



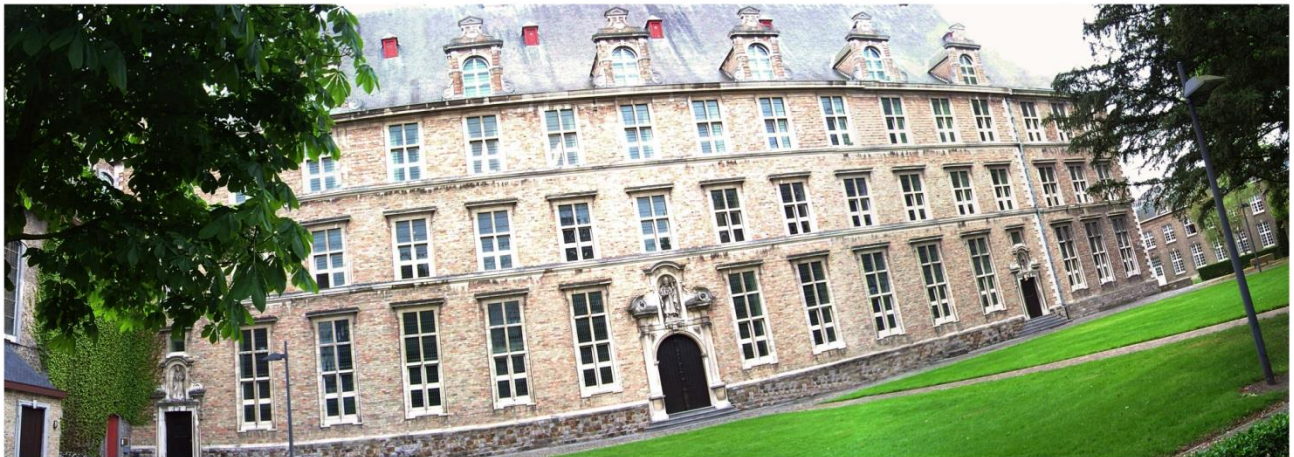
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Addressing Human Rights in the Court of Justice of the Andean
Community and Tribunal of the Southern African Development
Community (SADC)



Authors:

Giovanni Molano Cruz
Stephen Kingah



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The authors

Giovanni Molano Cruz is a Visiting Researcher at UNU-CRIS.
E-mail: [gmolanocruz \(@\) cris.unu.edu](mailto:gmolanocruz@cris.unu.edu)

Stephen Kingah is a Research Fellow at UNU-CRIS.
E-mail: [skingah \(@\) cris.unu.edu](mailto:skingah@cris.unu.edu)

United Nations University
Institute on Comparative Regional Integration Studies
Potterierei 72, 8000 Brugge, BE-Belgium
Tel.: +32 50 47 11 00 / Fax.: +32 50 47 13 09

www.cris.unu.edu

Abstract

The goal of this article is to compare how the regional tribunals of the Andean Community (CAN) and Southern African Development Community (SADC) have dealt with human rights issues. While focus is placed on the rules applied by the tribunals, underlying factors that determine trends including political economic aspects are also examined. One of the important aspects explored in presenting the work of these two tribunals of the Southern Countries is to explore options for South-South judicial cooperation especially through adjudicative cross-fertilization, notwithstanding specificities that characterize both regional entities. In doing so, focus is placed on four elements: the scope of human rights covered by each of the regional tribunals; the locus standi of individuals before the tribunals; the added value of the regional tribunals as such; and the restrictive role of politics in the functioning of the tribunals.

Introduction

Since 1990 there has been an increase in the number of organizations geared towards regional integration. The “new” feature of what has come to be known as “new” regionalism is the marked rise in the number of these arrangements that cover a wide variety of thematic issues that go well beyond the traditional concept of economic integration. This marker has been one of the main traits of contemporary regionalism. Contemporary regionalism has, moreover, been characterised by the receptiveness of regional organizations to human rights precepts. The pursuit of human rights is considered as an objective in the treaties of many regional bodies. It appears that drafters of such provisions craft these clauses as a matter of ritual. However, in those regional entities with active civil societies characterized by constitutional consciousness, regional policies are being forged to activate and fully use these treaty provisions on human rights. In this article, the focus will be on how the regional courts in the South, in particular, the tribunals of the Andean Community (CAN) and the Southern African Development Community (SADC), have adjudicated on matters that pertain to human rights. It is important to evaluate how these entities which were initially created with the goal of economic integration, have, over the years broadened their mandate to also entertain cases that hinge on human rights. This is important for a number of reasons.

First it gives one a fairly predictable feel as to how willing regional courts may be to expand their mandates. Secondly it indicates how politics still remains vital in judicial processes that is, even if the regional judicial authorities are audacious and prepared to widen their mandates this has to be understood within the clear limits of what is politically acceptable. However, in order to gain a broader perspective it is important to examine the role of courts in regional integration in the South from the angle of human rights because regional integration cannot be an end in itself. It has to serve a purpose and how better to examine whether these (human) purposes have been served than through the prism of human rights?

The approach used in this article draws from international human rights law, international relations and international political economy. From the perspective of international human rights law, it draws on the global and regional human rights norms that have been adopted by states to explain their patterns of behaviour. Allusion is also made to dicta of international courts. However, given the limitations of the law in explaining the actions of states, use is also made of international relations in clarifying why recourse is made to courts on human rights claims at the regional level. These developments cannot be disjointed from the international political economic context wherein developing countries turn to specific kinds of rights to enhance their interests and claims in the global economic context dominated by neo-liberal inclinations.

Two regions are selected from the South. This serves two principal interests. First, we seek to identify the patterns, trends and dynamics shared by the Andean Community and SADC. What lessons can be drawn from the human rights experiences of these entities and what do the experiences of the courts tell us about the future of judicial activism at the regional level? This is important because it also gives one the opportunity to identify potential areas where there could be cross-fertilization of approaches. In other words how can South-South cooperation in judicial matters be increased in the area of human rights especially at the regional level? Secondly, and of greater importance how do the cultures of compliance compare in both regions?

The article proceeds as follows. The second part considers some of the major political developments in both regions. The basis for human rights in the regions is discussed in part three. Mindful that regional courts cannot be dissociated from the global tapestry of adjudicative bodies, we consider the architecture of regional courts within the context of proliferation of international courts and tribunals in part four. Part five outlines the rules governing the respective tribunals. The major human rights cases heard before the regional tribunals of CAN and SADC are presented in part six. Trends are drawn from these cases and synthesized in part seven. This is done in view of better understanding elements such as the scope of human rights covered by each of the regional tribunals; the locus standi of individuals before the tribunals; the added value of the regional tribunals as such; and restrictive role of politics for the tribunals.

Political developments in both regions

CAN is a regional economic integration organization that was created in 1969 following the endorsement of the Cartagena Agreement. Initially, it was composed of Bolivia, Chile, Colombia, Ecuador and Peru. Venezuela delayed joining the agreement until 1973. In 1976, the Chilean military dictatorship announced its withdrawal from the Cartagena Agreement. Thirty years later Venezuela left the organization to join the *Mercado Comun del Sur* (MERCOSUR) in 2012. On the other flank of the Atlantic, SADC was created in 1992 to replace the Southern African Development Coordination Conference that had been created in 1981 as a regional response by Frontline States to resist the adverse policies of the South African Apartheid governments. The goal of the organization today is to create a common market. In 2010 SADC became a free trade area. Plans of attaining a customs union by 2010 proved to be overly ambitious. SADC has fifteen member states: Angola, Botswana, Democratic Republic of Congo, Lesotho, Madagascar, Malawi, Mauritius, Mozambique, Namibia, Swaziland, Seychelles, South Africa, Tanzania, Zambia and Zimbabwe.¹

Both regions share important traits when one examines the question of overlaps in membership, leadership divides and ties with the main regional power. Membership overlaps are a common issue in both regions. In South America there are many regional organizations that are closely linked to political relations and alliances between given leaders. Besides the CAN, in South America there is the Common Market of the South (MERCOSUR), *Unión de Naciones de América del Sur* (UNASUR), the Bolivarian Alternative for the Americas (ALBA) and recently the Pacific Alliance. In Southern Africa there are also many instances of overlaps as some SADC states belong to the East African Community (EAC), the Common Market for Eastern and Southern Africa (COMESA), the Economic Community of Central African States (ECCAS) and the Indian Ocean Commission (IOC). The motives and interests for maintaining overlapping institutions vary in both regions. In those instances where overlaps have been regarded as too overwhelming, as in the case of African regional economic communities, there are now efforts led at the continental level to better rationalize the regional entities into building blocks that would eventually form a bigger economic community due in 2028.

Leadership divides are also common in both regions. In the past there have been some differences between the government of ex-president Alvaro Uribe of Colombia and the governments in Venezuela and Ecuador. But since president Juan Manuel Santos took power this has started to change. While the leadership divide in the region appears to be more personal than ideological, political ideologies have played an important role in shaping how

leaders perceive the purpose for regional integration. One of the reasons offered by Venezuela for leaving the CAN was that President Chavez believed the approach of Colombia and Peru of signing FTAs with the USA rendered the project of CAN more tenuous and doomed to fail. In Southern Africa, there have been leadership divides as well. But these have mainly revolved around events in Zimbabwe and how the region ought to respond to the humanitarian crises to which that country has been subject for many years. While leaders such as former South African president Mbeki adopted a more conciliatory approach, others including president Khama of Botswana have been very outspoken against Mugabe and appear frustrated with the weakness of SADC in addressing the human rights abuses that have been taking place in that country.

Each region has a specific approach to dealing with the supposed regional powers. These are countries that have express or implied ambitions to be leaders in the relevant regions. In South America efforts to reclaim leadership positions occur at different levels. In all of these efforts, Brazil stands out even if Venezuela, Colombia and Argentina are also powers in given areas. Within CAN, Colombia has clearly been a leading nation and the events in Colombia tend to have direct effects on the other three neighbours of the CAN. This is the same scenario in Southern Africa where South Africa is a leading nation both within Southern Africa and in Africa as a whole.

In both regions, external influences both from the US, the European Union (EU) and increasingly from China cannot be dismissed. It is interesting to note that the perceived leaders in both regional spaces, Colombia and South Africa, are close allies of the US even if the later has also been keen to allow greater Chinese inroads into Africa.

Basis for human rights at the regional level

In international relations theory, there are various approaches to human rights depending on the different interest points. Realists broadly consider matters of human rights as issues of soft or low politics given their own keenness and interest with high politics. Unless depletion of human rights cardinally threatens the state attention to these ought to be measured. For Machiavelli, statecraft is not about philanthropy. In Morgenthau's view, state survival trumps considerations of justice and rights. But liberals take their cue from Kant on the good nature of humans and the need for cooperation and treating others fairly. States can and should engage others to deal with common problems that impinge on human rights. Constructivism promotes the use of ideas including norms and principles as engines for change. The key here is about the processes and outcomes of transmission of ideas, in this case, the idea that human rights are sacrosanct. Arguments from international society hold that human rights make sense given that richer nations have benefitted most from the current system of rights. The core precept here is responsibility.

What do political philosophers tell us about human rights? Egalitarians find it hard to accept gaping inequalities between people and states. They rest their claims on ethics, benefaction and morality. They draw inspiration from David Hume, especially his theory of moral sentiment. This stands in contrast with the brutish world of Hobbes. For a utilitarian, such as Mill, an action is right if it leads to the greatest possible balance of beneficial effects or at least possible balance of (negative) consequences. Social justice arguments led by John Rawls are anchored to the notion of redistribution. Brian Barry, in the same vein, argues like international society theorists that those who have benefitted the most should pay more

and assume greater responsibility and so ensure the social and economic rights of the less privileged. For cosmopolitans, like Kwame Anthony Appiah, humans have shared values and a shared future including human rights. No one person or nation should be deprived of life's needs. Yet this ideal is endangered when libertarians enter the equation. For Nozick, what matters are individual rights which, in a situation of conflict, trump social justice. Individuals, like countries, should not be compelled and coerced to be good for the welfare of an abstract community. According to Bernard Gert, persons, like countries, have no obligation to be good, or moreover, to adhere to some distant concepts of social and economic rights.

From the point of view of legal philosophers like Finnis, human rights are significant to our well-being. This harks back to notions of natural law, traceable to Aristotle and articulated by Aquinas. These rights have evolved since the Second World War with the first, second and now third generation rights. However, over the years there have been strong arguments against human rights as deduced from natural rights, as contained in the French Declaration on the Rights of Man and of the Citizen (1789). Edmund Burke was concerned that such rights were too abstract and devoid of a political framework within which they would be applicable. For the utilitarian Jeremy Bentham, the universality of rights was an illusion. Pushed to its extremes, he believed individual rights were detrimental for the broader good of the society. This view was shared by Marx, as he cast aspersions on the works of Locke. For Marx, real freedom does not come from sequestered isolationism, but from interacting with others. Moving beyond the theoretical considerations, nations have sought to create institutions that safeguard the rights of people. In fact, human beings are at the core of all juridical systems. In the context of economic regionalism, courts and tribunals have been created to ensure that regional norms are duly interpreted. However, specific instruments for the protection of human rights have been produced simultaneously with economic rules that promote regional trade. Regional courts and tribunals contribute both to the creation of norms concerning human rights and to their protection. To understand how this process has evolved in the contexts of CAN and SADC it is useful to contextualize the debate on the multiplicity of courts within the international legal system.

Regionalism in the process of global proliferation of international courts and tribunals

Today regionalism is not only marked by the increase in themes (from security, cultural diversity, and environment to human rights) and new forms of actors in the field of regional integration (corporations, social organizations and individuals), it is also characterized by a marked hike in regional institutions such as regional courts and tribunals. From a neo-functional perspective, some scholars have argued that community law would spill-over into new legal domains as litigants realized that regional courts' precedents could apply to a broad range of matters (Burley and Mattli, 1993). At the global level, a normative structure for international trade also encourages the construction of new rules, which leads to new cases, which create additional opportunities for litigation and expansion of norms (Stone Sweet, 1999). The proliferation of regional courts and tribunals, including the creation of those in South America and Africa, cannot be understood in a vacuum. These proliferations have been taking place within the contexts of noticeable proliferation of international courts and tribunals both at the regional and global levels. But the proliferation of courts and tribunals in itself is a symptom of a deeper evolution that has shaped a fragmentation of the

international legal order that is now characterised by a myriad of regimes in specific legal/thematic areas as well as in specific regions.

In terms of courts and tribunals, a significant development has been the increased activity levels of dispute settlement instances with a global remit. These include the International Court of Justice (ICJ), which has general jurisdiction; the World Trade Organization Dispute Settlement Body, that handles commerce related litigation; the International Tribunal for the Law of the Sea, that is habilitated with general jurisdiction on matters pertaining to the law of the sea; and the International Criminal Court (ICC), which is the forum for proceedings relating to serious crimes. Below these global courts and tribunals (albeit in the absence of any prescribed constitutional hierarchy), are an assortment of regional courts and tribunals that have jurisdiction to apply regional norms that may relate to trade and human rights questions.

Creating more courts and tribunals may appear anodyne, however, besides issues of costs, a more critical concern regarding problems of germinating incoherence to the international legal system have been raised by the proliferation of specialized or regional courts and tribunals (Spelliscy, 2001: 152). As Thomas Franck argues, the problem with incoherence in the international legal system is that it dampens the legitimacy of the international legal order (Franck, 1988). What is more, despite the fact that the effectiveness of the international legal system may be hard to measure (Shany, 2010), it has nonetheless been contended that an incoherent legal system may in turn weaken its effectiveness and validity (Kelsen, 1992: 62).

The more practical dangers raised by proliferation of courts and tribunals is described aptly by Joost Pauwelyn. He notes that such problems are raised when two international tribunals or courts arrive at different conclusions to decisions based on the same issue or similar facts. For him, such a development may lead to a dent in the predictability of international law (Pauwelyn, 2003: 114-115). The fallout in terms of legal certainty cannot be measured. On the other hand, these concerns have thus far proved rather academic and some scholars see little cause for concern given that international courts can and do exchange experiences, particularly given that the ICJ can coordinate the operations of regional courts (Abi-Saab, 1999: 926-928 and especially Dupuy, 1999: 807). Charney is even more upbeat noting that the proliferation of courts is actually a welcome development (Charney, 1998: 347). Such proliferation becomes even more appealing if one regards it as a catalyst for competition amongst the courts and tribunals, which in turn will allow for decent engagement and a "race to the top" in international adjudication.

The proliferation of courts mirrors a deeper issue in international law as a whole. This is the issue of fragmentation or perceived sundering of international law due to the multiplicity of thematic areas into which international law is expanding. In one sense, this is a process that cannot be avoided, mindful of the ever-expanding challenges that the world faces and also given that cooperation appears to be the only viable solution to addressing these problems. It is in this regard that matters related to the seas or international waters, trade, the environment, migration, health, human trafficking and terrorism amongst others cry out for collective approaches and common solutions. With regard to how these matters should be addressed, there is a global consensus that is frequently embodied in international norms and agreements. International law now encompasses a wide array of areas that go well beyond the traditional themes of state responsibility, state succession, immunity and territoriality amongst others to encapsulate a broad range of thematic issues representing a

global or regional desire to solve common challenges (Brownlie, 1987). Given this reality, the international legal order can be subject to a variety of both horizontal and vertical antinomies (Salmon, 1965: 285). Such antinomies are largely explained by the fact that the various areas or fields of law including trade, energy and security are basically very interdependent (Hafner, 2002).

In the view of some scholars, fragmentation is a challenge (Tammelo, 1965: 347). The main issue often alluded to is the danger of conflict of norms. The central UN entity that drafts international treaties, or the International Law Commission, has asserted that such conflicts may arise between conflicting general norms; conflicting general and special norms; and finally conflicting special norms relating to specific fields or areas (Koskenniemi, 2003). Much like in the debate on proliferation of courts and tribunals, there is a general view that the discussion on fragmentation also tends to be rather academic. Some jurists take for granted that conflicts within the international legal system are simply ineluctable (Rousseau, 1932: 191-192; Jenks, 1954: 451; Fischer-Lescano and Teubner, 2004: 1004). Others are disinclined to regard the issue as a problem (Pauwelyn, 2004: 904), especially if aspects such as trade, human rights, security and energy, amongst others, are regarded as part of a whole rather than as compartmentalised problems (Delmas-Marty, 2003: 27). Bearing in mind all these positions, it is important and helpful to note that international law itself contains specific conflict of norms resolution principles that can be used as handy tools to avert conflicts. These are contained in the following Latin phrases: *lex speciali derogat lege generali* (special norms take precedence over general ones), *lex posterior derogat lege priori* (rules that are issued later in time take precedence), and *lex posterior generalis non derogat lege prior speciali* (special rules take precedence even over later general norms). This notwithstanding, a customary rule of *ius cogens* always takes precedence over a treaty even if the former is *generalis* or *prior* (Bos, 1984: 97).

The existence of many courts and tribunals in itself epitomises a divergence of international norms and has important implications for human rights in terms of implementation and enforcement of the rules that codify the rights. If protection of human rights has no borders, it is because human rights have become a global issue. Besides the regional courts and tribunals which may have jurisdiction for human rights questions there are also the specialized continental courts of human rights (for instance, the Inter American Court of Human Rights, African Court of Justice and Human Rights, The Court of Justice of the European Union (CJEU) and the European Court of Human Rights). Certain aspects of the Court of Justice of the Andean Community (CJAC) and the SADC Tribunal have been modelled according to the Court of Justice of the European Union.ⁱⁱ The literature comparing the CJEU with regional courts is vast and important contributions in the field (Smis and Kingah, 2013; Alter, Helfer and Saldias, 2012; Hummer and Frischhut, 2004; Lenz, 2012) have also been made in recent years by the regional human rights commissions (Moravcsik, 1997; Vargas Mendoza, 2010; Cole, 2010). However, there is a dearth of comparisons of Southern regional courts and tribunals as such (Giupponi, 2006; Nkatha and Gallinetti, 2010).

The rules and tribunals compared

Court of Justice of the Andean Community

In its Article 1, the Cartagena Agreement states that the objectives of regional integration “are aimed at bringing about an enduring improvement in the standard of living of the sub-region’s population”. It means that people and protection of people are matters directly linked to the Andean regional integration process. Article 87 of Chapter VII, related to agricultural development programs, stipulates that member countries shall harmonize their policies and coordinate their national plans in this sector, bearing in mind the improvement of the standard of living of the rural population. Furthermore, the member countries must take steps to meet the food and nutritional requirements of the population satisfactorily. In fact, Chapter XVI of Cartagena Agreement makes clear that social and economic cooperation is only possible through the respect for human rights principles. Achieving social justice, strengthening non-discrimination, participation and formation of citizenship values, promoting social support systems, embracing programs on education, protection and well-being of the working population, women’s participation in economic activity, child and family protection, and paying attention to ethnic/minority groups must be the goals of regional programs and regional action aimed at the social development of Andean people. In this way, the Charter of Andean integration connects the regional process to/with the promotion and protection of human rights.

In 2002, the Andean Council of Presidents adopted the Charter of Promotion and Protection of Human Rights. But the Charter is considered a declaration of community values rather than a binding source of community law. The judicial body of CAN is the CJAC, created in 1979 by the Treaty Establishing the Tribunal of Justice of the Cartagena Agreement. The CJAC, based in Quito, ensures that regional laws are interpreted properly and that they are applied across all the member countries. Unlike the Andean Parliament, the Labour Council and the Business Council (also created in 1979 and whose role is advisory), the CJAC is a supranational institution.

Article 1 of the CJAC treaty defines the community legal corpus to include the Cartagena Agreement and its protocols, the Treaty Establishing the Tribunal of Justice, the decisions of the Andean Council of Foreign Ministers and the Commission of the Andean Community, resolutions of the General Secretariat, and agreements entered into by Member States in the context of Andean integration. Generally, the institutional decisions and resolutions pertain to the rights of workers, labour, education, consumer rights, intellectual property and public health, amongst others. Although the Treaty does not refer to the supremacy of Andean community law, in the CAN structure the relationship between community law and national law of member countries accords precedence to community rules. The CJAC treaty does expressly mention the doctrine of direct effect and Andean legislation does not require incorporation procedures to be applied in member countries.

The CJAC settles any dispute that may arise from any action relating to regional normative structure. Inspired by the CJEU, drafters of the Treaty creating the CJAC granted it jurisdiction on two types of claims, namely, noncompliance actions (Article 17) and nullification actions (Article 27). Through the action for noncompliance, the Andean judicial body can adjudicate as to whether a member state has breached community law and establish a corresponding sanction. Individuals, corporations and member countries may raise complaints of noncompliance with the Andean General Secretariat. With regard to the

procedure of actions for nullification, individuals, companies and states may challenge the validity of decisions and resolutions issued by the two political decision making bodies (the General Secretariat and the Andean Council of Foreign Affairs) and by the policy making body (Andean Commission) that allegedly violate community law. In fact, an individual can bring an action to nullify decisions that have been taken by CAN authorities that affect the applicant's rights or legitimate interests. In addition, the CJAC has authority in terms of interpretation of community law at the request (optional or mandatory) of national judges in pending proceedings (Articles 28-31). The purpose of a preliminary ruling is not the harmonization of internal laws of member countries, but rather to ensure that community law is given the same interpretation in all member countries. Besides the power to settle disputes through arbitration, the CJAC has jurisdiction in labour disputes that may arise between the organs of the Andean integration system.

In 1996, the Cochabamba Protocol reinforced the authority of CJAC. Since then, private litigants can apply directly to the CJAC if they disagree with the Secretariat's deposition of a complaint. Furthermore, private actors find it easier to start a procedure for an action for annulment. The Protocol also relaxed restrictions on preliminary references.

The CJAC has been in operation since 1984. Its membership is comprised of one judge for each member state. According to Articles 7 and 9 of CJAC Treaty, judges must be nationals of a member country, be of high moral character and either fulfil the conditions for exercising the highest judicial office in their countries of origin or be jurists of recognized competence and probity. Plenipotentiary representatives from member countries unanimously appoint the judges. Each member state submits a list of three candidates from which the judges are eventually chosen. Andean judges serve for a six-year term that may be renewed once. They cannot engage in any gainful occupation, except in academia.

SADC Tribunal

Article 4(c) of the SADC Treaty of 1992 stipulates that SADC shall act in accordance with human rights principles. Although it is not explicitly stated as a goal, Article 5(1)(a) has vital implications for the pursuit of human rights, especially from the perspective of human development. It states that one of the objectives of the regional body shall be to "promote sustainable and equitable economic growth and socio-economic development that will ensure poverty alleviation with the ultimate objective of its eradication, enhance the standard and quality of life of the people of Southern Africa and support the socially disadvantaged through regional integration."

Article 9(1)(g) provides that one of the institutions of SADC is the Tribunal. It is significant that the Tribunal is constitutionally and institutionally embedded within the treaty framework because this is not the case for SADC's Parliamentary Forum that is completely excluded from the treaty. The main rules concerning the tribunal within the treaty are contained in Article 16. The article states that the main task of the tribunal is to "ensure adherence to and the proper interpretation of the provisions of this Treaty and subsidiary instruments and to adjudicate upon such disputes as may be referred to it" (Article 16(1)). The composition, powers (jurisdiction) and procedures sanctioning the operation of the tribunal are contained in a SADC protocol regarded, importantly, as an integral part of the treaty (Article 16(2)).

With regard to the composition of the SADC tribunal, which has its headquarters in Windhoek, Namibia, there cannot be less than ten judges. In addition to these, member states can also appoint five judges from which the head of the tribunal can select for specific cases. A complete tribunal that is competent to hear a case is constituted of three judges, but a full bench requires five judges. No two judges can be of the same nationality (Tribunal Protocol, Article 3). The judges are recommended by the Council but are ultimately appointed by the Summit of Leaders. The judges are appointed for a period of five years, renewable once. With given exceptions to be determined by the head of the tribunal, the judges are not resident but part-time adjudicators with their services solicited as needed (Tribunal Protocol, Article 6).

Regarding powers, it is vital to note that the treaty envisages the power to provide advisory opinions as referred to it by the Summit or the Council (SADC Treaty Article 16(4) and Tribunal Protocol, Article 20). Specifically, the tribunal has jurisdiction to interpret the SADC Treaty, protocols, and importantly, if so agreed, agreements entered into between given SADC states (Tribunal Protocol, Article 14). With respect to the scope of its jurisdiction, the tribunal can entertain disputes between states on the one hand, and on the other hand, disputes between natural/legal persons and states. Legal/natural persons cannot bring actions against states unless national remedies have been exhausted. It is of crucial importance that once a claimant with *locus standi* before the court brings forth a claim, consent from the opposing party is not a requirement to entertain the cause of action (Tribunal Protocol, Article 15).

In terms of appeals, the decisions of the Tribunal are not supposed to be subject to appeal as they are regarded to be final. This is stated in Article 16(5) of the SADC Treaty. However, as has been discussed in the sample cases, the relevant political players within SADC are basically the court of last resort given that they can veto the judgments and rulings of the Tribunal.

From a procedural perspective, like the Court of Justice of the European Union, the tribunal of SADC is open to preliminary ruling proceedings. It can also exercise original jurisdiction on questions of interpretation submitted to it from national courts (Tribunal Protocol, Article 16). The tribunal has exclusive jurisdiction in state-Community disputes (Tribunal Protocol, Article 17). Such exclusivity in jurisdiction is also extended to cases between natural/legal persons and the Community (Tribunal Protocol, Article 18) as well as those between staff and Community on employment related matters (Tribunal Protocol, Article 19).

Finally in terms of enforcement, states have to take steps to enforce the rulings of the tribunal, but the final word in the ultimate event of non-compliance rests with the supreme political organ or the Summit of leaders (Tribunal Protocol, Article 32). The hands of the tribunal are not only tied to the apron strings of the political elite but they are also tied to the Community's pool of financing (Tribunal Protocol, Article 33) which again, is a function of the dues paid in by member states.

Practice and protection of human rights at the regional level

The Court of Justice of the Andean Community

After the CJEU and the European Court of Human Rights, the CJAC is the third-most active international court. From 1984 to 2011, CJAC issued decisions on 2,003 prejudicial interpretations, 117 non-compliance actions, 52 annulment actions and 9 labour demands. The Andean experience shows that when countries resort to the dispute resolution mechanism, they are able to remedy non-compliance of community law, particularly as regards trade matters (Fuentes and Allegret, 2009). Most of the CJAC's activities have dealt with intellectual property, specifically the interpretation of Decision 486 of 2000, which is the governing document for intellectual property in the Andean Community. The Court has issued over 1500 rulings (more than 90 percent of which involve intellectual property rights disputes). In fact, within the CAN, intellectual property is principally regulated at the regional rather than the national level (Alter, Helfer, Guertzovich, 2009).

The workload of the CJAC related to human rights increased noticeably from 2003, one year after the Andean Council of Presidents adopted the *Charter of Promotion and Protection of Human Rights*. To protect human rights, the Andean Court has, in particular, used techniques such as: interpretations, arguments and resolution of contradictions (Vargas Mendoza, 2010). However, this regional court has also resorted to diplomatic mechanisms to protect the human rights of Andean citizens. On 25 June 2008 four Andean Judges sent a letter to the President of the CJEU to express their deep concern about the terms on which the new EU immigrant law (the Return Directive), were written. In their letter, the judges noted that the EU Return Directive equated undocumented immigrants to common criminals and allowed the deprivation of their rights for eighteen months without any recourse to the courts. Pointing to an opinion from the Inter-American Court of Human Rights and to the principle of non-discrimination in the International Law of Human Rights, Andean Judges stated that the principle of equality did not exclude the consideration of immigrant status and called for a just and human treatment for migrants in Europe comparable to that which Latin American countries had given to European immigrants in the twentieth century.ⁱⁱⁱ

In relation to questions on human rights handled by CJAC, Vargas Mendoza (2010) has distinguished five sample cases (Vargas Mendoza, 2010). In 2003, with regard to the *Case Registers of health of the product Vintix coated tablet*, the Council of State of Colombia requested a preliminary ruling from the CJAC on the provisions enshrined in articles 78 and 79 of Decision 344 of the Andean Commission.^{iv} In decision 344, concerning the common system of industrial property, the CJAC considered the issues of trade secrets and test data. The Andean tribunal ruled that common laws included clear limits to the powers granted to trade secrets. By law or by court order such information must be disclosed. In its dictum, the CJAC argued that the holder of the information covered by trade secrets cannot act in a manner that erodes fundamental rights. Three years later, in *Colombian Association of Pharmaceutical Industries (Asinfar) vs. Colombian state*, the CJAC ruled in favour of the request by Asinfar, quashing Decree 2085 of the Colombian state for breach of Decision 486, which replaced Decision 344. In its dictum the CJAC affirmed that:

the granting of exclusive rights for certain periods of time, may conflict with fundamental human rights such as health and life, since the consumption of drugs is related to its price and the monopoly price may make it impossible to access the drug, which can lead to disease and death to their potential customers.^v

For the CJAC, the Colombian state was in non-compliance with its obligations because Decree 2085 was not compatible with the community law, public health or the purpose of the integration process of seeking progressively to meet the basic needs of the people in Andean region.^{vi}

In the preliminary ruling involving the Colombian state and a pharmaceutical brand company, the CJAC ruled that the registration standards of a trademark covering pharmaceutical products for non-human use (such as products for veterinary purposes) must be extremely rigorous in order to avoid any risk to human health, animals or plants. Therefore, the CJAC found that the competent national authority should assess such health risks and avoid any mistake on the product consumed.^{vii} Thus, in this case, the jurisprudence connected the interpretation of community law with health-related rights (public health), and environmental rights (animal and plant health).

Another CJAC case, that has been significant, pertained to the protection of rights of children. In 2006 a game company brought an action against Ecuador for non-compliance with Decision 439, related to principles and norms for trade liberalization of community services. In its judgment, the CJAC examined whether internal rules regulating slot machines violated the Andean services trade regime. The judgment stated that the right of free access to the gambling market must give way to the right to health of people and, in particular, children.^{viii} Vargas Mendoza (2010) has argued that, in addition to considerations on the value of health, public order and child protection, this case is relevant because the Andean tribunal used two techniques of contemporary jurisprudence: a test of reasonableness and weighting analysis. Preliminary rulings requested by Peru in relation to the location of slaughterhouses also illustrate how, in its arguments and interpretation, the CJAC addresses human rights issues. To build its judgment the Andean tribunal carefully analyzed the relevant regional rules. Its interpretation was that although the overall objective of the legislation was to promote the development of livestock and beef agribusiness in the Andean region, "this objective is related to higher goods such as health and life of people and the protection of the right to a healthy environment and care for the collective rights and public health safety."^{ix}

SADC Tribunal

Questions on rights brought before the SADC Tribunal have predominantly been those that pertain to labour and land rights, with the secondary aspect of property rights having been very prominent in Zimbabwe. On the labour rights related questions that referred mainly to aspects of unlawful termination of employment, the SADC Tribunal did not adopt a clear approach of siding consistently with the employees. In its dictum in *Mtingwi v SADC Secretariat*,^x the Tribunal was at pains to reject the claims of a plaintiff who demanded costs for wrongful termination of contract due to pending criminal charges in Malawi. The Tribunal ruled in favour of SADC secretariat, accepting the argument that the claimant was not entitled to any compensation under the circumstances. In another case, the tribunal adopted an approach that was adverse to the interests of the secretariat. This was the *Kanyama* ruling in which the tribunal adjudged (leaning on the concept of justice) that the secretariat had to explore the lawful contractual extension of the claimant's employment by a period of four years. In order to reverse the damage suffered by the respondent, the employer was ordered to make good the costs of the claimant.^{xi}

In the landmark case involving the late Zimbabwean white farmer Campbell, the tribunal adjudicated in favour of Campbell and claimants. It ruled that the actions of the Government of Zimbabwe, in confiscating the landed property of the claimants, was tantamount to acting in violation of the Treaty of SADC that,^{xii} amongst others, seeks to protect the rights of SADC citizens including property rights. The Campbell saga epitomised a deeper problem in Zimbabwe that harks back to 1979 when the Government of the United Kingdom agreed in the Lancaster Agreements that it would regularly pay the government in Harare in exchange or as consideration for the white landowners to maintain their industrial concerns. Subsequently, as the British Government fell short in their payments, President Mugabe decided to lean on a constitutional amendment (2004 Amendment 17) to seize the farms that were owned predominantly by white farmers. What irked many in the international community was that Mugabe was using the land issue as a pretext to settle political grievances, all the more so as the confiscated property often went to cronies of the ruling party (ZANU PF), who could not tend to the land as had been the case when the agricultural fields were in the control of the white farmers.

The Campbell case was an example where one of the dispossessed white farmers and other claimants leaned on SADC Treaty rules to make a claim against the Mugabe Government for expropriating their property. Initially, the claimant filed motions in Zimbabwean courts when his Mount Carmel property (purchased in 1974) was seized. Not pacified by the ruling of the courts in Zimbabwe, the claimant sought the services of the SADC Tribunal. The tribunal ruled that the actions of the Government of Harare were in direct violation of Articles 4 and 6 of the Treaty of SADC. The tribunal found that the Government's actions could not be objectively justified and that they amounted to crass and brazen acts of racial discrimination. The entire land reform program that Mugabe had championed was questioned. The tribunal then ruled that the claimants were entitled to compensation from the Government of Robert Mugabe. Following the dictum, the tribunal transmitted the ruling to the Summit for consideration and implementation. When this was done, in 2009, the Summit rather adopted a less politically resistant approach by basically stripping the tribunal of its powers and suspending its activities. This also came subsequent to a declaration by the Government of Zimbabwe that it would not respect the ruling of the SADC tribunal. This, of course, raised the question of the competence and powers of the regional court, especially when faced with a charged political reality.

It could be argued that the judges were not politically savvy or sensitive enough to understand how unsettling their ruling would be. Southern Africa is a region that is still marked by strong political ties amongst the rulers, who, not more than thirty years ago, were still linked by strong bonds of the liberation struggles and who are not ready to delegate their political sovereignty to unelected judges who may not be attuned to or steeped in the sensitive historical details that underpin the political realities of the region today. Therefore it is not surprising that Mugabe simply dismissed the work of the tribunal as sham and rejected the validity of its rulings.^{xiii}

SADC is faced with difficult issues as exposed in the Zimbabwe land reform challenges. SADC leaders have to confront the choice of adhering strictly to the rule of law as ordained in SADC treaty and rules or simply to back one of their peers to pacify historical expediencies. Even if there has been resistance by SADC Governments to adopt a Bill of Rights (Ruppel, 2012), the Campbell case provided a good chance for SADC leaders to project their regional system as one based on the rule of law. They failed and as Ruppel argues the Campbell case "became a benchmark of the SADC Tribunal's key role in the

integration of legal and institutional systems in its region of jurisdiction” (Ruppel, 2012). However, the leaders missed the opportunity to highlight this.

Another SADC case that was important pertained to the rights of private sector operators within SADC. In the *Bach case*, the issue was that customs control officers of the Democratic Republic of Congo impounded the applicant’s truck without justification. The claimant brought the matter before the SADC tribunal and requested damages worth 2 million US dollars. He adduced evidence to corroborate the fact that he could not avail himself of national remedies, highlighting that the DRC officials had requested bribes. On various issues raised by the case, the SADC tribunal leaned on its own *stare decisis*, especially in the Campbell ruling and found *inter alia*:

Clearly, there is evidence supported by documents that the Applicant tried to utilize the legal system of the Respondent to have its truck and trailer released but was unsuccessful. It even tried to use the diplomatic channels available but was equally unsuccessful. It was clearly unable to proceed under the domestic legal system of the Respondent. In *Mike Campbell (PVT) Ltd v The Republic of Zimbabwe* SADC (T) 2/2007, the Tribunal observed: ... where the municipal law does not offer any remedy or the remedy that is offered is ineffective, the individual is not required to exhaust the local remedies. . . . These are circumstances that make the requirement of exhaustion of local remedies meaningless, in which case the individual can lodge a case with the international tribunal.^{xiv}

The tribunal ruled in favour of the applicant and demanded that due costs be paid to the applicant business operator. The ruling of the tribunal here is very important because it is a fundamental departure from common practice and the basis which many States Parties often use to justify the dismissal of non-compliance actions before regional courts. Here, the tribunal was actually making a robust case that, in those instances where national remedies are worthless and less than effective, the exhaustion argument can be waived.

Analysis in the variance of the scope of action for the tribunals

From the foregoing, one may assert that there are similar features between what was achieved by the SADC and the CAN in terms of human rights adjudication. Both are institutions that were initially created with the objective of fostering commerce between the States Parties. With the passage of time, their mandates have broadened and been interpreted creatively to address further questions pertaining to human rights. One main difference between SADC law and CAN community law is that there is no principle of direct effect that is observable under SADC norms. States are still wont to incorporate regional norms through specific legislation. This explains some of the differences that are identifiable between the two bodies. Another important difference is that while the CAN has developed a strong case-load in the area of intellectual property, the major cases in SADC concern landed property rights. This again reflects the specific historical contexts of both regions. However, these differences allow for ample room for learning.

The dissimilarities can be further approached from four perspectives including: the scope of human rights covered by each of the regional tribunals; *locus standi* or standing of individuals before the tribunals; the added value of the regional tribunals as such; and restrictive role of politics for the tribunals. In both instances the drafters of the founding

texts for CAN and SADC had very limited ambitions when they alluded to human rights in the treaties. Given their particular histories, states in both regions sought to reflect the specific needs of their citizens in terms of political and civil rights. Less emphasis was placed on economic and social rights. However, over the years, these rights have been interpreted broadly to also encompass the second-generation human rights.

In terms of *locus standi*, individuals can bring cases in both tribunals. This means that they can have recourse to the regional tribunals in the event of rights violation. The remedies developed in CAN are actions for non-compliance and nullification actions. These are not christened as such under the SADC legal system but the class actions brought against the state of Zimbabwe in the Campbell cases were tantamount to actions in view of reversing Zimbabwe's non-compliance under its SADC Treaty obligations in terms of respect for human rights.

The added value of the tribunals is that they can serve as appellate jurisdictions in those cases where national adjudicative avenues have been exhausted. Moreover, in addition to the provision of advisory opinions, they can also institute proceedings *sua motu* (on their own accord). However, these judicial bodies face certain problems. The first is one of awareness. For the most part, citizens of both regions often tend to be unaware of the existence of the regional courts. In a way, the courts are regarded as detached and distant. Outreach steps could be useful in this respect and the bar associations, both at the national and regional levels, could play an important role in this regard. The second challenge is that of resources. Running regional courts is similar to running other regional entities. Human resources needs are often acute. Identifying qualified staff for the regional bench is a process that can take time. The third problem is that there are many established human rights bodies both in the Americas and in Africa that have developed strong reputations in the protection of human rights. As such, the respective human rights courts and commissions in both regions have more credibility on human rights matters and this tends to dampen any zeal that potential complainants may have to bring cases before tribunals that were initially created to mainly supervise trade liberalisation agreements. Finally, the issue of political interference remains pervasive. The restrictive role of politics remains a thorny issue. It relates to the fact that the political rulers are adept at and poised to sideline judicial rulings of the regional courts and tribunals when it pleases them. This has been a major concern in the SADC with the suspension of its tribunal.

In terms of shared insights, there are aspects related to intellectual property rights protection as upheld in CAN that can be useful for SADC. This is more so because SADC is one of the regions that has been plagued by the virus causing aids and other diseases. Intellectual property norms can often be interpreted in ways that restrict access to affordable medicines and vaccines to deal with these health problems. The interpretative elasticity of the CAN courts could serve as insight for future SADC tribunal judges. In terms of insights for CAN, the nature of political over-reach that has jeopardised the functioning of the SADC tribunal is a route that CAN leaders would do well to avert if the rule of law is to retain its hallowed meaning in the region.

Substantively and in terms of case load, the cases that have been brought before CJAC outweigh those of the SADC Tribunal and have been on matters that impinge clearly on socio-economic rights including intellectual property rights. While politics is vital in the selection of the judges in both courts, there is greater political interference in the case of SADC. It is therefore not surprising that the SADC Tribunal's activities have been suspended

by the leaders of the region pending a re-negotiation of the tribunal's protocol. Given the circumstances that led to the suspension of the court, it is hard to foresee how a re-negotiated protocol would not dilute any possible leverage that the tribunal could hope to have in terms of independence. In a way, this is disappointing because SADC countries face real challenges in the area of health and the environment and it would have been useful to have a strong regional court that can address trans-border questions rather than making recourse to the ICJ or the WTO dispute settlement body whenever there are territorial or trade related claims. In this respect, we argue that those working on a re-negotiated SADC tribunal protocol could draw inspiration from the workings of the CJAC to assess why the Andean court has had such a rich case load and how the CJAC balances its tasks against political forces in a region animated by leaders who also have very strong personalities.

Conclusions

In both regions the founding treaties accorded an integral part of their constitutive moorings to courts. This is very important when collated and juxtaposed with the more consultative roles that are accorded to parliaments. So, why then do leaders create courts and tribunals when they decide to adopt treaties for regional economic communities? In a sense, the notion of exporting the rule of law to the regional level appears appealing and without taking account of the dissimilarities between municipal and regional legal orders in terms of rule of law, they tend to hope that the compliance levels exerted by national courts would also be replicated at the regional level. Secondly, courts and tribunals are often presented as neutral bodies. Their inclusion in treaty texts allows political rulers a degree of legitimacy in the political bargaining process of negotiating treaties. Finally, political leaders and their economic *sherpas* often genuinely believe that courts are needed to address disputes that are unforeseeable when the treaty is negotiated.

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ⁱ Since 2009, Madagascar is suspended following an unconstitutional takeover of government.

ⁱⁱ Other international courts modeled in according to ECJ are: the Benelux Court, European Free Trade Area Court, West African Economic and Monetary Union Court, Common Market for East African States Court, Central African Monetary Community Court, East African Community Court, Caribbean Court of Justice, and African Court of Justice and Human Rights.

ⁱⁱⁱ The letter is available, in Spanish only, on the Web site of CAN:
http://www.comunidadandina.org/sai/comunicado_directivaUE.pdf

^{iv} "Proceso 37-IP-2003", *Gaceta Oficial del Acuerdo de Cartagena*, N° 960, Lima 1 de Agosto de 2003, 16-26. Available, only in Spanish, on the Web site of CAN: www.comunidadandina.org

^v "Proceso 114-AI-2004", *Gaceta Oficial del Acuerdo de Cartagena*, N° 1295, Lima 9 de Febrero de 2006, 36.40. available at www.tribunalandino.org.ec

^{vi} *Idem*

^{vii} "Proceso 45-IP-2008", *Gaceta Oficial del Acuerdo de Cartagena*, N° 1641, Lima 31 de julio de 2008, 32.56 available at www.tribunalandino.org.ec

^{viii} "Proceso 03-AI-2006", *Gaceta Oficial del Acuerdo de Cartagena*, N° 1667, Lima 30 de octubre de 2008, 1-34. available at www.tribunalandino.org.ec

^{ix} "Proceso 90-IP-2008", *Gaceta Oficial del Acuerdo de Cartagena*, N° 1662, Lima 9 de octubre de 2008, 16.48, available at www.tribunalandino.org.ec

^x *Ernest Mtingwi v SADC Secretariat*, SADC (T) CASE No.1/2007, at 15.

^{xi} *Clement Kanyama v SADC Secretariat*, CASE NO. SADC (T) 05/2009. See also *Angelo Mondlane v Secretariat of the Southern African Development Community*, CASE NO SADC (T) 07/2009 and *Bookie Monica Kethusegile-Juru v SADC Parliamentary Forum*, CASE NO. SADC (T) 02/2009, at 2 and 6.

^{xii} *Mike Campbell and 78 Ors. v Government of Zimbabwe*, SADC (T) Case No. 2/2007, at 57-58. Other land cases pitting the Government of Zimbabwe against farmers and in which the Government has been ordered to refrain from evicting title holders from their landed property include: *Gideon Stephanos Theron v The Republic of Zimbabwe and Ors.*, CASE NO SADC (T) 2/08, *Douglas Stuart and Ors., v The Republic of Zimbabwe and Ors.*, *Andrew Paul Rosalyn Stidolph v The Republic of Zimbabwe and Ors.*, CASE NO SADC (T) 04/08, *Anglesea Farm Ltd., and Ors v The Republic of Zimbabwe and Ors.*, CASE NO SADC (T) 06/08; *Luke Munyando Tembani v Republic of Zimbabwe*, SADC (T) Case No. 7/2008; *Luke Munyando Tembani v Republic of Zimbabwe*, CASE NO. SADC (T) 07/2008.

^{xiii} *Louis Karel Fick and Ors. v Republic of Zimbabwe*, CASE NO. SADC (T) 01/2010, at 3; *William Michael Campbell and Richard Thomas Etheridge v The Republic of Zimbabwe*, CASE NO SADC (T) 03/2009.

^{xiv} *Bach's Transport Ltd., v The Democratic Republic of Congo*, CASE NO. SADC (T) 14/2008, at 4-7.