



THE DISSOLUTION OF THE SADC TRIBUNAL

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“We have created a monster that will devour us all”
–Tanzanian President, Jakaya Kikwete¹

Background.

On 17th August, 1992, the SADC² Treaty and Declaration was signed, creating a “community” of State parties in the Southern African region in accordance with international law.³ The Treaty provided, in Article 9, for the establishment of various institutions to serve and govern SADC. The SADC Tribunal was one such institution. Article 16 of the Treaty provided that the Tribunal would be “*constituted 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 relevant Protocol was signed⁴ on the 7th August, 2000 by the Summit, which comprises the heads of all member states.⁵

When the SADC Treaty was amended in 2001, the Amendment Treaty made specific reference to this Tribunal Protocol. Most importantly, for present purposes, the amendment altered the wording of Article 16, to provide that the Tribunal Protocol “*shall, notwithstanding the provisions of Article 22 of this Treaty, form an integral part of this Treaty.*” The Tribunal Protocol was itself later amended on 3rd October, 2002.⁶

However, it was only in November, 2005, that the members of the Tribunal were sworn in and the Tribunal was inaugurated, operating from premises in Namibia. A further full two years

1 Referring to the SADC Tribunal and cited in the Mail & Guardian (19.08.11 – 25.08.11) Killed off by ‘Kings and Potentates’.

2 Southern African Development Community.

3 SADC presently comprises 14 countries - Angola, Botswana, Democratic Republic of Congo (DRC), Lesotho, Malawi, Mauritius, Mozambique, Namibia, Seychelles, South Africa, Swaziland, Tanzania, Zambia and Zimbabwe. Madagascar, originally part of SADC, is currently suspended.

4 The word “signed” has again been chosen to avoid anticipating the arguments concerning whether the protocol was “adopted” or “approved.”

5 Article 10(1).

6 There were two further amendments on the 17th August, 2007 and 17th August, 2008. It is the October 2002 amendment which is of primary importance here.

passed before the first dispute was lodged with the Tribunal by a Malawian national with a claim against SADC's own Secretariat.⁷

In November 2008, the Tribunal handed down judgment in the landmark case of *Campbell (Pvt) Ltd and Others v The Republic of Zimbabwe and Others*.⁸ The Tribunal ruled that the Government of Zimbabwe had violated the human rights provisions of the Treaty in using race as the basis upon which to dispossess white farmers of their land. When the Zimbabwe Government twice refused to comply with the orders of the Tribunal, the Tribunal referred each instance of non-compliance to the SADC Summit for "appropriate action".⁹

Having accepted the 2001 Amendment Treaty, and the Tribunal Protocol, up to this point, the Zimbabwe Government¹⁰ belatedly sought to challenge the validity of the Tribunal Protocol, claiming that neither the 2001 Amendment Treaty nor the Tribunal Protocol had been validity brought into force. In August 2010, the Summit decided to limit the operations of the Tribunal, ostensibly to allow for time to consider this issue.¹¹ To this end, it commissioned a review of the role, responsibilities, and terms of reference of the Tribunal by an independent consultant and specialist in international law, Dr. Lorand Bartels of Cambridge University.¹² Action against Zimbabwe was deferred pending the outcome of the review. The Tribunal was enjoined not to entertain any new cases in the interim.

However, when the Bartels Report was presented, the Summit chose to ignore its fundamental recommendations, and, in May 2011, determined that the jurisdiction of the Tribunal was to be altered. The Summit held that appropriate legal instruments to change the jurisdiction of the Tribunal and the legal framework within which the Tribunal operates were to be prepared for presentation to the Summit in August 2012. 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 inoperative and defunct. 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.

The effect of the 2001 Amendment Treaty and the question as to whether the Amendment Treaty and Tribunal Protocol have entered into force are the given axis around which turns the decision to effectively dissolve the Tribunal and the legal disputes which have arisen. Various arguments have been advanced in this regard – most notably by Zimbabwe's Justice Minister, who first challenged the validity of the Tribunal; by Dr. Tawanda Hondora;¹³ by the Bartels Report; by the Southern African Litigation Centre;¹⁴ by Zimbabwe Lawyers For Human Rights;¹⁵ by the

⁷ *Ernest Francis Mtingwi v SADC Secretariat* SADC (T) CASE No.1/2007.

⁸ SADC (T) Case No. 2/2007.

⁹ *William Campbell and another v Republic of Zimbabwe* SADC (T) 03/2009 (June) and *Fick and Another v Republic of Zimbabwe* SADC (T) 01/2010 (July).

¹⁰ While technically correct, it is a little misleading to refer to the Zimbabwe Government here. Although as a matter of law and international protocol there can only be a single position put forward by the Zimbabwe Government, the stance was only taken by the ZANU PF component of the "unity" or "inclusive" government in the face of objections from the MDC component.

¹¹ See *SADC Tribunal: Will Regional Leaders Save It or Sabotage It?* Nicole Fritz, Director of Southern Africa Litigation Centre (SALC) available at <http://www.osisa.org/openspace/regional/sadc-tribunal-will-regional-leaders-save-it-or-sabotage-it>.

¹² The Report was issued under the auspices of the WTI Advisors, an affiliate of the World Trade Institute.

¹³ *The Establishment of the SADC Tribunal: Troubled Beginnings* Twanda Hondora 2009: available at <http://ssrn.com/abstract=1727342>.

¹⁴ *Opinion Piece from The Southern Africa Litigation Centre* – 22.09.09 available at www.southernafricalitigationcentre.org/download/5/26.

Zimbabwe Human Rights NGO Forum¹⁶, and by Counsel in the *Campbell* cases – J. Gauntlett SC, Prof J.L. Jowell QC and F. Pelsler.^{17/18} The view of the latter four broadly concur and shall be collectively referred to here as Gauntlett *et al.*¹⁹ Some of the key legal issues raised relating to the suspension of the Tribunal, and positions adopted in respect to these issues, are discussed below:

Issue 1.

Whether the Amendment Treaty of 14th August, 2001 has any force and effect.

Zimbabwe's Justice Minister, Patrick Chinamasa, relies on the contention that the 2001 Amendment Treaty is of no force and effect for several of his arguments, and most importantly, that the Tribunal Protocol only forms an "integral part" of the Treaty by virtue of the Amendment Treaty. If the Amendment Treaty is not in effect the Protocol cannot presently be said to form an integral part of the Treaty. The Minister further contends that the Tribunal Protocol is yet to be of any force and effect, and cannot be of any force and effect until ratified as provided for in Article 22 of the Treaty. The Tribunal cannot, it is claimed, lawfully operate without an effective Protocol.

The argument is based on this proposition: that the 2001 Amendment Treaty must, under international law be ratified by the Member states before it enters into force, which, in the case of Zimbabwe, in terms of Section 111B of its Constitution, requires that "*any convention, treaty or agreement acceded to, concluded or executed by or under the authority of the President with one or more foreign states or governments or international organizations*" shall be subject to approval by Parliament. A State, the Minister contends, is not bound by an agreement, by whatever name called, entered into with other States, to which it has not consented in accordance with its own constitutional provisions.

¹⁵ *Hon. Chinamasa's Attempt to Pull Out' of SADC Tribunal Futile and Unjustifiable* ZLHR 03.09.09 available at http://kubatana.org/html/archive/hr/090903zlh.asp?orgcode=ZIM007&year=2009&range_start=31

¹⁶ *Status and Meaning of Ratification of SADC Treaty and Tribunal Protocol* Zimbabwe Human Rights NGO Forum August 2009 available at <http://www.hrforumzim.org/pressreleases/status-and-meaning-of-ratification-of-sadc-treaty-and-tribunal-protocol/>.

¹⁷ *Ex Parte: Commercial Farmers Union. In Re: Response by the Minister of Justice, Zimbabwe, to Opinions on the Status of Rulings by the South African Development Community (SADC) Tribunal Vis-à-vis The Government of Zimbabwe* available at <http://www.thezimbabwean.co.uk/comment/24919/opinion-sadc-tribunal-ruling-is-binding-on-zim-govt-jeremy-gauntlett-.html> ("The Gauntlett Opinion")

¹⁸ Zimbabwe's Justice Minister, Patrick Chinamasa made part of his submissions to SADC Council of Ministers/Attorneys-General on the validity of the Tribunals rulings against Zimbabwe public in August 2009 in a document entitled *Execution and Enforcement of Judgments of the SADC Tribunal, Opinion of the Government of the Republic of Zimbabwe on issues relating to International Law which were raised at the Meeting of Ministers of Justice/Attorneys-General which was held in Pretoria, South Africa from 30 July to 31 July 2009, 31 August 2009* ("the Chinamasa opinion"). This prompted brief critiques of his submissions by the NGOs referred to in the text and legal counsel in the *Campbell* cases see *Ex Parte: Commercial Farmers Union In Re: The Status of Rulings by the Southern African Development Community (SADC) Tribunal Vis-à-vis the Government of Zimbabwe. Opinion* available at <http://www.zimbabwe-democracy.com/2009/09/04/legal-opinion-re-zimbabwe-and-the-jurisdiction-of-the-sadc-tribunal/>. Chinamasa then publicised a strident riposte ("the Chinamasa riposte") attacking opinions of Gauntlett, the Zimbabwe Human Rights Forum and Zimbabwe Lawyers For Human Rights. Gauntlett and Pelsler responded in detail to this riposte in a detailed opinion – see fn 17.

¹⁹ They are grouped under the name of Gauntlett as senior counsel for the main protagonists rather than to privilege opinion of Gauntlett and co-counsel.

The Legal Opinions

In international law, there is frequently a distinction between accepting the terms of a treaty and agreeing to be bound by its provisions. The first is usually indicated by a delegate of the State, often the State's premier, signing the treaty, the second by the process of ratification. The practice of ratification arose to allow each State an opportunity to consider an instrument signed by its delegate before agreeing to be bound by its terms and to allow any necessary legislative amendments to be accepted and made by the State's own legislature. It is often expressly provided in international treaties that they will only enter into force once ratified by a specified number of signatory States, and will only bind those States which have ratified the treaty. Accordingly, there is a distinction between the adoption of a treaty by a State, and the entry into force of the provisions of the treaty vis-à-vis each State.

For example, the SADC Treaty itself provided that it would enter into force “*thirty (30) days after the deposit of the instruments of ratification by two-thirds of [member] States*” with the Executive Secretary of SADC.²⁰ This condition was only met more than a year later, on 30th September 1993 and it is on this date that the Treaty was regarded as entering into force. The Treaty also provided that amendments would be valid²¹ if adopted by no less than three-quarters of the members of the Summit²².

With this in mind, Chinamasa argued as follows:²³

Although the SADC Treaty provides that amendments to the Treaty are made when adopted by three-quarters of the Summit, it makes no mention as to how and when such amendments enter into force. In the absence of any such provision, Chinamasa maintains that customary international law prevails, and requires that the same procedures applicable to the entry into force of the Treaty itself are of application to the amendment. Thus, Chinamasa claims, the deposit of instruments of ratification by two-thirds of the Summit, required to bring the SADC Treaty itself into force, is likewise required to bring the Amendment Treaty into force. No such ratification has taken place. The Amendment Treaty has thus not entered into force, the Tribunal Protocol is not “*an integral part*” of the Treaty as (arguably - see below) provided for by the amendment to Article 16(2) of the Treaty until the Amendment Treaty is in force and the SADC Tribunal is thus improperly established.²⁴

The Minister finds no support for this submission in any of the diverse opinions expressed on the issue. A major difficulty for Chinamasa is that the Amendment Treaty itself provided for this situation in Article 32:

²⁰ Articles 42 and 44 of the Treaty.

²¹ The word “valid” has been chosen here rather than “to have effect” to avoid anticipating the argument of Zimbabwe's Justice Minister as to as the requirements which must be met before an amendment comes into force (see below).

²² Article 36 (1) “An amendment of this Treaty shall be adopted by a decision of three-quarters of all the Members of the Summit.” This is clearly poor drafting. The clause intends to mean that amendments will only be valid upon such adoption, not, as phrased, that the Summit must adopt the amendment. This poor drafting appears throughout the Treaty and it is remarkable that disputes, such as that around the Tribunal, did not arise earlier.

²³ In a document entitled *Execution and Enforcement of Judgments of the SADC Tribunal, Opinion of the Government of the Republic of Zimbabwe on issues relating to International Law which were raised at the Meeting of Ministers of Justice/Attorneys-General which was held in Pretoria, South Africa from 30 July to 31 July 2009, 31 August 2009* (“the Chinamasa opinion”).

²⁴ The Chinamasa opinion p8 et seq.

This Agreement shall enter into force on the date of its adoption by three quarters of all members of the Summit.

To avoid this unequivocal agreement by the Summit as to the entry into force of the Amendment Treaty, Chinamasa is compelled to develop an argument which effectively suggests that the Amendment Treaty cannot pull itself up to a level of effectiveness by its own bootstraps, as it were. In other words, that this provision, providing that the Amendment Treaty is to enter into force upon adoption by three-quarters of the Summit, is itself not in force until ratified. Thus Chinamasa holds that: “*The amendment could not have granted powers to the Summit which were not contained in the Treaty*”.²⁵ It could not therefore have provided for its entry into force upon adoption by three-quarters of the Summit, as the Treaty (implicitly, by virtue of international customary law) demands ratification of any amendment. The entry into force provision itself, Chinamasa argues, is invalid. Chinamasa furnishes no authority under international law for this proposition, and ignores the authority which he himself cites²⁶ to the effect that an amendment may itself “*provide whether the adopted amendment needs to be ratified*”. He does, however, argue:

It is inconceivable that Member States could agree that Articles considered essential to the structure, objects and purposes of the Treaty could be adopted by SADC and become operational other than through the traditional process of ratification. It would be highly undesirable not only for individual States but for the development of international law, if a State were to find itself bound by provisions which it never contemplated and to which it did not consent and which, we might add, it has no knowledge of.

The Bartels Report and the SALC respond in detail to this contention of Chinamasa. Bartels states that it is simply wrong:

*It is basic international law that a treaty concluded by all of the parties to an original treaty can override that original treaty regardless of any restrictions contained in that treaty.*²⁷

Hence, even if there were an implied requirement for ratification under international customary law, it would clearly have been overridden by the entry into force provisions of Article 32 of the Amendment Treaty. Bartels notes that a treaty may be amended by any means chosen by the parties to the treaty. There is no requirement that amendments must be ratified. The manner in which the amendment enters into force may be agreed, as it was, by the parties. Extensive and incontrovertible authority in international law is provided both by Bartels and the SALC in support of this view.²⁸

Dr. Hondora, who otherwise supports Chinamasa’s view that the Tribunal Protocol has yet to come into effect, dismisses Chinamasa’s position on the Amendment Treaty and does not deem it worthy of analysis stating:

²⁵ At p9.

²⁶ At p7.

²⁷ Bartels cites Mark Villiger, *Commentary on the 1969 Vienna Convention on the Law of Treaties* (Leiden/Boston: Martinus Nijhoff, 2009), 512, para 5.

²⁸ In particular Article 39 and 40 of the Vienna Convention.

*The SADC [Amendment] Treaty is in force. Of this there is no doubt.*²⁹

In ruling upon an application to have the judgment of the SADC Tribunal in the first *Campbell* case³⁰ registered in Zimbabwe's High Court,³¹ Justice Patel dismissed the contention that the Amendment Treaty had not come into effect as it had not been ratified. The Judge noted that in terms of Article 36(1) of the Treaty:

“An amendment of this Treaty shall be adopted by a decision of three-quarters of all the Members of the Summit.”

that the term “Summit” is defined in Article 1 of the Treaty as:

“..... the Summit of the Heads of State or Government of SADC established by Article 9 of this Treaty”.

and that the Amendment Treaty itself provided in Article 32:

This Agreement shall enter into force on the date of its adoption by three quarters of all members of the Summit.

Since all SADC Heads of State adopted the Amendment Treaty, and agreed that it should enter into force after adoption by at least three quarters of its members, its validity and effectiveness seem self-evident. This view is also the contention of Gauntlet *et al.*

A further procedural point was raised by the Zimbabwe Government.

Article 36 of the Treaty requires that proposed amendments to the Treaty be submitted to the SADC Council³², for consideration by a Member State, three months in advance. Although the amendment was submitted timeously, it was submitted to Council by the Secretariat, not by a Member State as had become regular practice. Bartels cites a judgment of the International Court to affirm that this procedural lapse could not affect the validity of the 2001 Amendment Treaty. In the case referred to, South Africa had contended that a UN Security Council resolution was invalid as it lacked the concurring vote of the five permanent members, as required by Article 27(3) of the UN Charter, there being two abstentions. The argument was rejected on the basis that accepted practice of the UN regarded such resolutions as valid.³³

Issue 2.

Whether the Tribunal Protocol is in force.

Here the arguments are more subtle and involved. The dispute revolves around the meaning of Article 16(2) of the SADC Treaty and the effect of the amendment to this Article. It now reads as follows:

*The composition, powers, functions, procedures and other related matters governing the Tribunal shall be prescribed in a Protocol, **which shall,***

²⁹ Hondora p6. The context suggests that Hondora is referring either to the Amendment Treaty or the Treaty as amended.

³⁰ *Mike Campbell (Pvt) Ltd & Others v The Republic of Zimbabwe* Case No. SADC(T) 2/2007.

³¹ *Gramara (Private) Limited & Ors v Government of Zimbabwe & Ors* HC 33/09.

³² Comprising one Minister from each state “preferably the Minister responsible for Foreign Affairs or External Affairs” - Article 11(1).

³³ The Bartels Report p70.

notwithstanding the provisions of Article 22 of this Treaty form an integral part of this Treaty, adopted by the Summit.”

The emphasized words were introduced by the Amendment Treaty.

- a) What is the meaning to be according to “*notwithstanding the provisions of Article 22*”?

It suggested that the meaning of “*notwithstanding*” is ambiguous³⁴ or that its “*object is difficult to locate.*”³⁵ It is necessary to consider Article 22 to understand the point. Article 22 provides:

1. *Member States shall conclude such Protocols as may be necessary **in each area of co-operation**, which shall spell out the objectives and scope of, and institutional mechanisms for, co-operation and integration.*
2. *Each Protocol shall be **approved** by the Summit on the recommendation of the Council.*
3. *Each Protocol shall be open to signature and ratification.*
4. *Each Protocol **shall enter into force thirty (30) days after the deposit of the instruments of ratification by two thirds of the Member States.***
5. *Once a Protocol has entered into force, a Member State may only become a party thereto by accession.*

(The emphasized words are significant in the discussion which follows.)

The Legal Opinions

Chinamasa is anxious to avoid the interpretation of 16(2) which leads to the conclusion that the Tribunal Protocol is an integral part of the Treaty, despite not having been ratified as provided for in Article 22 – for if it is an integral part of the Treaty it is arguably in force. To this end, Chinamasa initially sought to argue that “*notwithstanding the provisions of Article 22*” means “*notwithstanding that the Tribunal **is not an area of cooperation**, for which protocols may be approved under Article 22(1), there will nevertheless be a Protocol on the Tribunal*”. This interpretation is strained and requires Chinamasa to link the protasis with a contrived apodosis.³⁶ The apodosis which is linked to the protatic “*notwithstanding clause*” is obviously that the Protocol shall be an “*integral part of the Treaty*” and not that “*there will nevertheless be a protocol on the Tribunal*”. Furthermore, this construction raises the difficulty for the Minister that if the Tribunal Protocol does not fall under Article 22 as not dealing with an area of co-operation, it would not then require ratification in terms of that Article to become effective in any event.

Chinamasa thus, at first sight, seemingly contradicts himself by proceeding to argue immediately that the Tribunal Protocol requires ratification under Article 22 of which he has just stated it is not a part. For Chinamasa’s argument as to the meaning to be accorded to “*notwithstanding the provisions (plural) of Article 22*” to have any coherence it is necessary to assume that Chinamasa

³⁴ Hondora p8.

³⁵ Bartels Report p74.

³⁶ In the terminology of grammarians, the subordinate clause in a conditional sentence beginning (in this instance) “*notwithstanding*” is the protasis. The state which exists given the protatic condition, the main clause, is the apodosis. For example, in the sentence “if X, then Y”, the protasis is “if X” and “then Y” is the apodosis.

understands the reference to the provisions of Article 22 to refer to the provision (singular) of Article 22 paragraph (1) alone - the reference to areas of co-operation - *and* that the paragraphs immediately following relating to the requirement of ratification before entry into force and commencing “Each protocol” refer to *all* Protocols approved by the Summit and not just those in areas of co-operation. In this way Article 16(2) can be both exempt from and covered by Article 22 – that is, it applies notwithstanding paragraph (1) of Article 22, but the exemption does not extend to the other paragraphs of Article 22 which demand ratification. This, to say the least, is unlikely.

Chinamasa’s difficulty in this regard is highlighted by the fact that those reaching a contrary conclusion to his, Gauntlett *et al*, also argue that the Tribunal Protocol pertains to dispute resolution, and is not one of the eight areas of co-operation which are specified in the Article immediately preceding Article 22.³⁷ As Gauntlett *et al* point out, Article 16 is:

*schematically divorced from, and semantically absolved from, the provisions governing the entry into force of protocols adopted in furtherance of co-operation in the designated areas. [Article 22]*³⁸

Hondora, who argues that ratification of the Tribunal Protocol is required, more consistently and logically (though not, it is suggested here, correctly) contends that the mechanism of dispute resolution is an automatic concomitant of an agreement to co-operate in designated areas, maintaining that it is

*inconceivable that SADC member states can realise the objectives of the regional economic community, and in particular any of the listed areas of co-operation, including those relating to peace and security, industry, trade, investment and finance, etc without a dispute resolution mechanism interpreting and applying prescribed law, rules and policies.*³⁹

After all, he argues, the parties have agreed “*to co-operate*” in establishing a dispute resolution system in order to achieve the objectives of SADC and areas of co-operation listed in article 21(3).⁴⁰

Of course, Gauntlett *et al*’s contention in this regard is undermined in favour of that of Hondora when one considers that if the Tribunal Protocol is not one of the kind to which Article 22 applies (an area of co-operation), then the insertion of “*notwithstanding Article 22*” in Article 16 is redundant as Article 22 never had any application to Article 16 in any event.⁴¹ However, it is most likely that the phrase was so inserted intending to emphasize the point⁴² and intending to

³⁷ Under Article 21(3) these areas are food security; land and agriculture; infrastructure and services; trade, industry, finance, investment and mining; social and human development and special programmes; science and technology; natural resources and environment; social welfare, information and culture; and politics, diplomacy, international relations, peace and security.

³⁸ The Gauntlett opinion para 25.

³⁹ Hondora p23.

⁴⁰ Hondora p24.

⁴¹ This point is also noted by Hondora (p24) The argument only makes sense if one adopts Chinamasa’s approach that the reference to “each protocol” in Article 22 refers to *all* protocols and not just those in areas of co-operation which the first paragraph announces as the subject matter of Article 22 and which, with Articles 21 and 23, falls under Chapter 7 of the Treaty titled “Co-Operation”. Article 21 is titled “Areas of Co-operation”. As Gauntlett *et al* themselves point out, article 16 is schematically divorced from the Articles in Chapter 7.

⁴² Or, as lawyers would put it, *ex abundante cautela* – from excessive caution.

avert the possibility of anyone suggesting otherwise. Ironically and paradoxically, by so suggesting otherwise, Hondora justifies the need for the insertion of this phrase and supports the explanation for its presence – even though the ill it sought to cure persists. Whether the Tribunal Protocol is or is not an area of co-operation is not essential to Gauntlett *et al*'s argument⁴³ as the key provisions are those relating to ratification, and it is to ratification that Gauntlett *et al* link the “notwithstanding” protasis.

The obvious meaning is that the Protocol is to be regarded as an integral part of the Treaty without the need to follow the provisions relating to ratification set out in Article 22 and this seems to be accepted by all except Chinamasa. Chinamasa's approach must be rejected. It is doubtful whether the argument is advanced sincerely.

Whether the Tribunal Protocol became effective by virtue of the amendment to Article 16(2).

The Legal Opinions

Gauntlett *et al* draw an inference from the integration of the Tribunal Protocol into the Treaty – that the Tribunal Protocol *enters into force* without the ratification process set out in Article 22, that is, simply by virtue of being an integral part of the Treaty.

Hondora rejects this inference⁴⁴ and argues that the meaning of 16(2) is the opposite - that the Protocol is to be regarded as an integral part of the Treaty *even though* (notwithstanding that) it must be ratified in the manner set out in Article 22. Hondora then holds that it does not necessarily follow that the Tribunal Protocol enters into force simply by being an integral part of the Treaty and maintains that the Tribunal Protocol is only to be regarded as an integral part of the Treaty, and in force, once ratified in accordance with Article 22. Since the Tribunal Protocol has not been ratified by two-thirds of member States in the manner detailed in Article 22, it is thus argued that it is not in force.

What then is the meaning to be accorded to Hondora's⁴⁵ approach to Article 16(2) - that the Tribunal Protocol will be an integral part of the treaty notwithstanding the fact that it must be ratified in terms of Article 22 and only when so ratified? Hondora's argument is based on the notion that protocols are generally accepted as being lesser subsidiary legal instruments than the Treaty, and this is evidenced in part by the fact that a ratification process under Article 22 is required in order for a protocol to come into force even though the protocol has been “approved”⁴⁶ by the Summit. The argument is thus that the intention of the amendment is to elevate the status of the Tribunal Protocol and to provide that, notwithstanding the fact that it is a protocol and a subsidiary instrument which requires ratification, once such ratification has been effected it is to be regarded as being of equal status to the Treaty.

⁴³ In fact the argument is strengthened as the anomaly of cross-referencing Article 22, which would have no application in any event if the Tribunal Protocol is not an area of co-operation, is avoided.

⁴⁴ As does Chinamasa, though his argument in this regard is not as articulate as that of Hondora – see the Chinamasa Opinion p13.

⁴⁵ It is not known whether Chinamasa shares this view. The Minister published a detailed riposte to Gauntlett *et al*'s repudiation of his claims concerning the (il)legality of the Tribunal's operation in the Zimbabwean press. However, from the Bartels Report it can be deduced that more detailed and possibly more sophisticated arguments on the legality of the Tribunal were subsequently presented to SADC by way of answers to a questionnaire. The author of these arguments presented on behalf of the Zimbabwe Government and whether they complement or in places contradict the argument initially advanced by Chinamasa are not known.

⁴⁶ See Article 22(2).

Hondora makes several points to advance this reading. Firstly, he argues that if Article 16(2) had intended to exempt the Tribunal Protocol from the ratification process required to bring it into force, why was Article 16(2) not simply amended by stipulating that the Protocol will *enter into force* on adoption by the Summit, notwithstanding the provisions of Article 22?⁴⁷ In other words, if the Tribunal Protocol was to enter into force without following the specific ratification requirements of Article 22, the Treaty would have provided as much in explicit terms directly stipulating the entry into force of the Tribunal Protocol rather than merely referring to its “integration” into the Treaty.

Secondly, Hondora points to the fact that *prior* to the 2001 Amendment Treaty, the SADC Treaty defined a protocol to mean “an instrument of implementation of this Treaty, *having the same legal force as this Treaty*. (Emphasis added).⁴⁸ Furthermore, Article 22(2) itself, prior to the Amendment Treaty, stipulated that:

Each Protocol shall be approved by the Summit on the recommendation of the Council, and shall thereafter become an integral part of this Treaty.

(Emphasis added).

and Article 22(3) provided:

Each Protocol shall be subject to signature and ratification by the parties thereto.

The conclusion Hondora reaches from these Articles is that SADC member states originally agreed that they would regard Protocols approved by the Summit as forming an integral part of the SADC Treaty, even though they were not yet in force as they had yet to be ratified. It is clear that, prior to the amendment, stipulating that protocols would be an integral part of the Treaty was not intended to bring them into force. Hondora claims that the stipulation was rather intended as “a *restatement of values*”, that protocols were to be regarded as an important component of the SADC Treaty. Hondora argues that the amendment to Article 16(2) could not have been intended to give a meaning to “*an integral part of this treaty*” (i.e. that integration meant that the instrument would come into force) which is “inherently contradictory and mutually exclusive”⁴⁹ to that accorded to the phrase prior to the amendment (that the instrument would not come into force).

Thirdly, Hondora draws attention to the fact that the Summit had “adopted”⁵⁰ the Tribunal Protocol on the 7th August, 2000⁵¹ prior to the Amendment Treaty of the 14th August 2001. Hondora then points to the use of the word “*shall*” in Article 16(2), i.e. that the Article provides that “the composition, powers, functions, procedures governing the Tribunal *shall be prescribed* in a Protocol (the provisions of the original Treaty), *which shall*, notwithstanding the provisions of Article 22 of this Treaty, form an integral part of this Treaty” (the portion added by the

⁴⁷ Hondora p9.

⁴⁸ Hondora p10.

⁴⁹ Hondora p11.

⁵⁰ The use of “adopted”, as will be seen, is legally significant though Hondora appears to overlook this and does not justify its use here.

⁵¹ Hondora gives the date as 7th October, 2000, in the text (p12) though this is presumably merely a typographical error. It appears correctly as 7th August, 2000 in footnote 17.

Amendment Treaty). If the Tribunal Protocol had already been “adopted” and was already part of the Treaty, why is the future tense “shall” used other than to convey that it would only come into force sometime in the future once ratified? However, only the “shall” of the amended portion of Article 16(2) is pertinent to Hondora’s argument. This is the weakest of Hondora’s points. The second “shall” is obviously not a simple future tense but also a modal of obligation reflecting a determination that the future manifest itself in a particular way. The future obligation refers to how the Tribunal Protocol must be treated henceforth and not the contingency of it entering into force.

Hondora does not indicate any practical consequence flowing from the Tribunal Protocol’s elevated status. It seems unlikely that such a considered amendment would have been made to Article 16(2) if it were to have little practical effect. Of course, Gauntlett *et al* do indicate a practical effect – the obviation of any need for ratification.

Entry into force by virtue of Articles 38 and 39 of the Tribunal Protocol and ratification by member states.

The Legal Opinions

Two other arguments in regard to the “entry into force” of the Tribunal Protocol appear to have been advanced.⁵² Firstly, Chinamasa points out that the Tribunal Protocol itself contained an Article (Article 38) titled “Entry into Force” stipulating that:

This Protocol shall enter into force thirty (30) days after deposit, in terms of Article 43⁵³ of the Treaty, of instruments of ratification by two-thirds of the States.

Lesotho, Namibia, and Mauritius ratified the Tribunal Protocol after the adoption by Summit of the Amendment Treaty, suggesting that these countries believed that ratification was necessary despite the amendment to Article 16(2) of the Treaty.⁵⁴

Similarly, if a protocol is an integral part of the Treaty and thus may be amended in accordance with the provisions of the Treaty (rather than the provisions of the protocol itself) and becomes effective when so adopted, why did all members of SADC ratify the 2000 Protocol Amending the Trade Protocol, which had already been adopted by the Summit in accordance with the amending procedures under Article 36 of the Treaty?

Bartels notes that these ratifications are simply “redundant”, unnecessary and merely symptomatic of untidy legal drafting. He provides several examples from international law to show that such redundant provisions are not uncommon in international law.⁵⁵ It also does not seem that the ratifying states believed that such ratification was actually necessary to bring the protocols into force but were simply dutifully complying with provisions which were a

⁵² Bartels Report p74.

⁵³ This is an error – the reference should be to Article 42.

⁵⁴ It would be interesting to know whether these ratifying states followed the procedure for ratification under Article 22 of the Treaty, and deposited the instruments of ratification with the Secretariat, which was not required by Article 35 of the Tribunal Protocol.

⁵⁵ Bartels report p74.

redundant formality. Significantly, and supporting the contention of redundancy, Article 38 was removed from the Tribunal Protocol by way of the 2002 Amendment.

More cogently, Chinamasa draws attention to the provisions of Article 39(1) of the Tribunal Protocol:⁵⁶

The original texts of this Protocol and all instruments of ratification and accession shall be deposited with the Executive Secretary who shall transmit certified copies to all Member States.

What is the purpose of this Article if the Tribunal Protocol does not require ratification and there should thus be no such instruments to deposit or transmit as stipulated? Even more anomalous is the fact that Article 39 was repealed and replaced by the amendment to the Tribunal Protocol in October 2002. Bartels regards this as “*best explained as infelicitous drafting, perhaps resulting from confusion as to the legal effects of the 2001 Amending Agreement.*”⁵⁷ That (less euphemistically put) incompetent and careless drafting explains the anomaly and that this is not uncommon in SADC’s documentation is supported by more instances of errors than are conscionable in documents as important as SADC’s international legal instruments⁵⁸ - and in further lax drafting concerning Article 39 of the Tribunal Protocol itself. The Article, headed “Depositary”, prior to amendment read:

The original text of this Protocol and all instruments of ratification and accession shall be deposited, and certified copies thereof shall be transmitted, in terms of Article 43 of the Treaty.

Unfortunately, it is not Article 43 of the Treaty which refers to Depositaries, but Article 44 which reads:

- 1. The original texts of this Treaty and all instruments of ratification and accession shall be deposited with the Executive Secretary of SADC, who shall transmit certified copies to all Member States.*
- 2. The Executive Secretary shall register this Treaty with the Secretariat of the United Nations Organisation and the Commission of the African Union.*

The amendment to the Article 39 of the Tribunal Protocol introduced in October 2002 copies the wording of the Treaty exactly, save that “this Treaty” is replaced by “this Protocol”. It was thus intended to remove the clumsy cross reference in Article 39 of the Tribunal Protocol to a provision of the Treaty and to insert the actual wording of the correct Article of the Treaty, Article 44, into Article 39 of the Tribunal Protocol. More sensibly, the Article should arguably have been removed along with Article 38 or should merely have referred to instruments of accession.

⁵⁶ The Chinamasa opinion p14.

⁵⁷ The Bartels Report p74.

⁵⁸ Similar incompetence is often manifest in SADC communiqués. After the entire Zimbabwean populace had waited with bated breath for the communiqué which was to emanate from the Summit of the Troika of the Organ on Politics, Defence and Security Co-operation meeting in Mozambique in November 2009, they were treated to this piece of self contradictory gibberish: “*the political parties signatory to the GPA should engage in dialogue with immediate effect within fifteen (15) days not beyond (30) days*”.

The intention of the amendments is also manifested in the changes made to Article 37 of the Tribunal Protocol, dealing with how amendments themselves are to be made. Whereas previously amendments were to become effective subject to ratification in the manner provided⁵⁹ for in the Protocol, the Article was repealed and replaced by provisions providing that amendments would become effective through adoption by the Summit, that is, without ratification. This gainsays the idea that Article 39 was so phrased with the intention of retaining the ratification requirement. However, this amendment overlooks the fact that if the Protocol is an integral part of the SADC Treaty, it should be amended in accordance with the Treaty provisions in Article 36, rendering Article 37 of the Tribunal Protocol redundant (and contradictory). While both Article 36 of the Treaty and Article 37 of the Tribunal Protocol provide for amendment through adoption by three-quarters of the Summit, the time limit for prior notification of the proposed amendment is three months in the case of the former and 30 days in the case of the latter.

When did the Summit intend the Tribunal Protocol to enter into force?

The Summit itself provides the most authoritative answer as to when it intended the Protocol Tribunal to enter into force. The preamble to the October 2002 amendment to the Protocol Tribunal reads as follows:

*Recognising that the Protocol on Tribunal was adopted by Summit at Windhoek on 7th August 2000 and that the Protocol **entered into force upon adoption of the Agreement Amending the Treaty of the Southern African Development Community at Blantyre on 14th August 2001.***

This would seem to dispose of the argument.

Hondora, however, attempts to counter this inexorable conclusion by asserting that “the declaration made by the Summit recognising that the Protocol had entered into force is both factually and legally incorrect” and cannot alter the requirement for ratification in terms of Article 22. The argument is circular in that it assumes that ratification is required under Article 22 which is the point of contention. More cogent is Hondora’s point that if the Amendment Treaty of August 2001 brought the Tribunal Protocol into force, why were Articles 34, 35, 36 & 38 not repealed at this time, rather than in 2002? These Articles all concerned ratification and entry into force:

ARTICLE 34

SIGNATURE

- 1. This Protocol shall be signed by the Heads of State or Government, or their duly authorised representatives.*
- 2. This Protocol shall remain open for signature by the States listed in the Preamble, until the date of its entry into force.*

⁵⁹ The protocol cross-references Article 36 dealing with accession. One assumes this is a (further) error and the intention is to refer to Article 38 which pertains to ratification.

ARTICLE 35

RATIFICATION

This Protocol shall be ratified by Signatory States in accordance with their constitutional procedures.

ARTICLE 36

ACCESSION

This Protocol shall remain open for accession by any State subject to Article 8 of the Treaty.

ARTICLE 38⁶⁰

ENTRY INTO FORCE

This Protocol shall enter into force thirty (30) days after deposit, in terms of Article 43 of the Treaty, of instruments of ratification by two-thirds of the States.

These provisions were repealed by the 2002 amendment to the Tribunal Protocol. The preamble to this instrument recognizes that the 2001 Amendment Treaty entails effecting amendments to the Tribunal Protocol.

Unfortunately, it does not particularize which changes to the Treaty demand amendment to the Tribunal Protocol. If the reference is to the change to Article 16(2), the removal of the Articles pertaining to ratification and entry into force is necessary as these are no longer applicable and are redundant. However, the reference could be to the changes made to Article 22, where ratification and entry into force provisions for protocols generally were introduced into the Treaty. This suggests it was not the intention of SADC to remove the requirement of ratification and entry into force provisions but merely to move them from separate protocols, including the Tribunal Protocol, into Article 22 of the Treaty where they would apply uniformly to all protocols. This was accomplished by the Amendment Treaty and the later amendment to the Tribunal Protocol. It would also explain why Article 39 of the Tribunal Protocol was not removed, as there is no equivalent provision in Article 22 of the Treaty.

However, and most significantly, the Preamble also declares that the Tribunal Protocol had entered into force at the time of the 2001 Amendment Treaty. This must be taken to mean that the Summit claims that the Tribunal Protocols had entered into force by virtue of the amendment to Article 16(2) of the Treaty which provided that the Tribunal Protocol is to be an integral part of the Treaty – as argued by Gauntlett *et al.* This proclamation in the Preamble then leads to the conclusion that the provisions pertaining to ratification and entry into force were removed, not because they had been made part of Article 22 of the Treaty, but because they were no longer applicable.

Hondora's explanation is that when the declaration in the preamble was made the Summit had decided to "re-interpret" the effect of the amendment to Article 16(2) of the Treaty, had

⁶⁰ Article 37 deals with the manner of amendments to the Tribunal Protocol.

determined that it could “latch onto”⁶¹ the amendment as meaning that the Tribunal Protocol had come into effect and could thus by-pass and remove the ratification requirements of Article 22 and the Tribunal Protocol respectively.

This “retrospective re-interpretation”, Hondora argues, is invalid and *ultra vires* the Treaty.

A Resolution.

There is a much simpler synthetic (and syncretic) thesis which, with one exception, resolves all the issues raised, explains the various anomalies and queries around the amendments to the Treaty and Tribunal Protocol and which invites the application of Occam’s razor. Before advancing this thesis, it is useful to summarise the sequence of changes around ratification and integration into the Treaty.

- a) The original Treaty of 1992 provided that any protocol was to be regarded as an integral part of the Treaty.
- b) Protocols were “subject to” signature and ratification in terms of Article 22(3) of the Treaty.
- c) The Tribunal Protocol adopted by the Summit in 2000 specifically and separately provided for its ratification and entry into force.
- d) By way of amendment in 2001, the stipulation in the Treaty (in several places) that all protocols were to be regarded as an integral part of the Treaty was removed wherever it had existed previously, but the same provision removed elsewhere was newly and specifically inserted into Article 16(2) dealing with the Tribunal.
- e) By the same 2001 amendment, Article 22 of the Treaty was altered so that protocols were “open to” rather than “subject to” ratification, and specific ratification and entry into force provisions were inserted.
- f) In 2002, when the Tribunal Protocol was amended, the preamble to the amendment stated that the amendment was necessitated by the 2001 Amendment Treaty and that the Tribunal Protocol had entered into force at the same time as the Amendment Treaty.
- g) The amendment to the Tribunal Protocol removed the ratification provisions (bar Article 39) and entry into force provision.

The thesis then is this: the SADC Treaty originally provided that protocols were to be regarded as an integral part of the Treaty. If a protocol is to be regarded as an integral part of the SADC Treaty, which has entered into force, it is reasonable to assume that the protocol ought also to be regarded as having entered into force. However, this logical assumption was contradicted by the fact that the protocols approved by the Summit were originally “*subject to*” signature and ratification by the parties (Article 22(3) - later “*open to*”) and those protocols contained specific Articles providing for entry into force by way of ratification. To avoid this confusion, the Treaty

⁶¹ Hondora p15.

was amended in 2001 and the general provisions providing that the protocols were to be an integral part of the Treaty removed – signaling an acceptance that the Treaty provisions were most logically construed to mean that protocols entered into force when integrated into the Treaty and that this contradicted the ratification requirements.⁶² Where it was intended that the protocol enter into force upon adoption by the Summit, the phrase was specifically inserted, *in casu*, in Article 16(2). In the absence of this phrase, protocols were only to enter into force following ratification provisions, which were then provided for by the amendment of Article 22 to this effect in the same Amendment Treaty. This meant that Articles 34, 35, 36, and 38 of the Tribunal Protocol, providing for ratification and entry into force, became redundant. They were thus removed when the Tribunal Protocol was next subject to amendment in 2002. Certainly, it would have been more desirable that the amendment was made immediately, but there are most probably prosaic administrative reasons why it was not – for example the intention to amend the Tribunal Protocol would need to be brought onto the Summit agenda in compliance with the time limits relating to notification of the proposed amendment.

There are thus two means by which a protocol may enter into force, one is after “*approval*” by the Summit and ratification in terms of Article 22,⁶³ the second is where the Protocol is “*adopted*” by the Summit and becomes an integral part of the Treaty. The use of the word “*adopted*” is significant in that, if the protocol in question is an integral part of the Treaty, its adoption amounts to an amendment of the Treaty and the provisions of Article 36 of the Treaty apply – that is, the amendment must “*be adopted by a decision of three-quarters of all the Members of the Summit*” and enters into force when so adopted. Having been so adopted, any ratification is redundant, in the same way that ratification of an amendment to the Treaty adopted by the Summit is also unnecessary (contrary to the view of Chinamasa - but no one else). The fact that Article 16(2) uses the term “*adopted*” (the terminology of Article 36) rather than “*approved*” (the terminology of Article 22) thus indicates that the provisions of Article 36, which do not demand ratification, are inferred, rather than those of Article 22 where ratification is required.

The question however remains as to why Article 39 of the Tribunal Protocol, providing for the deposit of instruments of ratification, was not repealed. One possibility is that, since three countries had already (though redundantly) ratified the Tribunal Protocol the depositary provisions remained to deal with these instruments of ratification. This is a generous view of events. Administrative efficiency, as this paper shows, is not a forte of the SADC Secretariat. An instruction may have been issued to attend to the drafting errors in Article 39 and improve upon it (the fact that the wrong Article in the Treaty had been cross referenced and that the Article would be improved if the cross reference were replaced by including the actual words of the Treaty, but changing “*this treaty*” to “*this protocol*” to prevent any confusion or ambiguity arising - see above). It is possible that this instruction was not countermanded when the second instruction, to repeal the Articles relating to entry into force and ratification, was given.

In choosing between this thesis and that of Hondora, one is essentially required to view the sequence of events and amendments as either a cynical conspiracy or as sloppy drafting and administration. There is ample evidence of the latter. If the Summit had been determined that the Tribunal Protocol enter into force, there is no evidence that they tried and failed to take the route

⁶² This, of course, is the opposite of the conclusion drawn by Hondora, above.

⁶³ It remains moot whether such ratification only applies to protocols concerning areas of co-operation.

of ratification or believed such a route too difficult to pursue and therefore engaged in a transparent conspiratorial ploy, requiring the consent of all, to bring the Tribunal Protocol into force.

However....(or “notwithstanding” the arguments above...)

It needs to be borne in mind that when the Summit came to consider Zimbabwe’s non-compliance with the Tribunal’s rulings, there were two separate issues before it. Firstly, whether the Tribunal’s ruling was legally invalid for want of jurisdiction over Zimbabwe, and, secondly, whether the legal instruments establishing and governing the proceedings of the Tribunal have yet to enter into force. Although the issues are interlinked, the first is not dependent on the second. This is because, regardless of the legal status of the instruments and determination of the arguments outlined in this paper, a country may submit to the jurisdiction of the Tribunal by conduct. There can be no doubt that Zimbabwe did so.

Zimbabwe had accepted the Tribunal Protocol as valid and in force. Although not specifically mentioned by Gauntlett *et al* and Bartels, perhaps because it is too obvious to require comment,⁶⁴ the most telling conduct is that Zimbabwe signed the 2002 amendment to the Tribunal Protocol which proclaims in the preamble that the Tribunal Protocol entered into force in August 2001. Zimbabwe has since proceeded under the Tribunal Protocol, and seconded a judge to the Tribunal in accordance with its provisions. It appeared before the Tribunal on 12 occasions without once querying the jurisdiction of the court and invoked the Tribunal Protocol in argument. Bartels points out that international law stipulates that States are bound by statements made by them before international courts and tribunals.⁶⁵ The submission to jurisdiction cannot be withdrawn.⁶⁶

By submitting to the jurisdiction of the Tribunal, Zimbabwe became bound by its rulings. The SADC Summit was thus compelled to consider the non-compliance and compelled to do so regardless of the merit or otherwise of Chinamasa’s arguments pertaining to whether the Tribunal Protocol or Amendment Treaty had entered into force.

In a similar way Zimbabwe’s conduct precludes it from challenging the effectiveness of the Amendment Treaty. It was not open to Chinamasa to argue that Zimbabwe has not ratified the Amendment Treaty and is thus not bound by its provisions. Zimbabwe has always acted as if the Amendment Treaty is valid and in force, and continues to do so. Most notably, the Troika on Politics, Defence and Security Co-Operation was established by the Amendment Treaty. The Troika plays a key role in the process established by SADC to resolve Zimbabwe’s political imbroglio. The ZANU PF component of Zimbabwe’s Inclusive Government, of which Chinamasa is a part, would certainly cause damage to their relations with Summit members if they chose to attack the validity of the Troika. But it is not open to Chinamasa to pick and

⁶⁴ Gauntlett and Pelsler do refer (the Gauntlett opinion, paragraph 28) to Zimbabwe’s signature of the 2002 Tribunal Protocol amendment but do not directly refer to the acceptance in the preamble that the Tribunal Protocol had entered into force as “conduct”, though this may have been the intention.

⁶⁵ See Bartels Report at p75 and the authorities there cited.

⁶⁶ Here it should also be recalled that in any event the Tribunal was established by the original Treaty (Articles 9 and 16) and not by the Amendment Treaty or Tribunal Protocol. It is moot whether the Tribunal can exercise its jurisdiction in the absence of a protocol – denied by Hondora and Chinamasa, affirmed by Gauntlett and Pelsler in the arguments documented and under discussion here.

choose which parts of the Amendment Treaty he regards as binding, and the fact that his approach necessarily implies an attack on the Troika system is worthy of comment (see below).

Bartels and Gauntlett *et al* cite a plethora of international law sources⁶⁷ which show that, through its conduct, Zimbabwe is bound by the provisions of the Amendment Treaty and Tribunal Protocol and precluded from denying the effectiveness of the instruments, including the citation of Article 45 of the Vienna Convention on the Law of Treaties (1969):⁶⁸

A State may no longer invoke a ground for invalidating, terminating, withdrawing from or suspending the operation of a treaty under Articles 46 to 50 or Articles 60 and 62, if, after becoming aware of the facts it must by reason of its conduct be considered as having acquiesced in the validity of the treaty or in its maintenance in force or in operation, as the case may be.

While Bartels regards these propositions of international law as “basic” the Chinamasa opinion does not address this point (which is fatal to Zimbabwe’s argument) at all. Hondora does so,⁶⁹ asserting that:

“conduct of contractual parties that is manifestly ultra vires the constitutive treaty cannot transmit legally enforceable rights and obligations, unless if the error is cured and/or disregarded by all parties.”

However, the international law he cites is unhelpful. Hondora refers to an Advisory Opinion on the Maritime Safety Committee of the Inter-Governmental Maritime Consultative Organisation which held that the exclusion of two countries from a Committee in violation of Treaty provisions was unlawful and states that “*this contention shows that the failure to comply with a treaty provision can be declared invalid under international law.*” But that is not in dispute – and thus stated the proposition almost fatuous. Of course conduct cannot justify a violation of a Treaty by one or some of the parties thereto – it is often evidence of the very violation, just as Zimbabwe’s conduct in regard to white farmers was found to be a failure to comply with the human rights provision under Article 4(c) of the SADC Treaty. Such conduct could hardly be held to have amended the Treaty. The position under discussion is entirely different. It is Zimbabwe that is seeking to invoke the invalidity of a Treaty. Yet under international law it is deemed to have acquiesced in the validity of the Treaty by its prior conduct. Until the ruling against it, Zimbabwe accepted the validity of the Amendment Treaty, and continues to accept some of its provisions.

Hence, even if there were procedural breaches in regard to the Amendment Treaty and Tribunal Protocol this would be irrelevant, as the Hondora quote itself shows, if they have been disregarded by *all parties*” and Zimbabwe in particular– as would be the case in the present instance.

Hondora does try to avoid this conclusion by claiming that the conduct of the signatories and Zimbabwe has not been consistent in its acceptance of the validity of the instruments, but in so

⁶⁷ See, for example, Bartels at p70 et seq.

⁶⁸ The Treaty entered into force on 27 January 1980.

⁶⁹ Hondora p19.

doing is constrained to rely on Zimbabwe's conduct *after* the non-compliance rulings and after the challenge to the Tribunal's validity and effectiveness, such as the belated and unlawful recall of the Zimbabwean judge appointed to the Tribunal. The only prior conduct (which is the only conduct which is relevant) referred to by Hondora is that some parties had ratified the Tribunal Protocol. He infers from this that they did not recognise the Amendment Treaty as exempting the Tribunal Protocol from the requirement of ratification and that this conduct suggests they did not regard the Tribunal Protocol as having entered into force. The point is obviously weak, and has been discussed above.

A final point under the head of jurisdiction requires discussion. Chinamasa (and Hondora) question the effect of Article 4(c) of the Treaty - the basis upon which the *Campbell* cases were decided. Article 4(c) requires that Member States "*shall act in accordance with the principles of human rights, democracy and the rule of law.*" Hondora⁷⁰ and Chinamasa⁷¹ hold that this sparse commitment to uphold and observe human rights cannot, in itself, create justiciable rights and obligations – it is merely a restatement of principles and values. To be actionable, Hondora maintains, there needs to be a definitive legal framework codifying a bill of rights against which the conduct of member states may be assessed. The view has some support in an *obiter dictum*⁷² by the judge in the *Gramara* case.⁷³ Bartels rejects this,⁷⁴ asserting that the distinction made between "rules" and "principles" is untenable, that international law has long regarded the term "principles" to refer to binding obligations and that the sparseness of the Article is not unusual in international instruments creating human rights obligations. A simple reference to the principle of "human rights" is, he argues, sufficiently clear to be interpreted and applied by any tribunal. However, it is the Tribunal itself which is competent to rule on this issue of jurisdiction and in *Campbell's* case⁷⁵ unequivocally held that it did have jurisdiction in respect of any dispute concerning human rights, democracy and the rule of law. Although it may seem to offend natural justice that the Tribunal should be competent to determine whether it is competent to hear a matter, this is accepted under the "competency-competency" provisions of international law.

Conclusion

The SADC Summit did not have to resolve the arguments raised by Chinamasa in order to deal with Zimbabwe's non-compliance with the Tribunal's judgments. Zimbabwe had submitted to the jurisdiction of the Tribunal and was bound by its rulings. Yet the Summit chose to defer dealing with Zimbabwe's non-compliance and to examine the validity and ambit of the Tribunal's jurisdiction. This invites the question as to whether the Summit adopted this course of action in order to protect the Government of Robert Mugabe or whether the Summit used the issue as an excuse to dismantle a Tribunal with which it was extremely uncomfortable. The Summit members would not have been unduly alarmed by the anticipated accusation that they were protecting Mugabe and his ZANU PF party.⁷⁶ It is an accusation and perception that has

⁷⁰ Hondora p35.

⁷¹ The Chinamasa opinion p4 though the point is not elaborated.

⁷² An *obiter dictum* is a statement by the judge which does not form part of the reasoning behind the judgment.

⁷³ p13 of the judgment.

⁷⁴ Bartels Report p9.

⁷⁵ (see above) SADC (T) Case No. 2/2007.

⁷⁶ In fact, coincidentally or otherwise, the accusation has proved politically convenient after ZANU PF accused the Troika Summit of bias following its meeting in Livingstone, Zambia.

been levelled at the Summit members many times before.⁷⁷ Knowing that this accusation would be made, as it duly was,⁷⁸ the Summit would have been aware that the charge could act as a convenient fig leaf and subterfuge by which they could emasculate the Tribunal. With the possible exception of South Africa, SADC States suffer from severe democratic deficits, and state institutions which ought to deal with rights abuses are either compromised (such as the courts), complicit in or co-perpetrators of such abuses (such as the police forces). The member states would have looked upon the workings of the Tribunal in regard to Zimbabwe and felt more than merely a “there-but-for-fortune-go-you-and-I” sentiment but rather a sense that it was only a matter of time before facing similar such political embarrassment themselves. Confronted with a choice of instituting democratic reforms to avoid such embarrassment or the evisceration of the Tribunal, they chose the latter.

The history of the Tribunal suggests a distinct lack of enthusiasm for the institution by members of the Summit. Although the Tribunal had been established by the SADC Treaty in 1993, it was some 12 years before its members were appointed and the court inaugurated. The first *Campbell* case was only the second with which the Tribunal had been seized, the first against a member state and only heard in 2007. The Summit prevaricated on acting on the first instance of non-compliance by a member state following the ruling of the Tribunal against Zimbabwe and when the second came before it, moved to effectively render the Tribunal defunct – a mere three years after the Tribunal had begun hearings and on the basis of its second case. The Summit members thus failed the very first test of accountability under the rule of law and basic principles of human rights. The life of the Tribunal has been rendered lepidopteral.⁷⁹

The Zimbabwe issue was merely a convenient cloak under the cover of which the operations of the Tribunal could be restrained by the Summit. As noted, there was no need to defer dealing with the Zimbabwe issue on the basis of Chinamasa’s arguments, and linking the two was a disingenuous subterfuge. And it was a subterfuge which could only be effective with the extremely credulous. The narrative of the Summit is that the Tribunal must be suspended while a review of its jurisdiction is undertaken. It is implicit that this arises from the submissions advanced by Zimbabwe’s Government. This requires one to believe that: Chinamasa’s patently untenable arguments are weighty and worthy of consideration; that Zimbabwe’s non-compliance could not be dealt with by the Summit until these arguments had been addressed; that the Tribunal had to be suspended while the process takes place; that the Summit itself did not know that the purpose behind its amendments to the Treaty and Tribunal Protocol was to do away with the ratification requirement; that the SADC Secretariat’s statement that this was the purpose may be mistaken;⁸⁰ and that the Summit’s proclamation in the 2002 amendment to the Tribunal Protocol that the Protocol had entered into force without the need for ratification may thus also be mistaken.

The draft and final report of the review by Dr. Bartels was extensively discussed at two meetings of Senior Legal Officers of Member States (whose duty is to advise the Council of Ministers). The recommendations of the Bartels report were unanimously accepted by the Senior Legal

⁷⁷ See, as one of many examples *Zimbabwe’s Problems Are Sheltering Mugabe* <http://www.swradioafrica.com/pages/heart240909.htm> 24.09.09.

⁷⁸ Fritz op cit.

⁷⁹ Lepidopteral – of or pertaining to butterflies or moths.

⁸⁰ See the Chinamasa opinion p11.

Officers but equally firmly rejected by the Council of Ministers and Summit.⁸¹ The Summit thus ignored the report it had itself commissioned and its own legal advisors. The Summit also appears to have no difficulty in considering that the 2001 Amendment Treaty might not be effective against Zimbabwe vis-à-vis the Tribunal, but unequivocally effective for purposes of the Troika system on which it relies to attend to the Zimbabwe impasse. But most egregiously, the Summit has no power to suspend or effectively dissolve the Tribunal. It has the power to amend the Treaty to achieve this effect, but until it does so its actions in this regard are clearly unlawful. It has shown itself prepared to act outside the provisions of the SADC Treaty in its determination to achieve its objectives.

The inexorable conclusion is that the Summit had determined to reconstitute the Tribunal to prevent the possibility of future political embarrassment to any member of the kind yielded by the ruling against Zimbabwe. This will be achieved by removing the right of individuals to approach the Tribunal – an objective only Zimbabwe and Botswana had the honesty/temerity to express openly⁸². The resultant axing of the first incarnation of the Tribunal is one of the more shameful episodes (in a highly contested field) in the annals of SADC history. It is also a giant step backwards in the quest for democracy in the region.

19/08/11.

⁸¹ See *SADC Tribunal Dissolved by Unanimous Decision of SADC Leaders* Transcript of a speech by Ariranga G. Pillay, Former President of SADC Tribunal (undated) p9.

⁸² Pillay *ibid* p10.