AN UPDATE ON COMPLIANCE BY ZIMBABWE WITH DECISIONS AND JUDGMENTS OF INTERNATIONAL HUMAN RIGHTS JUDICIAL AND QUASI-JUDICIAL BODIES

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I. Introduction

The human rights discourse continues to follow a path of increasing emphasis on ensuring domestic implementation of human rights standards by state parties to various human rights instruments. It appears there is a clear and deliberate shift of focus from standard setting ushered by the proliferation of human rights instruments and institutions after WWII. Still to a fairly substantive degree, standard setting continues to be part of international human rights discourse as supervisory institutions continue to elaborate on them for the mutual benefit of duty and rights bearers alike. These human rights standards in question are predominantly provided for in international treaties and authoritative interpretations of supervisory institutions taking the form of general comments, views, findings, general recommendations as well as in decisions and judgments of judicial tribunals established at that level. In states where international law has influenced the domestic legal strata, international human rights standards are variably transposed into national bills of rights.

On their part, legally binding judgments of international tribunals as well as recommendations of quasi-judicial mechanisms such as treaty-bodies, have immensely contributed to the standard setting by providing authoritative interpretation of rights and obligations in international treaties

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or conventions. It logically follows that once states are aware of their respective obligations, it remains that they implement same in compliance with those obligations.

Being a state party to various global, regional and sub-regional human rights instruments, individuals and juristic persons alike have brought Zimbabwe before judicial and quasi-judicial human rights supervisory bodies alleging violation of some provisions of these instruments. As will more fully appear in this discussion, a number of decisions and judgments have been issued in favour and against the Government of Zimbabwe. It is the core objective of this paper to trace all these pronouncements where after the writer will appraise the readers regarding the extent of implementation by that State.

It is intended that this paper will cover much of judgments and decisions issued by international human rights supervisory bodies established by treaties that have been ratified by Zimbabwe. These institutions include tribunals, treaty-bodies as well as mechanisms such as the United Nations Human Rights Council (herein UN Human Rights Council). Discussing both tribunals and quasi-tribunals appears prudent as it would enable an analysis into whether the status of the rendering institution has a bearing on Zimbabwe's compliance pattern. Wherever possible, the discussant will endeavour to proffer reasons to explain the pattern of implementation and suggest the way forward.

2. Understanding concept of compliance of states with decisions

In its most simple terms, compliance entails the process and action taken by a state in order to remedy the state of affairs found inconsistent, by a court or tribunal, with that state's international obligations. Invariably, the presiding body or tribunal spells out the nature of the violation in detail and conduct expected of the state concerned in order to remedy the violation and guarantee non-recurrence.[2] Some scholars

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[2] This conduct translates into what are commonly referred to as measures taken by states to redress the violation in question. The European human rights system has become synonymous with the concept of special and general measures to implement the European

have attempted to shed light on the understanding of compliance by examining how and why nations behave the way they do.[3] In answering this question others have postulated theories to explain the phenomenon of why states sometimes decide to live up to their human rights obligations.[4] In so doing, theorists have mentioned virtually every stakeholder who should participate in the compliance process, and the specific roles they ought to play.[5] This is compliance through 'deliberate', not 'serendipitous compliance' approach.[6] States have to take deliberate actions in order to fully execute any judgments against them. This is because compliance 'is a matter of state choice' that strongly draws from the political will of a particular state.[7]

Compliance with decisions and judgments of supervisory institutions is enjoined by many factors some of which include the principles of utmost good faith as well as the rationale behind the concept of a remedy in international law. On its part, utmost good faith (*pactum sund servanda)* derives its origins from article 27 of the Vienna Convention on the Law of Treaties (herein Vienna Convention).[8] Following ratification, State parties to a treaty ought to behave in good faith thereby desisting from engaging in conduct that defeats the spirit and purpose of the treaty they have ratified. However, it is important to note that human rights treaties rarely proscribe the virtue of good faith. Perhaps such proscription has been

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Court of Human Rights [Herein European Court] judgments. Special measures refer to action taken that only deal with the specific circumstances of the victim, whereas general measures are designed to reach beyond the life of the victim concerned, for instance, by guaranteeing non-recurrence of the condemned violation in respect of other members of the public.

3 HH Koh 'Why do nations obey international law?' (1997) 106 *Yale Law Journal* 2599.

4 HH Koh 'Transnational legal process' (1994) 75 *Nebraska Law Review* 181.

5 As above.

6 PM Haas 'Compliance with EU directives: insight from international relations and comparative politics' (1998) *Journal of European Public Policy* 17 18.

7 Haas (n 5 above) 19.

8 Adopted by the United Nations General Assembly and came into for in 1969.

rendered redundant by the fact that scholarship insists that much of the provisions of the Vienna Convention have crystallised into customary international law.[9] If that be the case, the need to repeat the principle of good faith in the text of each human rights instrument ceases to have significance.

Paulson, writing on compliance with judgments of the ICJ, suggests the 'acceptance of the judgment as final, reasonable performance in good faith of any binding obligation' as pivotal principles relative to compliance with international judgments.[10] The author explains 'compliance in good faith' as tantamount to executing a final judgment in such a way as to deliberately avoid 'superficial implementation or otherwise circumventing it'.[11] All in all, the cross-cutting principles that explain compliance are, accepting a 'judgment as final', then judgment debtor engages in 'reasonable performance' in 'good faith'. Once these three are achieved, state conduct could be readily described as full compliance.

One interesting upshot from this discussion is whether compliance could be measured to assess a state's performance as it were. On the face of it, measuring compliance is elusive given the ambiguity of treaty provisions (the 'first level' of compliance). This might bring confusion as to what the expected behaviour of states arising from the treaty provisions should be. However, in spite of the complexity of the exercise, compliance can surely be measured although a great deal of controversy has been generated regarding the tools, instruments, formula or indicators for such measurement. Raustiala insists that 'measuring compliance with an international commitment is typically conceptually straightforward', the challenge lies in explaining the behaviour surrounding compliance.[12] We comment here that adoption

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9 Alexander Orakhelashvili, Sarah Williams (eds) 40 Years of the Vienna Convention on the Law of Treaties (2010) xviii; E Cannizzaro *The Law of Treaties Beyond the Vienna Convention* (2011).

10 C Paulson 'Compliance with final judgments of the ICJ since 1987' (2004) 98 *The American Journal of International Law* 434 435-6.

11 Paulson (n 9 above) 436.

12 K Raustiala 'Compliance and effectiveness in international regulatory co-operation' (2000) 13 *Case Western Reserve Journal of International Law* 387 391.

of quantitative research methods would end in mobilisation of statistics as to the number of decisions complied with as a fraction of the total decisions rendered by a particular court or within a given period of time. However, as already mentioned, scholarship has been confronted by the challenge of how to explain the reasons behind compliance or non-compliance beyond the level of speculation. The task is compounded by the general unwillingness of government to open up to the public regarding the motives underlying their decisions.

Indeed compliance with judgments of a court presents less daunting modalities to measuring such compliance. Posner and Yoo propose a simple formula as a tool for measuring compliance with judgments, namely,[13]

> x/n times 100%, where *x* = the number of judgments that have been complied with, and *n* represents the total number of judgments rendered, the value being then reduced to a percentage to reflect the magnitude of such compliance on scale.[14]

Viewing from a different perspective, Paulson maintains that the good faith proposition discussed above constitutes 'a practical measure of compliance'. This has been discovered to be so following some judgments of the ICJ.[15] Viljoen and Louw have embarked on assessing compliance trends by states with decisions of the African Commission on Human and Peoples' Rights (herein African Commission) and came up with various strains of compliance such as non-compliance, partial, substantial and full compliance.[16] As will be discussed in detail later in this paper, not only were the authors able to measure or assess compliance, but also came up with reasons for certain compliance patterns after analysing the data so collected.

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13 EA Posner and JC Yoo 'Judicial independence in international tribunals' (2005) 93 *California Law Review* 1 28.

14 The numerical expression of the formula has been formulated by this writer deducing from what Posner and Yoo (above) 28, had suggested.

15 Paulson (n 9 above) 436 where he quotes the ICJ judgment on *Hungary v Slovakia* 1997 ICJ Rep. 1, paras. 141-147.

16. F Viljoen and L Louw 'State compliance with the recommendations of the African Commission on Human and Peoples' Rights - 1993-2004' (2007) 101 *American Journal of International Law* 1.

The anatomy of a remedy

A remedy or reparation at international law is an act designed to redress breach of an international law obligation. It is immaterial to whom the obligation is owed. Conventional conception of international law recognised only states as rights bearers at that level. This ideology, however, purled into insignificance with the advent of the international human rights movement at the brink and aftermath of WWII. The adoption of human rights treaties engraved the paradigm shift ushering individuals as human rights bearers vis-à-vis subscribing states.

The modern conceptualisation of a remedy was elaborated by the International Court of Justice (herein ICJ) in the *Chorzow Factory* case as follows:

> "Reparation must, as far as possible, wipe-out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed. Restitution in kind, or, if this is not possible, payment of a sum corresponding to the value which a restitution in kind would bear; the award, if need be, of damages for loss sustained which would not be covered by restitution in kind or payment in place of it-such are the principles which should serve to determine the amount of compensation due for an act contrary to international law."[17]

The above quotation summarises two principles key to discussions on compliance. First, it presupposes that where compliance has been effected by way of implementing a decision or judgment, the action taken will wipe away the adverse effects of the violation and restore the *status quo ante* in force prior to the violation being corrected. Second, the need to wipe away the adverse consequences of the violation now presents itself as a compliance indicator by which compliance is partly assessed. This revelation is critical as it will be used to assess compliance in respect of the many judgments and recommendations issued against Zimbabwe by various international human rights law supervisory institutions.

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[17] *Germany v Poland* 1928 PCIJ, Ser. A No. 17.

International legal framework on compliance with international decisions

It must be noted from the outset that international institutions of a purely judicial nature are very limited as compared to a myriad at the national level. As a matter of fact only the Southern Africa Development Community Tribunal (herein SADC Tribunal and as then it was)[18] and the International Court of Justice (herein ICJ)[19] are the only judicial institutions with inherent competence to preside over complaints against Zimbabwe. These two courts are mentioned here to the extent that they preside over governance-related disputes.

The African Court on Human and Peoples' Rights (herein African Court) is another institution of significance to Zimbabwe, perhaps only potentially. It is argued here 'potentially' in the sense that the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of the African Court on Human and Peoples' Rights (herein African Court Protocol), like any other international treaty, requires ratification by each African Union (AU) member state in order to be binding in relation to that state.[20] Despite taking part in the negotiations leading to the adoption of the African Court Protocol, Zimbabwe has neither signed nor ratified that Protocol. This state of affairs makes her unreachable to the judicial arm of the African Court.

As regards the framework enjoining compliance by states with judicial decisions, there are mainly two provisions in international human rights treaties. First, almost every human

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18 The SADC Tribunal is currently undergoing legislative review. However, it is anticipated that the new form this Tribunal will take would emphasise competence over member states in purely trade-related institutions. This Tribunal is discussed here to the extent that it had human rights-related competence prior to its suspension by the SADC Summit in 2009. In keeping with legal traditions, it is contented that the legal authority of decisions rendered prior to the legislative process remain in force and the decisions are still good for enforcement.

19 This Court is established by Chapter XIV of the United Nations Charter. Over and above its Rules of Procedure, the ICJ has a Statute that generally regulates the manner in which it conducts its business.

20 In terms of Article 34(6) of the African Court Protocol, a state needs to lodge a declaration accepting the competence of individuals to file complaints against that state.

rights treaty provides for a principle with the effect that on ratification, contracting states make an undertaking to give effect to the provisions of the treaty in questions by taking 'legislative, judicial, administrative and other measures'.[21] It is argued here that where an international tribunal renders a binding decision against a state, compliance with such a decision is conduct tantamount to giving effect to the provisions of the treaty establishing that tribunal. This is so accepting the fact that states take all forms of measures to implement court decisions as guided by the specific orders of the decision being implemented.

Compliance by state parties with decisions of human rights monitoring institutions is another way through which states give effect to the provisions of the parent treaty. Executing judgments translates to the realisation, by victims of human rights violations, of measures taken to extinguish, as far as possible, the adverse consequences of violation of the treaty provisions in relation to them. Put differently, genuine execution of judgments by the state supported with guarantee of non-repetition is a way to provide effective remedies as required by every treaty in the event of violation.[22] This explains why every human rights system has put in place, legislatively or by way of practice, mechanisms and institutions mandated to monitor compliance by states with decisions and judgments of the relevant supervisory institutions.[23]

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21 See Article 1 of the African Charter.

22 The issue of effective remedies is indirectly provided for in many human rights treaties. However, article 2(3) of the International Covenant on Economic-Social and Cultural Rights [herein IESCR] is more direct on this obligation. See G Musila 'The Right to an Effective Remedy under the African Charter on Human and Peoples' Rights' 6 (2006) *AHRLJ* 442 for a full discussion on effective remedies under the African Charter and the practice of the African Commission on Human and Peoples' Rights.

23 The Inter-American Court has taken a leading role through its 'written procedure' to ensure it monitors compliance by state parties to the Organisations of American States [herein OAS] with its final judgments. On its part the Council of Europe has earned reputation by installing the Council of Ministers as the one to oversee execution of judgments of the European Court for Human Rights in terms of Article 46(2) of the European Convention (as amended).

Second, and perhaps more direct to the point is the provision often found in statutes establishing courts that re-affirm that states, upon ratifying such a statute, undertake to 'comply with judgments in cases where they are parties'.[24] It is argued here that this provision is more direct than the one that simply provides that decisions of a particular court or tribunal are binding on member states. Compliance with judicial decisions in some of the leading human rights systems such as the European framework is anchored on such provisions.

Some human rights instruments go a step further making states undertake compliance with decisions of international courts or tribunals. These instruments legislate on the manner in which decisions of specified courts or tribunals must be implemented by contracting states in their respective domestic systems.

The former article 32 of the SADC Tribunal Protocol clearly stipulated that decisions of the SADC Tribunal were to be enforced in member states by way of the procedure for recognition and enforcement of foreign judgments.[25] This is a procedure that exists both in the common and civil legal traditions. In fact this provision was put to test in two SADC member states, namely Zimbabwe and South Africa, involving a SADC Tribunal decision in *Mike Campbell and others v Zimbabwe* with somewhat different outcomes.[26] In both cases,

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[24] See Article 30 of the African Court Protocol, Article 46(1) of the European Convention on Human Rights, Article 68(1) of the Inter-American Convention on Human Rights, Article 32 of the Protocol on the SADC Tribunal.

[25] The author is aware that at the time of writing this paper, the Protocol on the SADC Tribunal and Rules of Procedure Thereof was undergoing legislative reform with the possibility that article 32 could be reviewed bearing in mind that the desire of some SADC member states to undermine judgments of the SADC tribunal appeared to be the major driver of the legislative process. The author also has on file the Draft Protocol on SADC Tribunal adopted by the SADC Summit in Victoria Falls, Zimbabwe in August 2014.

[26] In 2009, the Zimbabwe High Court presided over a motion requesting the recognition of the SADC Tribunal decision for purposes of enforcement against the Government of Zimbabwe in the case of *Gramara (Pvt) Limited & Ors v Zimbabwe & Ors* Unreported Judgment HH-169-2009. In June 2013 the Constitutional Court of South Africa allowed the enforcement of a SADC Tribunal decision in South Africa on the case of *Fick & Ors v Government of Zimbabwe* (2013) ZACC 22.

the applicants who were successful before the SADC Tribunal against Zimbabwe sort to enforce the part of the judgment that offered them protection from threatened land acquisition in Zimbabwe, yet in South Africa the Applicants sought to enforce the costs order part of the same *Campbell* judgment. The two cases immensely contributed to the body of knowledge on the domestic implications of ratifying SADC community law, the practical application of the foreign judgments procedure as the avenue for enforcement, and the politics involved in state compliance with international judicial decisions.[27]

In other parts of Africa, article 9 of the Revised Protocol on the Statute of the Community Court of Justice of the Economic Community of West African States (herein ECOWAS Community Court of Justice) provides in the same way as article 65 of the Inter-American Convention of Human Rights re-affirms, namely, that the 'procedure utilised for enforcing civil judgments' must be adopted to give effect to judgments of the Community Court of Justice. In a way that reference incorporates the foreign judgment enforcement procedure preferred by SADC community law, among other legal options available to enforce civil court judgment in the domestic setting. Be that as it may, this is all what human treaties provide regarding the need to implement judicial decisions as well as the procedure to be adopted at national level.

Constitutional framework on compliance with international obligations

Zimbabwe adopted a modern and progressive constitution following its publication in the Government Gazette on 22nd May 2013.[28] This Constitution represents a radical departure

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[27] For a commentary on the two cases see T Mutangi 'Fick & Others v the Republic of Zimbabwe: A national court finally enforces the judgment of the SADC Tribunal as a foreign judgment – a commentary on implications on SADC Community Law '1 (2014) *Midlands State University Law Review* 83.

[28] The qualitative is on account of the fact the Zimbabwean Constitution provides for all generation of rights for the very first time in Zimbabwean constitutional tradition, backed up with strong provisions acknowledging and accepting the influence of international law in

from the 'Lancaster House' Constitution of 1979 adopted at a time when the human rights movement was still finding its way especially into the domestic legal orders of formerly colonised states. Admittedly, the Lancaster House Constitution, until its disposal, remained a negotiated piece of legislation to manage a protracted and bloody civil war to end British colonisation. The general citizenry made no meaningful contribution to its content. As evidence of its failure to keep up with the ever-changing landscape of fundamental rights, that constitution was amended in piece-meal nineteen times. Accordingly, the 2013 Constitution is a milestone improvement which saw the inclusion of socio-economic and cultural rights among other ground-breaking provisions thereby triggering a massive process of legislative revision and reform in the country.

Section 34 of the Constitution of Zimbabwe – domestication requirement

One of the notable changes ushered in by the 2013 Constitution was the inclusion of a provision specifically on the fate of international human rights treaties ratified by Zimbabwe. Traditionally, national constitutions including Section 111B of the erstwhile Constitution would just go as far as prescribing the status of international treaties in comparison to national law. Section 34 now goes a step further to require that Zimbabwe '… must ensure that all international conventions, treaties and agreements to which Zimbabwe is a party are incorporated into domestic law'. What is clear from this provision is the lack of time frames within which such incorporation ought to be implemented following ratification or accession to particular treaties. That is expected. International and national law have not yet developed to an extent that it puts time frames on domestication of treaties. On their part constitutional provisions are usually skeletal in nature needing implementing framework in the form of

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the interpretation of the bill of rights, expanded scope of *locus standi* when enforcing the bill of rights, entrenched bill of rights and a clear intent to provide effective remedies in the event of violation of rights. It remains to be seen how the state will give effect to these progressive provisions.

elaborate legislative provisions to give effect to obligations or aspirations of the supreme law.

The point here is that section 34 requires that the state incorporates into national law those treaties from which it draws its international obligations. The consequence that follows the domestication or incorporation of human rights treaties is to bring legal standing within the reach of potential litigants. Similarly, courts of law are simultaneously vested with competence to preside over law suits based on domesticated international treaties. By so domesticating international treaties, Zimbabwe would be giving effect to the provisions of those treaties.

By implication, the requirement for domestication in section 34 of the Constitution must be extended to cover international decisions. International legal decisions face the same fate of non-recognition at the national level just like treaties unless there is a framework for their reception. International law rarely legislates on the status in national law of international judgments or judicial decisions. The dualist or monist conception of international and national law does not seem to adequately address the issue of status of international decisions or judgments in national law.[29] This presents complex problems for the reception of same into national law. On their part states are given ammunition to resist domestic implementation of international decisions on account of exclusive control they exercise over national law.

By extending the ambit of section 34, Zimbabwe is enjoined to at least ensure that international treaties establishing courts and tribunals at that level are domesticated thereby in a way receiving such courts into the national legal framework.

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[29] The dualist approach to status of international law in national legal orders is that international law only becomes part of national law upon adoption of an act of parliament giving it that status, whereas monism is a position opposed to dualism to the extent that upon ratification, such treaties become part of national law without need for a legislative process as is the case with dualism. Nevertheless, practice has shown that most dualist legal traditions still require that the treaties so ratified have to be first published in the government gazette or by whichever name the publication is called before they can be applied at national level.

However, the simpler way in order to avoid the hierarchical conflicts between international and national courts is to legislate on the status of international decisions in national law. Put differently, Zimbabwe must facilitate the reception of international decisions under the strength of the domestication required by section 34 of the 2013 Constitution.

Compliance with decisions of the African Commission on Human and Peoples' Rights

The African Commission is a treaty body established by the African Charter on Human and Peoples' Rights (herein African Charter) under the African human rights system.[30] Although now that it works in complementarity with the newly established African Court on Human and peoples' Rights (herein African Court), its mandate is clearly defined in Article 45 of the African Charter as promotional and protective of human rights in Africa. In fulfilment of its mandate, the African Commission, among other things, is endowed with the responsibility to undertake in-depth studies in human rights and organise seminars to deliberate human rights issues with a view to solving chronic problems in the area.[31] This Commission could also deliver advisory opinions at the request of authorised organs and or organisations.[32]

Perhaps more germane to this discussion is the competence of the African Commission to preside over inter-state communications in terms of Article 47 of the African Charter[33] as well as individual communications submitted by individuals in terms of Articles 55 through to Article 59 of the Charter, whereupon such individuals or their representatives would be alleging violation of the provisions of the African Charter by a state party thereto. While no inter-state communication was

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30 Established under Part II of the African Charter.

31 See Article 45(1)(b) of the African Charter.

32 Article 45(3) of the African Charter.

33 Inter-state communications are complaints submitted to the African Commission by any African State being a party to the African Charter based on 'good reason to believe that another state party to this Charter has violated the provisions of the Charter'. Such communications have been quite rare in the African human rights system.

ever lodged with the African Commission against Zimbabwe, quite a number of individual communications have been filed with the continental human rights body, many of which have gone as far as the merits stage. Therefore, the following is a discussion on these individual communications with a view to assessing the extent of implementation in respect of those communications in which violation(s) of the African Charter were confirmed.

Courson v Zimbabwe

The premise of this communication was to interrogate the legal status of consensual sexual conduct of same sex parties as between each other in private in view of the criminalisation of such conduct as well as public declarations by the political leadership denouncing such practices in society.[34] The complainant invited the African Commission, by invoking article 60 of the African Charter, to draw inspiration from related jurisprudence of the United Nations Human Rights Committee (herein UNHRC).[35] However, the complainant withdrew the communication whereupon the African Commission accordingly closed the file.

Zimbabwe Human Rights NGO Forum v Zimbabwe

In this communication, the African Commission was grappling with two issues, namely, *whether an amnesty for perpetrators of human rights violations is in violation of the African Charter by virtue of the Clemency Order No. 1 of 2000,*[36] *and whether*

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[34] (2000) AHRLR 335 (ACHPR 1995).

[35] The complainant attached a copy of the decision of the UNHRC in *Toonen v Australia*Communication No. 488/1992, U.N. Doc CCPR/C/50/D/488/1992 (1994). In this case the UNHRC found that the criminalisation of homosexuality in Tasmania infringed upon Toonen's right to privacy as protected by article 17(1) of the International Covenant on Civil and Political Rights (herein ICCPR).

[36] Clemency Order No.1 of 2000, published on 6 October 2000 (General Notice 457A of 2000).The Clemency Order granted pardon to every person liable to criminal prosecution for any politically motivated crime committed between 1 January 2000 and July 2000. The Order also granted a remission of the whole or remainder of the period of imprisonment to every person convicted of any politically motivated crime committed during the stated period.

the state (Zimbabwe) was responsible for the acts of non-state actors.[37] *The communication was submitted in the aftermath of a bloody referendum and general election that took place in 2000. The two processes were characterised, so the communication alleged, by massive politically motivated violence, abductions, extrajudicial executions and detentions. In the view of the complainant,* 'ZANU (PF) supporters engaged in a systematic campaign of intimidation aimed at crushing support for opposition parties. It is alleged that violence was deployed by the party as a systematic political strategy in the run up to the Parliamentary elections'.[38]

Having arrived at a finding that the amnesty for certain crimes committed at polling time in 2002 had the effect of depriving victims thereof of remedies under national law (article 7(1) right to access to justice), and that the complainant had failed to link the acts of non-state actors to state indifference and or collusion, the African Commission went on to make two recommendations; one substantive and the other related to implementation. Specifically addressing the first issue, the African Commission recommended Zimbabwe 'to establish a Commission of Inquiry to investigate the causes of the violence which took place from February – June 2000 and bring those responsible for the violence to justice, and identify victims of the violence in order to provide them with just and adequate compensation'.[39] As the implementation mechanism, it was recommended that the respondent State ought 'to report to the African Commission on the implementation of this recommendation during the presentation of its next periodic report'.[40]

At the time of writing this paper, it is exactly eleven years since the communication was filed and seven years of the decision of the African Commission and there is no evidence whatsoever of any form of compliance by Zimbabwe with the recommendation to establish a commission of inquiry into the

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37 Communication No. 245/2002.

38 See Para. 3 of the decision.

39 See Para. 215 of the decision.

40 As above. This recommendation represents a rather soft mechanism adopted by the African Commission for purposes of enforcing compliance by states with its decisions.

violence that took place in 2000 in a bid to hold perpetrators such violence accountable.

In confirmation of such dereliction of duty to implement the recommendation at least in good faith, Zimbabwe, having fallen behind its reporting obligation, submitted a consolidated state report (covering a period of ten years thus combining 6th, 7th, 8th, 9th and 10th periodic reports) on 20th October 2006. This report is so crucial to the current discussion in that Zimbabwe ought to have reported on the measures taken to implement the substantive recommendation in the *Zimbabwe Human Rights NGO Forum* communication. Nevertheless, the State did not bother to comply with both recommendations, that is to say, the State neither established a commission of inquiry nor appraised the African Commission on the measures (of lack of them) adopted during the presentation of its last report. Accordingly, since that country has already gone past a relatively peaceful referendum,[41] and general election, the non-compliance in this communication falls in the category of 'no compliance'.

Zimbabwe Lawyers for Human Rights & Associated Newspapers of Zimbabwe v Zimbabwe

The complainants stated that the *Access to Information and Protection of Privacy Act (AIPPA),* enacted in 2002 by the Respondent State required, under section 66 of AIPPA read together with section 72, that "mass media services" be registered with the Media and Information Commission (MIC) before commencing operations.[42] The Associated Newspapers of Zimbabwe (herein ANZ) filed an application challenging the constitutionality of the provisions requiring it to register

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41 Zimbabwe held a referendum on 16th March 2013 to determine whether a new draft constitution prepared predominantly by way of a political process would be accepted by the general public. The Zimbabwe Electoral Commission declared a few days after the polls that the draft constitution had been overwhelmingly accepted by a 94.5% vote. However, it ought to be noted that in practice, individuals and or institutions that were desirous to campaign for a 'No' vote were targeted with arrest and threatened with prosecution. See The Election Resource Centre *Zimbabwe Constitutional Referendum 2013 interim report*.

42 Communication No. 284/2003.

with the MIC. ANZ therefore declined to register until the question of the constitutionality of the AIPPA provisions it was challenging had been determined by the Supreme Court in a matter that was already pending. The Supreme Court declined to determine the constitutionality of the law unless ANZ had purged itself of failure to comply with the law in question arguing that laws are presumed constitutional unless the contrary is proven.[43]

On approaching the Commission, the complainants alleged violation of articles 3 (equal protection of the law), article 7 (right to a fair hearing), article 9.2 (freedom of expression), article 14 and 15 of the Charter. Taking into account the fact that the complainants had already approached the Supreme Court, the highest judicial authority in the country, taken conjunctively with other factors under article 56 of the Charter, they had made a good case for the admissibility of the communication. The communication was accordingly rendered admissible notwithstanding the spirited opposition by the State.[44]

As regards the merits, among others, the main issue the Commission had to grapple with was whether refusal by the Supreme Court to deal with the application citing the dirty hands doctrine was in fact a violation of any right and or freedom as provided for under the Charter. A related issue of equal importance was whether the confiscation of complaints' equipment by the Police in the aftermath of the Supreme Court decision was a violation of any provisions of the Charter.

In its decision on the merits, the Commission did not find a violation of articles 3 and 7 of Charter. It argued that by virtue of the case being the first of its kind to be dealt with by the Supreme Court, there is, therefore, no evidence that the complainants had been treated differently.[45] Further, the Commission further argued that:

> Thus, by pronouncing on the preliminary issue raised by the Respondent State on the question brought by

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43 *Associated Newspapers of Zimbabwe (Pvt) Ltd v e Minister of State for Information and Publicity & Ors* 2004 (1) ZLR 538 (S)

44 Paragraph 121 of the Decision.

45 See paragraph 159 of the Decision.

> the Complainants, the Supreme Court in effect heard the 'cause' of the Complainants. Besides, the Supreme Court did not close its doors on the Complainants, it simply asked the latter to go and register and come back to it for the matter to be heard on the merits. It can therefore not be said that the Respondent State has violated the Complainants' rights under Article 7.[46]

The only violation established in the communication and of relevance to the current discussion was in respect of articles 9 (freedom of expression), 14 (right to property) and 15 (right to work). It was argued and decided that the seizure of complainants' equipment by the Police without a court order amounted to unlawful actions that led to financial loss.[47] Accordingly, the Commission recommended that the State 'provides adequate compensation to the Complainants for the loss incurred as a result of this violation'.[48]

It is not in dispute that efforts were deployed to seek recovery of the seized equipment, reinstatement of the publisher's right to access the cordoned premises as well as clearance to continue operating pending the outcome of the licensing process.[49] There seems to be no evidence to show that any

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[46] See paragraph 174 of the Decision.

[47] See paragraph 178 of the Decision. It should also be noted that during the 36th Session of the Commission, provisional measures were adopted that sought to require the State to return the equipment so seized on 16th September 2003 without a court order. Meanwhile on 18th September 2003, the Harare High Court ruled that the government return the seized equipment since the Supreme Court had not ruled that the ANZ was operating outside of the law. In any event, having lodged an application for registration on the 15th of September 2003 was from that date operating within the law. On the 19th of September 2003 the ANZ application was declined whereupon the Police refused either to vacate the ANZ premises or to return the confiscated equipment.

[48] See paragraph 181 of the Decision.

[49] In *Associated Newspapers of Zimbabwe (Pvt) Ltd versus Chief Superintendent Madzingo and the Commissioner of Police* HH-157-03, the applicant sought a court order for the return of seized equipment and to continue operating pending the outcome of the application for licensing filed with the relevant authorities. The relief sought was granted although operations could not continue on account of the negative outcome in the application for registration.

attempt was ever made at the national level to seek recovery of financial loss suffered as a result of the unlawful seizure of complainant's equipment by the State. The complainant only made such attempt before the Commission, which relief was granted by the Commission. However, no such payment of compensation ever took place at national level. It does not appear that sufficient effort was employed to pursue payment of same in the aftermath of the Commission's decision and recommendation although access to premises was eventually allowed.[50] Nonetheless, the decision remains good for enforcement although it might not escape the procedural trappings such as prescription. By and large, the Commission's decision still remains to be complied with.

Scanlen & Holderness v Zimbabwe

The complainants in this communication were in fact *The Independent Journalists Associations, the Zimbabwe Lawyers for Human Rights and the Media Institute of Southern Africa*.[51] Their contention was simple, namely, that Sections 79(1) and 80(1) of the Access to Information and Protection of Privacy Act [*Chapter 10:27*] (AIPPA), were inconsistent with Article 9 of the African Charter. The complainant's concerns were summarised by the Commission as follows:[52]

> According to the Complainants, compulsory accreditation of journalists, irrespective of the quality of the accrediting agency, interferes with freedom of expression. They state that accreditation fees provided for under the law are an additional restriction on freedom of expression. They allege that compulsory accreditation of journalists by a Commission which lacks independence interferes with professional independence and the autonomy of the journalism profession. The Complainants submit further that, the MIC is not democratically constituted. Its constitution and control is not consistent with democratic values.

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[50] This is a common attitude among successful litigants before international bodies. Litigants often make no effort to pursue the implementation of recommendation made at that level and expect States to comply with such decisions. This rarely happens unless the international body itself invokes its follow-up competence.

[51] Communication No.297/2005.

[52] See paragraph 6 of the Decision.

The complainants further argued that "that self-regulation is a central feature of an independent profession and that the AIPPA is inherently inimical to freedom of expression and has no justification in a democratic society."[53] Having found the communication admissible and going on to deal with the merits, the Commission found a violation of Article 9 of the African Charter and recommended that Sections 79 and 80 of AIPPA be repealed and generally align AIPPA with provisions of Article 9. Such was a clear recommendation that needed no further interpretation for a better understanding of what the respondent State was expected to do in compliance therewith.

In view of the fact that the *Scanlen & Holderness* decision was adopted by the Commission in 2009 having been filed in 2005, it is important to note AIPPA was partly amended in 2007 by virtue of Act 20 of 2007. Section 79 was partly amended but not in a way that addressed the complainants' concerns. The parameters of the amendments by Act 20 of 2007 accordingly dispensed with any possibility that such were motivated by the need to comply with the recommendation of the Commission.

Gabriel Shumba v Zimbabwe

The communication was filed in 2004 by the complainant who had legal representation.[54] It alleged a violation of articles 4 (integrity of the person), 5 (torture), 6 (liberty and security of the person), 7 (fair trial), 10 (peaceful assembly) and 14 (right to property). In a nutshell, the factual background was that complainant was arbitrarily arrested by the police and denied legal assistance, his dignity and integrity of his person was violated as a result of mistreatment while in custody. He also had his personal belongings such as mobile phone confiscated by the authorities as the time of arrest. From the place of his exile, he challenged the State's conduct as inconsistent with the provisions of the African Charter.

The communication was dealt with on the merits. In its decision, the Commission only found violation of Article 5

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53 Paragraph 7 of the Decision.

54 Communication No. 288/2004.

(torture) and dismissed the rest of the allegations. It accordingly made relevant recommendations, namely, that the complainant be paid adequate compensation for the trauma suffered, that an inquiry and investigation be launched to bring to justice the perpetrators of torture, and that the State reports within six months on the measures taken to implement the recommendations.[55]

It is a relevant fact that the decision in the *Shumba* communication was only adopted in May 2012 – merely over a year as at the time of writing. There is no evidence supporting the view that any of the three recommendations have been complied with. This may be also as a result of the fact that the complainant is not ordinarily resident in Zimbabwe.[56]

Zimbabwe Lawyers for Human Rights (On behalf of Gabriel Shumba, Kumbirai Tasuwa Muchemwa, Gilbert Chamunorwa, Diana Zimbudzana and Solomon Sairos Chikohwero) v Zimbabwe

Of late, the African Commission had an occasion to make provisional measures against Zimbabwe. On 12 December 2012, the Applicant, representing some individuals living outside of the country, approached the African Commission seeking recognition of their right to participate in the public affairs of their country by exercising the right to vote in referenda and general elections. During its 13th Extraordinary Session which was held in Banjul, the African Commission found a "prima facie violation of the Charter" upon learning that Zimbabweans living in the Diaspora are unable to "… participate freely in the government of his country, either directly or through freely chosen representatives in accordance with the provisions of the law."[57]

On consideration of the complaint, the African Commission promptly established a 'prima facie' violation of the African

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55 See paragraph 194 of the Decision.

56 The author had a telephone interview with the complainant in order to establish whether any measures have been taken by him to follow-up or by the respondent State on the compliance the Commission's recommendations.

57 Article 13(1) of the African Charter. This provision implies the right to vote and or the right to stand as a candidate for public office.

Charter and issued provisional measures. The African Commission is empowered to issue provisional measures.[58] It is provided as follows in respect of the competence to issue provisional measures:

> At any time after the receipt of a Communication and before a determination on the merits, the Commission may, on its initiative or at the request of a party to the Communication, **request that the State concerned adopt Provisional Measures to prevent irreparable harm to the victim or victims of the alleged violation as urgently as the situation demands.** (own emphasis).

In practical terms, the provisional measures against Zimbabwe were meant to 'prevent irreparable harm to the victims' in that Zimbabwe was just about to hold a national referendum on the new constitution two weeks from the date on which provisional measures were rendered. Furthermore, the imminent harmonised general elections were eventually held on 31st July 2014. Both these processes were immensely important for the applicants to exercise their right to vote in adopting the most superior law of the land as well as choosing preferred representatives. The imminence of the two electoral processes buttressed the irreparable nature of the harm due to non-participation.

The extent of compliance with provisional measures in question deserves no study. Zimbabweans resident outside of that country did not take part both in the 2013 referendum and general elections. The government just did not react to the issue of provisional measures.[59] Although decisions of the

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[58] Rule 98(1) of the Rules of Procedure of the African Commission on Human and Peoples' Rights.

[59] It must be noted that the Constitutional Court of Zimbabwe had already ruled that Zimbabweans in the Diaspora had the right to vote but the state is unable to mobilise the required funds to facilitate the exercise of that important right. However, critics of the government especially ZANU-PF the ruling party, maintain that the basis for denial of the right to vote is not the issue of cost, rather it is fear that majority of over three million Zimbabweans who fled the country for better economic opportunities would most likely vote for the opposition political parties and candidates. Further, the flip argument was that it was impracticable for Zimbabwe to adopt measures necessary to implement the provisional measures taking into account the

African Commission are not binding, they have a moral authority that induces enforcement. It appears the stakes were just too high for the government to comply with the provisional measures. On its side, it would seem there was little time left for government to put in place measures to give effect to the decision in question before the landmark electoral processes took place. Nonetheless, the legitimate expectation of compliance with international decisions was breached as provisional measures went unimplemented maintaining Zimbabwe's hundred percent non-compliance record in respect of decisions of the African Commission.

Compliance with recommendations of the UN Human Rights Council

Based at the UN Office in Geneva, the United Nations Human Rights Council (herein Human Rights Council) is a 47 member inter-governmental body within the UN system.[60] Membership is through election by fellow member states of the Un General Assembly by way of secret ballot. It is responsible, among other things, for strengthening the promotion and protection of human rights around the world.[61] The UN Human Rights Council is competent to address situations of human rights violations and make recommendations once it has established the violations. It covers all thematic human rights issues and situations that require its attention throughout the year.

The UN Human Rights Council executes its mandate through a number of its mechanisms and procedures contained in the

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imminence of the referendum and general elections. As others argued the relief came a bit too late for realistic implementation. One has to wait to see if same will be implemented in respect of forthcoming general elections. See *Bukaibenyu v Chairman, ZEC & Ors* CC-12-17. A further case on the Diaspora vote was brought in 2018 before the Constitutional Court. The judgment in this case, which is *Shumba & Ors v Minister of Justice, Legal and Parliamentary Affairs & Ors* CCZ-4-18 followed the reasoning in the earlier case and rejected the argument that the Constitution required that persons living outside the country were entitled to vote outside the country.

60 For more information on the UN Human Rights Council, see: http://www.ohchr.org/EN/HRBodies/HRC/Pages/AboutCouncil.aspx (accessed on 11 February 2015).

61 Resolution 60/251 adopted by the General Assembly on 15 March 2006.

'institution building package' adopted in 2007, a year after its inaugural session. The Universal Periodic Review (herein UPR) mechanism is one such tentacle focussed on assessing the human rights situations in all UN Member States.[62] It is the UPR that is of sufficient relevance to this discussion. General Assembly Resolution 60/251 provides as follows in respect of the UPR especially that it is:[63]

> based on objective and reliable information, of the fulfilment by each State of its human rights obligations and commitments in a manner which ensures universality of coverage and equal treatment with respect to all States; the review shall be a cooperative mechanism, based on an interactive dialogue, with the full involvement of the country concerned and with consideration given to its capacity-building needs; such a mechanism shall complement and not duplicate the work of treaty bodies…

The nuts and bolts of the UPR mechanism are embodied in the *United Nations Human Rights Council: Institution Building* package (herein Institution-Building Package), which is a framework by the Council to operationalise itself in the new role after taking over from the UN Commission for Human Rights.[64] The Institution-Building package provides detail on the objectives, legal basis, procedure, and expected outcomes of this process among other things.

Zimbabwe submitted to the UPR mechanism or process by submitting a national report in October 2010. This national report was Zimbabwe's inaugural report. In keeping with the spirit and purpose of the UPR framework, the report was a

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62 The other mechanisms of the UN Human Rights Council include Advisory Committee regarded as the Council's source of expertise and advice on thematic human rights issues; the Complaint Procedure which allows individuals and organizations to lodge human rights violations before the Council, and the UN Special Procedures consisting of special rapporteurs, special representatives, independent experts and working groups that monitor, examine, advise and publicly report on thematic issues or human rights situations in specific countries

63 Paragraph 5(e) of Resolution 60/251.

64 The United Nations Human Rights Council: Institution Building is contained as an Annexure to UN Human Rights Council Resolution 5/1 - Institution-building of the United Nations Human Rights Council.

summary of the measures taken by the government to give effect to human rights obligations subscribed under different international human rights instruments and humanitarian law.[65] Thereafter, the outcome of the review process produced 177 recommendations. These recommendations covered a wide spectrum of issues and thematic areas. It is on record that Zimbabwe accepted 147 of these recommendations and rejected the rest perhaps with a bit of resentment as proof of the chilling effect of peer review.

At the time of writing, Zimbabwe had adopted a National Plan of Action to map stakeholders, among other things, who could take part in the implementation of the accepted recommendations. This was a multi-stakeholder process involving state and non-state actors pooling resources together. The inclusive approach by government received accolades for its participatory nature to the human rights agenda in the country. In keeping with the imperatives of the UPR process, in July 2014, Zimbabwe submitted the Mid-Term Report in preparation of the second round of review at the expiration of the four-year review cycle.[66]

It is important to comment on Zimbabwe's rejection of so many recommendations that came out of the UPR process. Paragraph 32 of the Institution-Building Package speaks on the possibility of the reviewed Member State supporting certain recommendations and possibly rejecting others.[67] Accepting recommendations on the one hand and rejecting others on the other presents Zimbabwe in a balanced scenario. On account of this zero percent record of compliance with decisions of the African Commission, the UPR process saw Zimbabwe publicly accepting to implement some

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65 Paragraph 1A of the Institution-building package provides for basis of review to include The Charter of the United Nations; the Universal Declaration of Human Rights; human rights instruments to which a State is party; applicable international humanitarian law.

66 In terms of Paragraph 14 of the Institution-building Package, the period for initial review is four years.

67 'Recommendations that enjoy the support of the State concerned will be identified as such. Other recommendations, together with the comments of the State concerned thereon, will be noted. Both will be included in the outcome report to be adopted by the Council'.

recommendations from its peers. It can only be hoped that this is the beginning of a new compliance dispensation in terms of the government's attitude towards adverse decisions by international human rights supervisory institutions.

Compliance With Binding Decisions Of International Tribunals

The Southern Africa Development Community Tribunal (SADC Tribunal)

Established in 1992, the SADC Tribunal is the judicial institution of the SADC in terms of Article 16 of the SADC Treaty. A Protocol on the SADC Tribunal and Rules of Procedure Thereof was adopted to operationalize this Tribunal.[68] Among other things, the SADC Tribunal was established to interpret community law. Its decisions are binding in terms of Article 32(1) of the Protocol of the SADC Tribunal. Further, decisions or judgments of the SADC Tribunal are enforceable in SADC member states by utilising the procedure often adopted in implanting foreign judgments.[69] The SADC Tribunal has presided over a number of disputes by individuals against selected member states as well as SADC itself.[70]

Zimbabwe is one of the member states that appeared before this Tribunal defending herself in a number of proceedings. Two of them, namely, *Gondo & Ors v Zimbabwe*[71] and *Mike Campbell (Pvt) Limited & Ors v Zimbabwe*[72] will be discussed in this article. In both cases, the SADC Tribunal by and large found against Zimbabwe with implications that respective court orders ought to be executed in good faith.

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[68] It must be mentioned that following a legislative review of the SADC Tribunal, a new Protocol on this institution was adopted by the SADC Summit in August 2014 in Victoria Falls, Zimbabwe. Accordingly, once this new protocol comes into legal force, there could be changes regarding the enforcement of decisions of this Tribunal among other things.

[69] See Article 32(5) of the Protocol on the SADC Tribunal.

[70] Clement Kanyama v SADC Secretariat SADC (T) 05/2009.

[71] Gondo & Ors v Zimbabwe SADC (T) 05/2008

[72] SADC Tribunal, Case No. ADC (T) 02/2007; SADC (T) 02/08, SADC (T) 03/2008, and SADC (T) 06/2008.

Gondo & Ors v Zimbabwe

The applicants in this case were victims of violence perpetrated by national security agents, namely, the Zimbabwe Republic Police and Zimbabwe National Army. The applicants successfully sought remedies before national courts. The applicants were awarded damages for the violence suffered. However, the respondent state failed to comply with orders of national courts. The applicants were unable to enforce the judgment because section 5(2) of the State Liability Act [*Chapter 8:14*] prevented the execution of judgments against the respondent's property.

Before the SADC Tribunal, the applicants contented that section 5(2) of the State Liabilities Act was incompatible with the Zimbabwe's obligation under Articles 4(c) and 6(1) of the SADC Treaty on account of the fact that the said provision shielded the respondent from providing effective remedies to the applicants. Such failure by the respondent state was contended to amount to a breach of the principles of human rights provided for in Articles 4(c) and 6(1) of the SADC Treaty. The Tribunal recomputed the amounts of money awarded by Zimbabwe national courts as damages. The computation was to factor in the hyperinflationary environment and cushion the applicants from the vices of delayed performance.

Upon considering the dispute on its merits, the SADC Tribunal held that section 5(2) of the State Liabilities Act also contravened the principle of equality and equal protection as it prevented the law from been equally enforced and did not accord equal protection to all parties. According to the Tribunal, the provision unfairly differentiated between judgment debtors. The state as a debtor was more protected by the law yet the rest of them in the form of individuals and juristic persons, enjoy no similar privileges. In this regard, the Tribunal found that section 5(2) of the Act was in breach of the respondents' obligation under Articles 4(c) and 6(1) of the SADC Treaty, and that granting the state immunity from the execution of judgment debt had an adverse effect on the rule of law.

As regards compliance with this judgment, the respondent state did not implement any of the two operative orders of

the judgment.[73] Even if the State had paid, those monetary payments would not have been noticeable to avoid flooding of cases. However, research pursuant to this publication revealed no efforts to align the State Liabilities Act with the constitution or Zimbabwe's international law obligations. There is currently a legislative review and reform underway designed to align legislation with the 2013 constitution. The process is reported as not transparent to the extent that interested stakeholders are unaware which laws have been earmarked for legislative reform. On its part, the impugned law is still part of the law of Zimbabwe and judgment creditors still cannot execute public property in satisfaction of judgment debts.

Mike Campbell (Pvt) Limited v Republic of Zimbabwe[74]

The Applicants in this widely publicised case challenged the agrarian reform programme carried out by the Government of Zimbabwe as unlawful to the extent that it was racially grounded with no prospects of compensation. The Government of Zimbabwe, by way of Constitution of Zimbabwe Amendment (No. 17) Act (herein Amendment No.17) made a decision to expropriate privately owned land, including agricultural land without compensation. The Amendment No. 17 also ousted the jurisdiction of national courts from presiding over land acquisition-related disputes and left the Applicants without an effective remedy at the national level. The Government of Zimbabwe raised a preliminary objection to the Application on the basis that the Tribunal lacked jurisdiction as the Applicants failed to exhaust local remedies and that the Tribunal had no mandate to entertain human rights matters on account of the fact the SADC did not have a protocol on human rights.

The SADC Tribunal held that it had jurisdiction to hear the matter and the Applicants had exhausted local remedies since national law provided no domestic remedy more particularly because the constitutional amendment 17 ousted the jurisdiction of the domestic courts over land disputes. The

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[73] The representatives of the applicants confirmed that their clients did not receive any payments in respect of the judgment in question.

[74] SADC-T 001/2008.

SADC Tribunal further held that it did not need a protocol on human rights to entertain human rights matters as Article 21 (b) of the Protocol on the SADC Tribunal provided the power to develop its own jurisprudence, and instructs the Tribunal to do so "*having regard to applicable treaties, general principles and rules of public international law*" which are recognised sources of law for the SADC Tribunal.

Put differently, the said Article settled the question whether the SADC Tribunal could look elsewhere for legal bases where it appeared that the SADC Treaty provided none. Furthermore, the SADC Tribunal held that Article 4 (c) of the SADC Treaty was an express provision in that regard, because it required the SADC Members States to act in accordance with human rights principles and in terms of Article 6 (1) of the Treaty, "to refrain from taking any measures likely to jeopardize the sustenance of its principles, the achievement of its objectives and the implementation of the provisions of the Treaty".

As regards the allegations of racial discrimination, by a majority decisions, the SADC Tribunal found that the Respondent substantively discriminated against the applicants, although Amendment 17 did not mention race, the intention of the legislation was to target white farmers, in violation of Article 6 (2) of the SADC Treaty.

The Tribunal held that the all the Applicants were entitled to fair compensation for their farms. It also ordered the Government of Zimbabwe to pay fair compensation to the three (3) Applicants whose farms had already been expropriated. The SADC Tribunal declared the Government of Zimbabwe to be in violation of Article 4 (c), and (6) (2) of the SADC Treaty and to take all necessary measures to protect the possession, occupation and ownership of all other Applicants.

The enforcement of the *Campbell case* is one that later became riddled with political controversy and legal dynamics that were never anticipated at the time it was rendered. It is now common cause that the Government of Zimbabwe made public statements denouncing and declining to comply with the decision. The main argument raised by politicians was that the Protocol on the SADC Tribunal never came into force in

respect of the Government of Zimbabwe as she did not ratify it. This position was however, disputed and ruled against by the Zimbabwean High Court in the case of *Gramara (Pvt) Limited & Ors v Zimbabwe & Ors*.[75] The Protocol on the SADC Tribunal was declared as binding on Zimbabwe.

The Government of Zimbabwe's refusal to implement the *Campbell decision* was so flagrant that it was referred back to the SADC Tribunal by the applicants.[76] The SADC Tribunal presided over the referral in the case of *Louis Karel Fick & Ors v Zimbabwe*. In that case, the SADC Tribunal held that Zimbabwe had failed to comply with the order of the Tribunal in the *Campbell* case. In such circumstances the only recourse was for the SADC Tribunal to refer the incidence of non-compliance to the SADC Summit 'for appropriate action' in terms of article 35 of the SADC treaty. As expected, the SADC Summit enforcement option did not yield any results. Rather than focussing on enforcing compliance, the SADC Summit embarked on a campaign to discredit the SADC Tribunal and its decisions.

On referral of Zimbabwe's non-compliance with the *Campbell* decision, the SADC supreme body took a number of decisions inconsistent with engendering compliance. First, the Summit did not do enough to enforce compliance with judicial decisions. Second, it adopted the SADC Ministers of Justice and Attorney-Generals and the Foreign Affairs Ministers' recommendation to carry out a legislative review of the Protocol on the SADC Tribunal. Third, during the 2012 summit in Mozambique, the SADC Summit took a decision to suspend the SADC Tribunal, terminated judges' contracts and imposed a moratorium on receiving new cases. Fourth, and very ironically,[77] the SADC Summit adopted a new protocol on the

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[75] Unreported Judgment HH-169-2009.

[76] A referral to the Summit is provided for in article 32(5) of the Tribunal Protocol which provides that "[i]f the Tribunal establishes the existence of [any failure by a State to comply with a decision of the Tribunal], it shall report its finding to the Summit for the latter to take appropriate action."

[77] The development of the adoption of a new protocol on the SADC Tribunal was ironically in the sense of it taking place in Zimbabwe. The legislative process leading to the adoption is believed to have

SADC Tribunal in Zimbabwe during a session in August 2014.

On account of SADC Summit inability to enforce compliance by taking appropriate action in terms of the SADC Treaty, the litigants in the *Campbell* case took on a campaign to seek enforcement of the decision one way or another. The efforts by this group of people have seen attempts to have the decision enforced in at least two countries. By and large, the *Campbell* decision judgment creditors embarked on some degree of creative litigation in order to avoid enforcement barriers presented by both SADC law and that of its member states.

In 2009, some of the farmers who were part of the applicants in the *Campbell* case approached the Harare High Court seeking recognition of that decision for purposes of enforcement in the *Gramara* case. The legal basis was grounded in the provisions of article 32(1) of Protocol on the SADC Tribunal. In essence, the applicants sought to invoke Zimbabwean domestic law on recognition and registration of foreign judgments. While it appears the Harare High Court creatively found legal basis to accept the SADC Tribunal decision as a foreign judgment, it declined to register it on the grounds of public policy, namely, that enforcing the decision would be contrary to the prevailing Supreme Court of Zimbabwe judgment in *Mike Campbell (Pvt) Ltd & Another v Minister of National Security Responsible for Land, Land Reform and Resettlement & Another*.[78] The Supreme had held that the agrarian reform was in terms of the constitution of Zimbabwe and not racially discriminatory as held by the SADC Tribunal. No appeal was filed against the Harare High Court decision.

Another band of applicants in the *Campbell* case also approached the Gauteng High Court of South Africa seeking the recognition and registration of the costs order of the decision rendered by the SADC Tribunal following referral for

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been incepted at the instance of Zimbabwe as she failed to comply with the Tribunal's ruling in the *Campbell* case. Another aspect of the Victoria Falls session is that Zimbabwe assumed the SADC Chair seat.

78 S-49-07.

non-compliance.[79] The Gauteng High Court registered the decision in *Fick and Others v Government of the Republic of Zimbabwe*. Zimbabwe did not participate in those proceedings until it was nudged to do so when the applicants attached Zimbabwean property in South Africa. Zimbabwe then appealed unsuccessfully to the Supreme Court of South Africa through to the Constitutional Court of South Africa in *Government of Zimbabwe v Fick & Ors*.[80]

Zimbabwe's main arguments in prosecuting the appeal were that as a sovereign state it enjoyed immunity in domestic courts of South Africa and that in any event the SADC Tribunal lacked international jurisdiction over the dispute hence its decision should not be registered for enforcement. Granting Zimbabwe leave to appeal on the basis of interests of justice, the Constitutional Court of South Africa rejected the other grounds of appeal and developed common law to recognise the SADC Tribunal as a foreign court and enforced the costs order.[81] However, it remains unclear as to whether Zimbabwe complied with the costs order by paying for these costs it being now two years since the decision of the Constitutional Court of South Africa.

The Effect Of Non-Compliance With Court Judgments

Non-compliance with judgments of courts of law, whether by the state or individuals, is one of the indicators of societies where rule of law, observance of human rights and democracy are impeded. A government that complies with judgments of its own courts against both strong and small men (people) is one that gives credence to the notion that a government draws authority to rule from the people. Compliance with court decisions buttresses the principle of equality before the law and that no one including the state, is above but is subject to the law.

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79 *Fick and Others v Government of the Republic of Zimbabwe*, Case No 77881/2009, North Gauteng High Court, Pretoria, 25 February 2010, Unreported Judgment.

80 Case CCT-101-12 [2013] ZACC 22.

81 See paragraphs 71 – 74 of the Judgment.

Conversely, non-compliance with judgments directly impacts on the right to access to justice, especially the effectiveness thereof, and specific aspects of the right to be heard and right to a fair hearing. In general terms, access to justice requires that barriers of any kind be removed from the path of those who wish to approach courts of law to assert their rights. The Inter-American Court on Human Rights held as follows:[82]

> The absence of an effective remedy to violations of the rights recognized by the Convention is itself a violation of the Convention by the State Party in which the remedy is lacking. In that sense, it should be emphasized that, for such a remedy to exist, it is not sufficient that it be provided for by the Constitution or by law or that it be formally recognized, but rather it must be truly effective in establishing whether there has been a violation of human rights and in providing redress. A remedy which proves illusory because of the general conditions prevailing in the country, or even in the particular circumstances of a given case, cannot be considered effective. That could be the case, for example, when practice has shown its ineffectiveness: *when the judicial power lacks the necessary independence to render impartial decisions or the means to carry out its judgments*; or in any other situation that constitutes a denial of justice, as when there is an unjustified delay in the decision; or when, for any reason, the alleged victim is denied access to a judicial remedy.

The Inter-American Court identified the inability of a judicial body to 'carry out its judgment' as clear evidence of the non-existence of an effective remedy. In other words, where the executive declines to comply with court decisions, courts are invariably left with no means to enforce compliance. Once that state of affairs obtains, then the effectiveness of remedies is seriously undermined and so is the legitimacy, dignity and authority of the court that rendered the decision in question or courts in general.

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[82] Inter-American Court on Human Rights, Advisory Opinion OC-9-87 of October, 1987, Judicial Guarantees in States of Emergency (Articles 27(2), 25 and 8 of the American Convention on Human Rights) para 41.

In *Bissangou v Republic of Congo*,[83] the African Commission was more forthright in pronouncing the effect of state refusal to pay a judgment debt:

> ...Article 7 includes the right to the execution of judgment. It would therefore be inconceivable for this article to grant the right for an individual to bring an appeal before all the national courts in relation to any act violating the fundamental rights without guaranteeing the execution of judicial rulings... as a result, the execution of a final judgment passed by a tribunal or legal court should be considered as an integral part of the right to be heard which is protected in Article 7. The African Commission remains conscious of the fact that without a system of effective execution, other forms of private justice can spring up and have negative consequences on the confidence and credibility of the public in the justice system.[84]

Over and above the effect on access to justice, the African Commission concluded in the *Bissangou* case that '... execution of a final judgment passed by a tribunal or legal court should be considered as an integral part of the right to be heard which is protected in Article 7'. In other words, non-compliance affronts the right to be heard. To the extent that judgments of tribunals or courts are not complied with, the right of every person to have their cause heard by an independent and impartial tribunal established by law is violated as non-compliance takes away the rationale of adjudication. One cannot be said to have been heard in the context of the right to be heard unless the judicial pronouncement in their favour is given effect.

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[83] *Bissangou v Republic of Congo* (2006) AHRLR 80 (ACHPR 2006). See also G Musila 'The Right to an Effective Remedy under the African Charter on Human and Peoples' Rights' 6 (2006) AHRLJ 442, citing G Naldi 'Future trends in human rights in Africa: The increased role of the OAU?' in M Evans & R Murray (n 5 above) 1, citing KO Kufuor 'Safeguarding human rights: A critique of the African Commission on Human and Peoples' Rights' (1993) 18 Africa Development 18 (1993) 65 66-69 and W Benedek 'The African Charter and the Commission on Human and Peoples' Rights: How to make it more effective' (1993) 11 Netherlands Quarterly of Human Rights 25 31.

[84] *Bissangou*, para 75. See also European Court of Human Rights decision in *Hornsby v Greece* Application No. 18357/91.

Furthermore, non-compliance with court decisions undermines the independence of the rendering tribunal thereby adding another layer of violation of the right to be heard. In many a legal jurisdictions, non-compliance with a court decision by a person or entity that was a party to the concluded legal proceedings is contemptuous conduct that is met with a criminal sanction.[85] The independence of courts is not only constitutionally protected, but also aided by criminalising contemptuous conduct for democracy and rule of law to thrive.

An argument must be put forward, which is that a state that fails to comply with decisions of an international tribunal must be met with punishment for contempt of court. On practical grounds, the modalities of holding states in contempt in the traditional meaning of the concept would be difficult. This is so more particularly because at national level, states have protected themselves from judicial attachment of property in execution of court judgments against them by claiming that such property belongs to the public.

Accordingly, states such as Zimbabwe have enacted and maintained legislation clearly designed to void enforced compliance with judgments of national courts.[86] While holding certain government officials in contempt for failing to act in compliance with a court order has been tolerated in other jurisdictions, that approach never presented itself as a permanent solution hence in South Africa, the Constitutional Court of that country declared as unconstitutional section 3 of the State Liabilities Act No. 14 of 2011 in the case of *Nyathi*

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[85] Contempt of court is invariably a criminal charge that is available in legal systems where courts exist. It is deemed to be a very important charge in that it serves to preserve and protect the authority and integrity of courts in a modern democracy. To that end, contempt of court proceedings are regarded as *sui generis* proceedings designed to effectively strike the source of contempt with speed so that the public does not lose trust and respect of courts of law. If they do, so will they behave in relation to the laws of the state.

[86] Zimbabwe maintains the State Liabilities Act, which in Section 6 thereof, a judgment creditor cannot attach in execution of judgment, property that belongs to the state. Efforts are underway to repeal this provision in line with the 2013 Constitution of Zimbabwe that is aggressive on access to justice.

v Member of the Executive Council for the Department of Health Gauteng and Another.[87]

In order to preserve the integrity and authority of international tribunals by enforcing compliance with their judgments, international human rights mechanisms have anticipated this problem by establishing institutions and or procedures to deal with cases of non-compliance by imposing what are termed here as compliance incentives. These are sanctions or other forms of actions taken by the compliance supervisory institutions against the recalcitrant state in order to enforce compliance with court judgments backed up by treaty provisions in respect of which states under took to comply with decisions in cases where they are parties.

Under the African human rights system, article 30 of the African Court Protocol states undertake to comply with decisions and to guarantee execution while article 29(2) empowers the Executive Committee to oversee compliance with judgments. This provision lays to rest any doubt regarding the question as to whether undertaking compliance is not direct enough to impose the implementation obligation on states. It goes to say states must 'guarantee execution' of those judgments, that is to say, giving effect to the remedial parts of the order by implementing it 'within the time stipulated by the Court'.

On its part, the Protocol on the SADC Tribunal provides in article 32(1) that states parties must adopt 'the procedure for the registration and enforcement of foreign judgments' to ensure enforcement of judgments of the SADC Tribunal. Article 32(2) is akin to article 30 of the African Court Protocol regarding reference to 'execution'. In terms hereof, SADC member states are required to 'forthwith take all measures necessary to ensure execution of decisions of Tribunal'. Article 32(3) makes sure that it is only parties to the dispute that must comply with decisions of the Tribunal while articles 4 & 5 of the Protocol on the SADC Tribunal speak directly to the issue of non-compliance. In terms of article 4, party can refer

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87 (CCT 19/07) [2008] ZACC 8; 2008 (5) SA 94 (CC); 2008 (9) BCLR 865 (CC) (2 June 2008).

non-compliance to the Tribunal,[88] and the Tribunal itself has the option under article 5 to refer the case of non-compliance to the SADC Summit for 'appropriate action'.

In conclusion, in line with the wording of article 5 of the Protocol on the SADC Tribunal that provides for referral of cases of non-compliance to the SADC Summit for 'appropriate action', many international treaties shy away from stipulating the incentives.

Conclusion

In this contribution to existing body of knowledge on the discussed subject, the author has demonstrated the need for enforcement mechanisms in order to ensure implementation of decisions and judgments of human rights supervisory institutions. The concept of compliance entails adopting deliberate measures in good faith in a bid to give effect to these decisions in a manner that changes the status quo created by instances of human rights violation. To a certain degree, a state's compliance record could be assessed to give a general trend and attitude of that state towards compliance.

Of the cases lodged before the African Commission against Zimbabwe, the country has maintained a hundred percent record of non-compliance spanning over the past two decades. However, the country has thawed to the UPR process by subjecting itself to that mechanism. Zimbabwe has submitted a national report and then the mid-term review. More importantly, she accepted quite a number of recommendations and undertook to implement them as opposed to the attitude exuded in respect of the African human rights mechanisms.

The impact of non-implementation or non-execution of judicial decisions has been condemned by human rights supervisory institutions such as the African Commission and the Inter-American Court as a violation of the same obligations twice. Non-execution of decisions contradicts the tenets of rule of

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[88] This is what transpired in the *Campbell* case when Zimbabwe declined or failed to comply whereupon the SADC Tribunal upheld the claim of non-compliance and referred the case of non-compliance to the SADC Summit for appropriate action.

law, democracy and human rights such as the rights to be heard, fair trial and the right to access to justice. Non-compliance with judgments further violates the right to an independent tribunal as execution of judgment lies at the heart judicial independence. Therefore, the gravity of the impact of non-compliance with court decisions on other human rights should serve as an impetus to push for collective efforts towards ensuring that human rights decisions are implemented at national level.