV. CMTY. TRIBUNAL, THE SADC TRIBUNAL IN 20 QUESTIONS: A GUIDE TO SADCT, 2, http://www.sadc-tribunal.org/docs/A_Guide_to_SADC_T.pdf (last visited Oct. 20, 2011).

³² *Id.*

³³ *Id.*

1992, with enough signer-states ratifying it for it to take full effect on September 30, 1993.³⁴ The binding authority of a sovereign government's signing and ratification of a treaty will be developed in a later section of this article.

C. SUMMARY OF THE BACKGROUND LEADING UP TO LITIGATION BEFORE AN INTERNATIONAL TRIBUNAL

On one hand, Zimbabwe had just emerged as a sovereign nation with the goals and desires of “pursu[ing] its own destiny, totally unshackled by any fetters or constraints,” as President Mugabe so eloquently put it.³⁵ On the other hand, Zimbabwe would like to build strong relations in a region in which other new-born sovereigns are pursuing similar goals. The problem is, in Zimbabwe's haste to build international relations, it compromised some of its sovereign power when it signed the SADC Treaty giving power to an international body to bring certain types of lawsuits against it.³⁶

Campbell v. Zimbabwe makes a great study of the difficulties in enforcing international law because it represents a nation that wants to hold onto its sovereignty while simultaneously opening itself up to litigation by an international body. No nation can claim one-hundred percent unilateral sovereignty while simultaneously making the actions of its heads of state or military open to litigation by an international tribunal. This

³⁴ AllAfrica.com, Southern Africa: 'Chinamasa Wrong on SADC Tribunal Pull Out', <http://allafrica.com/stories/200910191651.html> (last visited Oct. 20, 2011).

³⁵ Lancaster, *supra* note 3.

³⁶ Southern African Development Community Tribunal, <http://www.sadc-tribunal.org/> (last visited, Oct. 20, 2011).

is why the United States, for example, refuses to allow its military to be subject to international tribunals for war crimes or anything else.³⁷

IV. THE CASE OF *CAMPBELL v. ZIMBABWE* IN THE SADC TRIBUNAL AND APPLICABLE INTERNATIONAL LAW

On the 11th of October, 2007, Mike Campbell, Ltd., and William Michael Campbell (the person), followed by seventy-seven other entities and individuals, filed an application with the SADC Tribunal challenging the acquisition for redistribution of agricultural land in the District of Chegutu by the Republic of Zimbabwe.³⁸

A. THE FOUNDATIONS OF INTERNATIONAL LAW REQUISITE FOR BRINGING THE *CAMPBELL v. ZIMBABWE* CASE BEFORE AN INTERNATIONAL TRIBUNAL

In the case of *Campbell v. Zimbabwe*, the first question raised by counsel for Zimbabwe was whether the SADC Tribunal had the jurisdictional authority to hear the matter.³⁹ Some of the answers to this question are rooted in the origins of International Law.

³⁷ ANDREAS L. PAULUS, *From Neglect to Defiance? The United States and International Adjudication*, 15 EJIL 783 (2004), available at <http://www.ejil.org/pdfs/15/4/379.pdf>. Cf. DANIEL SCHWAMMENTHAL, *Prosecuting American 'War Crimes*, THE WALL STREET JOURNAL, November 26, 2009, <http://online.wsj.com/article/SB10001424052748704013004574519253095440312.html>.

³⁸ *Mike Campbell, Ltd., & Others v. The Republic of Zimb.*, SADC (T) No. 02/2007 1, (available at <http://www.sadc-tribunal.org/docs/case022007.pdf>).

³⁹ *Id.*

i. *The Beginning of International Law and Its Importance to the Question of Jurisdiction in the Case of Campbell v. Zimbabwe*

The classical definition of international has been “the body of rules and principles of action which are binding [but not usually enforceable, as the case may still be, and therefore something akin to a gentleman’s agreement] upon civilized nations.”⁴⁰ The rules once differed between what applied to the nations themselves and what applied to their citizens; however, in today’s world, that distinction is going away.⁴¹ Further, today’s international law governs more than just the relations between nations themselves “but also relations between [1] international organizations and states, [2] among the international organizations themselves, [3] as well as the relationship between states or international organizations and natural or juridical persons.”⁴²

International law began in Europe between A.D. 1100 and 1400, and was based upon interactions between romans and foreigners as well as civil law and religious law.⁴³ In both cases, the idea was that something called “natural law” existed and that it was “somewhat universal and transcended the divine right of kings to act as they pleased.”⁴⁴ “The natural rights of states [and individuals] are basic principles of justice with a universal validity.”⁴⁵

⁴⁰ JAMES L. BRIERLY, *THE LAW OF NATIONS: AN INTRODUCTION TO THE INTERNATIONAL LAW OF PEACE* 1 (Humphrey Waldock ed., Clarendon Press 1963) (1928).

⁴¹ *LaGrand Case (Ger. v. U.S.)* 2001 I.C.J. 466 (June 27).

⁴² RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE U.S. § 102 (1987).

⁴³ S.K. VERMA, *AN INTRODUCTION TO PUBLIC INTERNATIONAL LAW* 10, 11, 37 (PHI Learning Pvt. Ltd., 2004) (1998).

⁴⁴ MALONE, *supra* note 40, at 2.

⁴⁵ *Id.*

Other theories of international law have developed as a result of time and globalization. Positivism is a theory of international law that bases itself on the consent, whether express or implied, of one nation to be bound by rules that govern its interaction with other nations.⁴⁶ Liberalism is a theory of international law that bases itself on the idea that all nations would arrive at the consensus that a rule should be universal and bind all states, regardless of consent, holding that states are actually interdependent.⁴⁷

Today's international law holds elements of all three theories, but leans heavily on Liberalism; for example, Human Rights is an area of international law that is a part of "the modern trend...toward recognition of other restraints on the power of a state's government...that all sovereigns must respect."⁴⁸

In 1980, the world took a historical step toward recognizing many already extant natural and public international laws by codifying them in a treaty signed at what is called the *Vienna Convention on the Law of Treaties*.⁴⁹ At the same convention a definition of what qualifies as a treaty was also created, stating: "[a treaty is] an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments..."⁵⁰

⁴⁶ VERMA, *supra* note 44, at 13, 41.

⁴⁷ NORMAN J. VIG, *THE GLOBAL ENVIRONMENT: INSTITUTIONS, LAW, AND POLICY*, 3-4 (REGINA S. AXELROD ED., EARTHSCAN 1999).

⁴⁸ NOORTMAN, *supra* note 1, at 123.

⁴⁹ Vienna Convention on the Law of Treaties, *opened for signature* May 23, 1969, 1155 U.N.T.S. 331, available at http://treaties.un.org/doc/Treaties/1980/01/19800127%2000-52%20AM/Ch_XXIII_01p.pdf.

⁵⁰ *Id.* at 333, art. 2, paragraph 1(a).

Because human rights have gained such universal acceptance as international law among sovereign nations, international courts created with the purpose of trying states and individuals for human rights crimes generally have the broadest amount of authority to declare jurisdiction in these matters.⁵¹

Campbell v. Mugabe is a matter of international law because it involves the rules that govern relations between civilized nations. It is further supported on the theories of Natural Rights, Positivism, and Liberalism because it involves not only express agreements, but human rights that make crimes against humanity illegal.⁵²

The SADC Tribunal, in response to Zimbabwe's counsel on the question of whether or not authority in international law existed upon which it could hear the case, stated:

In deciding this issue, the Tribunal first referred to Article 21 (b) which, in addition to enjoining the Tribunal to develop its own jurisprudence, also instructs the Tribunal to do so "having regard to applicable treaties, general principles and rules of public international law" which are sources of law for the Tribunal.

...[W]e do not consider that there should first be a Protocol on human rights in order to give effect to the principles set out in the Treaty, in the light of the express provision of Article 4 (c) of the Treaty which states as follows: "SADC and

⁵¹ MALCOLM NATHAN SHAW, INTERNATIONAL LAW, 574 (Cambridge University Press 2003).

⁵² *Id.* at 256.

Member States are required to act in accordance with the following principles - ...
(c) human rights, democracy and the rule of law.”⁵³

The SADC Tribunal stated, in effect, that because this case is being adjudicated on the premise of international law, and has elements of human rights, it has jurisdictional authority to hear the case; but just in case that wasn't enough, it also has express authority based upon the reference to human rights in the SADC Treaty.

ii. The International Treaty and Its Importance to the Question of Jurisdiction in the Case of Campbell v. Zimbabwe

Counsel for Zimbabwe also questioned the jurisdiction and authority given to the SADC Tribunal by the SADC Treaty.⁵⁴ In most cases, international laws, including those laws which exist naturally, become formally recognized by nations through treaties.⁵⁵ The answers to Zimbabwe counsel's questions on treaty jurisdiction have developed alongside international law.

International courts are usually created and governed by a treaty. Within the treaty, provisions are created which govern the types of cases that can be heard and the international court's jurisdiction of authority to hear cases.⁵⁶

⁵³ *Campbell*, SADC (T) No. 02/2007 at 21-22.

⁵⁴ *Id.*

⁵⁵ SHAW, *supra* note 51, at 871.

⁵⁶ Michael Fleshman, *Africa Ending Impunity for Rights Abuses*, 20 #4 AFRICA RENEWAL 7 (January 2007), available at <http://www.un.org/ecosocdev/geninfo/afrec/vol20no4/204-ending-impunity.html>.

a. *The international treaty is only binding once signed and ratified according to both the international and domestic law*

The treaty itself may only become binding upon the parties to it once those parties have either properly signed it via the heads of state, or via ratification by the legislative authority, or both.⁵⁷ The treaty itself may also designate the way in which a particular treaty becomes binding.⁵⁸

The SADC Treaty had provisions requiring the signer-states to take certain actions before it would become binding, e.g., ratification by “all Signatory States in line with their Constitutions, and [declaring that] it would come into force 30 days after 2/3rds of these lodged ratifications.”⁵⁹ Zimbabwe met all of the requirements for implementation of the treaty on the international side as well as on the home side; thus, the SADC Treaty became binding upon it.⁶⁰ As previously mentioned,” President Mugabe first signed the SADC Treaty in August of 1992, and then Zimbabwe’s Parliament ratified it in November of 1992, with enough signer-states ratifying by September 30, 1993, for it to take full binding force upon all signers.⁶¹

⁵⁷ ChangeZimbabwe.com, Zimbabwe Bound by SADC Tribunal Protocol, http://changezimbabwe.com/index.php?option=com_content&task=view&id=2355&Itemid=2 (last visited Oct. 20, 2011).

⁵⁸ *Id.*

⁵⁹ AllAfrica.com, Southern Africa: ‘Chinamasa Wrong on SADC Tribunal Pull Out’, <http://allafrica.com/stories/200910191651.html> (last visited Oct 20, 2011).

⁶⁰ ChangeZimbabwe.com, *supra* note 57.

⁶¹ AllAfrica.com, *supra* note 59.

b. The international treaty is meant to be enforceable despite domestic laws to the contrary

In cases involving sovereign parties, disputes arising out of the treaty will be subject to the application of the international body of law, not the body of domestic laws of either sovereign party to the treaty—unless express agreement *in the treaty* makes one party’s domestic body of law govern dispute resolution.⁶²

The SADC Tribunal cited Professor Malcolm Shaw’s treatise entitled *International Law*, as follows, to further the idea that international law is more binding upon a nation than its own domestic legislation:

*It is no defence to a breach of an international obligation to argue that the state acted in such a manner because it was following the dictates of its own municipal laws. The reason for this inability to put forward internal rules as an excuse to evade international obligation are [sic] obvious. Any other situation would permit international law to be evaded by the simple method of domestic legislation.*⁶³

The SADC Tribunal backed up Professor Shaw’s logical statement by further citing the *Vienna Convention on the Law of Treaties*, Article 27, which states that “A party may not invoke provisions of its own internal law as justification for failure to carry out an international agreement.”⁶⁴

⁶² SHAW, *supra* note 51, at 124.

⁶³ *Campbell*, SADC (T) No. 02/2007 at 25.

⁶⁴ *Id.* (Cf. Vienna Convention on the Law of Treaties, opened for signature May 23, 1969, 1155 U.N.T.S. 331, 345 available at http://treaties.un.org/doc/Treaties/1980/01/19800127%2000-52%20AM/Ch_XXIII_01p.pdf).

c. *The SADC Treaty had provisions written with sufficient clarity prior to signing to put Zimbabwe on notice that it would fall within the jurisdiction of the SADC Tribunal for this type of legislation*

The SADC Treaty provides in its preamble that the fourteen regional countries, including Zimbabwe, involved in its original signing did so: (1) “DETERMINED to ensure, through common action, the progress and *well-being* of the people of Southern Africa,” (2) “CONSCIOUS of our duty to promote the interdependence and integration of our national economies for the harmonious, balanced and equitable development of the Region,” (3) further “DETERMINED to meet the challenges of globalization,” (4) “MINDFUL of the need to involve the people of the Region centrally in the process of development and integration, particularly through the guarantee of democratic rights, observance of *human rights and the rule of law*,” (5) “RECOGNIZING that, in an increasingly interdependent world, mutual understanding, good neighbourliness, and meaningful co-operation among the countries of the Region are *indispensable* to the realisation of these ideals,” and (6) “BEARING IN MIND the principles of international law governing relations between States.”⁶⁵

Article 9 of the SADC Treaty establishes a SADC Tribunal and Article 16 gives the Tribunal the authority to adjudicate disputes as may be properly referred to it (i.e. according to official Protocol), and that “the decisions of the Tribunal shall be *final and binding*.”⁶⁶ These items of jurisdiction are duly noted by the court in its main decision of

⁶⁵ Treaty, *supra* note 26. (Emphasis added).

⁶⁶ *Id.* (Emphasis added).

November 28, 2008. The court states that “the scope of the jurisdiction, as stated in Article 15 (1) of the Protocol, is to adjudicate upon ‘disputes between States, and between natural and legal persons and States’.”⁶⁷

Zimbabwe was well aware of the goals outlined in the SADC Treaty as well as the purposes of the permanent Tribunal created in the treaty. It may be disputed by Zimbabwe that it did not know what Protocols would be established thereafter upon which cases would be adjudicated, but that does not matter because it knew from the treaty itself that it would be bound by future protocol since as a signer-state it would have a vote in what protocol would be adopted.⁶⁸ The judges of the SADC Tribunal also thought that it was clear to Zimbabwe that they were signers to an international treaty where questions of discrimination and human rights would *not* be tolerated, it said “that the Respondent has undertaken under the treaty to prohibit discrimination.”⁶⁹ The SADC Tribunal further stated in its decision that “discrimination of whatever nature is outlawed or prohibited in international law.” To support this declaration, the SADC Tribunal cited the United Nations Charter, Article 1 (3) which protects fundamental freedoms in international law for all without distinction as to *race*.⁷⁰ The SADC Tribunal further cited other sources of international law, but finished by citing a provision of the SADC Treaty itself, saying,

⁶⁷ *Campbell*, SADC (T) No. 02/2007 at 18.

⁶⁸ AllAfrica.com, *supra* note 59.

⁶⁹ *Campbell*, SADC (T) No. 02/2007 at 45.

⁷⁰ *Id.* (Emphasis added).

*SADC and Member States shall not discriminate against any person on grounds of gender, religion, political views, **race**, ethnic origin, culture, ill health, disability or such other ground as may be determined by the Summit.*⁷¹

The only matter to be resolved is whether or not the SADC Tribunal's decision that Zimbabwe did violate the Campbells' and others' fundamental rights with its Fast Track constitutional land reform is enforceable enough to invalidate the amendment made to its constitutional, or at the very least, provide protection to those affected.

V. THE ENFORCEABILITY OF THE SADC TRIBUNAL'S DECISION IN THE CASE OF *CAMPBELL v. ZIMBABWE*

SADC Tribunal held with regards to the case of *Campbell v. Mugabe* as follows:

- (a) *by unanimity, the Tribunal has jurisdiction to entertain the application;*
- (b) *by unanimity, the Applicants have been denied access to the courts in Zimbabwe;*
- (c) *by a majority of four to one, the Applicants have been discriminated against on the ground of race, and*
- (d) *by unanimity, fair compensation is payable to the Applicants for their lands compulsorily acquired by the Respondent.*⁷²

The SADC Tribunal further held that (1) Zimbabwe breached the SADC Treaty, (2) Amendment 17 of the Zimbabwe constitution breached the SADC Treaty, (3)

⁷¹ *Id.* at 48.

⁷² *Id.* at 57.

Zimbabwe is to protect all the Applicants, and (4) that Zimbabwe is to pay due compensation to Applicants whose land has been taken by the State and cannot be returned to the Applicant from whom it was taken.⁷³

Campbell v. Mugabe is an example of how difficult it is to enforce judgments made by an international tribunal because it involves a sovereign nation, which by treaty, has availed itself of a consensual dispute resolution, received an adverse judgment, and to this day has neither complied, nor been forced to comply by the SADC entity itself or its signer-states. Some of the options available to SADC and its Tribunal up for debate, e.g. Self-help and Consensual Dispute Settlement (CDS), but could any of them prove to be effective for SADC in the case of *Campbell v. Zimbabwe*?

A. THE CURRENT OPTIONS FOR ENFORCEMENT OF AN INTERNATIONAL DECISION
MADE BY AN INTERNATIONAL TRIBUNAL AND THEIR QUESTIONABLE
EFFECTIVENESS

A part of the problem with the enforcement of international law stems from the two ways in which international laws are traditionally enforced. Those two ways are either (1) self-help—generally by means of military action or sanctions, and (2) consensual dispute settlement—generally by means of an agreement of self-restraint.⁷⁴

⁷³ *Id.*

⁷⁴ NOORTMAN, *supra* note 1, at 3.

i. The Concept of Self-help as a Means of Enforcing International Law

Self-help means all unilateral measures taken in response to an infringement upon a right or an interest of a signer-state and which are taken in reaction to a previous wrongful or undesirable act.⁷⁵

Self-help measures for enforcing international law include actions by sovereign states “aimed at protection, coercion, redress or punishment, or...mere symbolism.”⁷⁶ Based upon their objectives, self-help measures can be “(1) symbolic, (2) protective, (3) remedial, (4) manipulative, and (5) punitive.”⁷⁷

“Where an international act has not caused...any material harm...self-help cannot be employed for protective, remedial or manipulative purposes, since there is nothing to protect or remedy, or there is no necessity for behavioral change.”⁷⁸ Where an international act has caused material harm, “the wronged state may either take measures which in themselves provide an adequate remedy, such as seizing assets for compensation, or it may take coercive measures in order to force the wrongful state to remedy the wrong done.”⁷⁹ The basic requirements for taking self-help measures include (1) an infringement of rights or interests and (2) a communication or demand for redress.

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ *Id.* at 4.

⁷⁸ *Id.* at 18. (Emphasis added).

⁷⁹ *Id.* at 21.

Before a state resorts to self-help, it should follow agreed mechanisms for the settlement.⁸⁰

ii. *The Concept of Consensual Dispute Resolution (CDR) as of Means of Enforcing International Law*

Consensual dispute resolution means that all international parties “accept the consequences [of the decision by the international court] and [they] implement [settlement mechanisms] rather than resorting to self-help...”⁸¹ The UN Charter requires that “all Members *shall* settle their disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered.”⁸² A problem with Consensual Dispute Resolution agreements in international contracts is that they are too vague to really implement.⁸³ For example, what types of measures should be considered “peaceful” when an international court decides on a binding judgment? To help with this problem, “many bilateral as well as multilateral contemporary treaties provide for specific procedures for the settlement of disputes arising out of these treaties.”⁸⁴

It is presumed that when sovereign parties have made themselves subject to the procedures of a consensual dispute resolution, that “self-help” is suspended; however, in the event of “non-compliance the right to resort to measures of self-help is likely to

⁸⁰ *Id.* at 53.

⁸¹ *Id.* at 85.

⁸² *Id.* at 87.

⁸³ *Id.*

⁸⁴ *Id.* at 107.

revive in its initial latitude due to a lack of effective international enforcement mechanisms.”⁸⁵

B. THE DIFFICULT NATURE OF IMPLEMENTING INTERNATIONAL JUDGMENTS AGAINST SOVEREIGNTIES

It is rare that any sovereign entities will simply conform to the decision of an international court that renders an adverse decision. The reality is “the majority of disputes require the implementation of the [decision] in order to settle the matter finally.”⁸⁶

After a judgment is rendered against a sovereign nation, compliance might be “partially or fully refused for practical, legal, or policy reasons” even if there is a treaty or other binding obligation requiring it.⁸⁷ In the international law setting, it is presupposed that the tribunal has zero power to induce compliance with its decisions.⁸⁸ Therefore, where adjudication is involved, the governing body which created the tribunal is responsible for implementation.⁸⁹

“It has been well accepted in literature and jurisprudence that execution and enforcement are not among the functions of international courts and tribunals. After the

⁸⁵ *Id.* at 108.

⁸⁶ *Id.* at 121.

⁸⁷ *Id.*

⁸⁸ *Id.* at 123.

⁸⁹ *Id.* at 121.

Court has rendered its judgment, it becomes formally *functus officio*—meaning of no further legal effect.”⁹⁰

Currently, it is so difficult for international courts to implement their decisions that in anticipation of the implementation phase they often adjust their decisions to make them more likely to be complied with. “It has been suggested that the International Court of Justice, anticipating non-compliance, goes so far as to deny jurisdiction or refuses to grant an order for interim measures of protection.”⁹¹ The inability of international courts to induce compliance is quite evident from the actions of the courts which are leaning toward lessening sentences or avoiding adjudication in hopes that they won’t have to suffer the embarrassment of non-compliance.⁹²

Many international organizations have compliance provisions written into their constitutions, which provisions grant “notification procedures, monitoring procedures, or enforcement procedures.”⁹³ Only enforcement provisions grant international courts the authority to induce compliance with the judgment.”⁹⁴

Regarding dispute resolution, the SADC Treaty states in Article 32 that disputes arising under the treaty shall be referred to the Tribunal (which accomplishes nothing in the way of actual enforcement).⁹⁵ Article 33 states that “sanctions may be imposed against any member-state that: “(a) persistently fails, without good reason, to fulfill

⁹⁰ *Id.* at 123.

⁹¹ *Id.* at 123.

⁹² *Id.* at 124.

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ Treaty, *supra* note 26.

obligations assumed under this Treaty; [or] (b) implements policies which undermine the principles and objectives of SADC...”.⁹⁶ Article 33 appears to be more promising for SADC Tribunal decisions, because it at least allows the SADC to resort to a certain degree of self-help in getting member-states to comply with “obligations” assumed under the Treaty.

A SADC Tribunal decision should be an obligation because Article 16 of the SADC Treaty states that Tribunal decisions are “binding.” If Zimbabwe intended to become a member of SADC when it signed and ratified the Treaty, then decisions must also be considered obligations under the treaty that, in theory, a member state would implement against itself even when adverse. The problem is that no “self-respecting” sovereignty is likely to implement an adverse decision against itself; therefore, something like sanctions would be a more realistic approach to accomplish enforcement. In this case, the SADC entity itself under Article 33, should be able to implement sanctions on Zimbabwe for undermining the principles and objectives of SADC.”⁹⁷

Unless, an international entity such as SADC has some kind of militaristic or executive enforcement, it is not likely that a sovereign nation will ever adhere to an adverse decision. *Campbell v. Mugabe* is a perfect example of this in and of itself. When this case came before the SADC Tribunal, an order of injunction was also submitted to the Tribunal to protect Campbell from being kicked off his land. The SADC Tribunal granted the injunction as an interim decision, called a “Notice of Set Down,” prohibiting

⁹⁶ *Id.*

⁹⁷ *Id.*

the Zimbabwean government from molesting or removing the Campbell family from his land, pending the outcome of the case.⁹⁸ However, during the case, the Campbell's were not granted any protection by the government of Zimbabwe and, in fact, the Campbell family was severely beaten and tortured.⁹⁹ The SADC Tribunal responded to the beatings by holding Zimbabwe in "Contempt of Court" for not abiding by its interim decision.¹⁰⁰ This status meant nothing to the Zimbabwean government which continued to systematically remove farmers from their lands throughout the proceedings.

C. SUMMARY OF THE DIFFICULTIES IN ENFORCING THE SADC TRIBUNAL'S DECISION IN THE CASE OF CAMPBELL V. ZIMBABWE

The final decision of the case was in favor of the Plaintiff, Michael Campbell, in which the Zimbabwean government was ordered to protect Mr. Campbell's right to live and work peacefully on his farm.

One of the reasons why the Zimbabwean government, headed by President Mugabe, will never submit to this order in the case of Michael Campbell is not only because the SADC has very few resources with which to enforce it, nor is it because of Zimbabwe's desire to maintain sovereignty, but more because if it were to follow this order, it would reverse a policy change charged by the current political climate. Such a change—adhere to the SADC decision—would make the current President, Congress, and Constitution appear weakened by outside forces. Thus, to maintain political power in

⁹⁸ *Campbell*, SADC (T) No. 02/2007 at 5.

⁹⁹ WHITE AFRICAN, *supra* note 17.

¹⁰⁰ *Id.*

the face of the voting populace and hold on as a totally sovereign nation, President Mugabe will just shirk the international rule of law. For example, President Mugabe said in February of 2009 in response to the Campbell decision, “Land distribution will continue. It will not stop...our land issues are not subject to the SADC Tribunal.”¹⁰¹

“In August of 2009, after months of violent attacks and looting, Mugabe’s thugs burnt the [Mike Campbell] farm to the ground. Mike Campbell, Ben Freeth, their families and all of the 500 workers, lost everything.”¹⁰²

VI. CONCLUSION THAT *CAMPBELL v. ZIMBABWE* IS AN EXAMPLE OF THE DIFFICULTIES INTERNATIONAL TRIBUNALS FACE ENFORCING DECISIONS MADE IN THE INTERNATIONAL TRIBUNAL SETTING

The case of *Campbell v. Mugabe* is just one example of an enforcement loop hole in international law that will need to be closed as the world pushes forward with Globalization.

Before we can expect treaties and natural rights to be given the full weight of the law that such treaties deserve as they are created to govern us, enforcement of international tribunals will have to obtain some teeth with a strong enough bite to encourage even sovereign nations to respect the contracts they’ve entered into; otherwise, neither human rights, not other agreed upon laws will be enforceable against the sovereign parties involved.

¹⁰¹ *Id.*

¹⁰² *Id.*