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“Operation Restore Legacy (2017) renders Southern African Development Community (SADC) constitutionalism suspect in the *coup d’état* that was not a *coup*”

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Abstract

This article examines the SADC constitutional norm on the absolute prohibition of unconstitutional takeover of power¹ under the light of the 2017 Zimbabwe correction of governance destiny from a Mugabe contrived family dynasty to sovereign control of Zimbabwe’s peoples. The article shows that this norm is a *blunt tool* and its operationalization has enormous potential to subjugate SADC populations to *totalitarian rule* by shielding unpopular and illegitimate leaders from popular challenge once they have set their hands on the levers of power and integrated themselves into the SADC Assembly of Heads of States and Governments – the SADC’s executive decision making body. Had it been successfully implemented against Zimbabwe’s Operation Restore Legacy (2017) as intended, the norm would have severely restricted Zimbabwe’s ancient and enduring constitutional convention of *Chimurenga/Inkululekhol/Resistance of oppression*, which has the support of UN standards on good governance.² The article recommends the urgent development by the SADC of a parallel constitutional normative structure on the absolute sanctity of the national assembly ballot to counterbalance the the absolute prohibition of unconstitutional takeover of power. The new norm must have also a similar if not even stronger monitoring and enforcement mechanism.

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All internet sources last accessed on 08 March 2018.

¹ See generally Muna Ndulo, ‘The Unconstitutional Change of Government’ in *The African Union: Legal and Institutional Framework – A Manual on the Pan-African Organization* (2012) Brill pp. 251-74; Ademola Abass, ‘Prosecuting International Crimes in Africa: Rationale, Prospects and Challenges’ *European Journal of International Law* (2013) pp. 933–946; Gerhard Kemp and Selemani Kinyonyu, ‘The Crime of Unconstitutional Change of Government (Article 28E)’ in Gerhard Welrle and Moritz Vormbaum, *The African Criminal Court: A Commentary on the Malabo Protocol*, Springer (2017) pp.57-50; Ulf Engel and Joao Gomes Porto (eds. 2010) *Africa’s New Peace and Security Architecture: Promoting Norms, Institutionalizing Solutions*, Ashgate; Helene Tigroudja, ‘The African Charter on democracy, Elections and Governance’ in *The African Union: Legal and Institutional Framework – A Manual on the Pan-African Organization* (2012) Brill pp. 275-90 ; Dersso, S.A. ‘Unconstitutional Changes of Government and Unconstitutional Practices in Africa’ World Peace Foundation Paper No.2 (2016) at: <https://sites.tufts.edu/wpff/files/2017/07/2.-UCG-Dersso-f.pdf>

² See especially Article 25 of the UN International Covenant on Civil and Political Rights (1966) 999 UNTS 171; 6 ILM 368 (1967)

Key words: SADC, Zimbabwe, constitutionalism, *coup d'état*, Operation Restore Legacy, *Chimurenga/ Inkululekho* logical diligence, ancient constitutional convention

Background:

The process to correct Zimbabwe's governance destiny from a Mugabe contrived family dynasty rule to protection of sovereignty of its peoples began to unfold when on 6 November 2017 President Mugabe sacked the Vice President of Zimbabwe accusing him of disloyalty.³ This was a high watermark in the long-running leadership succession struggles within the ruling ZANU (PF) Party to replace President Mugabe who had ruled the country for 37 years. The move was widely characterised as the last bold move to ensure that the President's wife, Grace Mugabe would be in place to succeed her husband as President of Zimbabwe sooner or later. In December 2014, Grace had been elevated to Head of ZANU (PF) National Women's League,⁴ a position that catapulted her into the ruling party's policy-making body - the politburo.

The sacking of Vice President Mnangagwa – later annulled by High Court Order⁵ of 24 November 2017 was followed immediately by two developments. The first was the swift public endorsement of Grace Mugabe as the person most suited to replace sacked Vice-President Mnangagwa by several ZANU (PF) organs, including Provincial and National Women's League formations, and Youth League formations. However, it was the military's response that was to shape Zimbabwe's response to the question whether the contrived family dynasty governance of Zimbabwe would prevail or not.

³ See also Independent, "Robert Mugabe sacks Zimbabwe Vice President Emmerson Mnangagwa" 6 November 2017 at: <http://www.independent.co.uk/news/world/africa/robert-mugabe-sacks-vice-president-emmerson-mnangagwa-zimbabwe-a8040341.html> . The decision was quashed by a decision of Judge President Chiweshe on 24 November 2017 following an application by Emmerson Munangagwa before his inauguration as President on the same day. See also "Court nullifies Mugabe's dismissal of Mnangagwa" Newsday Website at: <https://www.newsday.co.zw/2017/11/court-nullifies-mugabes-dismissal-mnangagwa/>

⁴ See also Financial Times, "Grace Mugabe named as head of Zanu-PF women's league" at: <https://www.ft.com/content/ebbc66fc-7e35-11e4-87d9-00144feabdc0>

⁵ Justice Chiwehe ruled that: "The dismissal of the applicant (Mnangagwa) by Robert Gabriel Mugabe, the then President of Zimbabwe, from the office of Vice-President of Zimbabwe on November 6, 2017 is null and void and accordingly, of no force or effect," Justice Chiweshe ruled in his chambers, hours before Mnangagwa took his oath of office." iHarare website at: https://iharare.com/__trashed-23/

The Zimbabwe Defence Forces (ZDF) launched Operation Restore Legacy with an address on 13 November 2017, by General Constantino Chiwenga, accompanied by around 100 senior military officers⁶ from the Zimbabwe National Army and the Air Force of Zimbabwe, stating that:

The current purging which is clearly targeting members of the party with a liberation background must stop forthwith. The known counter-revolutionary elements that have fomented the current instability in the party must be exposed and fished out. As the party goes for the extraordinary congress, members must go with equal opportunity to exercise their democratic rights...

The following morning, Military spokesman Major General Sibusiso Moyo took to the airwaves to announce that following the previous day's address by General Chiwenga, the situation in the country had moved to "another level". The only clarification offered was that:

Firstly we wish to assure our nation, His Excellency, The President of the Republic of Zimbabwe and Commander-in-chief of the Zimbabwe Defence Forces, Comrade R. G. Mugabe and his family, are safe and sound and their security is guaranteed. We are only targeting criminals around him who are committing crimes that are causing social and economic suffering in the country in order to bring them to justice.

As soon as we have accomplished our mission we expect that the situation will return to normalcy.⁷

President Mugabe was placed under house arrest.⁸ Some members of his cabinet allegedly aligned to his wife's G40 faction in the long-running Presidential succession battle within the ruling ZANU (PF) Party were placed in custody. The military's intervention appeared to have consensual support of the entire nation which perceived it as a messianic move to stop the Mugabes' attempt to capture and subvert Zimbabwe's revolutionary legacy

⁶ See also The Telegraph, "Zimbabwe army chief warns Mugabe's party that military may intervene after sackings" at: <http://www.telegraph.co.uk/news/2017/11/13/zimbabwe-army-chief-warns-mugabes-party-military-may-intervene/>

⁷ The Guardian, "The situation has moved to another level': Zimbabwe army statement in full" at: <https://www.theguardian.com/world/2017/nov/15/the-situation-has-moved-to-another-level-zimbabwe-army-statement-in-full>

⁸ See also The New York Times, "Zimbabwe's Military, in Apparent Takeover, Says it has custody of Mugabe" at: <https://www.nytimes.com/2017/11/14/world/africa/zimbabwe-mugabe-mnangagwa-chiwenga.html> ; <https://www.nytimes.com/2017/11/15/world/africa/zimbabwe-coup-mugabe.html?action=click&contentCollection=Africa&module=RelatedCoverage®ion=Marginalia&pgtype=article>

that is traceable to the first Matabele rebellion of 1893;⁹ followed by the First *Chimurenga* (1896-7);¹⁰ and later by the *Chinhoyi* Battle of 1966 or, as it is better known - the Second *Chimurenga*.¹¹ The latter escalated the protracted armed struggle for independence until the cease-fire of 1979, followed by granting of political independence from Britain the following year.

The *legacy* invoked under Operation Restore Legacy (2017) was the legacy of rejecting and actively resisting oppression – *Chumurenga* in Shona language and *Inkululekho* in Ndebele language. In this instance that oppression was summed up in Mugabe’s attempt to arbitrarily impose a family dynasty governance of Zimbabwe. Placards displayed at the demonstrations against Mugabe during the operation, particularly on 18 November, left no doubt about what Operation Restore Legacy (2017) was all about, namely, the outright and resounding rejection of arbitrary rule.

⁹ History today writes that: this was “the first serious fight between blacks and whites in Rhodesia”. History today website: <http://www.historytoday.com/jv-woolford/matabele-war-part-i>

¹⁰ The First Chimurenga war broke out in the Zimbabwean plateau from 1896 to 1897 between the white colonisers and the indigenous Shona and Ndebele communities. “The war was as a result of the locals’ resistance to colonisation at the hands of the British.”

https://www.pindula.co.zw/First_Chimurenga

¹¹ On 28 April 1966 a group of seven ZANLA fighters infiltrated Zimbabwe from Zambia and engaged Rhodesian colonial forces at Chinhoyi. The seven, David Guzuzu, Arthur Maramba, Christopher Chatambudza, Simon C Nyandoro, Godfrey Manyeranyere, Godwin Dube and Chubby Savanhu were overcome after running out of ammunition, but not before they had downed a Rhodesian helicopter and killed 25 soldiers. It is known today as the Chinhoyi Battle. A secondary school built next to the battle scene in 1986 has been appropriately named Chemagamba - The Heroes’ Place.

One read:



Another read:



Yet another read:



The SADC leadership responded swiftly and vociferously to Operation Restore Legacy (2017) in the name of SADC and Zimbabwean constitutionalism. This was not surprising at all. As the brains behind SADC constitutionalism from the outset, and also as the longest serving African Head of State and Government, Mr. Mugabe had mentored each SADC Head of State and Government individually, and also mentored them collectively as a group in the Assembly of Heads of States Parties of both the SADC, and the AU. In a sense, Operation Restore Legacy (2017) became the unexpected but severest test of the SADC leadership's loyalty to their 'Master and Mentor' – Mugabe.

In a 2018 interview¹² Mugabe boldly stated that his mentees all failed him. He singled out South Africa for special criticism because of its military strength in comparison to other SADC States. He stated that the South African defence and security ministers dispatched on 15 November to Harare by former President Zuma "gave a false impression that all was okay [and that] they had spoken not just to us but also to the soldiers, and then gave out that there was

¹² "South Africa could have done much more to save me: Mugabe" News 24 website at: <https://www.news24.com/Africa/Zimbabwe/sa-could-have-done-much-more-to-save-me-mugabe-20180323>

no need for intervention".¹³ For this reason, other countries in the region "just sat on their laurels and they said: Ah well South Africa says there's no need [to intervene]".¹⁴

The problem:

Zimbabwe is a founding member State party of the Southern African Development Community (SADC) that was established by treaty of 1992.¹⁵ The SADC treaty has a wide range of objectives, including ensuring peace and security in the sub-region – Article 5(1)(c). Chapter VIII of the UN Charter is the constitutional basis for the involvement of regional organizations and agencies in the maintenance of international peace and security.¹⁶ Consequently, Zimbabwe has peace and security obligations under the SADC Treaty.

Briefly, Article 52 of the UN Charter provides for the involvement of regional arrangements or agencies in the peaceful settlement of disputes. Article 53 allows regional institutions to take enforcement action, but only with explicit authorization of the Security Council. Article 54 requires regional institutions or agencies taking peace and security initiatives to inform the Security Council of their activities at all times. Thus, as long as it complies with these requirements, the SADC remains suited as the first responder to SADC peace and security challenges until the AU or the UN Security Council itself intervenes.

SADC peace and security initiatives have been developed and codified extensively. They encompass on-going inter-State Police and Military training for peace and security enforcement operations. The SADC norm on the absolute prohibition of unconstitutional takeover of power has been codified in various SADC instruments and consolidated under *The Strategic Indicative Plan for the Organ on Defence, Politics and Security (SIPO)* which was revised at Maputo on 5 August 2010.¹⁷ SIPO is itself a mechanism for the

¹³ Ibid.

¹⁴ Ibid.

¹⁵ See the Consolidated Treaty of the Southern African Development Community, 21 October 2015, SADC website at: <http://www.sadc.int/documents-publications/show/4171>

¹⁶ See also Repertoire of the Practice of the Security Council, UN website at: http://www.un.org/en/sc/repertoire/regional_arrangements.shtml

¹⁷ See SADC website at:

http://www.sadc.int/files/6313/6880/3040/03514_SADC_SIPO_English.pdf

implementation of the *Protocol on Politics, Defence and Security Cooperation* which was revised at Blantyre on 14 August 2001¹⁸ (Blantyre Protocol).

The Blantyre Protocol seeks to implement the over-arching SADC objectives contained in Article 5 of the *SADC Treaty* (1992).¹⁹ The norm is the centre-piece of the SADC's peace and security apparatus. However, the UN has made human rights protection its core value for promoting and protecting international peace and security.²⁰

Thus, the SADC leadership's insistence on the primacy and constitutional supremacy of the norm on the prohibition of unconstitutional takeover of power absent the guarantee of impeccable national assembly election outcomes is the biggest and unmistakable contradiction of present times. Zimbabwe is not even a State party to the African Charter on Democracy Elections and Governance (2007).²¹ Zimbabwe is yet to even place its signature to that treaty.

Yet Mr. Mugabe has as one of the core-achievements of his 37-years and 7 months in power, the entrenchment of the constitutional norm on the absolute prohibition against unconstitutional takeover of power in the codified constitutional law of the SADC. Why had he invested so much effort into such a project and neglected institutionalising the requirement for dependable national assembly ballots?

Under this norm it is illegal to mount a *coup d'état*. Perpetrators face political oblivion. This has become a constitutional norm of extreme importance in both the SADC and the AU. The Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights (2014) - Malabo Protocol,²² recognises jurisdiction of the African Court of Justice and

¹⁸ Ibid at:

http://www.sadc.int/files/3613/5292/8367/Protocol_on_Politics_Defence_and_Security20001.pdf

¹⁹ Ibid at: http://www.sadc.int/files/9113/5292/9434/SADC_Treaty.pdf ; See also SADC Regional Indicative Strategic development Plan available on the SADC website at: http://www.sadc.int/files/5713/5292/8372/Regional_Indicative_Strategic_Development_Plan.pdf

²⁰ See preamble to the UN Charter (1945).

²¹ See AU website at: <https://au.int/en/treaties/african-charter-democracy-elections-and-governance>

²² AU website at: <https://au.int/en/treaties/protocol-amendments-protocol-statute-african-court-justice-and-human-rights>. See also Amended ACJHR Statute, Articles 28A; Ademola Abass, 'Prosecuting International Crimes in Africa: Rationale, Prospects and Challenges' *European Journal of International Law* (2013) pp. 933-946. Gerhard Kemp and Selemani Kinyunyu, 'The Crime of Unconstitutional Change of Government (Article 28E)' in

Human Rights' (ACJHR) over 14 international and transnational crimes, including genocide, crimes against humanity, war crimes, *the crime of unconstitutional change of government*, piracy, terrorism, mercenarism, corruption, money laundering, trafficking in persons, trafficking in drugs, trafficking in hazardous wastes, illicit exploitation of natural resources, and the crime of aggression. Article 28E (1)(a-f) defines the crime of *unconstitutional change of government* as committing or ordering to be committed the following acts, with the aim of illegally accessing or maintaining power:

- A putsch or *coup d'état* against a democratically elected government;
- An intervention by mercenaries to replace a democratically elected government;
- Any replacement of a democratically elected government by the use of armed dissidents or rebels or through political assassination;
- Any refusal by an incumbent government to relinquish power to the winning party or candidate after free, fair and regular elections;
- Any amendment or revision of the Constitution or legal instruments, which is an infringement on the principles of democratic change of government or is inconsistent with the Constitution;

Additionally, it is a crime under the Protocol to substantially modify the electoral laws in the last six months ahead of the elections without the consent of the majority of the political actors.

Institutions for ensuring the absolute prohibition of the unconstitutional takeover of power have in some instances already been elaborately developed in the SADC. *The SADC Indicative Plan for the Organ on Politics, Defence and Security Cooperation (2010)*²³ and the *AU Peace and Security Council*²⁴ (PSC) - the AU's standing organ for the prevention, management and resolution of conflicts are both robust and reliable mechanisms that African leaders now look to for their restoration to power in the event of a revolution. This fierce assault by African leadership, and by the SADC leadership in particular against citizens' authority to decline and recall governments is one sided in that it is not matched by an equal and necessary absolute guarantee of safe reliable dependable and national assembly ballots to determine who legitimately governs these States as required under Article 25 of the UN

Gerhard Welrle and Moritz Vormbaum, *The African Criminal Court: A Commentary on the Malabo Protocol*, Springer (2017) pp.57-50;

²³ SADC website: http://www.sadc.int/files/6313/6880/3040/03514_SADC_SIPO_English.pdf

²⁴ See AU Website at: <https://au.int/en/organs/psc>

International Covenant on Civil and Political Rights (1966).²⁵ It is brazenly championed under the guise of peace, security and political stability initiatives.

Yet SADC countries' recent history on the question of the dependability of their national assembly ballots as authentic process for ensuring that citizens make the call on who governs over them is far from encouraging. Electoral fraud is one of the most complained about problems in the discourse on combatting corruption and good governance in the SADC generally. This is an anomaly that requires urgent correction if the SADC wishes to still insist on the primacy and supremacy of the constitutional norm on the absolute prohibition of unconstitutional takeover of power, and also if it wishes to enhance its uptake of foreign direct investment. As a precondition to enforcement of the former norm, a new constitutional normative structure of equal weight to the one on the absolute prohibition of unconstitutional takeover of power must be developed and enforced, targeting the requirement of absolute transparency and dependability of the national assembly ballot.

To succeed in the circumstances, Operation Restore Freedom (2017) had to overcome the SADC trap against any military takeover of power in the sub-region - the SADC constitutional norm on the absolute prohibition against unconstitutional takeover of power.

ZDF strategy in the rejection/ circumvention of the SADC norm on the absolute prohibition of unconstitutional takeover of power:

From the beginning of its intervention, the ZDF engaged the media and unambiguously and meticulously communicated that Operation Restore Legacy (2017) was not at all a *coup d'état*. Consequently, it could not be perceived as a breach of any strictures of Zimbabwean; SADC; or AU constitutional law. They deliberately referred to Mr Mugabe still, and throughout the operation, as their Commander-in-Chief, and also as the President of the Republic of Zimbabwe, even though they had placed him under house arrest. They let him have international calls with other SADC leaders. He was able even to perform his ceremonial duties as Chancellor of the Open University of Zimbabwe, and to give a televised address to the nation. This was followed by an immediate line up of the Service Chiefs who each saluted the President publicly on live national television broadcast at the end of that address.

²⁵ 6 ILM (1967) 368

They even established negotiation teams comprising South African and Zambian envoys to help resolve the political conundrum. For up to ten days, the ZDF persuaded Mr Mugabe to resign as President of Zimbabwe, but perhaps mindful of the unemployment statistics, which pointed to 95 per cent unemployment nationwide, Mr. Mugabe repeatedly scorned that request. All these facts combined to give Operation Restore Legacy (2017) the appearance of anything but a *coup d'état*.

These calculations on the part of the ZDF, coupled with its persistent and unambiguous protestations that Operation Restore Legacy (2017) was not in any way a *coup d'état* at all, appeared to confuse and freeze the hand of the SADC leadership from making a joint and unequivocal triggering of the well-rehearsed drastic dictates of the SADC constitutional norm on the absolute prohibition of unconstitutional takeover of power.²⁶

International media, so used to calling situations in clear terms was baffled by the unfolding military intervention also because although Operation Restore Legacy (2017) had been triggered by the ZDF, it immediately attracted spontaneous, voluntary, universal support of all Zimbabweans who then fanned its power fervently and unrelentingly from literally every part of the country. This *sui generis operando* compelled Western media to introduce a new vocabulary, namely, 'a *coup d'état* that is not a *coup*'²⁷ as its way to best characterise Operation Restore Legacy (2017) as it unfolded. Under this light, it appears more appropriate to describe the operation as a measure to correct Zimbabwe's governance destiny from a contrived family dynasty rule by the Mugabes to, hopefully, people's sovereignty, which early signs suggest is the case.

SADC Practice on the norm on the absolute prohibition of unconstitutional takeover of power: A threat to good governance, human rights and people's sovereignty?

Previous to Operation Restore Legacy (2017) the SADC has condemned unconstitutional takeover of power in Madagascar, Lesotho and the Democratic Republic of Congo.

²⁶ See also Ben Chigara "What should a re-constituted Southern African Development Community (SADC) Tribunal be mindful of to succeed?" *81 Nordic Journal of International Law* (3) pp. 341 - 377

²⁷ See also "Is Zimbabwe's military takeover the world's strangest (non) coup?" CNN website at: <http://edition.cnn.com/2017/11/20/africa/zimbabwe-military-takeover-strangest-coup/index.html>

By its Double Troika Summit Communiqué²⁸ of 14 January 2010 the SADC reiterated its decision to suspend Madagascar from all SADC organs, structures and institutions until the restoration of constitutional order in that country. It called upon the AU, UN and other international organisations and institutions to also apply the same measure.

The Troika rejected “any attempt to use democratic means, institutions and processes to legitimise Governments that came to power through unconstitutional means, and urged the international community, in particular the development partners, to support SADC’s efforts to promote and sustain democracy in the region in general and Madagascar in particular”.²⁹

Further, the SADC Summit also rejected “the unilateral plan of Andry Rajoelina’s ‘*de facto*’ Government of Madagascar to ‘reorganize’ the transition and hold legislative elections in March 2010, after his overthrow of President Ravalomanana. The SADC urged the international community to also reject and penalise the new regime. The AU immediately imposed targeted sanctions against Mr Rajoelina and his administration. The EU suspended development aid to Madagascar by adoption of what it called “appropriate measures”³⁰ of the European Council, based on Article 96 of the *Cotonou Agreement* (2000),³¹ which refers to partner States’ approach to human rights, democratic principles and the rule of law. The measures entailed the suspension of the 10th European Development Fund (EDF) Country Strategy Paper as well as all cooperation projects implemented through the Government.

This was not the first time that the SADC had intervened to stop an attempt at an unconstitutional takeover of power. President Nelson Mandela’s government had invoked in 1998 the SADC Organ for Conflict Prevention³² to put down a civilian backed military coup in Lesotho.

²⁸ Issued at Maputo, Mozambique on 14 January 2010. SADC website: < www.sadc.int/index/browse/page/672 >

²⁹ Ibid.

³⁰ See also EU website at: https://ec.europa.eu/europeaid/countries/madagascar_en

³¹ 15.12.2000 EN Official Journal of the European Communities L 317/3. See also EU website at: https://ec.europa.eu/europeaid/partnership-agreement-between-members-african-caribbean-and-pacific-group-states-one-part-and_en

³² “The Organ for Politics, Defence and Security (Organ) was launched in June 1996 as a formal institution of SADC with the mandate to support the achievement and maintenance of security and the rule of law in the SADC region.” SADC website at: <http://www.sadc.int/sadc-secretariat/directorates/office-executive-secretary/organ-politics-defense-and-security/>

Pursuant to Article 5(1) of the Treaty on Politics, Defence and Security in the SDAC Region,³³ Pakalitha Mosisili, Prime Minister of Lesotho on 16 September 1998 requested South Africa, Zimbabwe and Mozambique to rescue his government from “a coup on our hands”.³⁴ Article 5(1) of the treaty provides that: “Any member State can at any time request the Organ to convene in order to bring the existence or imminent threat of a conflict to its attention, in which case the Organ would be convened expeditiously”.

The South African government obliged by sending a dawn advance party of 600 troops, later joined by 250 from nearby Botswana, armoured cars, helicopter gunships and tanks. This appeared to be entirely consistent with Article 5(2)(2)³⁵ of the treaty on Politics, Defence and Security in the SDAC Region.

South Africa’s intervention ended with nine South African soldiers dead, and at least fifty-eight Lesotho soldiers and civilians killed.³⁶ The Lesotho government was saved. Asked in Washington about the intervention, President Mandela argued that South Africa’s involvement in Lesotho’s internal problems had been necessitated by the need to prevent “chaos and anarchy”.³⁷

With equal force, Sydney Mufamadi, President Mandela’s Safety and Security minister stated: “We had no choice but to act”.³⁸ The facts leading to the SADC force’s intervention beg questions that the SADC Protocol on conflict management and resolution never addresses. They include the guarantee to individuals’ right to democratic governance;³⁹ the right to self-determination;⁴⁰ and what the UN has defined as individuals’ peace and security right claims under the human security understanding of the idea of sovereignty.

³³ African Journal of International and Comparative Law, Vol. 11 Part 1 (1999), p.197.

³⁴ Hawthorne, P., “The Battle for Lesotho”, Time Vol.152 No.14, 5 October 1998, p.39.

³⁵ In the case of intra-State conflicts, the Organ shall respond to an invitation by a member country to become involved in mediating a conflict within its borders.

³⁶ BBC “World: Africa @Shoot to Kill’ in Lesotho” BBC website at: <http://news.bbc.co.uk/1/hi/world/africa/178605.stm>

³⁷ BBC “World: Africa @Shoot to Kill’ in Lesotho” BBC website at: <http://news.bbc.co.uk/1/hi/world/africa/178605.stm>

³⁸ Ibid.

³⁹ See especially Thomas M. Franck, “The Emerging Right to Democratic Governance” 86 *The American Journal of International Law*, No. 1. (Jan., 1992), pp. 46-91.

⁴⁰ See especially UN General Assembly Resolution 1514 (XV) of 14 December 1960, Declaration on the Granting of Independence to Colonial Countries and Peoples UN Doc A/Res/1514(XV) GAOR 15th Session Supp. 16, 66; “Legal Aspects of Self-determination” The Princeton Encyclopedia of Self Determination also available at: <https://pesd.princeton.edu/?q=node/254>

Neither President Mandela nor Mufamadi his Security Minister had considered that the sovereign right of the Sotho people to democratic governance under Article 25 of the ICCPR; nor exercise of their right to self-determination were paramount. The sole-issue between the President and his Security Minister was the prevention of that which they had only *guessed* might follow even if there was no guarantee of their forecast coming to fruition in the little kingdom of two and a quarter million people, namely, *anarchy* and *chaos*. People were killed by the intervention and not before the intervention. The object of the intervention was as pleaded by the requesting authorities, namely, to *rescue them and maintain them as the rulers*, denying the people of Lesotho all the rights that Mr Mandela had previously stated that he had been prepared to die for.

The intervention by the Lesotho defence forces had followed seven weeks of “unrest caused by allegations of fraud during general elections in May.The opposition complained that May’s general election, which gave the ruling Congress for Democracy 79 out of 80 seats, was rigged.”⁴¹

Previous to Operation Restore Legacy (2017) the SADC had also previously intervened in the Democratic Republic of Congo. On 2 August 1998 a rebellion occurred against President Kabila of the Democratic Republic of Congo.⁴² Pursuant to the Protocol on Politics, Defence and Security in the Southern African Development Community (SADC) Region 1997⁴³ (the Protocol) a commission was established on 8 August 1998 in Harare to try and broker a peaceful settlement among the warring parties. The Commission comprised the foreign ministers of Zimbabwe,⁴⁴ Zambia, Namibia and Angola (the four nations). On 18 August the Commission met in Goma, rebel leaders

⁴¹ ⁴¹ BBC “World: Africa @Shoot to Kill’ in Lesotho” BBC website at: <http://news.bbc.co.uk/1/hi/world/africa/178605.stm>

⁴² Zimbabwean forces’ claims to have Rwandese troops were confirmed by television interviews of the captured soldiers. See Michael Hartnack, “Congo Claims to have taken 2,000 prisoners”, 29 September 1998, [<http://www.bday.co.za/98/0929/world/w13.htm>]

⁴³ 11 African Journal of International and Comparative Law, Part 1 (1999), p.197.

⁴⁴ As Chairman of the proposed Organ on Politics, Defence and Security in the Region, and in response to President Kabila’s request for help convened the meeting as required of the Chairman under Articles 5(1) and 5(2)(2). 5(1) provides that, “Any member State can at any time request the Organ to convene in order to bring the existence or imminent threat of a conflict to its attention, in which case the Organ would be convened expeditiously”. 5(2)(2) provides that, “In the case of intra-State conflicts, the Organ shall respond to an invitation by a member country to become involved in mediating a conflict within its borders”. Article 5(2)(1) states that: “Intra-State conflicts which could be subjected to regional intervention include: (a) large scale violence between sections of the population of a State, or between the State and/or its armed or para-military forces and sections of the population; (b) a threat to the legitimate authority of the government (such as a military coup by the armed or para-military forces)

and civilian leaders in an effort to determine whether Rwanda and Uganda had violated Congo's borders and were helping the rebels.⁴⁵ This followed earlier meetings with Ugandan officials and Rwandese officials and President Kabila in Kinshasa.⁴⁶ On 19 August, the Commission reported its findings. Moven Mahachi, Zimbabwe's Defence Minister, is quoted as having announced on local radio that:

... it had become clear that Congo had been invaded (by Rwandan and Ugandan soldiers aiding the Congolese insurgents). ... It was unanimously agreed that we must, with urgency, make sure practical assistance, both material and manpower, is given to (Congo) in order to restore peace and stability.⁴⁷

The SADC leadership is ever-so-keen to implement the norm on the absolute prohibition of unconstitutional takeover of power. This readiness compels a deeper inquiry into the question of whether SADC governments have the human rights credentials that merit possession of such a power. Enjoyment of that power must presuppose a sound human rights record on behalf of SADC governments. UN Human Rights Treaty monitoring bodies' periodic reports are less than flattering for this region. Yet a social contract between the governed and their leaders is implicit in the norm on the absolute prohibition of unconstitutional takeover of power. Otherwise it would not make sense at all in light of the emergent UN human rights culture. That human rights qualifying record required for this norm to subsist should derive from:

- 1) A State's participation in at least fifteen of the current stoke of eighteen international human rights instruments.
- 2) Participating in all of the current nine human rights treaty monitoring bodies and recognizing individuals rights petition/communicate any alleged human rights breaches to the relevant treaty monitoring body.
- 3) Establishing a National Human Rights Committee with powers and means to expeditiously process human rights claims within the State.
- 4) Demonstrating a clear record of holding verifiable free and fair national assembly elections.

⁴⁵ Stan Mudenge, Zimbabwe's foreign minister is quoted as having stated: "We're here to find out whether this is an invasion or an internal invasion." Ian Stewart (The Associated Press), "Kabila's Grasp Slipping", ABC News Com. 19 August 1998. [<http://archive.abcnews.com/world/DailyNews/Congo980818.html>]

⁴⁶ Ibid.

⁴⁷ Ian Stewart (The Associated Press), "Four Nations throw in with Kabila", ABC News Com. 19 August 1998. [<http://archive.abcnews.com/sections/world/DailyNews/Congo980819.html>]

Secondly, for that claim-right to subsist, it must be linked to UN good governance (GG) criteria. The UN OHCHR writes that GG encompasses:

... full respect of human rights, the rule of law, effective participation, multi-actor partnerships, political pluralism, transparent and accountable processes and institutions, an efficient and effective public sector, legitimacy, access to knowledge, information and education, political empowerment of people, equity, sustainability, and attitudes and values that foster responsibility, solidarity and tolerance.

[It] ... relates to political and institutional processes and outcomes that are deemed necessary to achieve the goals of development. ... Good governance is the process whereby public institutions conduct public affairs, manage public resources and guarantee the realization of human rights in a manner essentially free of abuse and corruption, and with due regard for the rule of law. The true test of "good" governance is the degree to which it delivers on the promise of human rights: civil, cultural, economic, political and social rights.⁴⁸

In Resolution 2000/64 the UN Commission on Human Rights⁴⁹ identified the following attributes of GG: transparency; responsibility; accountability; participation and responsiveness to the needs of the people as the key performance indicators of GG. The ZDF Spokesperson stated that Operation Restore Legacy (2017) had evidently been motivated by criminality of those closely linked to Mr Mugabe both inside and outside government. With national unemployment at 95 per cent, and possibilities of Ph.D. degree awards without previous undergraduate studies even, following only two months of registration with the University of Zimbabwe, the like-it or, lump-it approach⁵⁰ in Mr Mugabe's Zimbabwe pointed to a State very remote from UN GG standards and with no hope of normal recovery.

Lip-service to democratic governance is littered in numerous documents that Zimbabwe and other SADC States could have ratified but which their realities often contradict. They include the Constitutive Act of the African Union (2000);⁵¹ The Lomé Declaration on Unconstitutional Changes of Government

⁴⁸ UN OHCHR website at:

<http://www.ohchr.org/EN/Issues/Development/GoodGovernance/Pages/GoodGovernanceIndex.aspx>

⁴⁹ 26 April 2000 E/CN.4/RES/2000/64

⁵⁰ See also Mpazi Sinjela, 'The African Convention on the Prevention and Combating of Corruption' in *The African Union: Legal and Institutional Framework – A Manual on the Pan-African Organization* (2012) Brill pp. 291-301.

⁵¹ OAU Doc. CAB/LEG/23.15, *entered into force* May 26, 2001.

(2000);⁵² and the African Charter on Democracy Elections and Governance adopted on 30 January 2007.⁵³ Although it required only 15 instruments of ratification to bring it into force out of the possible 55 States, it took a full five years, one month and two weeks to achieve that and to bring it into force. As of January 2018 State parties that had ratified the treaty were in the 30s out of a possible 55 African States.

Ominously, Zimbabwe has neither signed nor ratified this treaty which seeks to promote and protect citizens' democratic entitlement by committing member States parties to honour that entitlement. Yet, Mr. Mugabe was the champion for installation and recognition of the prohibition of unconstitutional takeover of power in the SADC and beyond. His wariness with the idea of democratic governance was matched only by his determination to stop others from assuming power undemocratically.

The SADC norm on the absolute prohibition of unconstitutional takeover of power - "*A blunt counter-good governance tool*"

As presently constituted and implemented, the SADC constitutional norm on the absolute prohibition of unconstitutional takeover of power appears to be a *blunt counter-good governance tool* for the *subjugation* of SADC populations by the ruling elite. The SADC leadership upholds it regardless of any protestations from frustrated affected populations. There are no exceptions to this norm. Yet, the virtue it presumes of political leadership of SADC States is hard to find in the majority of cases.

For instance, only three of the fifteen SADC Member States parties have ratified the *UN Convention for the Protection of all Persons from Enforced Disappearances* (2006) – (CPED). This convention could be described as the litmus test of good governance. Alarming only one-fifth of SADC States are Parties to this convention, namely Lesotho, from 6 December 2013; Malawi, from 14 July 2013 and Zambia, from 4 April 2011. The rest are not.

Article 2 of the CPED defines enforced disappearance as:

.... the arrest, detention, abduction or any other form of deprivation of liberty by agents of the State or by persons or groups of persons acting with the authorization, support or acquiescence of the State, followed

⁵² AHG/Decl.5 (XXXVI)

⁵³ See AU website at: <https://au.int/en/treaties/african-charter-democracy-elections-and-governance>

by a refusal to acknowledge the deprivation of liberty or by concealment of the fate or whereabouts of the disappeared person, which place such a person outside the protection of the law.

The Convention has a treaty body for monitoring States compliance with its obligations which include, *inter alia* the requirement:

1. To enact specific laws establishing the crime of enforced disappearance.
2. To investigate complaints and reports of enforced disappearance and bring those responsible to justice.
3. To prevent the menace by detaining persons only in officially approved and monitored institutions in which all prisoners are registered, ensure the absolute right to Habeas corpus (a legal action, through which a prisoner can be released from unlawful detention, that is, detention lacking sufficient cause or evidence).
4. To prevent concealment of the whereabouts of arrested persons so that no one finds themselves placed outside the protection of the law.
5. That the right of victims and their families to know the truth regarding the circumstances and fate of the disappeared person be observed.
6. To criminalize the unlawful abduction of children whose parents were victims of enforced disappearance as well as the faking of these children's identities and their adoption.

Mugabe's Zimbabwe has been cited persistently in the work of the monitoring body - the Working Group on Enforced or Involuntary Disappearances. For instance in its report of 21 December 2009⁵⁴ the Working Group on Enforced or Involuntary Disappearances requested investigatory visits to Zimbabwe following from reports of Mugabe's failure to protect people from forced or involuntary disappearances.⁵⁵

It is curious that SADC States are reluctant to participate in this good-governance-test convention. This is in stark contrast to respective governments' unashamed championing and setting up of robust sub- regional and regional regimes and mechanisms for insulating one another from public rejection of their oppression.

Until the very end of Operation Restore Legacy (2017), Mugabe appeared to exude confidence throughout that the sophisticated ZDF action would suffer

⁵⁴ UN Doc A/HRC/13/31

⁵⁵ See UN website at: <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G09/177/04/PDF/G0917704.pdf?OpenElement>

delegitimation of both the SADC and the AU whom he had nurtured to react one way only in such circumstances. He had also given them the legal norm to point to as justification for putting down ‘unconstitutional power takeovers’ – the constitutional norm on the absolute prohibition of unconstitutional takeover of power.

This norm is referenced directly and indirectly throughout the Strategic Indicative Plan for the Organ on Politics, Defence and Security Cooperation (2010).⁵⁶ It is explicitly codified in Para. 1.2.8, which states that:

Though there is relative peace and stability in the region, there are challenges in the form of climate change, economic recession, *unconstitutional change of governments*, the growing vulnerability of national borders,

The treaty obsesses with protection against unconstitutional takeover of power without linking that or coupling it with the requirement for governments to commit to recognizing, promoting and protecting the human rights of their populations. In paragraph 5.2 the treaty powers are justified by the claim that “subversion of the constitutional order and national sovereignty” are a major challenge for SADC governments.⁵⁷

Mr. Edgar Lungu, the Zambian President and SADC leader most astute about the virtues of the norm on the absolute prohibition of unconstitutional takeover of power was the first to swing into action from Egypt where he was visiting, by declaring that: “.... the illegal takeover of power in Zimbabwe by the military is not in tune with modern politics”.⁵⁸ He was further quoted as saying: “SADC will negotiate the way forward with Mugabe as Head of State, the army goes back to the barracks.” Local media outlets further reported him stating that his troops were ready to support and uphold Mugabe’s regime.⁵⁹

Lungu’s behaviour is a perfect fit for the irrational category not least because Zimbabweans of all persuasions, backgrounds and political affiliations unanimously endorsed the ZDF intervention. They instantaneously and spontaneously flooded the streets across the country, and any form of social

⁵⁶ SADC website: http://www.sadc.int/files/6313/6880/3040/03514_SADC_SIPO_English.pdf

⁵⁷ http://www.sadc.int/files/6313/6880/3040/03514_SADC_SIPO_English.pdf

⁵⁸ See also Lusakan Times Newspapers at: <https://www.lusakatimes.com/2017/11/16/illegal-takeover-power-zimbabwe-not-tune-modern-politics-president-lungu/>

⁵⁹ See Wilbert Mukori, “Zambian Army to invade Zimbabwe to help Mugabe: Lungu, keep your nose out of Zimbabwe affairs” at Bulawayo 24 News, <http://bulawayo24.com/index-id-opinion-sc-columnist-byo-122178.html>

media accessible to them imploring the SADC and the AU not to meddle in their affairs.

There were tweets and re-tweets with the hashtag: “#SADCBackOffZim”; and others declaring: “There is a special place in hell for anyone – SADC, Zuma, AU – that tries to get between a scorned dictator and his people. Zimbabwe has been cheated of real change before; it can’t be allowed to happen again”.⁶⁰

Such a radical confirmation of the democratic entitlement approach to national governmental legitimacy is mandatory to secure the inalienable rights of citizens. Its demand has probably not been so vigorously expressed for a very long time now in Zimbabwe’s modern history.⁶¹ Democratic entitlement theory insists that governments derive their just powers from the consent of the governed. For this reason, Edgar Lungu’s remarks raise significant concerns about the object, purpose and utility of SADC values to SADC citizens under modern international law, which has realigned sovereignty claims to human security concerns instead of the previous *State security* concerns.⁶²

The remarks also contradict Zimbabwe’s enduring ancient convention: *chava-Chimurenga/ sesi-Inkululekhol/ time to resist oppression* manifested by Operation Restore Legacy (2017). The remarks pit people’s sovereignty against protectionism of the ruling elite. South African President Jacob Zuma is reported to have telephoned Mugabe who had been placed under house

⁶⁰ See also ISS Today, “The African Union’s chequered history with military coups” ISSAfrica Website at: <https://issafrica.org/iss-today/the-african-unions-chequered-history-with-military-coups>

⁶¹ Thomas M. Franck, “The emerging right to democratic governance” 86 *American Journal of International Law* No. 1 p 46.

⁶² See especially UN Human Security website at: <http://www.un.org/humansecurity/human-security-unit/human-security-approach> ; and at: http://www.un.org/humansecurity/sites/www.un.org.humansecurity/files/human_security_in_theory_and_practice_english.pdf ; See also Ben Chigara, “The ILO, harbinger and chief protagonist for the recognition and promotion of the inherent dignity of Sub-Saharan Africa labour”, in Abass, A. (ed.) *Protecting Human Security in Africa*. Oxford University Press (2010); S. Neil MacFarlane (Author), Yuen Foong Khong, *Human Security and the UN: A Critical History* (United Nations Intellectual History Project Series), 2006
Alex J. Bellamy and Matt McDonald “The Utility of Human Security’: Which Humans? What Security? A Reply to Thomas & Tow” 33 *Security Dialogue* No. 3 pp.373-377

arrest and dispatched soon afterwards his security chiefs to go and meet with Mugabe in Harare.⁶³

SADC Member States Parties' Human Rights *disinclinations* v. Revolution as Kelsen's possible second means of change of *grundnorm*

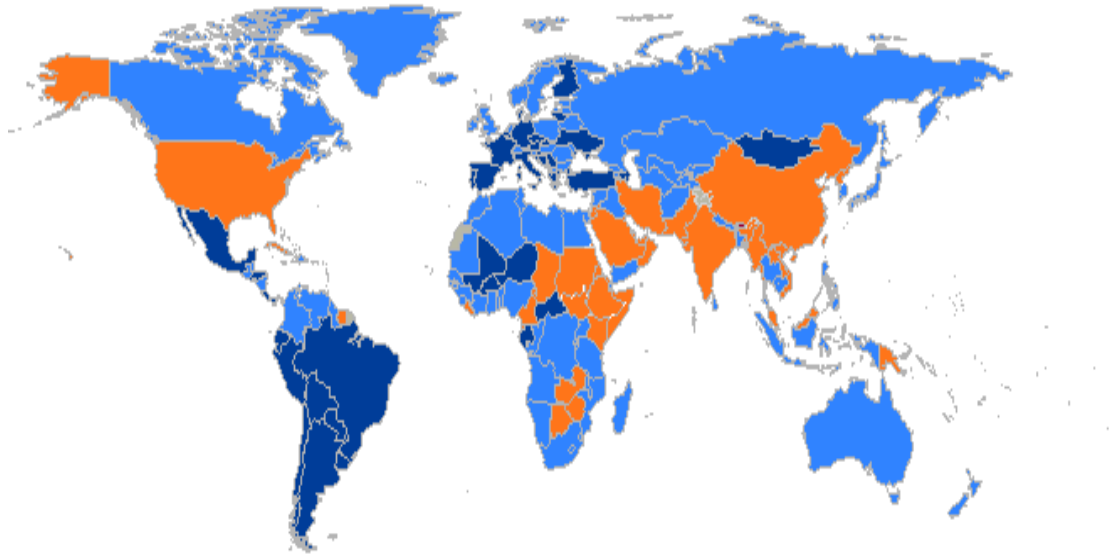
Human security is assured when governments subject themselves *inter alia* to external monitoring of their human rights practices, something that SADC States appear loath to do. There are nine international human rights treaties, and nine optional human rights protocols bringing together the total number of international human rights instruments to 18.⁶⁴ SADC States' participation in these instruments is worryingly low; particularly their participation in treaty bodies that monitor Member States Parties' compliance with their obligations under each corresponding treaty.

There is a universal constitution for the recognition, promotion and protection of the inherent dignity of their citizens. It is called the International Bill of Human Rights. SADC States' circumvention of this constitution, coupled with its lip-service to the recognition, promotion and protection of the inherent dignity of individuals on their territories contrasts sharply with their zeal to insist that citizens can use only national assembly ballots to change leadership. But national assembly ballots do not have a very good record of registering the people's choice of leadership in many of these States. This fact alone undermines SADC leadership's claim-right to not be unconstitutionally removed from office by their populations who may have no other means, elections being the least likely possible way of doing that because of ruthlessly efficient electoral fraud practices in the African sub-region.

Status of Ratifications of the current stock of 18 International Human Rights Instruments:

⁶³ "Zimbabwe: Zuma says Mugabe under house arrest but is 'fine'" IOL website: <https://www.iol.co.za/news/special-features/zimbabwe/zimbabwe-zuma-says-mugabe-under-house-arrest-but-is-fine-12010473>. See also Reuters "Zimbabwe's Mugabe told Zuma he was confined to home but fine: South African Presidency" at: <https://af.reuters.com/article/topNews/idAFKBN1DF1EF-OZATP>

⁶⁴ Visit <<http://www.ohchr.org/EN/ProfessionalInterest/Pages/CoreInstruments.aspx>> last visited 23 November 2017.



Category 1: 15-18 = shaded in dark-blue (No SADC State has ratified this many)

Category 2: 10-14 = shaded in sky-blue (Only two thirds of SADC States have ratified this

many: Madagascar, Seychelles, Mozambique, South Africa, Namibia, Angola, Malawi, Tanzania, Lesotho, Swaziland)

Category 3: 5-9 = shaded in orange (Zimbabwe, Zambia, Botswana)

Category 4: 0-4 = shaded in maroon

*Source: United Nations Human Rights, Office of the High Commissioner for Human Rights.*⁶⁵

⁶⁵ UN Website at: <http://indicators.ohchr.org/>

TABLE ON AFRICA/SADC PARTICIPATION IN INTERNATIONAL HUMAN RIGHTS INSTRUMENTS:

HUMAN RIGHTS TREATY	NO. OF AFRICAN STATES PARTIES	NO. OF SADC STATES PARTIES	TREATY MON. BODY	OPTIONAL PROTOCOL	NO. OF AFRICAN STATES PARTIES	NO. OF SADC STATES PARTIES
ICERD (1965) ⁶⁶	52 less Angola, South Sudan	14 less Angola	CERD	None	N/A	N/A
ICESCR (1966) ⁶⁷	51 less South Sudan, Mozambique, Botswana	13 less Mozambique, Botswana	CESCR	(2008) ⁶⁸	4 out of 54	Zero!
ICCPR (1966) ⁶⁹	53 less South Sudan ⁷⁰	15	HRC	(1966) ⁷¹	35 out of 54	10 out of 15
			HRC	(1989) ⁷²	14 out of 54	5 out of 15
CEDAW (1979) ⁷³	52 less Sudan,	15	CEDAW	(1989) ⁷⁴	Half of all African	Half of all SADC

⁶⁶ UN General Assembly, *International Convention on the Elimination of All Forms of Racial Discrimination* (Adopted by the General Assembly on 21 December 1965, entered into force on 1 January 1969) 660 UNTS 195.

⁶⁷ UN General Assembly, *International Covenant on Economic, Social and Cultural Rights* (Adopted by the General Assembly at New York on 16 December 1966, entered into force on 3 January 1976) 993 UNTS 3.

⁶⁸ UN General Assembly, *Optional Protocol to the International Covenant on Economic, Social and Cultural Rights* (Adopted by the General Assembly at New York on 10 December 2008, entered into force on 5 March 2013) UNGA Res. A/RES/63/117 (10 December 2008).

⁶⁹ UN General Assembly, *International Covenant on Civil and Political Rights* (Adopted by the General Assembly on 16 December 1966, entered into force on 23 March 1976) 999 UNTS 171.

⁷⁰ See un Website at: <<http://indicators.ohchr.org>>

⁷¹ UN General Assembly, *Optional Protocol to the International Covenant on Civil and Political Rights* (Adopted by the General Assembly at New York on 16 December 1966, entered into force on 23 March 1972) 999 UNTS 171.

⁷² UN General Assembly, *Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty* (Adopted by the General Assembly at New York on 15 December 1989, entered into force on 11 July 1991) 1642 UNTS 414.

⁷³ UN General Assembly, *Convention on the Elimination of All Form of Discrimination against Women* (Adopted by the General Assembly at New York on 18 December 1979, entered into force on 3 September 1981) 1249 UNTS 13.

	Somalia				States (27)	States (9)
CRC (1989) ⁷⁵	54	15	CRC	Armed Conflict (2000) ⁷⁶	45 out of 54	14 less Zambia
				Sale of children (2000) ⁷⁷	46 out of 54	14 less Zambia
				Complaint procedure (2011) ⁷⁸	Gabon only! (1 out of 54)	Zero!
ICPMW (1990) ⁷⁹	21 out of 54	3 out of 15				
ICPED (2006) ⁸⁰	16 out of 54	4 out of 15				
CRPD(2007) ⁸¹	46 out of 54	14 less Botswana	CRPD	(2006) ⁸²	Half of all African	Half of all SADC

⁷⁴ UN General Assembly, *Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women* (Adopted by the General Assembly at New York on 6 October 1999, entered into force on 2 December 2000) 2131 UNTS 83.

⁷⁵ UN General Assembly, *Convention on the Rights of the Child* (Adopted by the General Assembly at New York on 20 November 1989, entered into force on 2 September 1990) 1577 UNTS 3.

⁷⁶ UN General Assembly, *Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict* (Adopted by the General Assembly at New York on 25 May 2000, entered into force on 12 February 2002) 2173 UNTS 222.

⁷⁷ UN General Assembly, *Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography* (Adopted by the General Assembly at New York on 25 May 2000, entered into force on 18 January 2002) 2171 UNTS 227.

⁷⁸ UN General Assembly, *Optional Protocol to the Convention on the Rights of the Child on a communications procedure* (Adopted by the General Assembly at New York on 19 December 2011, entered into force on 14 April 2014) UNGA Res. A/RES/66/138 (19 December 2011).

⁷⁹ UN General Assembly, *International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families* (Adopted by the General Assembly at New York on 18 December 1990, entered into force on 1 July 2003) 2220 UNTS 3.

⁸⁰ UN General Assembly, *International Convention for the Protection of all Persons from Enforced Disappearance* (Adopted by the General Assembly at New York on 20 December 2006, entered into force on 23 December 2010) 2716 UNTS 3.

⁸¹ UN General Assembly, *Convention on the Rights of Persons with Disabilities* (Adopted at New York on 30 March 2007, entered into force on 3 May 2008) UNGA Res. A/RES/61/106 (24 January 2007).

⁸² UN General Assembly, *Optional Protocol to the Convention on the Rights of Persons with Disabilities* (Adopted by the General Assembly at New York on 13 December 2006, entered into force on 3 May 2008) 2518 UNTS 283.

					States (27)	States (8)
CAT (1984)	49 out of 54	12 less Angola, Zimbabwe, Tanzania	CAT	(2002) ⁸³	22 out of 54	One quarter - 4 out of 15

During his thirty-seven-year-rule of Zimbabwe Mugabe had distanced his government away from recognising the international human rights procedures that allow individuals to submit claims to human rights treaty monitoring bodies.⁸⁴ In the post-Mugabe era, Zimbabwe must make haste to do more to achieve a pro-human rights democratic status. It should distance itself away from the SADC norm on the absolute prohibition against unconstitutional takeover of power until a parallel regime of similar weight requiring sanctity of national assembly ballots has been established as a constitutional norm of the SADC. In any event, Zambia, Angola, and South Africa's insistence that Zimbabwe's Operation Restore Legacy (2017) fell under SADC norm⁸⁵ is symptomatic of the decrepit values of the SADC, and a mockery of logic because:

- 1) In his notice of 21 November 2017 to the Speaker of Parliament – Jacob Mudenda, resigning as President of the Republic of Zimbabwe, Mugabe made it clear that he had voluntarily reached the decision to step down as Head of State, allowing for procedures for his replacement.⁸⁶

⁸³ UN General Assembly, *Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment* (Adopted by the General Assembly at New York on 18 December 2002, entered into force on 22 June 2006) 2375 UNTS 237.

⁸⁴ See "Reporting Status of Zimbabwe" OHCHR website at:

http://tbinternet.ohchr.org/_layouts/TreatyBodyExternal/countries.aspx?CountryCode=ZWE&Lang=EN

⁸⁵ See "21 November 2017 Communiqué of The Summit of The Organ Troika Plus SADC Chair on The Political Situation in The Republic of Zimbabwe", SADC Website at:

<http://www.sadc.int/news-events/news/communique-summit-organ-troika-plus-sadc-chair-political-situation-republic-zimbabwe/>; See also

"SADC Organ Troika Plus Council Chairperson Ministerial Meeting on Zimbabwe Situation"

SADC Website at: http://www.sadc.int/files/8515/1076/4955/Media_Advisory_-_SADC_meet_on_Zimbabwe_situation.pdf; "The SADC Organ Troika Plus Council

Chairperson Ministerial Meeting was held at the SADC Secretariat in Gaborone, Republic of Botswana on 16th November 2017" Polity Website at: <http://www.polity.org.za/article/sadc-sadc-organ-troika-plus-council-chairperson-ministerial-meeting-on-zimbabwe-situatio-2017-11-17>

⁸⁶ See also "FULL LETTER: Robert Mugabe's resignation notice" News24 website at: <https://www.news24.com/Africa/Zimbabwe/full-letter-robert-mugabes-resignation-notice->

- 2) In what was to be his last address to the nation as President of Zimbabwe, Mugabe repeatedly stressed on 19 November 2017 that the Military High Command's intervention, namely, Operation Restore Legacy, was constitutional.⁸⁷
- 3) Even the Chairperson of the African Union Commission, Moussa Faki Mahamat on 21 November 2017 welcomed the decision by President Robert Mugabe to step down from his position as Head of State following a lifetime of service to the Zimbabwean nation.⁸⁸
- 4) The High Court of Zimbabwe Order of 24 November 2017 declares that the ZDF's intervention to stop Mugabe's unconstitutional actions were themselves constitutional under the Zimbabwean Constitution.⁸⁹

The Heads of States of the three nations, namely, Angola, South Africa, and Zambia; and others convened on 21 November 2017 at Luanda, Angola an SADC Summit meeting under the Organ on Politics Defence and Security Cooperation, to discuss Zimbabwe's Operation Restore Legacy (2017) under the light of the SADC norm on the absolute prohibition of unconstitutional takeover of power. They "... noted with great concern the unfolding political situation in the Republic of Zimbabwe, and resolved that H.E. President Jacob Gedleyihlekisa Zuma, in his capacity as the Chairperson of SADC, and H.E João Manuel Gonçalves Lourenço, in his capacity as Chairperson of the Organ on Politics Defence and Security Cooperation will immediately undertake a mission to Zimbabwe on 22 November, 2017 to assess the situation".⁹⁰ Clearly this norm is a blunt tool and a definite euphemism for the proposition that: 'Unpopular or illegitimate SADC leaders are immutable: touch them and we come after you!' Once the 'Comrade in distress call' reaches the SADC Organ Troika, it has to act, and act only to restore the unpopular or illegitimate leadership under siege from its own citizens. The ZDF was acutely aware of this fact from the beginning.

The SADC's cautious approach to international human rights protection recommends that it should not be allowed under International Law – not even

20171121; <http://www.independent.co.uk/news/world/africa/zimbabwe-mugabe-latest-resignation-how-it-unfolded-timeline-events-a8068186.html>

⁸⁷ See also CNN website at: <http://edition.cnn.com/videos/world/2017/11/19/robert-mugabe-addresses-nation-full-remarks.cnn>

⁸⁸ AU Website at: <http://www.peaceau.org/uploads/auc-statement-zimbabwe-21nov2017english.pdf>

⁸⁹ Case No. HC 10820/17

⁹⁰ See "21 Nov, 2017 Communiqué of The Summit of The Organ Troika Plus SADC Chair on The Political Situation in The Republic Of Zimbabwe", SADC Website at: <http://www.sadc.int/news-events/news/communique-summit-organ-troika-plus-sadc-chair-political-situation-republic-zimbabwe/>

under Article 52 of Chapter VIII of the UN Charter (1945)⁹¹ on Regional Arrangements, the blank cheque of control over citizens' last and often only means to rid themselves of unpopular or illegitimate leadership which, the norm on the absolute prohibition of unconstitutional change of government seeks to achieve. That would be contrary to the purposes and mission of the UN Charter.⁹²

Operation Restore Legacy (2017) recommends the view that the discretionary authorisation of regional and by implication sub-regional entities like the SADC to take peace and security initiatives at regional level requires the UN Security Council to continually audit all regional and sub-regional peace and security arrangements for two things. One is fitness for purpose in view of human rights law. The second is their legitimacy.

The ICJ ruled in the *Asylum case*⁹³ that the party invoking *regional law* must show that the other party had actually consented to be bound by that norm and not merely acquiesced to it. By invoking the ancient Zimbabwean constitutional norm - *Chimurenga/ Inkululekho/ Resistance of oppression* against the SADC norm on the absolute prohibition of unconstitutional change of power, Zimbabwean citizens have demonstrated that they are not bound by SADC norms and practices that are indifferent to good governance. But it is the State that conducts international relations and not its citizens.

This raises the question whether Zimbabwean citizens could bypass their State representatives and recuse themselves from previously agreed international obligations. Perhaps they could, where their State representatives have usurped their trust and teamed up with others to establish counter-human rights protection initiatives contrary to the emergent UN human rights culture. Abuse of public trust might merit retraction from agreements established contrary to the expectations of that trust.

In *ex parte Pinochet Ugarte No.3*⁹⁴ Lord Hope stated that acts of State leaders that are contrary to the functions of their offices are not protected by International Law doctrines on the immunity of Head of State because by their nature they are neither required nor expected in the office bearer's role. It could be argued entering into counter-good governance agreements for insulating political leaders from removal from public office is not one of the reasons why the public invests its trust in those that it elects to positions of

⁹¹ 1945, 1 UNTS XVI

⁹² See preamble to the UN Charter (1945) Ibid.

⁹³ (Columbia v Peru) ICJ Reports 1950 p.266.

⁹⁴ [2000] 1 A.C. 147 Also available at UK Parliament website at:

<https://publications.parliament.uk/pa/ld199899/ldjudgmt/jd990324/pino4a.htm>

public office. Should citizens not be able under International Law to disregard such treaty arrangements because they never entrusted their leaders to do any such thing on their behalf? If a Leader transfers billions of national reserve funds to a foreign jurisdiction, they cannot later invoke immunity from prosecution because looting State funds is not the proper exercise of the trust invested in the office bearer by their citizens. Per Lord Hope:

It may be said that it is not one of the functions of a head of state to commit acts which are criminal according to the laws and constitution of his own state or which customary international law regards as criminal. But I consider that this approach to the question is unsound in principle. The principle of immunity *ratione materiae* protects all acts which the head of state has performed in the exercise of the functions of government. The purpose for which they were performed protects these acts from any further analysis. There are only two exceptions to this approach which customary international law has recognised. The first relates to criminal acts which the head of state did under the colour of his authority as head of state but which were in reality for his own pleasure or benefit. the head of state who kills his gardener in a fit of rage or who orders victims to be tortured so that he may observe them in agony seem to me plainly to fall into this category and, for this reason, to lie outside the scope of the immunity. The second relates to acts the prohibition of which has acquired the status under international law of *jus cogens*.⁹⁵

By Operation Restore Legacy (2017) Zimbabwean citizens may have cut themselves loose from SADC indifference to good governance. While international law requires good governance, SADC appears to be indifferent to it. Perhaps there are at least two completely different contemplations of the SADC. One of the citizenry, which contemplates the human rights requirements of internal self-determination, democratic rule, rule of law, and other tenets of good governance; and another that, prioritises leadership protection from recall from public office under the guise of peace and security initiatives.

Unfortunately, development of SADC constitutional norms appears to have neglected the establishment of norms for the promotion of the SADC contemplated by the citizenry. Rather, it has concentrated on promotion of an SADC for the protection of unpopular or illegitimate leadership from rejection by the citizens. This has created a David and Goliath situation between SADC populations on the one hand, and on the other, unpopular or illegitimate leadership.

The latter is closer to UN values of good governance and democratic rule than the former. But it is the former that has international responsibility for Zimbabwe's foreign relations with other States. However, that responsibility is held only on trust of Zimbabwe's citizens and for their collective benefit.

⁹⁵ Ibid.

Therefore, where State authorities franchise citizens' trust against citizens' interest to deny them good governance, those same authorities can no longer claim to be appropriately exercising the trust of their citizens, particularly where citizens object to such franchise. This is because the UN has reconceptualised State security moving away from previous "traditional state-centric conceptions of security that focused primarily on the safety of states from military aggression, to one that concentrates on the security of the individuals, their protection and empowerment (by) ... drawing attention to a multitude of threats that cut across different aspects of human life and thus highlighting the interface between security, development and human rights; and ... promoting a new integrated, coordinated and people-centred approach to advancing peace, security and development within and across nations.⁹⁶

Additionally it seems appropriate to recommend that, any SADC 'peace and security' related requests to the AU, UN, EU and other entities, to implement punitive measures against any named SADC State should always be treated with caution because unconstitutional takeover of power in the sub-region is often preceded by a record of successive stolen national assembly elections, denying affected populations of any other possibility of ending unpopular or illegitimate rule or both.

Even more importantly, Operation Restore Legacy (2017) recommends that any SADC interventions in any takeover of power scenario should be restricted. What turned out to be in the words of both Robert Mugabe himself, and the High Court of Zimbabwe, a very constitutional takeover of power from Mugabe in Zimbabwe had, immediately it had begun to unfold, been declared illegal by both President Edgar Lungu of Zambia and by the AU Chairperson, the President of Gabon.

President Lungu had gone further than others to threaten military action against Operation Restore Legacy (2017). This is most surprising not least because the majority of SADC States had fought against foreign rule of British, Portuguese and German, protesting human rights abuses of their

⁹⁶ See also Human Security in Theory and Practice: An Overview of Human Security Concept and the UN Trust Fund for Human Security, UN Human Security Unit. UN website at: http://www.un.org/humansecurity/sites/www.un.org/humansecurity/files/human_security_in_theory_and_practice_english.pdf See also Amartya Sen 'Why Human Security' International Symposium on Human Security, 28 July 2000 Tokyo. Also available at: <http://www.ucipfg.com/Repositorio/MCSH/MCSH-05/BLOQUE-ACADEMICO/Unidad-01/complementarias/3.pdf> ; See also Ben Chigara, 'The ILO, harbinger and chief protagonist for the recognition and promotion of the inherent dignity of Sub-Saharan Africa labour', in Ademola Abass (ed.) *Protecting Human Security in Africa*, Oxford University Press (2010) p. 81.

colonial masters. In some cases the same liberators have become worse abusers of individuals' human rights than their former colonial masters.

Further, the SADC norm on the absolute prohibition of unconstitutional takeover of power rules out Kelsen's second means of possible change of the basic norm or *grundnorm* – a revolution.⁹⁷ This defies logic particularly when the state of affairs has often deteriorated into abject political, social and economic malaise. Moreover, the SADC's own record of ensuring democratic elections is uninspiring. Even worse, the SADC has no credibility in resolving cases of stolen elections. Hence its leadership's instinctive clamours for the suppression of events like Operation Restore Legacy (2017). This casts the SADC as a primitive safeguard tool for authoritarian rule. But democratic entitlement has become under UN Human Rights Law the first building block of legitimacy and of good government. Consequently, force alone is no longer sufficient to govern people.

More importantly, Zimbabweans may have declared by that operation that they have entered an era in which only democracy and the rule of law⁹⁸ will be the recognized test for governmental validity. This is because, "... To be effective, law needs to secure the habitual, voluntary compliance of its subjects; it cannot rely entirely, or even primarily on, upon the commanding power of a sovereign to compel obedience. Consequently, governments no longer blinded by totalitarian miasma seek to validate themselves in such a way as to secure a high degree of voluntary public acquiescence in the governing process. Consent benefits the governing as much as the governed."⁹⁹ The UN Secretary General has defined the rule of law as:

...a principle of governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated and which are consistent with international human rights norms and standards. It requires, as well, measures to ensure adherence to the principles of supremacy of law, equality before the law, accountability to the law, fairness in the application of the law,

⁹⁷ Hans Kelsen "The Pure Theory of Law: Its Method and Fundamental Concepts, Part I" *Law Quarterly Review* (1934) p.475.

⁹⁸ For a succinct discussion of the elements of the principle and its requirements see especially Tom Bingham, *The Rule of Law*, Penguin (2010).

⁹⁹ Thomas M. Franck "The Emerging Right to Democratic Governance" 86 *The American Journal of International Law*, No. 1. p. 48.

separation of powers, participation in decision-making, legal certainty, avoidance of arbitrariness and procedural and legal transparency.¹⁰⁰

In spite of its best efforts to appear inclined to this principle, the SADC needs to do more to merit *pro-rule of law status*. Louw-Aaudran writes that the SADC's intervention in Zimbabwe in the mid-2000s that led to the Government of National Unity (GNU) from 2008-13, led by Mugabe, was severely criticised in many quarters. "Notably, crucial provisions of the Global Political Agreement that led to the GNU were not implemented. The AU also repeatedly rubber-stamped elections in Zimbabwe despite serious allegations of fraud,"¹⁰¹ certainly disenfranchising Zimbabweans and protecting its leadership's "Mentor" – Mr. Mugabe.

Botswana President Ian Khama is widely reported to have declared the last Zimbabwe election a sham while both the SADC and the AU approved it as a free and exercise of Zimbabweans will. In frustration President Khama is reported to have declared that, his country would "not participate in future SADC election observer missions after he noted what he says were irregularities in Zimbabwe's disputed 31 July elections."¹⁰² He argued that both the AU and the SADC had paid a blind eye to "irregularities in last year's [2013] Zimbabwe harmonised polls and accused the blocs of endorsing the elections even though they were not fair".¹⁰³

On 15 November, the Chairperson of the Commission of the AU, Moussa Faki Mahamat urged "... all stakeholders to address the situation in accordance with Zimbabwe's constitution and the relevant instruments of the African Union, including the African Charter on Democracy, Elections and Governance".¹⁰⁴ This obsession with constitutions that house blunt tools for subjugating populations under dictatorial rule is a worrying trait among African States and the SADC in particular. Unless the AU and SADC have previously ensured a free and fair election in a Member State party, they should not invoke democratic legitimacy to protect non-democratically installed regimes. That just delegitimizes them both as intellectual wobblers that are ignorant of the value to good governance of what Thomas Franck

¹⁰⁰ Report of the Secretary-General on The Rule of Law and Transitional Justice in Conflict and post-conflict societies (S/2004/616). See also 'UN Secretary General, 'What is the rule of law?' UN website at: <https://www.un.org/ruleoflaw/what-is-the-rule-of-law/>

¹⁰¹ ISS Today, "The African Union's chequered history with military coups" ISSAfrica Website at: <https://issafrica.org/iss-today/the-african-unions-chequered-history-with-military-coups>

¹⁰² News 24 "Botswana 'breaks ranks with SADC, AU'", News 24 Website at: <https://www.news24.com/Africa/News/Botswana-breaks-ranks-with-SADC-AU-20140127>

¹⁰³ Ibid.

¹⁰⁴ See AU Website at: <http://www.peaceau.org/uploads/statement-by-the-chairperson-of-auc-on-zimbabwe-ff.pdf>

described over a quarter century ago as the “prescient glimpse of the legitimating power of the community of nations”.¹⁰⁵

Rotating AU Chairperson, Guinea’s President Alpha Condé reacted in similar vein at the start of Zimbabwe’s Operation Restore Legacy (2017); stating that the AU “ ... will never accept a military *coup d’état*. We insist on the respect of the constitution and a return to constitutional rule”.¹⁰⁶ Through various treaty instruments, the AU has proscribed unconstitutional change of government, leading to the establishment of the Peace and Security Council¹⁰⁷ - the AU’s standing organ for the prevention, management and resolution of conflicts.

Nonetheless, constitutionalism that pays only lip service to democratic governance is inimical to peace building because as Operation Restore Legacy (2017) shows, democracy has become the *sine qua non* for legitimacy. In a nutshell, Operation Restore Legacy (2017) was born out of common revulsion among Zimbabweans against the Mugabe contrived family dynasty rule of Zimbabwe.

According to Franck the international community has vigorously asserted and established that, “only democracy validates government. ... The transformation of the democratic entitlement from moral prescription to international legal obligation has evolved gradually [and] ... it has accelerated. Most remarkable is the extent to which an international law-based entitlement is now urged by governments themselves”.¹⁰⁸ This recommends the view that until the SADC can ensure beyond reasonable doubt that national assembly elections always guarantee a free and fair expression of the will of the respective States’ populations about who should govern them; the SADC has a very weak, and even unsustainable case for insisting upon the implementation of its norm on the absolute prohibition of unconstitutional takeover of power.

The Right to internal self-determination: A fundamental of the UN nomenclature on peace, security and development

¹⁰⁵ “The Emerging Right to Democratic Governance” 86 *The American Journal of International Law*, No. 1. p. 46.

¹⁰⁶ ISS Today, “The African Union’s chequered history with military coups” ISSAfrica Website at: <https://issafrica.org/iss-today/the-african-unions-chequered-history-with-military-coups>

¹⁰⁷ See AU Website at: <https://au.int/en/organs/psc>

¹⁰⁸ “The Emerging Right to Democratic Governance” 86 *The American Journal of International Law*, No. 1. p. 47.

The right of citizens to *internally determine* freely who may govern them, by determining for example how they pursue their economic, social, and cultural development occupies "... a central position in international law as a primary principle in the creation and destruction of states. It features in Article 1 of the UN Charter as one of the purposes of the organization. It is positioned as the first right in the twin Human Rights Covenants: ICCPR and ICESCR. Many commentators argue for its peremptory or *jus cogens* status."¹⁰⁹

Self-determination of peoples certainly belongs to the elite norms of the UN. This is evidenced in that it is specifically inscribed into the preamble of the UN Charter as one of the purposes for which the organization has been established to achieve. Thus, the UN Trusteeship Council¹¹⁰ for overseeing the granting of political independence to non-self-governing territories was established as one of the five organs of the UN.

The right to self-determination is habitually referenced as an example of *jus cogens*. Lord Hope made it clear in *ex parte Pinochet Ugarte No. 3* that although the principle of immunity *ratione materiae* protects all acts which the head of state has performed in the exercise of the functions of government, it does not apply to acts prohibited by norms that have acquired the status of *jus cogens* under international law. "This compels all states to refrain from such conduct under any circumstances and imposes an obligation *erga omnes* to punish such conduct".¹¹¹

Consequently, any treaty calculated to place restrictions on *jus cogens* or, to deny its effect is *null and void* under international law.¹¹² SADC treaties that conflict the *jus cogens* guarantees of internal self-determination of peoples of may not be valid after all.

The UN General Assembly in Resolution 1514 (XV) of 14 December 1960¹¹³ confirmed the significance of the *self-determination of peoples* norm under

¹⁰⁹ Oxford Bibliographies, "Self-determination in International Law" at: <http://www.oxfordbibliographies.com/view/document/obo-9780199796953/obo-9780199796953-0033.xml>

¹¹⁰ See UN Charter, *ibid.* Chapter XII, Articles 75-91. This replaced the institutions of the mandate under the Covenant of the League of Nations. For further discussion see Sorensen, ed., *Manual of Public International Law*, 1968, Macmillan, p.508.

¹¹¹ *Supra* note 91. See also UK Parliament website at: <https://publications.parliament.uk/pa/ld199899/ldjudgmt/jd990115/pino01.htm>

¹¹² Cassese, *International Law in a Divided World*, 1994, p.136.

¹¹³ UN Monthly Chronicle, Vol. II No. 5 (June 1965) p. 55.

modern international law. The declaration's preamble¹¹⁴ sets out the following principles:

- The need to remove all impediments to freedom as a means of abating serious threats to world peace.
- The need to promote social progress and better standards of life and larger freedom;
- The need for the creation of conditions of stability and well-being and peaceful and friendly relations based on respect for the principles of equal rights and self-determination of all peoples; and
- The need for universal respect for, and observance of human rights and fundamental freedoms for all.

Paragraph 6 of the Declaration states that: "Any attempt aimed at the partial or total disruption of the national unity and the territorial integrity of a country is incompatible with the purposes and principles of the Charter of the United Nations".

The Declaration concludes with the clarion call upon all States to:

Observe faithfully and strictly the provisions of the Charter of the UN, the Universal Declaration of Human Rights and the present Declaration on the basis of equality, non-interference in the internal affairs of all States, and respect for the sovereign rights of all peoples and their territorial integrity.¹¹⁵

Thus, it is incontestable that the right to self-determination is critical to international law's imagination on how to ensure stability, peace and security. The Declaration makes reference to "sovereign rights of all peoples". These rights must include the right of a population to remove a government which in its eyes has lost legitimacy to continue to govern over it – internal self-determination, which is quite apart from external self-determination. The latter refers to the independence of a State to freely determine on matters of its external relations with other States without prior authorization of other States.

On all of the occasions that the SADC has partially intervened (Zimbabwe 2017 Operation Restore Legacy), or fully intervened, (Lesotho 1998, DRC 1998,

¹¹⁴ Often cited as a good example of soft law or binding resolutions. See for example Asamoah, O., *The Legal Significance Of The Declarations Of The General Assembly of The United Nations*, 1966, Martinus Nijhoff, The Hague; Higgins, R., *The Development of International Law Through The Political Organs Of The UN*, 1963, Clarendon Press, Oxford.

¹¹⁵ Ibid.

Madagascar 2010); its major effect has not been to prevent an escalation of violence and disorder in the target State but to put down mass expressions of governmental illegitimacy absent the possibility of dismissing the same government by the ballot box for the national assembly.

Normative Evolution of the Norm against Unconstitutional Takeover of power

The SADC Organ on Politics, Defence and Security was first launched in June 1996 as a formal institution for ensuring and maintaining security and the rule of law in the sub- region.¹¹⁶ The Protocol establishing the Organ on Politics, Defence and Security in the SADC Region (1997)¹¹⁷ (the Treaty¹¹⁸) was signed and opened for ratification in 1977. On 14 August 2001, SADC Heads of State and Government signed in Blantyre, Malawi, a new Protocol on Politics, Defence and Security Cooperation, which provides an institutional framework by which Member States can coordinate policies and activities in the areas of politics, defence, and security; thereby formalising the SADC Organ first launched in 1996. Subsequently, the Strategic Indicative Plan for the Organ (SIPO) was signed in 2004, a view to operationalising the objectives set forth in the with Protocol done at Blantyre, Malawi on 14 August 2001

SIPO appears to be a perfectly valid international treaty in that it satisfies the general and specific requirements for treaties outlined in the 1969 Vienna Convention on the Law of Treaties (1969)¹¹⁹ (VCLT). International tribunals and national courts habitually rely on the material provisions of the VCLT to ascertain traditional rules on the law of treaties.¹²⁰ Nonetheless, the legality of treaties in international law must be tested against the relevant and applicable provisions of the United Nations (UN) Charter.¹²¹ Moreover, in several of its provisions, the Organ itself makes it explicitly clear that it remains subservient to the UN Charter. Article 52(1) of the UN Charter authorises regional arrangements for the maintenance of international peace and security

¹¹⁶ See SADC website at: <http://www.sadc.int/sadc-secretariat/directorates/office-executive-secretary/organ-politics-defense-and-security/>

¹¹⁷ African Journal of International and Comparative Law, Vol.11 No.2 (1999), p.197.

¹¹⁸ See Article 2(1)(a) of The Vienna Convention On The Law Of Treaties - 23 May 1969, UN Doc. A/Conf. 39/27; UKTS 58 (1980) Cmnd. 7964. In force from 20 January 1980.

¹¹⁹ 1155 U.N.T.S. 331, 8 I.L.M. 679 Articles 1, 6, 7, 9, 24 etc.

¹²⁰ See Reichert-Facilides, D., "Down The Danube: The Vienna Convention on the Law of Treaties and the Case Concerning the Gabcikovo-Nagymaros Project", International and Comparative Law Quarterly 47 No4 (1998), p.837; Rosenne, S., Developments In the Law of Treaties: 1945 - 1986, 1989, Cambridge University Press, Cambridge; Chinkin, C., Third Parties In International Law, 1993, Clarendon Press, Oxford.

¹²¹ UN Charter, 26 June 1945, San Francisco, UKTS 67 (1946), Cmd. 7015; 1 UNTS xvi.

but denies validity to treaty arrangements that undermine the 'Purposes and Principles of the UN'.

But for the intervention of the SADC the governments of target States would have collapsed. Whatever the SADC executive's initial intentions, practice on the norm on the absolute prohibition of unconstitutional change of government shows that this norm has become a double-edged cutting sword that potentially could be applied to limit intra-State conflicts on the one hand and on the other, it can be cruelly used to deny oppressed populations the only possible means left for them to get rid of an oppressive government.

The implementation of the SADC Organ on Politics Defence and Security on 22 September 1998 against Lesotho; and SADC attempts to invoke it against Zimbabwe's perfectly constitutional Operation Restore Legacy (2017) shows that absent another robust countervailing SADC Organ for protecting citizens from national assembly electoral fraud of incumbent governments; SIPO (2001) which operationalizes the Blantyre Protocol on Politics, Defence and Security Cooperation (2001) can frustrate democracy by perpetuating oppressive illegitimate governments. For Zimbabweans that would be unacceptable because it would effectively undo expression of their dignity summed up in their ancient constitutional convention of *Chimurenga* (Shona) or *Inkululekho* (Ndebele).

Chimurenga/ Inkululekho is Zimbabwe's foremost practised constitutional convention. It is evident in both their pre-colonial and post-colonial histories. It is what Operation Restore Legacy (2017) to stop the Mugabes from instituting a dynasty governance of Zimbabwe, and metaphorically intended "sexual transmission of leadership" was all about. *Chimurenga/ Inkululekho* opposes all the adverse effects of the SADC norm on the absolute prohibition of unconstitutional change of government. Zimbabweans themselves have executed Operation Restore Legacy (2017) in a peaceful medium that the intended operationalization of the SADC norm would have shattered. Moreover, Zimbabwean courts have ruled that Operation Restore Legacy (2017) did not breach any of the strictures of the Constitution of Zimbabwe. This raises the question whether the SADC norm on the absolute prohibition of unconstitutional change of government is at all needed by the peoples of the SADC.

Operation Restore Legacy (2017) and the emerging international constitutional order¹²²

Advocates of the demise of the State and the emergence of international institutions that have an equal if not stronger say in international ordering processes often exaggerate their claims by making replete assumptions from which they then cascade arguments for the proposition that state practice points to emergent international and regional value systems as processes for the re-organization and re-allocation of competencies among the pre-1945 traditional subjects of international law and the post-1945 emergent subjects of the international legal system.¹²³

They argue, sometimes profusely and often hyperbolically that the Westphalia State based model of international order has declined so much that it has become unfeasible to describe international law through the action of States alone.¹²⁴ They tend to invoke norms *jus cogens* – which refer to no more than a handful of norms in Public International Law,¹²⁵ and to human rights processes that are firmly dependent on previous exhaustion of domestic/State remedies, as a basis for their claims of phenomenal transformation of the dynamic of international order. In part, Operation Restore Legacy (2017) appears to be a robust challenge of some of these exaggerations. It points to the resilience of ancient national conventions that contradict sub-regional and even regional constitutional frameworks that lack *logical diligence* to capture also UN aspirations for democratic rule and UN normative requirements on internal self-determination of peoples.¹²⁶ By logical diligence I mean a norm's inscription in its content and operational strategies, relevant other norms to maintain consistency in legal obligation and law's integrity generally. By failing to accommodate cardinal principles of the UN and requirements of *jus cogens* in its normative framework, the SDAC norm on the absolute prohibition against unconstitutional takeover of power shows a very low *logical diligence* as no later norm of a lesser quality

¹²² See Report of the Study Group of the International Law Commission on Fragmentation of International Law: Difficulties arising from the diversification and expansion of International Law (2006 – Finalized by Martti Koskenniemi). Also available at UN website:

http://legal.un.org/ilc/documentation/english/a_cn4_l682.pdf

¹²³ See also Erika de Wet, 'The emergence of International and Regional Value Systems as a Manifestation of the Emerging International Constitutional Order' 19 *Leiden Journal of International Law* p.611.

¹²⁴ Aoife O'Donoghue, 'International constitutionalism and the State' 11 *International Journal of Constitutional Law* p.1022.

¹²⁵ See also Brownlie's *Principles of Public International Law* (James Crawford ed. 8th edition 2012 p.243-4

¹²⁶ See also Kalana Senaratne, 'Internal Self-Determination in International Law: A Critical Third-World Perspective' 3 *Asian Journal of International Law*, p.305.

could challenge the UN *jus cogens* on the right to self-determination. “Internal self-determination is the right of the people of a state to govern themselves without outside interference.”¹²⁷ Consequently, “other states should not, through appeals or pressure, seek to prevent a people from freely selecting its own political, economic, and social system”.¹²⁸

By any measure, Zimbabwe’s foremost and enduring convention in social ordering is the core-value of *Chimurenga/ Inkululekho* or *Resistance to oppression* that its people are historically linked to and well known for.¹²⁹ However, the core-constitutional value-set of the regional AU and sub-regional SADC includes the requirement to submit even to governments enthroned amid justifiable claims of electoral fraud. The AU’s *Peace and Security Council* (PSC)¹³⁰ and the SADC’s *Strategic Indicative Plan for the Organ on Defence, Politics and Security*¹³¹ which implements the *SADC Protocol on Politics, Defence and Security Cooperation* ensure this. The AU website describes the PSC as “the standing organ of the AU for the prevention, management and resolution of conflicts (and as) ... a key element of the African Peace and Security Architecture (APSA), which is the umbrella term for the main AU mechanisms for promoting peace, security and stability in Africa”.

The attempt by the Mugabes to institutionalise a dynasty rule of Zimbabwe in 2017 resulted in a clash between the ancient national convention – *Chimurenga/ Inkululekho/ Resistance to oppression* and the SADC and AU norm on the absolute prohibition against unconstitutional takeover of power. Professor Philip Rosessler¹³² protests that by not intervening to halt Operation Restore Legacy (2017) the AU got it wrong.

The African Union, in alignment with SADC, got it wrong and missed a valuable opportunity to strengthen and expand its anti-coup regime to include both de jure and de facto coups. In narrowly focusing on the

¹²⁷ The Princeton Encyclopedia of Self-Determination, Princeton website at: <https://pesd.princeton.edu/?q=node/254>

¹²⁸ Salvatore Senese, ‘External and Internal Self-Determination’ 16 *Social Justice* p. 19

¹²⁹ See also David Martin, *The Struggle for Zimbabwe*, ZPH (1982); David Coltart, *The Struggle Continues*, Jacana Media (2016).

¹³⁰ The PSC is the standing organ of the AU for the prevention, management and resolution of conflicts. The AU website describes it as “a key element of the African Peace and Security Architecture (APSA), which is the umbrella term for the main AU mechanisms for promoting peace, security and stability in Africa”. See AU website at: <https://au.int/en/organs/psc>

¹³¹ See SADC website at:

http://www.sadc.int/files/6313/6880/3040/03514_SADC_SIPO_English.pdf

¹³² Opinion/ African Union, ‘How the African Union got it wrong on Zimbabwe’ Aljazeera news website at: <http://www.aljazeera.com/indepth/opinion/african-union-wrong-zimbabwe-171204125847859.html>

removal of the sitting head of state as the defining feature of a coup rather than the unconstitutional use of force to coerce elected leaders to relinquish power, it sets a dangerous precedent that threatens to undermine the strong gains the region has made to move beyond politics by the gun.¹³³

In his view, ancient national conventions that have support of UN cardinal International Bill of Human Rights norms and norms *jus cogens* count for nothing. While he correctly observes that the AU has for years turned "... a blind eye to President Mugabe's subversion of democracy," he maintains that:

A sounder approach would have been for the AU's Peace and Security Council to condemn the de facto coup - as it would a de jure coup - and threaten to suspend Zimbabwe from the African Union until the military released Mugabe from house arrest, handed over power to a transitional post-Mugabe government, and returned to the barracks. Such a policy response would have delivered a similar outcome as what transpired - ridding Zimbabwe and the AU of the Mugabe problem - while strengthening, rather than weakening, the region's anti-coup norm. Instead, the AU endorsed a factional coup by the Zimbabwe military and its former vice president, Mnangagwa, that now sees the coup perpetrators in key positions in the post-Mugabe government in direct contravention of the African Charter on Democracy, Elections and Governance.¹³⁴

Clearly, Operation Restore Legacy (2017) had to climb behind the steep protections of both the AU and SADC *regime protectionist values* in order to ensure a stop to the contrived Mugabe dynasty rule of Zimbabwe. This manifests a tension between the *national core-value* of *Chimurenga/ Inkululekho/ Resistance to oppression* on the one hand, and on the other, the *sub-regional and the regional protectionist value sets*, that champion the sanctity of de facto governments, whatever their disposition even over the matter of one of the UN's most cherished goal of democratic governance under Article 25 ICCPR (1966) even though both the SADC and the AU profess to but miserably fail to insist on democratic governance among their member States parties.

The success of Operation Restore Legacy (2017) is underlined by the following:

- 1) A stop to the Mugabe contrived dynasty rule of Zimbabwe.
- 2) A successful circumvention of both SADC and AU de facto government protectionist mechanisms.

¹³³ Ibid.

¹³⁴ Ibid.

- 3) Achievement of the popular will of Zimbabweans adverse AU and SADC mechanisms.
- 4) Manifest national peace and security greater than that immediately preceding the operation.

This tentatively recommends the view that national conventions potentially can penetrate and bust sub-regional and regional value systems that have the potential to subvert cardinal principles and aspirations of International Law, including the right to democratic governance promoted by International Human Rights Law for the purpose of promoting and ensuring international peace and security.

Conclusion

Zimbabwe's Operation Restore Legacy (2017) has exposed fundamental flaws in the constitutional values of the SADC. These pertain to the SADC norm on the absolute prohibition against unconstitutional takeover of power. Particularly where sub-regional or regional institutions' normative structures have not developed diligently enough to inscribe in their constitutive formulations and operational mechanisms the cardinal requirements of UN law, the UN Security Council has a close monitoring responsibility to ensure that the peace and security competencies delegated to regional institutions and agencies are not applied inconsistently to *local general constitutional principles* enshrined in *enduring ancient national conventions* of Member States parties that have full backing of UN human rights standards. *Chimurenga/ Inkululekho/ Resistance of oppression* is an example of such principles. This has been justified in the foregoing discussion.

Firstly, the recognition under Public International Law of general principles of law recognised by members of the relevant community is a mainstay of the sources of International Law under Article 38(1)(c) of the Statute of the ICJ (1945). Secondly, any failure of the UN Security Council to ensure this will likely result in grave breaches of international peace and security because citizens will not stand by while unpopular or illegitimate leaders seek to remain in authority by invoking rules of *leaders' survival organizations such as the SADC*. Citizens will, as Operation Restore Legacy (2017) has shown reject the application of any such rules to their affairs by actively challenging them and by insisting on application of their local ancient and enduring conventional norms such as *Chimurenga/ Inkululekho/ Resistance of oppression*.

The ICJ clarified in the *Asylum case* that where a party seeks to rely on a regional norm *qua customary international law*, it must show that the other party had actually consented to be bound by that norm and not merely

acquiesced to it. By invoking the ancient Zimbabwean constitutional norm - *Chimurenga/ Inkululekho/ Resistance of oppression* against the SADC norm on the absolute prohibition of unconstitutional change of power, Zimbabweans have demonstrated that they want nothing to do with SADC norms and practices that are indifferent to UN requirements on good governance and International Law's requirements on democratic governance. Zimbabweans may have very well struck the first body blow to the SADC's decrepit value system.

There are several lessons for the UN, the AU and the SADC to draw from Operation Restore Legacy (2017). For the UN, the hyperbole about the decline of the significance of the State in the normative arrangements for peace and security often rehearsed in the literature on constitutionalism is questionable. Ancient national conventions of constitutional significance can still, as Operation Restore Legacy (2017) has shown, prevail over sub-regional and regional institutions unless the latter have been *diligently established* and their implementation mechanisms synchronised consistently with the aspirations of both the UN and local populations' constitutional values.

Membership of the SADC does not necessarily dispense with ancient fundamental conventions of States parties. On the contrary, the SADC would enhance its legitimacy by developing operational standards and mechanisms for the implementation of Article 5 goals of the SADC Treaty by drawing extensively on the commonest ancient and enduring conventions of member States parties. The conflict between the SADC norm on the absolute prohibition of unconstitutional takeover of power and Zimbabwe's ancient and enduring constitutional convention *Chimurenga/ Inkululekho/ Resistance of oppression* was resolved in Operation Restore Freedom (2017) in favour of the latter, thereby casting enormous doubt on the legitimacy of the SADC's value system.

If the SADC prioritised the promotion and ensuring of good governance in the sub-region, that could wipe out all the costs associated with implementation of the norm on the absolute prohibition of unconstitutional takeover of power in defence of unpopular or illegitimate leadership. Additionally, if it chose to promote good governance, that would serve to enhance economic performance of Member States parties by building confidence of foreign investors for example. Similar benefits could accrue to the AU if it prioritised good governance over the protection of unpopular or illegitimate leaders through operationalization of some of its Peace and Security Council initiatives.

International support and acquiescence with Operation Restore Legacy (2017) appears to have stemmed from a recognition of the SADC's democratic

deficit. Absent a practice of genuine democratic governance among SADC Member States parties, third States will generally find it difficult to condemn events like Operation Restore Legacy (2017). Therefore, the SADC needs urgently to promote and ensure democratic governance among Member States parties by establishing a parallel constitutional normative structure of equal weight to the one on the absolute prohibition of unconstitutional takeover of power in order to ensure the absolute sanctity of the national assembly ballot. As a precondition to the continued operation and enforcement of the norm on the absolute prohibition of unconstitutional change of government, the new norm must have also a similar if not stronger monitoring and enforcement mechanism than the former.

This is because implementation of the SADC norm on the absolute prohibition of unconstitutional takeover of power presupposes that citizens of the target State have a realistic possibility to remove the unpopular or illegitimate leadership via national assembly ballots. However, conducting free and fair democratic elections is still a big challenge for most African States, including those of the SADC. Zimbabwe itself has not even ratified the regional African Charter on Democracy, Elections and Governance adopted by the AU on 30 January 2007. To be certain, Zimbabwe has not even signed the thing.

Therefore, without the guarantee that SADC populations have realistic opportunities periodically to choose who governs over them as required under Article 25 of the ICCPR (1966), the norm on the absolute prohibition of unconstitutional takeover of power is nonsense on stilts. Insisting upon this norm in the absence of such a guarantee makes the SADC a surrogate for all unpopular or illegitimate regimes in the sub-region. It can be applied to protect unpopular or illegitimate leaders from “other means” of removal from office while the national assembly ballot remains an unlikely avenue for citizens to replace such leadership.

The SADC’s reserved and cautious approach to monitoring by international human rights treaty bodies is further reason why the norm on the absolute prohibition of unconstitutional takeover of power needs to be counterbalanced by another on the absolute sanctity of national assembly ballots. It is unconscionable that a sub-regional organization comprised of States with such a terrible attitude to ensuring protection of individuals’ human rights should guarantee political leaders protection from ‘other’ means of removal from power when in many cases national assembly ballots offer no realistic possibilities whatsoever to change leadership.

Operation Restore Legacy (2017) could be characterised also as a warning to SADC, AU and the new Zimbabwe administration of what to expect from this unique people comprised of several tribes that are bound by the same common trait which truly makes them one. In fact throughout Operation Restore Legacy (2017) Zimbabweans forgot any other inclination of personal identity and immersed themselves in *Chimurenga/ Inkululekho/ Resistance to oppression* – the struggle that had to be accomplished. Against SADC and AU manoeuvrings, Zimbabweans prevailed, and will prevail again, and again if so required. *Chimurenga/ Inkululekho* is the only way they know how to proceed against oppression.

SADC values on the protection of *de facto* regimes must change to end potential conflict with enduring and *not for change ancient national conventions* that seek to promote and uphold cardinal principles of the UN for ensuring international peace and security by advocating and advancing good governance and promoting International Human Rights Law.