AFRICAN HUMAN RIGHTS ARCHITECTURE IN THE 21ST CENTURY: THE CASE OF THE SADC TRIBUNAL AND ITS EFFECTIVENESS IN ADDRESSING HUMAN RIGHTS

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DEDICATION

This dissertation is dedicated to my two little children, Tanaka and Anotidaishe

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ABBREVIATIONS AND ACRONYMS

AU	African Union
EAC	East African Community
ECOWAS	Economic Community for West African States
OAU	Organisation of African Unity
SADC	Southern Africa Development Community
SADCC	Southern African Development Coordination Conference
FLS	Frontline States
PUDEMO	People's United Democratic Movement
ZLHR	Zimbabwe Lawyers for Human Rights
UN	United Nations

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ABSTRACT

This research was premised on the effectiveness of African human rights architecture in the 21st century with a special focus on the SADC Tribunal. It aimed at scrutinising and evaluating regional principles guiding human rights and analysing them vis-à-vis those adopted in the Southern African region. The overall objective was to analyse the effectiveness of the SADC Tribunal in dealing with human rights issues in the SADC region. It hypothesised that the SADC Tribunal has remained an ineffectual institution that has been lacking the capacity to live-up to prospects and expectations. This, thus allowed leeway to nation states to do as they please regarding people's fundamental naturally bestowed entitlements. Consequently,this has seriously jeopardized people's human rights in the SADC region. The need to add new information to already existing literature on human rights and sub-regional courts was the general motive behind the research. Primary and secondary, qualitative and quantitative data collection methods were utilised in the process of gathering data thus they formed the research design of the research. The research made use of a case study where qualitative data collection methods such as documentary search, focus group discussions and interviews were used to collection of data. Non-probability sampling techniques such as purposive or judgmental sampling were utilised in order to select relevant respondents in the process of research. Data was analysed using thematic and statistical analyses which are both qualitative and quantitative data analysis methods. Chapter two focused on conceptualising human rights, the architecture governing human rights in Africa and the Southern Africa Development Community, while Chapter three focused to analysing the SADC Tribunal. Chapter four gives an analysis of major findings and analysis where information gathered by the researcher reveal that the SADC Tribunal has done little to enhance human rights in the SADC region where politics has permeated the whole judiciary system. Chapter five proposes measures that can be implemented to make the SADC Tribunal effective and enhance human rights in the SADC region.

CHAPTER ONE: INTRODUCTION

1.1 Introduction and background to the Study

Slavery, conquest, enslavement and oppression have dominated people's interaction and state relations for ages. The individual's basic freedoms and entitlements have been victim affected in the process. The suppression of fundamental human rights spans nearly every race, culture, nationality, religion and continent. Africa is not an exception.Sixty-eight years after the United Nations adopted the 1948 Universal Declaration of Human Rights and 53 years after the Organisation for African Union adopted its own Charter on Humanand Peoples' Rights, the human rights situation on the African continent remains bleak. Arguably, the history of human rights in Africa, those most natural and inalienable endowments of human beings, has largely been one of violation and systematic erosion. Since the independence of African states in the 1950s human rights, whether first-generation (political and civil rights), second-generation (economic, social and cultural rights) or third generation rights (solidarity rights, that is the right to development) have seen massive violations by the state, (Akokpari and Zimbler:2008).

It would be wrong to blame solely a single factor for the human rights abuses that have affected Africa since independence. Maynarella (2000) notes that Africa's poor human rights record has been contributed to by racism, post colonialism, poverty, ignorance, disease, religious intolerance, internal conflicts, debt, bad management, corruption, the monopoly of power, the lack of judicial and press autonomy and border conflicts among others. Legacies of colonialism that were perpetuated sawsome individuals denied rights on racial grounds. The apartheid era in South Africa is an example. The introduction of the 1937 Native Laws Amendment Act removed the surviving rights of Africans to acquire land in urban areas. Such granting of rights based on race has been re-born in Africa especially after independence as noted by Idi Amin's 1973 redistribution of wealth policy where besides redistributing wealth to people close to him, he redistributed the wealth to black Ugandans. The state of Uganda at the time had white skinned Ugandans but the wealth was given to the black race only. The case of Zimbabwe in the redistribution of land deserves some mentioning here. Land was given to black indigenous Zimbabweans yet there are white indigenous Zimbabweans as well (Musariri 2013). This demonstrates the complexity of human rights issues.

Welch (1995) also notes that customary practices,*inter alia,* especially the actions of many governments, mock the high hopes with which independence was attained as governments have waged war on groups of their citizens based on ethnic or ideological differences. The lust for power by corrupt, power hungry leaders who have intransigently remained in office having hijacked or ignored popular pressures for free, competitive and democratic elections has also been a factor that has caused human rights abuses. Powerful leaders have either used state institutions or the available state resources to amass power or even manipulate available legislation to suit their ambitions. According to Jullien (2015) former Senegalese leader Abdoulaye Wade managed to run for a third term even though Senegal's constitution limits the number of mandates for a president to two. The constitutional court ruled that since the constitution was written after the end of his first mandate, he could run again in the 2012 poll, but the announcement prompted riots, which continued until election day (ibid). However, president Wade finally admitted his defeat in the polls by calling the winner, Macky Sall, to congratulate him.It is important to note that Wade attempted to stay in power by altering constitutional provisions to suit his needs. The same can be said for Pierre Nkurunziza who was elected president of Burundi after the end of the country's civil war in 2005 and a decade later, opposition parties say the president is threatening to violate the principles that brought him to power by attempting to alter constitutional provision so as to stay in power. In the Southern African region President Joseph Kabila has been in power since his father, Laurent Kabila, was assassinated in 2001 and is currently serving his second term. The country's constitution does not allow him to run for a third term in the 2016 elections but as noted by (Grills 2015) government spokesman Lambert Mende was quoted as saying that the poll could be delayed because of a nationwide census that could start this year (2015) and take three years and the opposition has protested about the bill to mandate the census, calling it a ploy to keep the president in power. Self-serving amendment of the laws has been a cause for concern in the African continent since independence.Often times such amendments have led to human rights violations.

Numerous attempts, including legal and institutional tools meant to deal with human rights issues have been formulated in Africa but human rights continue to be violated throughout the African continent. The promotion of democratic institutions, good governance and human rights is one of

the main objectives of the African Union (AU), enshrined in its Constitutive Act (2000). Its predecessor, the Organisation of African Unity (OAU) founded 53 years ago, in 1963 also established several mechanisms for the promotion of human rights. The aura of pessimism that now marks much of Africa stems in large from the continued demand of human rights. Tomaskova (2013) notes that historically all regional systems of human rights protection derive from universal system set by the UN and Africa's system is regarded as the youngest. Regional bodies such as the Economic Community for West African States (ECOWAS), the East African Community (EAC) and the Southern African Development Community (SADC) have also made strides towards the attainment of human rights on the continent. There remains a disconnect between the objectives of human rights institutions vis-à-vis the respect of human rights on the African continent.

Extensive human rights abuses still occur in several parts of Africa, often the acquiescence of the state as was the casewith the Rwandan Genocide of 1994 where close to 1 million people were systematically and intentionally killed. According to Nandi (2008) it has been reported that systematic and planned rape was the weapon of war and genocide used to humiliate and terrorise women and girls, their families and their communities and almost every adolescent girl who survived the genocide in Rwanda was raped. Again the displacement, rape, wanton killings of over 1 million people in the Darfur region between 1993 and 2011 are massive human rights violations too important to be ignored (ibid). Central Africa Republic has also witnessed massive human rights abuses with an estimated 1, 2 million people being displaced because of continued fighting between Christians and Muslims in 2014 (ibid). For, decades human rights issues have remained a major conundrum in Africa. In Madagascar, cases of human rights violations have been less publicised than the power struggles, but massive human rights violations especially of political detainees have occurred even after the 2009 crisis. (Radriamaro 2010). The fight against enlightenment of civilians by interest groups within the political entities has affected most Southern African countries.

The Southern African Development Community (SADC) was established in 1992 as a successor to the original Southern African Development Coordination Conference (SADCC). The latter was established through the Lusaka Declaration in Lusaka, Zambia in April 1980.

However, the original members were the "Frontline States" (FLS) which was a group of countries in Southern Africa that tried to overcome their dependency on South Africa and its apartheid regime of the time, the goal being for the political liberation of Southern Africa and the end of apartheid (McLeod 2011:11). According to McLeod (ibid: 2011) by 1979 consultations had been held between Ministers of Foreign Affairs and Ministers responsible for Economic Development from Angola, Botswana, Lesotho, Mozambique, Swaziland, United Republic of Tanzania and Zambia in Gaborone, Botswana, leading to a meeting which was held in Arusha, Tanzania in July 1979 that led to the establishment of SADCC. Although SADCC was established in 1980, consultations had been made previously to establish a regional bloc which would deal with arising issues in the region. Twelve years later the need to create a sub-regional institute that would be holistic in its approach in dealing with political, economic, social and even justice issues arose. Thus in 1992 the Southern African Development Community was established by the SADC Treaty, and a Declaration was signed, creating a "community" of State parties in the Southern African region. McLeod (2011) notes that Article 9 calls for the establishment of various institutions to serve and govern the Southern African region.The SADC Tribunal was an off-shoot of this. Article 16 of the SADC Treaty provides for the role of the Tribunal - to ensure adherence to, and the proper interpretation of, the provisions of this Treaty, and that its composition, powers, functions, procedures and other related matters would be prescribed in a Protocol. The Tribunal was not to hear any further cases henceforth, whether pending or otherwise, and members of the Tribunal were not to be reappointed or replaced, effectively rendering the Tribunal defunct (ibid). There is little doubt that the jurisdictional amendments will be to remove the right of private individuals to approach the Tribunal for relief against their governments. However, for decades even after the establishment of the Tribunal, human rights issues remained a major conundrum in the SADC region with nation states attempting or trying tirelessly to fight basic fundamental human rights as noted by the decision by leaders from different countries to suspend the court system in the SADC region. Historically, there has been numerous allegations in which state apparatus have been accused of violating people's rights for instance in the Madagascar crisis of 2009, the Zimbabwean crisis of

2008, Malawi in 2011, in Swaziland, Lesotho, Mozambique and Namibia among others. Human rights violations have continued in the SADC region which thus is affecting individuals who reside in the region.

1.2 Statement of the Problem

The SADC region has for decades witnessed human rights violations. In Angola the police force has increased brutality and have clamped down on those speaking-out against the restrictions that permeate the political system of the country particularly regarding fundamental liberties and good governance issues. On June 21 2015 over 10 activists were arrested in Luanda for merely discussing human rights and governance issues, in particular, freedom of speech, expression and the need for accountability in the country (Amnesty International 2015). There has been a growing concern among SADC human rights activists over the shrinking space for human rights in many countries across the SADC region. The police force which is supposed to be a security guaranteeing institution has been manipulated often acting contrary to its mandate. In the year 2008 in Zimbabwe, the period towards the 29 June Presidential election run-off witnessed police brutality and allegations that the police did not act when opposition supporters were being inhumanly butchered and beaten by ZANU PF supporters for not supporting the party (Smith 2012). Even after reporting such cases the law did not take precedence as the justice system was skewed in favour of ZANU PF (ibid). This henceforth reveal how people's rights have been affected in the region. In Swaziland the use of the 2008 Suppression of Terrorism Act (STA) and the 1938 Sedition and Subversive Act (SSA Act) to activities, further entrench political exclusion to restrict the exercise of the right to freedom of expression, association and peaceful assembly in the country. The first act has resulted in opposition political parties and individuals being labelled terrorists in the country. The People's United Democratic Movement (PUDEMO) has been clamped down by the Mswati regime since 1983. There have been attempted military coups since 1966 in Lesotho, with the latest being the failed coup of 2014(Amnesty International 2015). The coups and attempted coups are acts that are a threat to democracy and the choices that are made by people during election time. A vote is a right and voting is an element of exercising a bestowed right but the removal of elected leaders through coups has had detrimental effects to human rights issues in Lesotho.

Disquiet over bad governance and undemocratic practices by governments have prompted peaceful protests in a number of SADC countries, for instance in Malawi. Protests were experienced in June and July 2011 resulting in 18 deaths, 98 serious injuries and 275 arrests as according to James (2013) the Malawian organisations protested against perceived poor economic management and poor governance by President Bingu wa Mutharika and his Democratic Progressive Party but government retaliated by clamping down on journalists, radio stations, citizens and protesters wearing red. On 21 July 2011 the army was sent in to reinforce riot police already present in Mzuzu, Blantyre, Ntchesi, and in the capital Lilongwe. In Zimbabwe, arbitrary arrests and unwarranted detentions which in some cases have been followed by prosecution of targeted Human Rights Defenders, has been a cause for concern since the year 2000. In a space of 24 months alone the Zimbabwe Lawyers for Human Rights (ZLHR) states that 1390 local women human rights defenders were arrested for either staging street protests or petitioning and litigating government with the aim of pressing for political, social and economic rights (Newsday 2014). The Security of journalists and even citizens is a major concern because of the rampant violations of the right to freedom of expression in the region. In particular, security of journalists and citizens before and after expression is under attack. Open attacks on media practitioners have continued to be experienced in Lesotho, Malawi and Zimbabwe and there are imminent attacks on free expression in South Africa. Again in Zimbabwe laws such as the Access to Information and Protection of Privacy Act, Broadcasting Services Act, and the Criminal Law (Codification and Reform) Act continue to be applied with citizens being caught up in this onslaught with thousands of people having fallen victim to such legislation (James 2013).

Moyo (2014) observes that the SADC community is a region led by a group of dictators who are concerned with political goodies and pursuit of power often neglecting human rights issues. The response by the SADC as a body to human rights violations is a great conundrum as noted by ICR (2009) which states that since 2000 state security forces in Zimbabwe have committed acts of violence against thousands of civilians targeting primarily political opponents and aid workers. The suspension of the SADC Tribunal thus raises eyebrows as it was exercising its jurisdiction to hear human rights complaints in the sub region. Exercise of this mandate led to the SADC-ordered review of the Tribunal's role and functions in 2010 resulting in its suspension. It is important to note that the Tribunal was established in 1992 and only came into being in 2005. This suggests that member states always lacked commitment to human rights and justice issues.

The major challenge is that SADC member states continue to be accused of violating human rights with impunity.The decision taken by the states to review and suspend the Tribunal in 2010 is indicative of this.Even though the SADC Tribunal was re-inaugurated in 2014 massive changes have been made, chief among those being the stripping of its mandate to receive and consider individual human rights violation complaints. Ordinary citizens of the sub-regional bloc no longer have access to the court, yet this is the court that supposedly deals with human rights issues. Before the suspension of the tribunal individuals had *locus standi*before the tribunal. This right of access was taken away by the SADC leadership and does not form part of the 2014 reconstituted Tribunal.

One of the greatest challenges to human rights issues in the Southern African region is that the SADC body has not made human rights compliance a priority among member states. To the contrary,institutions accused of rubber-stamping executive decisions that dominate the justice system within member states have been taken to regional level. Justice has remained a vison within southern African States members as the respective executive branches of the government have in several instances encroached the duties of the Judiciary such that some judgements that are being given are biased. According to Moyana (2013) the replacement of the Gubbay bench by the Chidyausiku bench has witnessed frivolous and vexatious rulings in Zimbabwe especially on land reform issues. People's rights have been violated by state institutions, for instance, the Matabeleland disturbances in the 1980s in Zimbabwe and the Marikana incident in South Africa. The absence of independent and credible bodies of appeal is a major cause for concern.The victims of these two incidences have not seen justice and the perpetrators enjoy impunity. The justice system in the SADC region hence has been limited to state apparatus but these as history shows are controlled by the of ruling elites and decisions taken usually favour those who are in line with ruling parties' ideologies. The justice system in the SADC region has been greatly affected as individuals simply depend on state institutions which may give unfair rulings and the unavailability of an alternative supranational justice body is an issue too important to be ignored in the 21st century. International, regional and national human rights watchdogs view the failure

to deal with human rights issues at a sub-regional level as a threat to security and development.

1.3 Objectives of the Study

The study intends to;

1. To scrutinise the various dimensions of human rights in the 21st century and how they have been espoused internationally.
2. To critically examine the Architecture governing Human Rights in Africa.
3. To dissect and critique the Southern African Development Community Tribunal.
4. To ascertain the effectiveness of the SADC Tribunal in addressing human rights issues in Southern Africa
5. To recommend possible solutions of strengthening human rights protection mechanisms in the SADC region and internationally.

1.4 Research Questions

The study seeks to answer the following questions;

1. What are the various dimensions of the human rights concept and to what extent have they been enhanced by states in the 21st century.
2. What is the Architecture governing Human Rights in Africa?
3. What is the Southern African Development Community Tribunal, its purposes, objectives and relevance in human rights issues in the Southern Africa region?
4. To what extent has the SADC Tribunal been effective in addressing human rights issues in the SADC region?
5. Which strategic alternatives can be employed by SADC as a body and the SADC Tribunal to achieve the full realisation of Human Rights in member states?

1.5 Hypothesis

The SADC Tribunal has remained an ineffectual institution that has been lacking the capacity to live-up to prospects generously offering a leeway to nation states to do as they

please regarding people's fundamental naturally bestowed entitlements which has seriously jeopardized people's human rights in the SADC region.

1.6 Significance of the Study

Widespread abuses of human rights have occurred and continue to occur in the region south of the Sahara. This, notwithstanding the existence of numerous legal and institutional mechanisms at country and even regional levels. Human rights are continuously being violated on daily basis. The research therefore aims at ascertaining efficacy of the SADC Tribunal, one such mechanism that was originally meant to address such issues, in dealing with human rights issues in the 21st century with the aim of developing recommendations on how to effectively deal with human rights issues in the region.

The study is unique from other studies which have been done by various authorities in that various scholars have focused on the rise and fall of the SADC Tribunal for instance. And others have focused on specific cases that the Tribunal has dealt with since its birth, but no literature has been written focusing on how the institution has been dealing with human rights issues in the SADC region paying particular attention to its efficacy vis-à-vis the objectives of the African Union and the SADC Treaty. This study is a holistic approach to the nexus between human rights issues and tools or mechanism meant to ensure the attainment and respect of human rights.

The study is also of prime importance in complimenting existing literature in the sense that most human rights reports, scholars and commentators focus and give more attention to facts about human rights abuses. Thus most literature focuses on the number of people affected or whose rights have been infringed and often criticise judgments but none really focuses on offering a remedy to human rights challenges. Studies that have been carried either focus on exposing human rights violations and where they have taken place including offering recommendations at state level but none really focuses on how supranational sub-regional bodies can be of vital importance in curtailing and averting human rights abuses be it by state apparatus, certain groups within the political entity or any other non-state actor.

The study is of significant importance in that it will provide possible strategies and recommendations on how to make a supranational institution dealing with human rights real and meaningful. The study will also contribute and stimulate debate among international legal practitioners, scholars, the academia and various international relations actors on the ethical, morality and legality of how human rights issues have been dealt with in the SADC region. The study is also meant to equip the general populace with knowledge on what has happened since the birth of the SADC Tribunal vis-à-vis human rights issues. Therefore apart from the general populace, academia, students, civil society organisations and other relevant stakeholders will benefit from such a research. Policy makers all over the globe will benefit from the research as the research will recommend how justice can be achieved at a regional level which has been lacking in the modern day integration which has focused on economic, political and social issues but neglecting justice at a sub-regional level. Finally, the study will also contribute and stimulate debate among legal practitioners, scholars, the academia and various international relations actors on the best strategy for dealing with human rights issues at a regional level.

1.7 Literature Review

This section focuses on an evaluative report of information found in the literature related to the selected area of study on African Human Rights Architecture in the 21st century but with particular attention on the SADC Tribunal and its effectiveness in dealing with human rights issues.

1.7.1 The Human Rights Concept and the Human Race

Nickel et al (2013) asserts that human rights are moral principles or norms that describe certain standards of human behaviour and are regularly protected as legal rights in municipal and even international law. Thus, for the scholar, human rights are morals and they reveal the degree of what is expected within a society or community of people and these when analysed in the context of domestic or international law, constitute legal rights. Thus from a societal and traditional point of view, the entitlements are moral principles, and from a legalistic point of view, the practices become human rights. According to the UN Office of the High Commission for Human

Rights, human rights are inalienable fundamental rights to which a person is inherently entitled to.

Radriamaro (2010) asserts that human rights are inalienable entitlements which ought to be respected for every individual to live a health and safe life. Thus the safety and self-actualisation of every individual revolves around human rights as violation of certain rights may limit potential within an individual. According to Nandi (2008) human rights is a vital concept that dominates the governance system of every society in contemporary times. Nandi (ibid) notes that legal frameworks that guide nation states contain sections on human rights which reveals the importance of human rights. This 2008 analysis is buttressed by James (2013) who argues that every constitution within the international community has a section on the declaration of rights or bill of rights and these fundamental elements need not to be tempered with. Thus the authors concur that human rights have become important in the modern day state as they guide human and state behaviour including how individuals within a society should relate with each including the relationship between the government and the people.

1.7.2 The Nexus between Human Rights and Human Security

Madise (2014:34) notes that there is a strong relationship between human rights and human security in the sense these complement each other. Kondo and Makanza (2014:35) note that an essential part of human security approach is its focus on inter-linkages between the multiple threats and issues such as socio-economic deprivation, health, education, the environmental issues and physical threats and violent conflicts. A critical analyses of human security reveal that it is a concept dealing with the detrimental effects that accompany deprivations of an individual's entitlement. The right of an individual can be guaranteed if the security of the individual is guaranteed and the security of the individual is guaranteed if the individual's rights are respected. Human rights and human security are concepts that are intertwined and complement each other. The scope of human security includes seven areas which are economic security, food security, health security, environmental security, personal security, community security and political security. On the other hand, human rights can be classified as political rights, economic rights and social rights. Therefore the respect of one's right in a certain sector guarantees security in the sector concerned for instance if one's right to health is upheld, health security as an element of human security is assured (ibid). Thus, there exists a strong relationship between

human security and human rights as these coexist and greatly complement each other.

1.7.3 Human Rights Violations, a Phenomenon of Global Relations

According to Hayes (2014) every human being has certain rights that should be protected but these are violated throughout the world. Citing the example of Thailand, Hayes (ibid) notes that the country has embarked on unlawful killings and torture of prisoners and those engaged in drug trafficking. Such an analysis is also supported by Collins (2013) who argues that human rights violations are rampant all over the world, whether one is in the most-wealthy and cultivated country or in the poorest and most barren region. Citing Indonesia as an example Collins (ibid) depicts that Tentora Nasional Indonesia (TNI) which the armed force of the country has continually violated basic human rights as the operations they conducted In Aceh and Papua are inhumane. The armed force has committed numerous rapes, excessive executions and unnecessary beatings of innocent civilians. The trials of the famous 1984 Tanjung Incident have not been dealt with justly because of the involvement of politicians and the most powerful in the society.

Latin America is not an exception. Citizenship participation in the political process, though improved, has remained a major concern especially in Chile, Peru and Mexico amongst others, (Collins 2013). Collins (ibid) further states that even the most democratic state in the world, the United States, has had harsh sentencing violating people's rights especially by creating prisons such as Guantanamo. The US has the largest reported incarcerated population in the world standing at 2,2 million people in adults prisons by year end 2011. This analysis demonstrates that human rights violations have occurred throughout the world, in every continent. However it is important to note that the same state that violates human rights in most cases has been given the role to address its actions and this has failed dismally hence the need to create a respected, effective and autonomous body for a group of states in a region for individuals to appeal to if they feel that the concernedstate would have failed to uphold their rights.

1.7.4 Human Rights in the African Context

Makau wa Mutua (1995) points out that the post-colonial African states have largely failed to forge viable, free, and prosperous countries as he notes that the new African state has failed to inspire loyalty in the citizenry; to produce a political class with integrity and a national interest; to inculcate in the military, the police, and the security forces their proper roles in society; to build a nation from different linguistic and cultural groups; and to fashion economically viable policies. According to the author, since independence African states have been in great conundrums arising from the fact that these have failed to adequately deal with patriotism issues and have misguided security forces. Security forces have not performed their roles of being neutral political actors that protect everyone in the society. The resultant effect of such acts have resulted in massive human rights violations in the continent.

According to Magnella (2000) this historic, psychological process has adversely affected many African political leaders, who, lacking a genuine national commitment and sense of obligation exploit state budgets and power to strengthen their ethnic power bases, enhance personal privileges and thus retain power. Magnella concurs with Mutua (1995) that the independent African state has failed to unite and enact the nation state project but the former argues that such consequences have their roots in the history of the continent. The psychological effects of colonialism and the inheritance of colonial legacies have resulted in a continued system of oppression. The concern of leaders within the African continent lies in the pursuit of power often abusing state resources and greatly undermining the rights and security of the individual in the state.

1.7.5 Human Rights Vis-À-Vis Regional Coordination and Collaboration

Human rights issues have been affected by the lack of regional coordination and collaboration within the African context as noted by Bingu (2008). This is further buttressed by the International Human Rights Programme and Swedish NGO Fund Forum for Human Rights Report (2013) which argues that African human rights movement is more wishful thinking than a reality. The report (ibid) further asserts that the lack of contact and exchange of experience of materials among different African countries clearly shows how human rights issues are not prioritised by the ruling elites. Such an analysis is true to a greater extent in the sense that even

though there are various regional and sub-regional institutions meant to deal with human rights issues, they tend to be hampered by political and personal agendas often neglecting the fundamental issue of human rights.

1.8 Theoretical Framework

The debate on whether international law constitute what is called "law" in its essence or not dominates the field of international relations particularly international law. Different scholars and analysts have different views and opinions on the subject matter with some scholars arguing that laws that are found outside the boundaries of a state are morals and ethics because the international system is dominated by power ball politics. Institutions that are created outside the boundaries of the state serve the purposes of those behind the creation of the institution.

Therefore the international system is anarchic, it is a self-help system that is composed of functionally like units called "states". The research is informed by Realism. According to Fossey (2009:216), Realism as a theory is based on the premise that world politics is essentially unchangeable hence there exist a struggle among self-interested states or power and position under anarchy, with each state pursuing its own national interests. It prioritizes national interest and security over ideology, moral concerns and social reconstruction and even human rights of individuals. Therefore one can note that states take precedence over any other institution created hence any supranational entity created with objectives running parallel to the state's objectives is often declared null and void by the state concerned. This explains why SADC state members have lacked political commitment to the effective functioning and operation of the SADC Tribunal as the ruling elites are selfish. They seek to acquire and maintain power by every possible means even if it means violating human rights.

Variously called "power politics", "the billard ball mode", "political realism" or "the state centric model", realism as (Masbach and Vasquez 1943:3) note, is a paradigm which came up as critique of idealism, an earlier theory. Realism assumes that global politics is a contest for power among sovereign states in an anarchic environment. It focuses on state security and power above all thus early realists like E.H Carr and W.H Morgenthau argued that states are self-interested powerrational actors who seek to maximise their security and chances of survival. Therefore, the

Therefore the creation of an institution that halted the maximisation of power by SADC states can be analysed as a barrier to the security of the elites who run these countries. Thucydides, Sun Tzu, Nicollo Machiavelli, Thomas Hobbes and Cardinal Richeliue among others are often cited as the"inspiration" or the "founding fathers" of realism. Molly (2006:335) depicts that realists are of the view that the international realm is anarchic and consists of independent political units called states and these are primary actors. Inherently, states possess some military capabilities of power which makes them potentially dangerous to one another. Accordingly, sovereign states are the principal actors in the international system and special attention is afforded to large powers as they have the most influence on the international stage. International institutions like the United Nations, Non-Governmental Organizations, Multi-National Corporations, individuals and other sub-states or trans-states are viewed as having little independence or influence. For realists the injection of morality and universal values into international relations causes reckless commitments. Therefore human rights issues have been a cause for concern not only in the SADC region but the world over because attached to such issues is the aspect of power. The respect of human rights may entail loss of power for instance the if the right to vote is upheld through free, fair and peaceful elections incumbent leaders may lose their power hence not granting such a right means that they can maintain their power. Swaziland has been a monarchy since 1968 and the Mswatis have not been able to democratise the country. State actors, because of the need to gain, maintain and pursue power domestically and externally, have ignored protocols governing human rights and human security issues. The creation of the SADC Tribunal in 1992 came as a realisation within the region that though states had been granting the power to administer justice, they had failed to do. Such a move to ignore the relevance and importance of human rights by the SADC community member states reveal that what is fundamental to nation states is power and power plays second fiddle to nothing. Early realists like E.H Carr and W.H Morgenthau argued that individuals and states are self-interested power rational actors who seek to maximise their security and chances of survival. The need to maintain power by governments which to an extent are revolutionary governments within almost the entire region is revealed by the fact that for 13 strong and good years no leader or state paid particular attention to the inauguration of the Tribunal in the region. Thus they ignored its inauguration and suspended it later on for no concrete reasons. Power politics has dominated the SADC block as human rights

issues have been forced to play second to political issues for instance, in countries such as Swaziland, Zimbabwe, Malawi, Mozambique, Madagascar and Namibia, among others.

Violation of people's rights in-order to gunner political power has been the centre of the governance agenda. The hunger and thirst for power is a central pillar of realism and this has contributed to nation states paying a blind eye to human rights issues in the SADC region.

As argued by scholars like Robert Kaplan,

> realism means recognizing that international relations is ruled by a saddler, more limited reality than the one governing domestic policy. It means valuing order over freedom for the latter becomes important only after the former has been established. It means focusing on what divides humanity rather than on what unites it, in short realism is about recognizing and embracing those forces beyond our control that constrain human action, culture, tradition, history the bleaker tides of pattern that lie just beneath the veener of civilization

Therefore a supranational institution is only of fundamental importance if it functions second to domestic institution which in most cases in the SADC region are controlled by ruling elites resulting in them acting as they deem necessary to the extent of even violating human rights while safeguarding their power. It is of paramount importance to note that according to realism states participate in activities which they have interests in and which benefit them at the end of the day. This thus explains why the SADC region in 2010 chose to abandon the Tribunal. This can thus be analysed as move that was meant to protect their power in that having such an institution paused a menace to some of the states' policies, programmes and actions which are a great conundrum to human security. Realism as a theory thus best explains why the region of SADC has institutions meant to protect human rights but issues of human rights violations have been an enigma in the region.

1.9 Methodology

The following section is a description of the systematic, theoretical analysis of the procedures, methods, processes and techniques that the researcher employed in gathering data. The section is an analyses of the reliability and breadth of data collection techniques that were utilized in the field of research and it is divided into three that is research design, sampling procedure and data analysis and presentation.

1.9.1 Research Design

Saunders et al (2009) state that the research design is concerned with the overall plan for one's research. It is an arrangement of research that is used to answer the research objectives or a structure or framework used to inquire and get data so as to solve a specific problem. Babbie (2004:45) defines a research design as an operational framework used in social sciences to collect facts and embrace them in search of a clear meaning of collected data. A research design thus is the specification of methods and procedures for acquiring the information needed, (Gill and Jameson: 1997). The study made use of a case which according to Yin (1984:2) examines a contemporary phenomenon within its real life context. The study focused on the SADC region to ascertain the efficacy of the SADC tribunal vis-a-vis human rights issues. Leedy and Ormrod (2005) note that one of the strengths of a case study is that it may be suitable for learning more about a little known or poorly understood situation. No wonder why the objective of the SADC Tribunal as a supra-national institution meant to address, redress and ensure the respect of human rights has received little attention and its capacity and even efficacy is little known. Therefore the case study analysis was important as an examination of the institution using a case study approach revealed more imperative aspects surrounding the institution and its effectiveness on human rights issues. Key informants in carrying research included officials from the SADC countries embassies that are stationed in Zimbabwe, relevant SADC states embassy officials, the academia, civil society organisations mainly dealing with human rights issues ,international law analysts, and relevant authorities from the United Nations Development Program (UNDP), among others.

Qualitative research methods are methods of data enquiry which aim to gather an in-depth understanding of behaviour and reasons that govern such behavioural methods and the researcher focused on qualitative research methods so as to determine the effectiveness of the SADC Tribunal in resolving human rights issues. The researcher used primary data sources and secondary data sources in the process of research. A primary data source is the original source of evidence, an artefact, a document, reading or other information that was created at the time of a certain study, (Gathrum 2010). Primary data collection method was of paramount importance to the research as the questions which were asked in the process of research were tailored to elicit

data that helped in answering the research questions. On the other hand, secondary data collections methods were also utilized in the research and as Gathrum (ibid) states, these are sources containing data that has been collected and compiled for another purpose. Documentary search was used to gather information. Secondary data sources used consisted of published records and also unpublished records relevant to the topic. Secondary data sources were important to the study in that they cover a wider geographical space, a longer reference period and proved to be cheap and quick.

1.9.1.2 Interviews

The researcher made use of interviews in the process of research. An interview is defined by Smith (2011:4) as a conversation between two people, an interviewer and an interviewee. In-depth interviews were utilized in the study. An in-depth interview is a qualitative method of enquiry, which proceeds as a confidential and secure conversation between an interviewer and a respondent (ibid, 2011). The method was appropriate and was important to the research as the researcher was in a position to further probe more information on the effectiveness of the SADC Tribunal in dealing with human rights issues in the 21st century. By utilising such a method respondents were interviewed several times to follow up on a particular issues and they clearly clarified concepts including the reliability of the data that was acquired. Legal practitioners, diplomats from various embassies and the academia in the law circles were interviewed during the process of research.

1.9.1.2 Documentary Search

The research also made use of records of past events. These were either official or unofficial and they included events, journals, seminar papers and the internet among others. Documentary search was thus used by the researcher in gathering information. Scott (1990) cited in Smith (2011) delineates a document as an art-fact which has as its central feature an inscribed text. Documentary search encompasses the assortment and scrutiny of existing documents to complement field research. There are two types of documents that are used in documentary study, namely primary documents and secondary documents. Primary documents denote an eye-witness accounts produced by people who experienced the particular event or the behaviour one

may want to study. On the other hand secondary documents are documents produced by people who were not present at the scene but who received eye-witness accounts to compile the documents, or have read eye-witness accounts (Bailey 1994: 194). The method was an excellent source as the study required the historical background and development of human rights, SADC as a community and the SADC tribunal including an assessment of the Tribunal in line with human rights issues in the since 1992 when it was formed and 2005 when it was inaugurated. Apart from being inexpensive, documents were readily available making easy retrieval of critical information, especially the Tribunal's judgments.

1.9.1.3 Focus Group Discussions (FDGs)

Hopkins (2010:4) defines a focus group as a form of qualitative research in which a group of people are asked about their opinions, perceptions, beliefs and attitudes towards a product, service or an issue. It is an important method of inquiring data in that, it is an informal type of an interview of a group of people between six to ten. In this case, participants were at liberty to air out their views on the effectiveness of the SADC Tribunal in ensuring that human rights are respected in the SADC region. The use of such a method was importnat in that it produced records and discernments that would have been less accessible without interaction found in group settings. Listening to others' verbalized experiences and to an extent stimulated memories, ideas and experiences in the respondents. Purposive sampling was used targeting key informants and FDGs were carried at the University of Zimbabwe and a civil society organisation where students and human rights advocates discussed with the researcher.

1.9.2 Sampling Procedure

Smith (2011) states that, sampling is a method of selecting a trial to represent the entire population in a given study. There are two types of sampling techniques which are probability sampling techniques and non-probability sampling techniques. The difference between the two is that the former gives everyone within a polity entity an equal chance to be selected while the latter entails that there are no equal opportunities for everyone in the society to participate in

a study. The research will make use of the latter that is non probability sampling technique. The methods that were utilised in this research were Judgmental or the purposive sampling technique and snowballing. According to Cavana, Delahaye and Sekaran (2003), purposive sampling is a non-probability sampling design in which the required information is gathered from special or specific targets or groups of people on some rational basis. Purposive sampling was thus fundamental in the study as the researcher selected respondents intentionally as experts and seasoned personnel within law circles, human rights organisations and advocates were key in providing answers to the unanswered research questions and objectives. Snowballing was also used and it was useful in locating other relevant respondents through initially selected respondents. The respondents from for instance embassies referred the researcher to experts within the field of human rights and law which made snowballing a relevant sampling technique to the study.

1.9.3 Data analysis And Presentation

According to Barbie (2007:7) data analysis can be defined as the process of inspecting, transforming, tiding, and modelling data gathered from research with the goal and objective of highlighting useful information, suggesting conclusions and supporting decision making.

In the research data was analysed using thematic analysis which is a qualitative analysis method. Boyatzis, (1998) cited in Braun and Clarke (2006:6) defines thematic analysis as a method for identifying, analysing, and reporting patterns themes within data that are themes which it minimally organises and describes the data set in rich detail. Ibid.2006 further states that it is a fundamental method of analysing data because it often goes further than this as one interprets an assortment of those aspects related to the subject matter or focus. The researcher analysed data acquired through identification of recurrent themes during the course and process of research. The flexibility of the method made it relevant to the topic as the issues that linked and conveying similar meanings were categorized into same cluster in the process and conclusions were drawn by the researcher.

1.10 Limitations

A major drawback to the study is likely to be bias as some of the people who will be interviewed are politicians and politicians usually respond in line with the ideology of a party. Even diplomats from various embassies will likely take a stance in line with their countries' ideology concerning human rights and the SADC Tribunal. However the researcher will ensure that that research is conducted objectively and in a holistic manner encompassing all relevant political actors and neutral civil society organisations not only operating in Zimbabwe but in the region as a whole to ascertain the effectiveness of the SADC Tribunal in dealing with human right issues. Moreover other methods like documentary search will be used as well.

1.11 Delimitations

The study will allude to events in other countries within the SADC region besides the four selected that is Zimbabwe, Namibia, Mozambique and Lesotho thus though the scope of the study is limited to the SADC Tribunal vis-à-vis human rights in the four selected countries other relevant cases within the SADC region, and even outside the region but within the context maybe included in the research. The period of the study is from 2005 to current so as to critically examine the effectiveness of the SADC Tribunal in dealing with human rights issues in the region from the time of its birth.

Dissertation Outline

Chapter 1 Introduction

Chapter 2 Conceptualisation of human rights, the architecture governing human rights in Africa and the SADC region

Chapter 3. The SADC Tribunal: A Critical Analysis

Chapter 4. The Nexus between the SADC Tribunal and Human Rights (Findings and Analysis)

Chapter 5. Recommendations, Conclusion and Implications for Further Research

CHAPTER TWO: CONCEPTUALISATION OF HUMAN RIGHTS, THE ARCHITECTURE GOVERNING HUMAN RIGHTS IN AFRICA AND THE SOUTHERN AFRICA DEVELOPMENT COMMUNITY REGION

2.1 Introduction

This Chapter examines the concept of human, tracing its history and various dimensions so as to dissect the anatomy and essence of human rights. It critiques and gives a synopsis of how the various human rights dimensions have been enhanced at various levels in international relations that is at a national level, sub regional, regional and international level. It also explores, reviews and analyses some of the major human rights instruments in Africa and within the SADC region. The objective is to critically scrutinize the nexus between the architecture governing Africa and those in SADC noting the consistencies and contradictions if any.

2.2 Human Rights: A Critique

Human rights are generally understood as being those privileges which are inherent to the human being (United Nations Charter). They are thus naturally bestowed on every individual by virtue of belonging to the human race. According to Duck (1999:23) "human rights are inherent to all human beings, whatever our nationality, place of residence, sex, national or ethnic origin, colour, religion, language, or any other status". Thus the notion of human rights acknowledges that every single human being is entitled to enjoy his or her naturally bestowed privileges without distinction as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Benedek (2012) asserts that the aspiration to protect the human dignity of all human beings is at the core of the human rights concept. Human rights are based on a common universal value system devoted to the sanctity of life and provide a framework for building a human rights system protected by internationally accepted norms and standards (ibid). The aim of human rights henceforth is to ensure that every individual is treated equally internationally.

Human rights have also been defined in terms of their nexus with state or government entities. The UN (2010) asserts that human rights are legally guaranteed by human rights law, protecting individuals and groups against actions which interfere with fundamental freedoms and human dignity. From such an analysis human rights thus define certain minimum standards and rules of

procedure to which those in power should or must adhere in their treatment of people. Walter et al (2010) asserts that such restrictions upon which people should be treated in terms of the use of power or any other means primarily concerns state authorities such as governments, police or armed forces among others. However, increasingly also those wielding non-governmental power, such as international organisations, business enterprises and or the private sector in general as well as religious communities or individuals that exert power over other people, have been violators of human rights as well, (ibid) . The role of such non-state actors as terrorist groups have been detrimental to the enhancement of human security. The brutality of the government of Idi Amin between 1971-79, where close to, if not more than 500,000 people were killed, property was seized from Asians in 1973 during the government's 8-year rule is an example where state actors were involved in the violation of human rights, (ibid). The army was in most instances used by Idi Amin to brutalize and violate people's rights for the sake of Amin's survival. The unprecedented rise of non-state actors in the 21st century has also witnessed some groups concerned especially Non-governmental Organisations fighting for the respect of human rights and other groups fighting for their rights but violating some people's rights in the process.

Terrorist groups such as Al-Shabaab and Boko Haram have conducted a multiple number of acts that have greatly jeopardized the security of individuals vividly affecting human rights of ordinary citizens in such countries as Kenya, Somalia, Nigeria, Chad and Niger. Internationally terrorist groups such as AL-Qaeda, the Islamic State of Levante and Syria together with Boko Haram and Al Shabaab have conducted terrorist acts targeted at innocent civilians. The famous 9/11 attacks in US of 2001 and the Garisa Student Massacre in Kenya in December 2014 are some of the most remembered acts that have affected human rights within the international realm. Therefore human rights are found in spheres ranging from social facets to political spheres and even within economic circles, among others. It is within these circles that human rights are affected either by state actors or non-state actors in the 21st century.

2.2.1 A Historiographical Overview of Human Rights

Human rights are as old as the human race itself as they are entitlements that are bestowed on the individual as an in-born privilege. However, this does not entail that the notion of human rights as a universally documented accepted concept has been there since timeworn. The acceptance of human rights as a concept has also been a cause for concern with certain sections of the

international community arguing that is a concept for the first world countries. Abrahamsen (2000) argues that the development discourse has contributed to the collapse of the African state as human rights which are wrongly understood and construed in Africa. The scholar argues that human rights are contextual just like democracy and no state has the power to impose democratic principles on other states. However, the roots of human rights lie in tradition, customary and cultural practices. According to Flowers (2012) throughout much of history, people acquired rights and responsibilities through their membership in a group a family, indigenous nation, religion, class, community, or state. Citing what she "termed the "golden rule" which reads 'Do unto others as you would have them do unto you' Flowers (2012) denotes that human rights are deeply rooted in known and morally accepted practices. The Golden rule is celebrated, even in Christian doctrines for instance in the Bible, Luke 6 verse 31 states that "do to others as you would have them do to you". Implied in such a notion is that an individual has to respect others the same way that he or she expects the other to respect him or her. The Hindu Vedas which originated in ancient India, the Babylonian Code of Hammurabi, the Bible, the Quran (Koran), and the Analects of Confucius are five of the oldest written sources which address questions of people's duties, rights, and responsibilities (Flowers :2012). In addition, even in all civilizations, whether verbalized or inscribed tradition, have had systems of propriety and justice as well as ways of tending to the health and welfare of their members (Kissinger, 2013). Thus the fact that the human race has lived under a community of some sort means that laws and rights to do certain acts have been in existence since time immemorial.

However, documents asserting individual rights, such as the Magna Carta (1215), the English Bill of Rights (1689), the French Declaration on the Rights of Man and Citizen (1789), and the US Constitution and Bill of Rights (1791) are the written precursors to many of today's human rights documents (Flowers:2012). However, the documents excluded women, the black race, and members of certain social, religious, economic, and even political groups, (ibid). Therefore, during the 11^{th} and 19^{th} century and most probably part of the 20^{th} century human rights were granted on specified conditions. They therefore existed the Anthropos, humanism dichotomy where the former mostly the black race were not granted human rights as they were not considered humans. The latter were the white imperial men who were believed to be close to the creator hence had supremacy over the Anthropos hence they were granted rights. Nevertheless, beleaguered people throughout the world have drawn on the principles these documents express

to support revolutions that assert the right to self-determination. Revolutions that took place internationally between the 11^{th} and the 20^{th} centuries were aimed at the redemption of the oppressed.

It is crucial to note that contemporary international human rights law and the establishment of the United Nations (UN) have important historical antecedents. According to Flowers (2012) efforts in the 19th century to prohibit the slave trade and to limit the horrors of war are prime examples. The idea of human rights emerged stronger after World War II as extermination by Nazi Germany of over six million Jews, Sinti and Romani, homosexuals, and persons with disabilities horrified the world. The brutality at which an estimated 29 million people died world-wide horrified the world hence there was the need to draft measures that could halt unnecessary human suffering. Trials were held in Nuremberg and Tokyo after World War II, and officials from the defeated countries like Germany were punished for committing war crimes, crimes against peace and crimes against humanity.

The League of Nations, the predecessor of the United Nations operated under Woodrow Wilson's 14 points which are deeply rooted in idealism failed to prevent the outbreak of the Second World War as governments and leaders acted in their selfish interests prioritizing the pursuit of power at the expense of human life. This led governments to then commit themselves to establishing the United Nations, with the primary goal of bolstering international peace and preventing conflict. People sought to guarantee that on no occasion again would any person be unjustly denied life, freedom, food, shelter, and nationality (Mills 2007:87). This is the basis upon which the next international body would operate. Flowers (ibid) asserts that, the essence of these emerging human rights principles was captured in President Franklin Delano Roosevelt's 1941 State of the Union Address when he spoke of a world founded on four essential freedoms, that is the freedom of speech and religion and freedom from want and fear (Flowers: 2012). These are at the core of human rights and human security. Human rights can be analysed in their various dimensions which are fundamental to the safety and survival of every individual.

2.2.2 The Various Dimensions ofHumanrights inthe 21st Century: A Continued Evolvement of Human Rights

The various human rights dimensions seek to guarantee fundamental liberties and rights to individuals. The entitlements that safeguard the individual from state, community even other individual's brutality can be separated analytically but in practice they are intertwined such that failure to respect one dimension may affect the other dimension, (Mills, 2007). Therefore the fundamental human rights dimensions coexist and complement each other but the other objective is to safeguard and uplift the life of every individual within a political entity. All human rights are indivisible, interdependent and interrelated hence the fulfillment and protection of one right affects that of others. This is true among all rights and among or within specific categories of rights as economic rights are closely linked to social and cultural rights. The right to work, for example, is connected to that of ensuring minimum standards of living. If an individual is denied the right to life then he or she cannot enjoy all human rights. The social well-being of every individual is deeply rooted in him or her enjoying political rights and economic rights. According to Wood (2011) the securitization of the individual has been at the top of global agendas hence an individual has to be protected from the perils and menaces in all spheres such as the political arena and the economic arena.

2.2.3 First Generation Human Rights (Civil rights and Liberties, Political Rights and the Right to Equality)

2.2.3.1 Civil Rights and Liberties

The legal area known as civil rights has traditionally revolved around the basic right to be free from '/unequal treatment based on certain protected characteristics such as race, gender and disability among others in settings such as employment, housing and especially at state level, (Wood 2011:18). Civil rights or *ius civis* are basically rights of a citizen. The civil rights as can be traced back after the Edict of Milan in 313 but were parochial as these rights included the freedom of religion, (Ibid). Roman legal doctrine was lost during the Middle Ages, but claims of universal rights could still be made based on religious doctrine. According to the leaders of Kett's Rebellion (1549), "all bond men may be made free, for God made all free with his precious blood-shedding (Human Rights 1500-1760 cited in ibid). Though in the 17th century English Common Law Judge Sir E. Coke revived the idea of rights based on citizenship by arguing that Englishmen had historically enjoyed such rights. It is in the in early 19th century in

Britain, that the phrase "civil rights" most commonly referred to the issue of legal discrimination against Catholics emerged.

The Encyclopedia Britannica of Law states that civil rights guarantees equal social opportunities and equal protection under the law, regardless of race, religion, or other personal characteristics. The aim of civil rights henceforth is to ensure that everyone within a society is treated equally and is in a position to reach self actualisation with socially constructed barriers. On the other hand civil liberties concern basic rights and freedoms that are guaranteed, either explicitly identified in the Bill of Rights and the Constitution, or interpreted through the years by courts and lawmakers (ibid). Civil rights include, the right to privacy, the right to be free from unreasonable searches of your home, the right to a fair court trial, the right to marry, the right to vote, the right to privacy. Civil liberties on the other hand include freedom of movement, speech opinion, conscience, religious worship, of association and assembly; right to life, personal integrity.

Thus, it is fundamental to note that the failure to respect civil rights and liberties limits an individual's way of life and it is difficult for an individual to be initiative and to air out his or her relevant views if such fundamental freedom and rights are oppressed. There have been a number of civil rights movements internationally for instance in the 1960s the Roman Catholic-led civil rights movement in Northern Ireland was inspired by events in the United States fighting discriminatory gerrymandering that had been securing elections for Protestant unionists. Later, internment of Catholic activists by the British government sparked both a civil disobedience campaign and the more radical strategies of the Irish Republican Army (IRA) (The Encyclopedia Britannica of Law). The fight against racial segregation in South Africa during the Apartheid era until 1994 is also an example of a civil rights and liberties movement where the blacks were oppressed and enjoyed less freedoms than their white counterparts resulting in massive civil movements led by such heroes like Nelson Mandela.

2.2.3.2 An Analytical Overview of Political Rights under the Ambit of Human Rights

Political rights are a class of rights that protect individuals' freedom from infringement by governments, social organizations and private individuals, and which ensure one's ability to participate in the civil and political life of the society and state without discrimination or repression, (Mills 2011). These are often analysed intertwined with civil rights and together they

constitute what are called first-generation rights. First generation rights are often called blue rights, as they deal essentially with liberty and participation in political life. Examples of political rights fall within the ambit of natural justice which is often equated to procedural fairness in law for instance the rights of the accused, including the right to a fair trial, dueprocess, the right to seek redress or a legal remedy among others.

According to Heywood (2013:23) rights of participation in civil society and politics such as freedom of association, the right to assemble, the right to petition, the right of self-defense, and the right to vote also constitute political rights. At the core of political rights is the essence of choice thus an individual in entitled to make a choice within the political realm for instance during election time and that choice ought to be respected. In modern day democratic systems political rights are not only limited to the right to vote but even the right to assemble stands in as a political right. In Zimbabwe for instance it is now law that elections must be conducted after every five years and many democratic countries such as South Africa and the US also embrace such an element.

2.2.3.3TheRights ofEquality andRuleofLaw,Nexus

Rights of equality pertain the fundamental entitlements that aim at ensuring that every individual within a state is treated the same before and under the law. The protection against discrimination on grounds of sex, age, race, skin, colour, religion, ethnic and social origin, genetic features, political opinion, disability or sexual orientation within the ambit of law is the rationale behind having rights of equality (Mills, 2011). The rights of equality can be analysed vis-à-vis the rule of law as a concept. The idea of rule of law is a doctrine of governance where every individual in the community by virtue of belonging to that respective community is subject to the law regardless of position, colour, race and sex, the law being known to the community thus it must be equally enforced and independently adjudicated to ensure fairness and justice in the community.

Linington (2005) states that the rule of law as legality means that the actions of government must have a basis in law or rather government officials must be able to refer to some source of law which authorises any decision. The right of equality thus entails that even the adjudicators or

interpreters of law must act in accordance with what is stipulated and are also bound by the law. No one ought to be above the law hence equivalence and fairness are central under the human rights dimension of rights to equality. It is thus a right for everyone to be equal before and under the law and has to be granted the equal protection and equal benefit of the law without any form of discrimination for instance during colonialism laws that applied to blacks did not apply to whites and the same is true in reverse. The 1937 Native Laws Amendment Act removed during Apartheid South Africa legalized the discrimination of Africans regarding the rights to acquire land in urban areas yet whites could access the same land with ease using legal procedures. The same did not apply to blacks upsetting the entire human right right to equality doctrine.

2.2.3.4 Dissecting Second Generation Rights (Social, Cultural and Economic Rights)

Economic rights have traditionally been referred to as part of the second generation of human rights, together with social and cultural rights. According to Mark (2014:23) the traditionally accepted human rights were classified as the first generation referring to civil and political rights; the second generation comprises economic, social and cultural rights; and, the third generation refers to collective rights. Under the second generation rights are economic rights which include the right to work, the right to the free choice of employment and to just and favourable conditions of work, the right to form and join trade unions, the right to strike among others. The central notion under the second generation rights is for economic security which is essential for the survival of the individual. Contrary to civil and political rights, which are immediately applicable and essentially based on the prohibition of states from conducting inhuman acts like torture, the curtailing of freedom of speech, religion, or the right to vote, economic rights tend to be considered as requiring states to take action, usually in the form of specific legislation, policies or programmes, so those rights can be realised, (ibid). The state thus has a role to play in ensuring that individuals are secured economically.

However, such a right if analyzed in the context of the modern day is a complex doctrine as states like China and the so called Asian tigers that is Taiwan, Singapore, South Korea and Hong Kong developed using the developmental state concept where such rights like freedom to strike were prohibited but their development has since been labelled a cut above the rest. Long working hours, unfavourable working conditions and poor wages were central in their development but

these are anti-democratic elements which affect the rights of the individuals. It is vital to note that it took the United States of America approximately 50 years to double its economy while it took China, which is a developmental state, approximately 10 years to double its economy thus based on these findings, is it logical to infer that for a country to meet its social, economic and political obligations, it should become a developmental state, (Murwela, 2006).

Social and cultural rights also constitute what are known as the second generation rights. Social and cultural rights are recognised and protected in international and regional human rights instruments. According to Mark (2014) member states have a legal obligation to respect, protect and fulfil social and cultural rights including economic rights and are expected to take progressive action towards their fulfilment. Cultural rights are rights associated with art and ethos, both understood in a large sense. The objective of these rights is to guarantee that people and communities have an access to the beliefs, customs, and arts of a particular society, group, place, or time and can participate in the culture of their election. On the other hand, social rights relate to the right of interaction of an individual with other individuals in their collective co-existence. Socio-economic rights include the right to an adequate standard of living, food, water, housing, clothing, health, education and social security. The aim of the rights is to ensure that an individual lives freely and is in a position to interact with others in his own way as guided by certain beliefs and norms but on the condition that the interaction does not injure other individuals.

2.2.3.5 Third Generation Human Rights in the 21st Century (Collective rights)

Faucette (2015) argues that collective rights are rights that are held by a group, rather than any one individual and they have typically been a focus of indigenous peoples and other groups whose rights are threatened by an individualistic or rather a capitalist system. Therefore these are rights that are granted to collective individuals for instance the international community has been granted the right to protect the citizens of a country if the state concerned fails to protect its own citizens under the doctrine of Responsibility to Protect. Such a right is bestowed to able states or bodies by the United Nations Security Council. In 2011 after the Ghaddafi Regime had killed over ten thousand people in Benghazi the International Community through the North Atlantic Treaty Organisation intervened to save innocent civilians who were being butchered in the country using the Responsibility to Protect doctrine (RtoP). The RtoP is a UN humanitarian

doctrine which is premised on the international community being given the right to protect citizens of a country that fails to protect its own citizens. It is fundamental to note that much of the Third World organizing in the 1960s focused on collective rights and finding ways to enforce those rights in addition to the more widely-recognized individual rights. This thus led to revolutionary redemption movements like the Chimurenga War in Zimbabwe. Examples of the third generation rights include the right to self-determination of peoples, right to development and a healthy environment among others.

2.4 Human Rights in Practice: A General Synopsis of the State Level to International Level Application of the Dimensions of Human Rights

As earlier noted, human rights can be analysed in threefold ways that is as first generation, second generation and third generation rights. The enhancement of human rights at a state level that is in the context of Zimbabwe as a democratic country has mixed results. Political and civil rights in Zimbabwe improved significantly in the years after the country's independence in 1980 as the majority blacks could exercise the voting rights. In the 35 years of independence the country has witnessed enactment of legislation such as the Public Order and Security Act (POSA) which was aimed at bringing about order and peace in Zimbabwe as the period between 2000 and 2002 had witnessed massive violations. However, it is a restrictive law which affects such fundamental freedoms and rights such as freedom of association and movement. The country again has experienced economic woes with the inflation reaching 231 million % in 2008 (African Economic Development Institute, 2009). With formal unemployment paged at over 90% enhancement of economic rights is a cause for concern in the country. Minus the politics surrounding land reform, credit must be given to the government for embarking on empowerment programmes like the land reform and youth empowerment projects where to an extent people are earning a livimg. And again the promotion of small to medium enterprises greatly is a move that can lead to the enhancement of economic rights.

At a sub-regional level the first generation rights have been affected by political crisises that have happened in states like Zimbabwe in 2008, Madagascar in 2009 and in Mozambique between 2013 and 2015 where allegations of election rigging and political related disturbances have affected people's rights. The SADC bloc has tirelessly tried to promote deep economic

integration but economic rights are still to be realised at a sub-regional level. Collective rights such as the right to self-determination have been enhanced as witnessed by the bloc's vow to defend the region against external aggression. In 1998 for instance, Zimbabwe, Namibia and Angola rescued DR Congo from aggression by Rwandan rebels. At a regional level human rights have been affected by the rise of non-state actors like terrorist groups and respective government since independence. The wave of the Arab spring between 2010 and 2013 came as a result of governments' failure to respect fundamental first generation rights. The rise of terrorist groups in states like Nigeria can be understood in terms of the country's failure to adequately deal with second generation rights.

Internationally human rights have been a global agenda after the end of World War II but the so called champions of human rights have been serious violators of human rights in the 21st century. The US has created prisons for terrorists such as Guantanamo Bay and Abu-Ghraib where suspected terrorists are exposed to inhuman and degrading treatment. The proxy wars that have taken place between Israel and Palestine in the Middle-East, civil wars in Africa for instance in former Sudan, Angola and terrorist acts in Europe demonstrate how human rights have been affected by state and non-state actors in the international realm.

2.5 MAJOR AFRICAN LEGAL INSTRUMENTS: AN OVERVIEW

This section aims at analyzing the major legal instruments governing human rights issues in the African continent. The section will deal with the African Charter on Human and Peoples' Rights, the African Charter on the Rights and Welfare of the Child, the Convention on Preventing and Combating Corruption, the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, the Declaration of Principles on Freedom of Expression in Africa and the Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa. The section analyses these legal instruments guiding human rights issues in the African continent.

2.5.1 The African Charter on Human and Peoples' Rights

The African Charter on Human and Peoples' Rights (African Charter) is a legal instrument that was adopted in Nairobi Kenya on June 27, 1981 and entered into force on October 21, 1986. The

African Charter contains no specified stipulated objectives but the preamble of the Charter greatly reveals the essence of creating such a charter.

An analysis of the preamble highlights four critical principles on why the Charter was adopted. Firstly, the historical context of Africa necessitated the need to adopt a legal framework of human rights governing Africa. The Charter was created in order to restore lost dignity of the Africans during the colonial period. Colonialism had dehumanized individuals within the African continent and had created a parochial society in which people were not aware of their rights hence there was the need to adopt such a framework. Again the need for the enhancement of aspirations of Africa and individuals in Africa through ensuring freedom, justice, equality and dignity was seen as vital to the realisation of people's dreams. The Charter was created thirdly to protect individuals from the reality of the governance systems bearing in mind that oppression and brutality can be part and parcel of the governance system. Lastly the aspect of development which is a multidimensional and multifaceted concept was core at the adoption of the Charter. Development was a top agenda in an independent continent and there was recognition that development could not be achieved in isolation. The need to promote civil and political rights could not be disassociated from economic, social and cultural rights hence a holistic approach was then necessary in the socio-economic and political development of the African continent.

Article 1 of the Africa Charter states that, the Member States of the Organization of African Unity parties to the present Charter shall recognize the rights, duties and freedoms enshrined in this Charter and shall undertake to adopt legislative or other measures to give effect to them.Thus it is fundamental to note that the African Charter on human rights issues places obligations on all members party to the Charter to respect fundamental human rights and to act in line with what is contained in the Charter. The Charter also affirms the fact that member states should take the responsive action and draft statutes to ensure that human rights are respected in the African continent. The African Charter contains clauses on social, political and economic rights for instance article 3 focuses on equality before the law, while another article deals with the right to life. Article 1 to 12, to an extent, focus on first generations rights and other articles up to article 63 aim at dealing with second and third generation rights including the establishment and

organization of the African Commission on Human and Peoples' Rights as stipulated in Article 30 with a mandate to promote human and peoples' rights and ensure their protection in Africa.

However, Keetharuth (2014) asserts that the state of human rights enjoyment from Asmara to Abidjan, from Cape Town to Cairo and everywhere in between, would tempt one to question the commitment of states to translate the rights contained in the African Charter into tangibles. Thus (ibid:2014) notes that the economic, social and cultural rights still receive less attention than civil and political rights, while violations of civil and political rights continue on a massive scale. The concept of group rights is still in an embryonic stage. Therefore the African charter deals with all dimensions of human rights but fundamental violations of human rights have been affected greatly for instance in the Rwandan Genocide in 1994, the Matabeleland Disturbances in Zimbabwe in the 1980s and crimes against humanity in the Darfur region of Sudan yet there are provisions in the African Charter dealing with such issues.

2.5.2 The African Charter on the Rights and Welfare of the Child

The African Charter on the Rights and Welfare of the Child entered into force on 29 November 1999 with parties to the Charter considering that the situation of most African children, had remained critical due to the inimitable factors of their socio-economic, cultural, traditional and developmental circumstances. The Charter was adopted as natural disasters, armed conflicts, exploitation and hunger had been rampant in Africa. The 1994 Rwandan Genocide, the War in DR Congo in 1998, drought in Zimbabwe in the early 1990s, among others are examples that necessitated the adoption of the charter. Therefore on account of the child's physical and mental immaturity parties to the Charter acknowledged the need for special safeguards and care of children. According to article 2 on the definitions, every human being below the age of 18 years is a child. Thus states within the African continent are enjoined to protect all those who are below the age of 18 as they are considered to be vulnerable.

Article 3 of the Charter on the Rights of Welfare of the Child protects the child against any form of discrimination and any authority that takes the decision on behalf of the child be it in legal terms or any other circle must do so in the interest of the child as noted by article 4 of the Charter. However, such a clause has not been really followed in Africa as seen by conscription of children under the age of 18 into the so called freedom fighters or rebel groups. In Africa, it is estimated that up to 120,000 children are currently used as combatants or support personnel,

representing 40 percent of the worldwide total. Africa has the highest growth rate in the use of children in conflict, and on average, the age of those enlisted is also decreasing. DR Congo and Sierra Leon are some of the known countries where children have been used as soldiers during armed struggles. Children are also guaranteed the right to life and are exempted from death sentence. African countries have rightly acted in accordance with such a provision as children have been exempted from such provisions. Children have also been given the right to be registered immediately after birth and have a right to a nationality. Article 7, 8 and 9 of the Charter awards the child the right to freedom of expression, association, conscience and religion. The practicality of such provisions is a cause for concern in the sense that in African norms and customs children usually follow their guardians' religion and it is morally not acceptable for children to follow a different religion from the parents.

The right to education is also unconditionally accorded to the child in the Charter and article 13 gives special attention to the handicapped children. Article 13 (1) states that "every child who is mentally or physically disabled shall have the right to special measures of protection in keeping with his physical and moral needs and under conditions which ensure his dignity, promote his self-reliance and active participation in the community". Therefore the handicapped have to be given special treatment and state parties have to ensure that resources are available for the handicapped to reach self actualisation.

According to King (2012) Africa has made strides to ensure that the handicapped receive special treatment in some areas but it has also been lacking. Thus within education systems of the African Universities certain measures have been put in place to cater for all those with disabilities for instance the Disability Resource Center at the University of Zimbabwe. It is meant to cater for all those that are physically and mentally disabled and they work tirelessly to ensure that the handicapped are protected. Again the African child is protected from torture and child labour which are perceived as a great conundrum to his or her life. Security wise the child has been accorded the right to health services. The use of the child in acts that are termed inhuman like drug trafficking is prohibited under the Charter. The AU Charter acknowledges that the child ought to be raised under a family environment and any child who grows without their parents ought to be given special attention and protections as noted by Article 25 of the Charter. Therefore the African child is protected and has rights that are provided for in the Charter. The

African child has enjoyed some fundamental rights like the right to education and protection against child labour in some countries but in armed conflicts some of the outlined provisions have not been applied as children have been forced into fighting as child soldiers.

2.5.3 The Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa

The Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa better known as the Maputo Protocol was drafted in 1995 and came into force in November 2005. It accords wide-ranging rights to women including the right to take part in the political process, to social and political equality with men, to control of their reproductivehealth, and an end to female genital mutilation (King, 2012). The Charter thus aims at protecting women by combating all forms of discrimination against women through appropriate legislative, institutional and other measures. Thus traditionally women were intentionally or unintentionally discriminated from participating in certain areas and circles but the Protocol thus awards women the right to be treated as being equal to the man. Article 3 (2) of the Protocol on Dignity states that "every woman shall have the right to respect as a person and to the free development of her personality". Therefore women are granted the rights to reach self-actualisation and not to be limited by customary practices or any other measure within a political entity.

The Charter greatly revolves around curbing African practices that oppressed the rights of women specifically on marriage and divorce amongst others. It has been an accepted norm in most African countries namely Nigeria, Zimbabwe, Swaziland and Lesotho that women could be forced into marriage, that is through the consent of their parents. Article 6 (1) of the Protocol notes that no marriage ought to take place without the consent of both parties that is the male and the female. The set minimum age of marriage in 18 but such a provision is complicated and complex to follow as marriage is classified in two in the African context. Firstly there is the traditional way and secondly the legal marriage. The former takes place on a daily basis as it is morally accepted that if a female is impregnated, she should stay with the husband hence women below the age of 18 have been married in the traditional way a lot of times. The woman has a right to divorce if the marriage is not working out well and again women have been given the right to participate in the Political and Decision-Making Process under Article 9 of the Protocol.

Africa has made great strides on such a clause because Women are becoming more engaged in a variety of institutions from local government, to legislatures, and even the executive.

According to Tripp (2013), Africa is a leader in women's parliamentary representation globally. Rwandan women hold 64% of the country's legislative seats and states like Senegal, Seychelles and South Africa, more than 40% of parliamentary seats are held by women, while in Mozambique, Angola, Tanzania and Uganda over 35% of seats are occupied by women. Again the scholar states that Ellen Johnson-Sirleaf became the first elected woman president in Africa in 2005, and more so Joyce Banda once took over as president in Malawi. There have been nine female prime ministers in Africa since 1993, including Luisa Diongo in Mozambique, who served for six years, and female vice presidents who have served in countries such as Mauritius, Zimbabwe, Gambia and Djibouti,(ibid). Even within regional bodies, women hold 50% of the African Union parliamentary seats. Thus women are no longer excluded from the political circles within the African continent in the 21st as compared to other centuries. Zimbabwe has made gigantic efforts to include women in the realm of politics for instance Dr Joice Mujuru, a Zimbabwean politician served as Vice President of Zimbabwe between 2004 and 2014. Women have also been appointed to ministerial positions for instance Oppah Muchinguri-Kashiri among others.

2.5.4 An Ephemeral Examination of the Nexus between the Convention on Preventing and Combating Corruption and Human Rights in Africa

The convention aims at promoting and strengthening the development in Africa by each state party, of mechanisms required to preclude, identify, penalize and exterminate corruption and related offences within the public and private domains (Moyo, 2015). Member states bearing in mind that corruption undermines accountability and transparency in the management of public affairs as well as socio-economic development on the continent adopted the convention Maputo on 11 July 2003 to fight rampant political corruption on the African continent.

Therefore corruption was thus seen as a menace to socio-economic and political development as it deprives the rights that attached to the individual, be they first generation, second generation or third generation rights (Moyo, 2015). Corruption can thus be defined as misuse of public funds for private or personal use. Thus instead of the people realising economic or social

rights corruption can make the rights a mere vision. The Convention covers a wide range of offences including bribery domestic or foreign, diversion of property by public officials, trading in influence, illicit enrichment, money laundering and concealment of property and primarily consists of mandatory provisions. The Convention aims at combatting corruption in all levels and basically leads to the promotion of human rights. Corruption has however remained rampant in Africa in states like Zimbabwe and Nigeria where it is systemic. Corruption has become part and parcel of the system upsetting the enhancement of human rights because of various factors. The need to power and power maintenance, low salaries and unfair economic environments have contributed immensely to high corruption levels in Africa. However states like Rwanda have been champions in fighting corruption in the continent.

2.5.5 The Declaration of Principles on Freedom of Expression in Africa

The Declaration of Principles on Freedom of Expression in Africa hinges on the fact that freedom of expression as an individual human right, is a cornerstone of democracy and it is a means of certifying veneration for all human rights and freedoms. Thus according to Article I (1) of the Declaration on the Guarantee of Freedom of Expression,

> Freedom of expression and information, including the right to seek, receive and impart information and ideas, either orally, in writing or in print, in the form of art, or through any other form of communication, including across frontiers, is a fundamental and inalienable human right and an indispensable component of democracy.

The need for freedom of expression is a fundamental element that promotes the development of humanity and a vital protection of an individual's rights. It is important to note that freedom of expression can either be in written form or even in oral talk but what is fundamental about such a right is the progression that can be brought by such a right. Every project, plan, programme or development measure comes from a contemplated design or strategy hence suppressing such a right results in no initiatives being brought forward. Article II guarantees that there must not be interference with such a right and if there is any it must be through legislative measures which must conform to democratic principles.

Diversity and freedom of information are also guaranteed in Africa at continental level with aim of promoting pluralistic access to the media, promotion and protection of African voices within the media and access to information held by public bodies and institutions. Therefore the Declaration aims at halting frivolous and vexatious acts by public officials. However the extent to which such a Declaration has been upheld in Africa is questionable as journalists have been arrested in Africa for reporting on political matters. According to Daves (2007) since the adoption of the Declaration in 2002 in Banjul, the Gambia, Africans have not been able to express their views in public as incumbent governments usually pounce on those with differing views. This can be noted in Malawi in 2011 where journalists were arrested by the WaMtarikwa regime for opposing his regime's anti-democratic tendencies, (Ibid). Moreover in Libya for over 40 years under the regime of Muammar Gadhafi citizens could not enjoy such a right. The same can be said for Rwanda under the regime of Paul Kagame which greatly suppresses freedom of expression and in 2014 the regime banned the British Broadcasting Cooperation for broadcasting a documentary on the other side of the Rwandan Genocide which greatly discredits the regime. The right, though explicitly provided for, has remained a dream in Africa.

2.6 SOUTHERN AFRICA DEVELOPMENT COMMUNITY HUMAN RIGHTS FRAMEWORKS IN BRIEF

This section focuses on some of the human rights instruments in the SADC region including the SADC Treaty and how they blend with African Union Protocols, Declarations and Conventions on human rights. It thus aims at scrutinizing some of the clauses stipulated in the Human Rights frameworks in SADC vis-à-vis practice that is, how state parties to these Agreements in the Southern African region have enhanced the provisions in the instruments. The segment also analyses the SADC human rights covenants in line with the major legal frameworks of the African Union.

2.6.1 Promoting Human Rights in African Expanses: The SADC Treaty and the SADC Region

The promotion of human rights in the international milieu takes place in fourfold ways, involving state and non-state actors, that is through an international bodies (United Nations),

regional bodies for instance the African Union, sub-regional groupings (SADC) and lastly by nation-states. Within the southernmost expanse of the African continent human rights are a priority of the 15 member states that compose the region. According to Article 4 (c) of the SADC Treaty on Principles SADC member states shall act in accordance with principles of human right, democracy and the rule of law. Implied under such a clause is that SADC states are determined to ensure that human rights and other democratic principles are promoted to promote human development.

Article 9 (f) of the SADC Treaty establishes the Tribunal which according to article 16 (1) of the same Treaty has the mandate to ensure adherence to and proper interpretation of the provisions in the SADC Treaty and subsidiary Instruments. Key therefore, according to the clause, is for the Tribunal to adjudicate on disputes brought to and before it. The clause reveals that in the integration and interaction of the member states and the state and the respective citizens, clashes are bound to happen. A dispute involves one party trying to seek justice of some sort entailing that one party may feel that some rights have been infringed. The SADC Tribunal is meant to secure justice and promotion of human rights within SADC as a region

The SADC Treaty aims at creating deep integration of countries that are in the region in various spheres ranging from political, to economic and social to even cultural integration. Objective 1(a) of the SADC Treaty states that the objective of SADC shall be to achieve development and economic growth, alleviate poverty, enhance the standard and quality of life of the people of Southern Africa and support the socially disadvantaged through regional integration. A critical analyses of the objective shows that the promotion of human rights and human security as key elements. Promotion of economic growth and alleviation of poverty is the promotion of second generation rights and the enhancement of economic and social security under the realm of human security. Uplifting human development is also one critical factor entrenched under the human rights doctrine and enhancing the standard and quality of life for the people of Southern Africa means ensuring that there is freedom from fear or want. Therefore the SADC Treaty is a holistic Treaty that aims at uplifting the peoples of the region by protecting their human security and enhancing their human rights. The application of the Treaty however remains a cause for concern in the face of globalization as some states like South Africa have put much effort in local development through partnerships with the European Union and the Brazil Russia India China and South Africa (BRICS partnership).

Putting the SADC Treaty into practice in the face of the interdependency of states has remained a great conundrum in the region.

2.6.2 The Protocol on Gender and Development

The Protocol on gender and development was adopted in 2008 with the aim of empowering women and eliminating all forms of gender inequality. It was a Protocol created with vision 2015, that is, to ensure that what states parties agreed could be achieved by the year 2015. The protocol revolves around equity and equality within the SADC member states in socio-politico and economic spheres. It bestows rights to women in the region to be treated as the same as their male counterparts. It aims at eliminating barriers to self-actualisation by women especially the traditional norms that subjected women to men. It is vital note that women played second fiddle to men in the economic, political and even social set ups but the Protocol eliminates gender based discrimination.

According to article 6 of the Gender Protocol, states parties agreed to repeal all laws that discriminate on the ground of sex by 2015 and 6 (a) specifically eliminates gender based violence. The Protocol again called on member states to draft domestic legislation dealing with gender based violence and a significant number of countries namely Zimbabwe, Zambia and South Africa amongst others legalized the prohibition of gender based violence in their countries. The SADC Gender Protocol is in line with the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa in that they both seek to empower women and eliminate all forms of discrimination based on sex and gender. Article 6(1) of the African Union Protocol states that no marriage ought to take place without the consent of both parties, while Article 8 (2a) of the SADC Protocol states that there shall be full and free consent by both parties to a marriage. Both Protocols have a provision on the minimum age for marriage which is 18 years.The SADC Protocol howeverleaves room for municipal law to define the marriage age. The SADC protocol also contains clauses on the rights of widows under article 10 and it is line with the AU protocol that widows ought to be respected and treated humanely.

Article 11 interestingly is on the Girl and Boy Child Protection with the central aim revolving around the need to treat the girl child in a similar way as the boy child. Traditionally in most

African societies the boy child received special treatment unlike the girl child mainly because families believed the latter would be married and become part of another family. This prejudiced girl children especially in terms of access to education. The Protocols eliminates such practices thereby promoting human rights. And on governance issues, women were given the right to participate in governance issues and a target of 50% by 2015 for women participation in politics and governance issues was set. It has not been achieved yet but SADC has had a female president and a female vice president in Malawi (Joyce Banda) and Zimbabwe (Joyce Mujuru). The SADC protocol also eliminates the multiples rolesof women under article 16 so that women spend more time in developing their lives rather than working for their male counterparts. What is fundamental in the SADC Protocol is the redemption of the woman from traditional oppressive African customs. The Protocol has thus empowered women in the region and their rights as women have been recognised.

2.6.3 Charter of the Fundamental Social Rights in SADC, a Reflection of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa and the African Charter on the Rights and Welfare of the Child

Charter on social rights aims at complimenting the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa and the African Charter on the Rights and Welfare of the Child. It callson member states to act in accordance with international law in labour practices. The regulations stipulated in the Protocols are consistent as they aim to ensure that human rights are protected and enhanced at a regional level for the latter two and at a sub-regional level for the former. The objective of the SADC Charter on Social Rights is for the governments, organisations of employers and organisations of workers to protect individuals and promote their social rights in social areas like the work place.

According to article 3 of the Charter which is on Basic Human Rights and Organizational Rights, all institutions and organisations including the government have to respect internationally accepted human rights of employees. However, while the International Labour Organisation gives the maximum working hours for employees, such a rule in a predominantly capitalist dominated world has found no relevance. The eight working hours have not been respected even in the Southern Africa region where people often work for long hours and failure to abide by company stipulated company working hours may attract punishment or even dismissal. Article 6 the SADC Charter on SocialRights is a reflection of the Protocol to the African Charter on

Human and Peoples' Rights on the Rights of Women in Africa as it states that there shall be equal treatment of men and women within the work and employment circles.

Article 6(b) is specific by not noting that equal opportunities must be awarded to all in terms of access to employment, remuneration, working conditions and social protection among others. It is also a reflection of SADC Protocol on Gender and Development and the African Charter on the Rights and Welfare of the Child as article 7 of the Charter of the Fundamental Social Rights in SADC calls for the protection of children and young people. The minimum age of children is not stated but according to the African Charter on the Rights and Welfare of the Child, anyone who is below the age of 18 is a child. Thus the SADC Social Right Charter awards rights to children not be engaged in work practices until they reach the required age. Again article 8 asserts that retired pensioners have to be given benefits and such social right has been enhanced in the SADC region. Governments have worked tirelessly even with few resources to give benefits to pensioners. Countries like Botswana, Zimbabwe, South Africa, and Zambia have upheld such a social right.

2.7 Conclusion

The Chapter focused on the conceptualization of the major variables of the study namely human rights and the architecture governing human rights in Africa and the Southern African region. The aim was to scrutinize such concepts to lay the ground in establishing the human rights-tribunal nexus within the SADC region. The chapter analysed the historiographical overview of human rights including the various human rights dimensions which are based on the category upon which an individual's entitlements ought to be respected. It also dwelt on some of the frameworks governing human rights in Africa vis-à-vis the respect of human rights in the African continent. Chapter three will focus on the SADC tribunal analyzing its mandate, principles, objectives and evolution among others. The aim is to get a deep understanding of the institution through the analysis and scrutiny of material related to its establishment and functioning.

CHAPTER THREE: SUB-REGIONAL COURT SYSTEMS IN AFRICA HUMAN RIGHTS IN AFRICA: AN OVERVIEW OF THE SADC TRIBUNAL

3.1 Introduction

The chapter aims at examining the SADC tribunal, a body within the southern African region that is mandated to ensure adherence to, and proper interpretation of the provisions of the SADCTreaty and subsidiary Instruments, and to adjudicate disputes referred to it. The chapter analyses the composition, structure, execution and enforcement measures and appointment of judges and other staff members as is stipulated in the 2014 Protocol on the SADC Tribunal. It also focuses on the SADC Protocol and the SADC Treaty vis-à-vis human rights issues within the SADC region greatly substantiating on the hypothesis in brief on how the SADC Tribunal has failed to enhance human rights issues in the SADC region.

3.2 The SADC Treaty and the Establishment of the SADC Tribunal: An Introduction

The safeguard of human rights has been an issue of weighty anxiety to all nation-states of the world since the adoption and proclamation by the United Nations General Assembly of the Universal Declaration of Human Rights on 10 December 1948, (King 2012:12). The setting up of international, regional and even sub-regional criminal tribunals to deal with serious human rights cases has increased in the Post-Cold War epoch especially after the Rwandese Genocide of 1994. At the international level the international criminal court has been set up to deal with crimes against humanity. Regionally, human rights mechanisms such as the African Commission on Human and Peoples' Rights, African Court of Human and Peoples' Rights, European Court of Human Rights, Inter-American Commission on Human Rights and Inter-American Court of Human Rights have also been established to promote and protect human rights. Sub-regionally, courts have also been set up for instance, the Southern African Development Community (SADC) Tribunal which is meant to enhance and promote human rights in the region.

Article 4(c) and (e) of the SADC Treaty on the Principles of the SADC body stipulates that member states shall act in accordance with principles of human rights, democracy, and the rule of law and peaceful settlement of disputes. Therefore, by virtue of trying to achieve the various principles espoused in Article 4 (c) and (e), Article 6 of the SADC Treaty establishes various

institutions responsible for the implementation and achievement of the SADC principles. Article 6(f) of the SADC Treaty establishes the SADC Tribunal meant to enable member states to act in accordance with principles of human rights, democracy, and the rule of law including the peaceful settlement of disputes. This thus entails that the Tribunal is mandated to settle disputes arising in the region and to effectively deal with the rule of law, democracy and human rights issues. Article 16 of the SADC Treaty sets out the functions of the Tribunal. Article 16 (1) of the SADC Treaty states that the Tribunal shall be constituted to ensure adherence to proper interpretation of the provision of the SADC Treaty and subsidiary Instruments and to adjudicate upon such disputes as maybe referred to it. Thus the Tribunal, acting in line with the SADC Treaty, has the role of interpreting the Treaty and all other SADC guiding frameworks including settling peacefully all disputes that are referred to it. According to Article 16 (2) the composition, powers, functions, procedures and other related matters governing the Tribunal should be prescribed in a protocol adopted by the summit. The clause calls for the creation and adoption of a framework containing principles that guide the functioning of the Tribunal hence the adoption of the SADC Tribunal Protocol. Article 16 (3) of the SADC Treaty also stipulates that the Tribunal shall give advisory opinions on such matters as summit or the council may refer to it. Thus the Tribunal is responsible for fulfilling Article 4 (e).

3.3 Composition of the SADC Tribunal: A Critical Analysis

The composition of the SADC Tribunal is contained in Article 3 of the Protocol of the SADC Tribunal. It is important from the onset to note that currently there are two Protocols on the SADC Tribunal, the 2000 version and the latest 2014 one which is now the guiding framework of the Tribunal. Though alterations were made to the 2000 Protocol, the 2014 Protocol and the former are the same in terms of the composition of the Tribunal. According to article 3(1) of the Protocol, the Tribunal shall consist of, not less than 10 judges appointed in terms of article 4 of the Protocol which is based on merit. The 10 judges thus must be qualified to the highest judicial offices in their respective countries. Such a composition henceforth aims at the creation of a seasoned bench, with experience and all-encompassing as member states are allowed to nominate not more than two nationals to sit on the Tribunal bench. Such a composition seeks to ensure that every state is represented in the spirit of oneness and brotherhood in the region. Again it is vital to note that the Tribunal has not less than 10 judges butfive out of the available

number at a time sit as regular judges and an additional five are set aside to sit whenever a regular judge is absent. The additional five may sit for a particular case if the regular judge is absent. The stipulation is that not less than 10 judges, meaning on proposal from the Tribunal, the council may increase the number of judges as stipulated in article 3(5) of the Protocol. The responsibility of selecting judges who will hear a case is one of the mandates of the president of the Tribunal and again the Tribunal has to be constituted by at least three judges and a full bench is constituted by five judges, (article 3(3) of the Protocol). Therefore a minimum number of three judges can adjudicate a case under the regional court system. The Protocol explicitly asserts that out of the judges that compose the Tribunal no two or more judges maybe nationals of a member state at a given time. This thus entails that all judges sitting in the Tribunal must be from the different member states in the region. Such a move is aimed at establishing a strong justice system which is acceptable to all member states. Decisions that are taken by the SADC judges in theory are likely to be accepted by SADC member states as all the countries are represented, notwithstanding the fact that a judge cannot partake in litigation that involves his or her country.

3.4 The Appointment and Selection of Judges and the President in the Tribunal

The selection and appointment of judges is provided for under article 4 of the SADC Tribunal Protocol. The section highlights the need for equality and fairness in the appointment of judges as article 4 (1) of the Protocol focuses on all countries being represented regardless of economic status, size, population and geography. SADC member states are supposed to nominate not more than two qualified judges to fill in positions of the judges. It is the mandate of all SADC states to ensure that after a certain period of time and when called for, they nominate not more than two candidates per state for consideration by the Council. Recently in Zimbabwe four High Court judges, Justices Francis Bere, Martin Makonese, Nyaradzo Munangati-Manongwa and Happius Zhou together with senior lawyers Arthur Johnson Manase and Charles Maunga went through the intense public interviews led by Deputy Chief Justice Luke Malaba to select 2 judges that would represent Zimbabwe in the new SADC Administrative Tribunal. The Zimbabwean scenario is a critical example of a transparent system in the selection of SADC Tribunal judges as interviews are conducted

publicly.It is vital to note that the creation of legal frameworks in the SADC reveal a holistic and all-encompassing effort that does not isolate existing international law and regional policies. This can be noted in the selection and appointment of judges clause under the protocol of the tribunal which has clauses that are deeply rooted in the United Nations Declaration of Human Rights (1948), the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, the Protocol on Gender and Development where at the core is to treat every individual equally regardless of sex or gender.

Member states therefore nominate candidates that fill in positions of judges while appointments of judges are done by the Summit upon recommendation by the SADC Council, in accordance with guidelines adopted by the summit from time to time. Judges of the SADC Tribunal are appointed for a five year term period and may be re-appointed for one further term. The judge president is elected for a period of three years and an acting president may be appointed if the judge president is temporarily absent or is unable to carry out his or her duties. It is vital to note that the appointment of judges within the SADC Tribunal is done on a part time and full time basis as stipulated in article 9 of the protocol. Article 9(1) states that the tribunal shall sit when required to consider a matter submitted to it and the judges in this case maybe be appointed temporarily and Article 9(2) of the protocol states that upon the recommendation by the president, the council may at any time decide that the workload of the tribunal requires that the judges serve on a full time basis. For the latter holding of any other office is prohibited hence they have to be entirely dedicated to the work of the Tribunal.

The failure by a judge to perform his or her functions or if he or she commits a serious breach of his or her duties or if there is a serious misconduct, the judge concerned maybe removed from office as is provided for in Article 11 (1) of the protocol . However, this is only possible if an ad hoc independent committee appointed by the summit has recommended that the judge be removed from office following due processes. Therefore a judge can only be removed from office if there is concrete evidence that there was a breach or act of misconduct and determining such entails inquiry and investigation in the matter concerned which is the responsibility of the set independent ad hoc committee. The protocol on the Tribunal aims at creating a court system that is autonomous and free from influence from member states or individuals from

member states. The protocol thus under Article 12 prohibits the judges from participating or engaging in political and administrative functions in member states or SADC or even to engage in professions that may interfere with the proper exercise of the judicial functions. Again there are certain cases that are initially adjudicated within the domestic courts and may latter on be referred to the tribunal and according to the protocol a judge who sat to hear a case at a domestic level may not adjudicate the same case at a regional level [Article 12 (2)]. In the endeavor to create an independent court system in the region, judges of the tribunal are not allowed to adjudicate in cases where there is conflict of interest. Article 14(4) of the Protocol states that "conflict of interests includes without limitation the possession by a judge or associate of a judge or any financial and property interests relevant to the dispute… a close member of a judge or associate of a judge…" Therefore if any social, economic or political interest of a judge is at stake in a case brought before the tribunal, the tribunal may sit without the judge concerned. This henceforth is a respect of the natural principle of *nemo judex in sua causa* where no one has to be a judge of his or her own case.

3.5 The Day to Day functioning of the Tribunal: Analysing the Role of the President of the Tribunal and the Registrar's Office

The president of the tribunal is the head of the tribunal and is responsible for the running and functioning of the tribunal although assisted by other staff within the body. Overally the president is the overseer of the tribunal and he or she is the highest decision maker in the court. Article 15 of the Protocol on the SADC Tribunal focuses on the duties of the president who shall direct the work of the tribunal that is, to ensure that functioning of the court as according to stipulated guidelines. The president of the tribunal in SADC is responsible for administration and supervision of the tribunal. The president therefore ensures that the day to day running of the tribunal though done by the Registrar is order. The representation of the tribunal is another duty of the president where he or she is expected to report or give an account of the tribunal on behalf of the tribunal.

The president has the role of appointing the Registrar of the tribunal amongst some of his or her duties. While the president watches over the tribunal and plays a supervisory role, the day to day running of the tribunal is conducted by the registrar. The registrar is mandated to ensure

regular communication to and from the tribunal concerning the functioning of the body and this includes communicating to member states events that take place within the ambit of the SADC Tribunal. The Registrar has a role of taking minutes in every meeting or sitting of the tribunal directly or through a representative. The Registrar is appointed through a secret ballot by the tribunal after member states nominate qualified nationals who hold similar offices in the respective SADC countries. The Registrar just like judges in the tribunal, hold office for a period of five years and maybe eligible for appointment for one further term. He or she is prone to removal if he or she fails to perform his or her duties or if he or she commits a serious breach or is engaged in act of misconduct. However, in the event that such a scenario takes place the president of the tribunal may order three judges from the tribunal to inquire and determine the matter and to report the facts to the president and advice the president on whether the Registrar must be removed from office or not. Therefore the removal of the registrar is not spontaneous upon a breach of the principles but after examination of the matter concerned and investigations are carried out. This is critical as the expulsion of anybody from the work place must be deeply rooted in a serious contravention of work principles. This is an enhancement of the *Audi alteram partem* or *audiatur et altera* pars meaning "listen to the other side", or "let the other side be heard as well", which gives the so called ‘victims’ the opportunity to respond to the evidence against them.

The Registrar is assisted by the Assistant Registrar who has the role to act as the Registrar in the absence of the latter and to be the acting Registrar if the position of the Registrar is vacant [Article 24 (1)]. The Assistant Registrar has the same functions as the Registrar and is bound by the same provision even concerning the removal from office clause. In the event that both the Registrar and the Assistant Registrar are unable to perform or carry out their duties, the president shall appoint an official from the registry to perform the duties for a period of 6 months. The protocol therefore aim at avoiding the creation of a vacuum in the office of the Registrar for it is fundamental in the functioning and operation of the SADC Tribunal.

3.6 Jurisdiction of the SADC Tribunal

Articles 33, 34 and 35 of the Protocol of the SADC Tribunal deal with matters in which the tribunal has jurisdiction. Article 33 of the protocol focuses on material jurisdiction where the tribunal shall have the jurisdiction to interpret the SADC Treaty and

protocols relating to disputes between member states. However, in a world that is marred by violations of human rights, such a role is greatly parochial as disputes between member states are too important to ignore hence they have to be settled amicably but disputes between member states and citizens of member states have to vital to be ignored as well in the enhancement of human security (Mackenzie 2013:23). Therefore the scope of the jurisdiction of the SADC Tribunal is very much limited in this case. The SADC Tribunal again under article 34 of the protocol gives advisory opinion to the summit or council as may be called for and lastly under article 35 which is on applicable law, the Tribunal shall apply SADC Treaty and the applicable SADC Protocols. Therefore it is from these clauses that the functioning of the Tribunal is based upon.

3.7 Dynamics within the SADC Tribunal and Human Rights

The SADC Tribunal is a body that has been mandated to ensure that human rights are upheld but the SADC Heads of State and Government suspended it in 2010 pending a review of its role, terms of reference and mandate. A new protocol was adopted which was established contrary to Article 23 of the SADC Treaty. Article 23 of the SADC Treaty provides that decisions concerning the community and any affected persons or citizens must be made in consultation with them but according to Zimbabwe Human Rights NGO Forum (2015), the SADC Heads of State adopted a new Protocol on the SADC Tribunal, without any consultation. Consultation with the SADC community simply entails that the input of the community which will be guided by a covenant to adopt will be encompassed in the final guiding protocol. From a human rights perspective it simply guarantees first generation rights such as freedom of expression. Therefore the 2014 protocol was adopted without the people being consulted. Moreover not only did SADC not act in accordance with its own Treaty's procedures but the August 2014 decision to adopt a new Tribunal protocol contravenes the Abuja Treaty establishing the African Economic Community which provides a framework for continental regional integration. It is vital to note that maintaining the suspension of the SADC Tribunal SADC Heads of State and Government acted out of step with the other sub-regional economic communities that have accessible judicial bodies for the protection of human rights, such as the East African Court of Justice, ECOWAS Court of Justice and COMESA Court of Justice (ibid). It is hence baffling to note that the decision to adopt a new protocol was done outside the ambit of article 23 of the SADC treaty and denies ordinary citizens the right to access the

court is an upset to the justice as it is a court that is meant to protect ordinary citizens (Mikell: 2015). The new Protocol removed access to the Tribunal by individuals and legal persons, and further removed its human rights mandate (Zimbabwe Human Rights NGO Forum: 2015). Therefore the dynamics that have taken place within the SADC Tribunal have not helped advance the cause of human rights.

3.8 Decision Making and Enforcement and Execution under the Ambit of the Tribunal and its Feasibility

The establishment of the SADC Tribunal was seen as a major event in the history of SADC as an organisation and in the development of SADC law and jurisprudence (Bangamwambo: 2008). Such developments in the SADC region were viewed as a step towards the achievement of justice and enhancement of human rights in the region but having a body mandated to ensure that justice is served in its best interest is one thing whilst ensuring that written agreements are put to practice is another. Though part V of the Protocol of the SADC Tribunal focuses on decisions of the tribunal it is vital to note that it is a waste of time to establish decisions that are never respected or are declared null and avoid by those who the decisions have been made on their behalf. The decisions by the Tribunal are made by a majority vote and are binding and ought to be binding upon parties to a disagreement [Article 38 (1) and (2)] but that has not been the case as can be noted by the *Campbell v Zimbabwe case* (**SADC (T) Case No. 2/2007)**where the Tribunal held that the Zimbabwean government violated the organisation's treaty by denying access to the courts and engaging in racial discrimination against white farmers whose land had been confiscated under the land reform programme in Zimbabwe. The Zimbabwe's

Justice Minister Patrick Chinamasa wrote to the Tribunal to inform of Zimbabwe's withdrawal from the Tribunal in a letter written on 7 August 2009, arguing that it did not have jurisdiction over Zimbabwe because the Tribunal's Protocol had not yet been ratified by two-thirds of the total members of the SADC, as required by the organisation's Treaty, and stated that Zimbabwe would no longer be bound by any of the Tribunal's past or future judgments (King 2014).

Such a response to the Tribunal's ruling questions the commitment and adherence of member states to the sub-regional court system and thus compromises human rights in the region.

3.9 Financial Matters of the SADC Tribunal

The SADC Tribunal functions using a budgetary system that was designed to ensure sustainability and effectiveness in the duties of its staff. The budget of the Tribunal is funded through an annual regular budget of the SADC and from possible sources determined by the council based on a three year plan, (Article 46 (1) of the Protocol). The legal costs of any state party to a conflict are paid by the party concerned implying that a state has to incur all its legal expenses when appealing to the SADC Tribunal. Such a provision maybe fair at state level but it reveals the fact that individuals can no longer access the court which is detrimental to human rights, except for labour cases where the new administrative tribunal is expected to deal with labour disputes between SADC employees and States among others. The proceedings at the Tribunal are free of charge and Article 46(III) is explicit on calling member states to pay for any expense that they may cause the Tribunal to incur. The SADC Tribunal funding is a cause for concern in the sense that there are allegations that the former suspended Tribunal was western funded. Ndumiso (2014) asserts that the SADC Tribunal was essentially funded by western powers through NGOs and donor organisations. It is a cliché that "he who pays the piper calls the tune" hence he further states that objectively speaking, the suspended Tribunal was following a western rather than an African mandate. Therefore there are a lot of controversies that surround the financing and funding of the Tribunal but it is fundamental to note that the former Tribunal never faced financial difficulties as there was enough funding. The new one has been financially stable since its inauguration in 2014.

3.10 SADC Tribunal in Practice Vis-À-Vis Human Rights Issues

The SADC Tribunal has not been a priority for SADC member states as seen by the late inauguration of the Tribunal in 2005 after the protocol on the Tribunal was established in 2000. Again, ten years later the body was suspended and as observed by Fritz (2015) at the closure of the thirtieth SADC Summit in Windhoek, it was announced that the Tribunal's role, functions and terms of reference would be reviewed and that the process would be undertaken and completed within a six month time period. However, it took the SADC Community approximately 4 years to review the Tribunal's functioning, abrogating fundamental clauses that uphold fundamental human rights in the process. According to King (2014) the Tribunal is weak in its functioning and domestic courts are very powerful than the Tribunal which is an upset to

democracy and human rights. Fritz (2015) notes the Tribunal's incapacitation was secured by the Summit failing to

renew the terms of those judges eligible for reappointment and failing to appoint new judges to fill resulting vacancies a violation of the Article 4 of the Protocol guiding the Tribunal. The SADC law requires that the Tribunal at all times be comprised of no fewer than ten judges but at one point there were only four in office not sufficient judges to constitute a full bench of the Tribunal, (ibid).

It is fundamental to note that the Tribunal's proper functioning was clearly not intended to rest at the whim of the SADC Summit. The proper functioning of the Tribunal rests upon the Tribunal and its various departments and the summit has to redirect where the Tribunal falters but the summit seems to have usurped the running of the Tribunal. This can be noted by effectively shutting down the Tribunal where SADC leaders reached beyond their powers and acted unlawfully, (ibid). The suspension of the Tribunal in 2010 was a violation of the international principle of institutional balance, a synonym of the doctrine of separation of powers in domestic law which serves to prevent the concentration of uncontrolled power in a single institution and governs the relationship between institutions. The result of such actions within the SADC region has been controlled abuse of human rights by member states and individuals no longer have an alternative on to which they can appeal to. Where a government falters and where an individual is not satisfied it becomes challenging to actually address human rights issues as the decision which is reached by domestic courts is now final. However, a closer look at the functioning of the modern African state reveals that the court system's powers have greatly been in the hands of the executive which is responsible for appointing the judiciary bench. Therefore human rights issues in the SADC region have remained a major issue as there are no alternatives to appeal to if the state wrongly construe certain actions. The situation currently in the SADC region denotes that the state is a champion of democracy and human rights but deep analysis of events that have taken place in Zimbabwe in the 1980s (Matabeleland massacres) the Marikana Incident in South Africa and the 2009 chaos in Madagascar among others where people's rights were abused and justice has not been brought to book since then, (Madise 2015:4)

3.11 Conclusion

The chapter has been an attempt to unravel and unpack the structure and functioning of the SADC Tribunal as the organ mandated to interpret the treaty that establishes SADC as a community and other guiding instruments. It thus focused on key clauses that are stipulated in

the Protocol on the SADC Tribunal the latest 2014 version paying particular attention to the appointment of judges, their tenure and the functioning of the body. Also key to the chapter was an analysis of the execution and enforcement of decisions reached by the Tribunal. The chapter focused more on analysing the fundamental pillars that guide the SADC tribunal. The last section was an overview of the Tribunal vis-à-vis human rights issues from the researcher point of view. Chapter four focuses on the findings and analysis. That is, the analysis of data gathered by the researcher concerning the effectiveness of the SADC Tribunal face to face with human rights within the southern African region.

CHAPTER FOUR: THE SADC TRIBURNAL IS AN INEFFECTIVE TOOL IN CHAMPIONING HUMAN RIGHTS IN THE SOUTHERN AFRICAN REGION

4.1 Introduction

This chapter is a presentation of the major findings on how the SADC Tribunal has been ineffective in enhancing human rights in the SADC region. The chapter aims at examining how the SADC Tribunal has failed to live up to expectations and how leaders within the SADC region have contributed to the weakening of the structure. The findings are based on first-hand information and they unpack the real human rights situation in the SADC region based on the evidence gathered by the researcher from relevant authorities and officials. The researcher managed to conduct six in-depth interviews with academics, legal practitioners, civil society groups and human rights activists among others. Research instruments such as questionnaires were also utilised in gathering data that will be analysed in this section. The questionnaires were distributed to relevant authorities in political, economic and social organisations which have a global bearing. Again documentary search was used to compliment first-hand information. Thematic analysis which is a method of data analysis in Social Science Research was used to analyse the findings by the researcher.

4.2 The Creation of the Court Systems and Human Rights

Before an analysis of the nexus between the SADC Tribunal and human rights issues in the southern Africa region it is of paramount importance to note that various respondents concurred that at the core of the creation of the Tribunal was the issue of human rights hence the Tribunal must function for the enhancement of human rights. According to one anonymous respondent from the Research Council of Zimbabwe,

> …whether the Tribunal is settling a state vs state dispute or even individual disputes (which it nolonger does), the essence of having such a structure is to ensure that justice is served and where justice is served the rights of the individual are enhanced.

Implied in such an analysis is that wherever a conflict or dispute exists, either one party to the dispute or both parties feel that they have been of robbed certain rights and justice has not been done. The Tribunal must therefore be a guarantee that a dispute can be settled amicably without resort to self-help. Another respondent from a human rights organisation based in Zimbabwe

concluded that human rights fall into various categories ranging from first generation rights, second generation rights and third generation rights and any system crafted, or measure taken to serve justice, revolves around the three basic different categories of human rights. The motive behind the creation of the SADC Tribunal according to the respondent is to effectively deal with human rights issues. According to the respondent,

> Settling an economic, political, social or even environmental dispute between or among states enhances the security of those involved in the dispute especially of the complaint if the dispute is ruled in its favor. However, at the center of dispute settlement lies the protection and upholding of basic human rights. The rights maybe economic rights mostly or collective rights of individuals of a certain state or segment within a community.

Therefore, one is bound to conclude that the resolving of a dispute between state parties under international law or domestic law, regional settings or sub-regional set-ups revolves around enhancing human rights and/or serving justice. The creation of any court system should ordinarily enhance the advancement of human rights and human security issues. Courts are meant to serve justice and resolve disputes and at the same time enhance the protection of states or individuals.

4.3 The Southern African Community Tribunal Objectives vis-à-vis the Respect for Human Rights: A Cause for Concern.

The SADC Tribunal was set up that every country within the Southern Africa region not only respects but conforms to the principles and objectives engrained in the SADC Treaty of 1992. Notably these principles and objectives include peace, security and solidarity, human rights, democracy, the rule of law, equality and the peaceful settlement of disputes. According to an anonymous respondent from the Zimbabwe Human Rights Forum, the SADC Tribunal's objectives have remained a vision in the sub-region as fundamental democratic principles have not been upheld by nation states in the SADC region and the Tribunal has not done much to protect people's rights since 2005. The establishment of the Tribunal came with high hopes that human rights issues which could not be solved amicably at state level could now be referred to the sub-regional court but people's hopes and aspirations have been thwarted. According to the respondent, the establishment of the SADC Tribunal was the most crucial segment of the southern Africa region in the whole democratization process as the history of the region has been dominated by unfairness, brutality, massive killings,

and suppression of people's rights based on color or even sex. The respondent seems to concur with a lecturer from the University of Zimbabwe in the Law department who reiterated that

> The creation of the SADC Tribunal alone was a step ahead in the attainment not only of peace and democracy in the region but also it was a move towards the attainment of deep integration and solidarity. It was a move that meant complete removal of fear within nation states in the region and even individuals as if any party be it an individual or a state that felt that it had been injured could actually look for remedy through the use of the SADC Tribunal... by establishing a regional court in a region that has been marred with violence starting with the period known as the pre-colonial phase, to the colonial period up until even the post-colonial era with civil wars in states such as Angola and Mozambique, the Tribunal came as a court that could limit governments' powers over the people and certain individuals' powers over others.

Implied in such an analysis is that the SADC region has had human rights abuses since the pre-colonial phase where raids and dispossession was the order of the day. There was no law to deter one party from forcefully taking certain possessions of other parties. According to Maseko (2009) the Bantu speaking people disposed the Khoisan of their resources and land and the same happened with the whites dispossessing the blacks of their rights during colonialism. Accordingly so many human rights abuses have taken place in the region notably operation Dingo of 1977 in Mozambique which left over 3000 people dead. Even after independence in Zimbabwe, an estimated 20 000 people were allegedly killed in Matabeleland but justice has not been reached for some of the victims and survivors.

In an interview with a senior official from Zimbabwe Lawyers for Human Rights, the official argued that the SADC Tribunal has failed to live up to expectations because of power politics in the region where the lack of commitment by revolutionary leaders has 'killed' the motive behind creating a court system in the region. According to the respondent leaders in the region have, on various occasions, taken the law into their hands such that decisions in local court systems that affect the leaders concerned are predetermined. The Tribunal hence has been an attempt to ensure that if cases are unfairly ruled at a domestic level, the party affected has a right to take it to the next level. However, leaders in the region seem to be fighting the works and functions and the commitment to the Tribunal is questionable, the respondent added. Again, responses from a focus group discussion which was conducted with members of the Africa Human Rights Network reveal that human rights issues have not been a priority for the SADC leaders as can be noted by

the time and sequence that have taken place to actually come up with the Tribunal. The Treat establishing the SDAC Tribunal in the SADC was concluded in 1992, but the protocol guiding the Tribunal was only crafted in 2000. The Tribunal started functioning in 2005, five years after the Protocol was established and five years later that is in 2010, the sub-regional court system was suspended because of frivolous and vexatious reasons. Four years later the, the Tribunal was reinstated but with disappointing and unfavourable changes which are detrimenalt to human rights.The Tribunal returned with limited scope where the individuals can no longer access the court. Therefore according to respondents the SADC Tribunal has thus become a tool that is meant to make the world believe that there is a sub-regional court system so that the SADC region can be viewed as a region that supports human rights but in essence the body is in non-existent as people's rights have not been enhanced or realised as was expected with the creation of the Tribunal.

According to Russell, an academic and lecturer at Harare Polytechnic the Tribunal has been a disappointment in the SADC region if analysed against its objectives. Accordingly it is meant to effectively enhance the rule of law, democracy and human rights, including the settlements of disputes among others but these must do not necessarily apply to nation-states when analysed in the SADC region. According to the respondent the SADC region is a relatively peaceful region where solidarity is preferred to disunity and where fighting plays second fiddle to unity hence state vs state conflicts are likely less to happen because of such a set-up. Russell added that leaders in the SADC region may have differences (assumed) but to take each other to the court is less likely to be seen in the near future. It is believed that at one point the president of Zimbabwe Robert Mugabe and Former South African President the late Nelson Mandela had differences as was noted by their different stances on the 1998 war that was in the Democratic Republic of Congo (DRC) where the former wanted the use of hard power whilst the latter favored soft power. However, such analysis lacked evidence and the leaders never really showed any differences.

The central argument of the respondent is that the nature of the SADC region which has been shaped by history and the brotherhood effect limits the chances of a conflict being taken to the Tribunal. Therefore, according to the respondent, the Tribunal was established with the motive of complimenting local courts, in the name that if human rights are suppressed domestically, sub-regionally something can be done. History reveal that governments have been great violators of

human rights internationally. A state that fails to protect human rights has to be punished or forced to play and act according to what is stipulated. The SADC Tribunal henceforth stands as a court that is meant to be a savior for individuals that are unfairly treated by the state but since 2005 especially in the famous Campbell Case, the SADC Tribunal has remained a weak structure that no state pays attention to. The government of Zimbabwe failed to abide by the Tribunal's ruling showing that the Tribunal has never been a priority of the SADC states.

4.4 Scope Alteration of the SADC Tribunal and Its Detriment to Human Rights and Security of the Individual

There was a general consensus among the respondents to the research that the fundamental, noticeable and detrimental change of the SADC Tribunal after it was reinstated in 2014 was in its scope. The 2000 protocol set that any person, natural or juristic, could bring a matter before the Tribunal alleging a violation of SADC law by a member state and fundamentally such person needed not to be a citizen of a member state. Thus such a provision according to a respondent from the research council of Zimbabwe pointed to enhancing the security of the individual from state apparatus as it can be noted that the guidelines within the SADC community usually and at most also guide the states within the region.

Such a clause protected the individual and even arbitration within domestic courts focused on objectivity as there was the chance that an individual could also take the same case at a regional level as was in the Campbell case. Even employees of SADC could also access the court. The individual was the priority and such a clause as Russell noted was meant to effectively protect the individual against the powers of the state. According to the respondent if the powers of the state are unchecked and unbalanced, the state may abuse such powers and the victims are always individuals within the nation state concerned. It is imperative to note that since the mid-1990s the shift from the security of state to that of the individual has been a global agenda under the realm of human security. The focus therefore is on securitizing the individual instead of the state and guaranteeing the individual human rights is fundamental towards the attainment of such security of the individual.

However, the 2014 protocol altered the scope of the SADC Tribunal removing access to the Tribunal by individuals and legal persons. This is an upset to human rights and justice as individuals within member states of the SADC Tribunal have been left vulnerable to state

suppression and state violation of human rights. The Coalition for An Effective SADC Tribunal notes that

> …the disbandment of the old Tribunal and the adoption of the new Protocol effectively disregards the independence of the judiciary, the separation of powers and the rule of law and it also impacts negatively on human rights and business confidence across the region

Therefore it is pivotal to note that the alteration of the clause on the individual's right to access the Tribunal has detrimental effects on human rights of individuals in the region. Again business wise investor confidence has been limited as individuals can no longer wage legal complaints against nation states sub-regionally as it is no longer legally possible. The Crisis in Zimbabwe Coalition notes that investors will shy away from the region because there are no guaranteed property rights in some countries of the region and a flawed rule of law alongside a powerful executive will result in investors lacking the much needed confidence to engage states in the SADC region. It is vital to note that most countries in the SADC region are developing countries that are in dire need of investment and capital but because the court systems and legal mechanisms have become so limited it becomes difficult and risky to do business with such countries. Faricius (2015) notes that the decision by the southern African leaders to neuter the SADC Tribunal can be viewed largely as a human rights issue and it is also a commercial issue, which hurts not only the individual victims of illegal actions by regional governments, who it deprived of legal redress but all citizens of the region. In a meeting that was held by over 100 regional business leaders the conclusion was that it was difficult to engage SADC countries with the abrogation of the clause, (ibid).

According to a respondent from the Human Rights Forum, the alteration of the SADC Tribunal has affected the motive of having such a sub-regional court as the original and positive impact that it initially had has been lost. Russell also notes that the 2000 Protocol instead of being altered to meet human rights challenges of the 21st century was abrogated for further oppression of human rights. The respondent asserts that it was not clear why the Tribunal was suspended in 2010 but because of the abrogation of the fundamental clause on the individual's right to access the Tribunal, it becomes inevitable for one to conclude that such a clause was a threat to leaders of the member states of the SADC bloc and their regimes as time and again their respective regimes could be questioned especially on human rights issues. Such an analysis seem to reveal

that the suspension of the Tribunal was a move that was aimed at facilitating the alteration if not abrogation of the clause on the individual's right to access the court. This thus is detrimental to human rights as individual rights have been affected in various spheres ranging from political, economic and even social areas in the region because of the irresponsibility of the state.

4.5 Suspension of the Tribunal: A gimmick to prolong the power of revolutionary power hungry leaders

An anonymous respondent from the department of political and administrative studies (UZ) concluded that the suspension of the SADC Tribunal was a political gimmick to prolong the power and acceptance of leaders in the region who are power hungry. According to the respondent the Tribunal was launched in 2005 as the supreme court of appeal in the region empowered to make rulings on human rights complaints by individuals and citizens of SADC member states against their own governments. This came as a realisation that citizens of the region were not getting justice from their courts. However the suspension of the Tribunal was a political move according to the respondent because the 2007/2008 Campbell case where the Tribunal ruled that the Zimbabwean government could not evict Mike Campbell and other white farmers from their land as this amounted to discrimination against whites, Zimbabwe challenged the legitimacy of the court. Two years later the leaders of the SADC called for the suspension of the Tribunal mainly because their governance system was being called to question vis-à-vis the SADC Treaty. Therefore continued question of their governance style could have discredited them thus they had to abandon the Tribunal, tilt and manipulate it in a way that best suits their needs as was seen by a complete removal of the Tribunal's powers to adjudicate complaints of individuals reducing it to adjudicating in state disputes between states, which it had never done before, (Fabricius 2015).

Implied in such analysis is that most leaders of SADC member states oppress and violate basic human rights and such was the case in Zimbabwe in the so called fast track land reform but domestically such acts seem to go unnoticed because the political systems are structured in a way that favours the ruling elite neglecting the objectivity and autonomous effect that is a necessity in the adjudication process. Therefore removing the right of the individual to access the court is a move meant to strengthen the power of incumbent governments as the non-interference in domestic affairs principle also is part and parcel of the SADC community. The suspension of the

SADC Tribunal according to some respondents was meant to alter the Tribunal to save the best interests of political actors especially those in power overlooking the whole justice system and its fundamental importance in the securitization of the individual in the 21st century. This thus upsets human rights as governments are now in apposition to do as they deem necessary. Such an analysis was cemented by a respondent from the research council ofZimbabwe who argued that human rights can now be violated as individuals' complaints can be brushed away in domestic courts and what the international community and several human rights organisations can do is to simply criticise, report and lash certain regimes with no action being taken. Therefore human rights violations in the SADC region according to the respondents now have no remedy as local courts are strongly controlled by the incumbent government for instance in Swaziland and Zimbabwe where the executive seem to be encroaching the powers of the judiciary and legislature. The Tribunal hence has become a weakened structure that is there to paint a positive image about the SADC region when in actual fact it is not serving any purpose. The removal of the access of individual actors to the SADC Tribunal has reduced legal remedies available to ensure legal compliance in the SADC region.

4.6 The SADC Tribunal has been a Weak Structure without Implementing Powers (Campbell vs Zimbabwe Case)

Various respondents held that the SADC Tribunal has been a weak structure even before the removal of the clause on the individual's right to access the court. An anonymous respondent from Sapes Trust asserted that having access to the court is one thing while implementing the decisions of the court is another. The respondent argued that the Tribunal has since its birth failed to enhance human rights because the outcomes of its decisions have never been taken seriously. Citing the *Campbell vs Zimbabwe* in which Mike Campbell (pvt) Limited, a Zimbabwean-registered company, instituted a case before the Tribunal to challenge the acquisition of agricultural land in Zimbabwe by the Government of Zimbabwe on the grounds that their due process rights had been infringed and that the policy of land redistribution was being applied in a discriminatory manner, (Mcleon 2011). In the case concerned the Tribunal held that the Government of Zimbabwe should award damages to the applicant but government was however reluctant to act against the "war veterans" because they were key Zanu PF supporters(ibid). This intransigence led the Zimbabwe forum of non-governmental organisations (NGOs) to

take the Government back to the Tribunal to enforce the judgment. The Tribunal found against the Government again, but the Government still refused to enforce the judgment. However the Minister of Justice and Legal Affairs, Patrick Chinamasa, said in a statement that the Tribunal did not bind Zimbabwe because it had been ratified by less than two thirds of the SADC's members. This interpretation ignored the amendments to the SADC Treaty made in 2000, which accommodated the Tribunal and authorized it to exercise its jurisdiction separately from the conditions of the Protocol. The ruling of the Tribunal was totally ignored.

According to a lecturer of law at the University of Zimbabwe, though the Zimbabwean government refused to honor the ruling of the Tribunal the fact that the government was represented as a litigant in the case is vital as it meant that it was bound by the Tribunal. He likened such a case to a game a football where he asserted that,

> It is not acceptable for once to agree and participate in a game of football and after losing then seek to distance oneself from the process and outcomes. By virtue of agreeing to be a player, it means necessarily that one becomes bound by the process and its outcomes and in this case Zimbabwe was bound by the process and outcomes of the Tribunal.

The respondent even went further to assert that the implication of Zimbabwe's stance on the Campbell stance will have long term negative consequences on the role and functioning of the Tribunal as states are likely not to act in accordance with the rulings of the Tribunal. The motive behind having the Tribunal was questioned in the Zimbabwean case as the two adverse judgements by the Windhoek-based court exposed the fact that the Tribunal and the region as a whole is weak in implementing noble and justified principles that violate the ideology of incumbent governments.

It needs to be noted that states within the SADC region accept certain rules and regulations if they do not affect the philosophy and ideology of the ruling elites and the regime in power as it is the same Zimbabwean government that was not bound by the SADC Tribunal's decision on the Campbell case but accepted the facilitation of talks by a SADC envoy in Thabo which led to the formation of the government of national unity or the inclusive government in 2009. However, human rights of individuals are affected in the process and it puts an upset to the democratization process of the region as decisions taken after thorough scrutiny and investigations are not respected. The individual is thus affected in the process.

4.7 The New SADC Tribunal: A regression on Democracy

The new SADC Tribunal was labelled not only as weak but a regression on democracy. According to an anonymous member of the Crisis in Zimbabwe Coalition confining the responsibilities of the Tribunal to resolving disputes between member states and interpretation of the SADC Treaty comes with adverse effects on people's rights and freedoms as a regional court of appeal that can be accessed by individual citizens is critical for the respect and protection of human rights in the SADC region. According to the respondent,

> A SADC Tribunal with a full human rights mandate will hold governments to account as far as respecting human rights is concerned with governments, individuals and institutions knowing fully well that there is a court of appeal whenever justice is denied

Therefore the respondent seem to suggest that denying individual citizens the right to appeal at regional level a step backwards on the democratization process as granting the individual such a right is a critical pillar for democracy and the respect for human rights.

According to Kabwato and Mureriwa (2014) the SADC region hosts over 270 million citizens yet they are held at ransom by 15 heads of State whose decision making is informed by the need for self-preservation than upholding the values of democracy. The decision taken by the SADC Heads of State on the Tribunal not only is undemocratic but it shows selfishness, arrogance and contempt with which they hold SADC citizens. The control of the judiciary by the executive has been at the heart of the lack of a clear cut separation of powers in the SADC region. Fresh evidence from Botswana suggest that the government of Ian Khama's intention to hold the judiciary hostage emerged in the first weeks of November where the fight between judges on the one hand and chief justice Mauping Dibotelo and the Executive on the other hand. The Fiscal conundrum in the Judiciary of states like Malawi and Zimbabwe with high corruption levels in these countries and according to Russell the general populace in some of these countries has lost confidence in the domestic courts. The Sub-regional court of appeal henceforth becomes a necessity as its decisions are likely to convince an individual than ones by courts which the individual has little confidence in. The ordinary citizen has thus

lost confidence in the local courts which distorts and affects the justice system in the SADC member states. Even when an individual is fairly treated, it is difficult to accept a decision reached by a judiciary which one feels is biased towards certain political parties within a nation-state.

4.8 The new SADC Tribunal: A worrisome development on good governance and human rights

The end of the cold war witnessed the rise of democracy, human rights and good governance at international agendas most probably because democracy had triumphed over socialism. Since then, every state within the international claim to be democratic defining democracy in its own way. It is fundamental to note that from the information gathered by the researcher democracy is various construed and defined. However, though democracy has been defined variously Russell concluded that, "democracy in its essence is a vision but practicing governance that revolves around the led is fundamental". Implied in such an analysis is that the art and practice of governing a state must be people centered thus people centered governance according to the respondent has such characteristics as transparency, equitable and inclusive, participatory, consensus oriented, accountability, responsiveness, effectiveness and efficiency, the rule of law and the respect of human rights. According to a respondent from the Human Rights Forum states in the SADC region have failed to honor basic elements of a democratic state. He cited the case of Zimbabwe, Malawi, Madagascar and Mozambique where elections have always created a tense situation in the respective countries and supporters fight over public positions. According to the anonymous respondent, political participation in the region has been limited to elections, transparency has been lacking and the rule of law has broken down and the ordinary person is suffering. The respondent even asserted that,

> The issue of human rights was at the core of the former Tribunal's mandate but it boggles the mind to imagine what prompted the SADC leaders to decide to take away the Tribunal's right to hear cases filed by individuals who would have been aggrieved by their respective governments. The Court system in the respective countries has not been fair on those opposed to those in power. The leaders in the SADC region and public office holders do not uphold governance elements, no wonder why there are high corruption levels in Zimbabwe and even South Africa which is a clear violation of the security of the individual and this in turn affects basic second generation rights.

The respondent concludes that there is a strong relationship between human rights and human security and these have to be upheld in the modern democratic state but this has not been the case as in the SADC region. The judiciary from the above analysis is tilted in favour of the ruling elite and the former SADC Tribunal seems to have provided an alternative for those unfairly treated or those who felt they were deprived of their human rights but all this has suddenly become a dream. An anonymous respondent from the University of Zimbabwe noted that the new SADC Tribunal is a sacrifice of good governance and human rights for the sake of maintaining comradeship between and among regional leaders. Thus, the SADC leaders want to maintain their hegemony to the extent of depriving people of their basic inalienable rights.

4.9 Renewal of the SADC Tribunal: The need to avoid Confusion and Respect the Independence of States

Various respondents took different views on why the SADC Tribunal was renewed and re-established without certain basic clauses especially on the individual' s right to access the court. According to one anonymous respondent, local courts felt that the Tribunal was on the verge of usurping their powers especially after the Tribunal's verdict on the Campbell case which greatly differed from what the local courts had concluded. The respondent seems to concur with an official from the President's office who noted that,

> …it becomes difficult for a nation-state to by-pass what has been set by local courts for citizens are bound to lose confidence in their respective domestic courts. Therefore the alterations serve the best interests of the SADC bloc as a region.

Implied in such analysis is that the Tribunal was slowly but surely becoming a threat to the courts of respective SADC countries as citizens could appeal to the court. However, for the sake of respecting human rights and justice, the right of the individual to access the court was and is still necessary. Power politics permeates the entire governance structure hence if a citizen feels that he or she has been unfairly treated, an alternative court must be made available sub-regionally.

4.10 Conclusion

In conclusion the SADC Tribunal has been an ineffective court that best serves the interests of ordinary citizens. The court has since its creation failed to live up to expectations because of

power politics. This has thus affected rights of ordinary citizens in the region. The decision by SADC leaders to establish the SADC Tribunal under the SADC Treaty of 1992 raised high hopes for ordinary citizens who felt that their governments were unfairly treating them, but the Tribunal's Protocol was created in 2000 and the court started to function in 2005 and five years later it was disbanded. Such lack of commitment to the functioning of the Tribunal by SADC leaders has resulted in unchecked human rights violations by the respective SADC countries. The suspension of the Tribunal in 2010 and the alteration of the provision of the individual's right to access the court has been an upset to democracy, good governance and human rights issues in the region. Even with the Tribunal being reinstated in 2014 human rights have continued to be a cause for concern as SADC countries have not been able to recognise the court as a sub-regional court mandated to ensure that human rights are honoured. The SADC Tribunal now adjudicates in inter-state disputes which are a rare phenomenon in the region. Human rights have thus played second fiddle to state interests under the new SADC Tribunal which has thus affected the security and well-being of the ordinary citizen.

CHAPTER 5: CONCLUSION, RECOMMENDATIONS AND IMPLICATIONS FOR FURTHER RESEARCH

5.1 Introduction

This chapter focuses on the conclusion, recommendations and implications for further research. The conclusion is based on the findings that the researcher acquired in the process of research on the nexus between the SADC's Tribunal and human rights that is, on how the SADC Tribunal as a sub-regional body has dealt with human rights issues in the SADC region. The SADC Tribunal has remained an ineffectual institution that has been lacking the capacity to meritoriously live-up to prospects generously offering a leeway to nation states to do as they reckon indispensable regarding people's fundamental naturally bestowed entitlements which has seriously jeopardized people's human rights in the SADC region. The section also proffers possible solutions of strengthening human rights protection mechanisms in the SADC region particularly on making the SADC Tribunal effective. It concludes with the implications for further research in which during the course of research the researcher found out some areas which really need to be explored further. The implications for further research section will thus focus on the areas which have to be researched further on.

5.2 Conclusion

The creation of Southern Africa as a sub-regional bloc dates back to the late 1970s but it was the 1980s that an official agreement was reached by states within the region to establish a more secure sub-regional bloc that could be vital in protecting the region from manifold complex security perils in the region hence the formation of Southern African Development Coordination Conference (SADCC) focused on a holistic socio-economic cooperation. However, because of the ever-changing perils and conundrums in the international system the 1992 Windhoek Declaration transformed SADCC into the Southern African Development Community (SADC) dealing with more extensive and diverse issues ranging from the social, political to economic as well as security issues as stipulated in Article 5 of the SADC Treaty which covers the objectives of the Treaty. Article 9 of the SADC Treaty establishes various institutions to serve and govern the Southern African region and amongst the institutions is the SADC Tribunal which as stipulated in Article 16 of the SADC Treaty has a role to ensure adherence to, and the proper interpretation of, the provisions of this Treaty, and that its composition, powers, functions, procedures and other related matters would be prescribed in a

Protocol. The protocol guiding the SADC Tribunal was established in 2000 and the SADC Tribunal as a body mandated to ensure compliance of member states to the laws governing the region came into being in 2005. However in 2010 it was disbanded as the Heads of State within the SADC region agreed to review the Tribunal so that it could serve the best interests of the citizens of the region. However, in 2014 the SADC was reinstated but it had changed immensely such that the old Tribunal and its Protocol was better off than the new Tribunal and its Protocol in terms of the respect for human rights. Information gathered by the researcher reveals that the SADC Tribunal has not done much in upholding human rights as the decisions that it once took were not respected by member states for instance the case of Campbell vs the government of Zimbabwe. The court held that the Zimbabwean government had violated international law on discrimination as it had forcefully removed some farmers from the farmland based on colour. However the Zimbabwean government through its legal ministry held that it was not bound by the SADC Tribunal and threatened to withdraw from the Tribunal. Therefore, ruling in a case without implementing the verdict is a cause for concern and this greatly affects human rights of ordinary citizen.

Moreover the new Tribunal contains no clause on the right of the individual to access the court but focuses on state disputes only. This has been seen as a threat to human rights of the ordinary citizen in the SADC region as history has shown that SADC states have on various times violated basic human rights and that goes unnoticed as the domestic court system is in the hands of the incumbent government. The people in the SADC region have been left with no alternative in the absence of the sub-regional court of appeal. The court maybe there but individualscan no longer access it. The Tribunal has not been effective in ensuring that human rights, good governance and democratic principles are upheld in the region. Human rights issues have played second fiddle to power politics and leaders of in the SADC from information gathered lack the political will and commitment to the justice system as this may witness the fall from power. Though some respondents argued that the new Tribunal aims at halting conflict between local courts of the respective SADC states and the sub-regional court, it is vital to note that upholding human rights and avoiding bias is fundamental for the well-being of the ordinary citizen. The Tribunal has therefore been not efficient in upholding and promoting human rights in the SADC region as it lacks the power and has limited power to adjudicate in cases involving ordinary citizens.

5.3 Recommendations

The SADC Tribunal has not been an effective tool in ensuring that human rights are upheld in the SADC region because of power politics. Therefore there is need for SADC leaders to distance themselves from the justice system. They have to stop interfering with the judiciary firstly in their domestic countries and lastly sub-regionally. An autonomous judiciary best serves the interests of every individual within a political entity regardless of status, colour, sex, gender or even position. It therefore has to start within nation-states and be adopted sub-regionally.

It is fundamental for SADC leaders to also commit themselves to human rights and good governance issues. Several times they have been reports and allegations of states within the SADC region having governments that violate basic human rights principles. Zimbabwe was slammed with sanctions in 2001 and 2002 by the European Union and US respectively because of human rights violations. There are allegations that the Ian Khama regime is brutal and shows such brutality to opponents. In Swaziland there are reports that the general populace has grown weary of the Monarchical governance system of the country but they do not have the power to act against it. Whether these reports and allegations are true, what is fundamental is that SADC leaders lack the commitment to human rights issues as was witnessed in the evolution of the Tribunal where it was established in 1992, its Protocol was developed 8 years later and it is only in 2005 that it started functioning. In 2010 it was disbanded as it handed down verdicts that opposed those within the domestic courts. In 2014 it was reinstated without fundamental provisions that uphold human rights. Such delays and the abrogation of the Tribunal reveals the lack of commitment of SADC leaders on human rights hence there is need for the SADC leaders to be fully committed to human rights in the region.

The SADC Tribunal must have jurisdiction in cases involving states and those involving individuals as well. The SADC Treaty has its focus on a wide range of areas and one of them is human rights. Human rights are individual rights which have to be respected hence there is need for the leaders to realise that human rights contribute immensely to development and social improvements as the opinions and views that they suppress maybe the breakthrough for the region. Therefore if an individual feels that he or she has been unfairly treated, he or she must be able to access the sub-regional court. The research therefore strongly calls for the complete

inclusion of a clause that will allow ordinary citizens residing in any of the SADC countries to access the Tribunal with ease.

There is also the need to educate ordinary citizens about the SADC Tribunal, once the clause on the right of the individual to access the court has been included in the Protocol. The ordinary citizen has to be enlightened on the functioning of the SADC Tribunal so that they appeal to it whenever it is necessary. This will also help in ensuring that governments respect human rights of ordinary citizens as the citizens will be in a position to access the regional court. The SADC Tribunal hence must provide checks and balances to nation states parties to the sub-regional court. This will improve transparency and accountability levels in the region as those who violate the law will be reported to the domestic law and if the complainant feels that a verdict passed was biased, then he or she can appeal to the SADC Tribunal. The Tribunal ought not to compliment the domestic courts but must be the court of highest appeal for citizens of the SADC region. Therefore, the ordinary citizens have to be educated about the Tribunal, if they are allowed to access the court.

The Protocol guiding the functioning of the SADC Tribunal is fundamental such that it cannot be created without consultation with ordinary citizens. The people have to been consulted and the current Protocol has to be altered to embrace the concerns of the people. The Tribunal has to be people centered as inter-state disputes are rare in the region. Human rights must not play second fiddle to state disputes but rather must be a priority for the sake of the residents of the SADC region. Therefore the current 2014 protocol must be revisited and people consulted so that human rights are enhanced and respected in the region. Moreover, when the Protocol is being re-crafted there is need to rely on the 2000 Protocol so that people have the much needed access to the court which in the view of the researcher will go a long way in enhancing or promoting human rights of ordinary citizens in the region.

5.4 Implications for Further Research

The SADC Tribunal is crucial in the enhancement of human rights in the southern African region but it is a cause for concern whether people know about its existence, especially the ordinary citizens. There is therefore the need to conduct a survey on the SADC Tribunal to ascertain the extent to which people in the SADC region know about the Tribunal and the changes that have taken place including the implications of such changes on their well-being and human rights.

There is also the need to investigate the implementation mechanisms of the Tribunal' decisions. These must be explored in order to improve them so that states comply with the decisions taken by the Tribunal.

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