important precedent on the imputability of conduct of UN peacekeepers—one that does not bode well for future victims of wrongful conduct by UN peacekeepers.

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Constitutional Court of South Africa—Tribunal of the Southern African Development Community—suspension of the Tribunal—modification of the Tribunal's jurisdiction—constraints

LAW SOCIETY OF SOUTH AFRICA AND OTHERS v. PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA AND OTHERS. 2019 (3) SA 30 (CC). *At* https://www.concourt.org.za.
Constitutional Court of South Africa, December 11, 2018.

The Southern African Development Community (SADC) is an intergovernmental organization that promotes regional integration in Southern Africa.[1] In 2010, SADC's member states suspended its principal judicial organ, the Tribunal, by depriving it of a quorum.[2] In 2018, the Constitutional Court of South Africa held that the participation of President Jacob Zuma in this maneuver was "unconstitutional, unlawful and irrational" under domestic law (para. 97). The Court's unanimous decision sheds light on the contemporary significance of international adjudication and the role of domestic law in preserving it.

As Chief Justice Mogoeng explained in the majority judgment, after the Tribunal ruled against Zimbabwe in disputes between it and its nationals arising from its program of land expropriation (paras. 10–12), Zimbabwe agreed with South Africa and other SADC member states to block the reappointment or replacement of the Tribunal's judges (para. 15). With the Tribunal unable to function for want of a quorum, South Africa and other SADC member states went on to sign a protocol[3] in 2014 intended to amend the Tribunal's existing protocol[4] in order to limit its jurisdiction to interstate disputes (para. 16).

The Law Society of South Africa, which represents South African attorneys, and several Zimbabwean farmers brought suit in South Africa contending that, by participating in the suspension of the Tribunal and signing the 2014 protocol, President Zuma violated the South African Constitution. Following an order of constitutional invalidity by the High Court,[5] the applicants sought confirmation before the Constitutional Court.

Before reaching the merits, the majority had to address a preliminary objection as to the application's admissibility. The government argued that the application was premature

[1] Southern African Development Community, *SADC Objectives*, *at* www.sadc.int/about-sadc/overview/sadc-objectiv.

[2] For a detailed account, see Karen J. Alter, James T. Gathii & Laurence R. Helfer, *Backlash Against International Courts in West, East and Southern Africa: Causes and Consequences*, 27 EUR. J. INT'L L. 293, 309–12 (2016). This stratagem is akin to that deployed against the Appellate Body of the World Trade Organization by the United States. *See, e.g.*, Rachel Brewster, *The Trump Administration and the Future of the WTO*, 44 YALE J. INT'L L. ONLINE 6, 8–9 (2018).

[3] Protocol on the Tribunal in the Southern African Development Community, Aug. 18, 2014.

[4] Protocol on the Tribunal in the Southern African Development Community, Aug. 7, 2000.

[5] Law Society of South Africa and Others v. President of the Republic of South Africa and Others 2018 (6) BCLR 695 (GP).

because the 2014 protocol did not yet bind South Africa (para. 21). The majority acknowledged that Parliament had not ratified the protocol, which itself provides that it will come into force only upon signature and ratification by a "specified number of Member States," events which had not occurred (para. 22). The majority nevertheless dismissed the objection (para. 42) on five grounds.

First, the majority reasoned that if the Court stayed its hand until ratification, other states might in the interval "sign, ratify and act" on the protocol to the disadvantage of the "citizens of those countries and [South Africa's] own citizens . . . in those countries" (para. 27). Second, referring to Section 38 of the Constitution, which grants standing in cases in which it is alleged that "a right in the Bill of Rights has been . . . threatened," the majority argued that the negotiation and signature of the protocol represented a "threat" to the right of access to justice enjoyed by South African citizens under both the Constitution and the SADC Treaty (Treaty) as well as the "citizens of the rest of the SADC countries" under the Treaty (para. 29). Third, the majority found it appropriate to consider the application because of the signature's immediate impact on South Africa's image abroad (paras. 30–32). Fourth, the majority pointed out that a lengthy period had elapsed without the protocol having been referred to Parliament for its consideration (para. 33).

Fifth, the majority took the view that the signature created a legal obligation for South Africa (paras. 34–41). The majority recalled that Article 18 of the Vienna Convention on the Law of Treaties obliges a state "to refrain from acts which would defeat the object and purpose of a treaty" upon signature, unless it subsequently makes clear its intention "not to become a party."[6] Although South Africa is not party to the Vienna Convention, the majority held that this provision has effect within the South African legal order because it codifies customary international law (paras. 36–38) and Section 232 of the Constitution provides that "[c]ustomary international law is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament" (para. 38). According to the majority, there is no conflict between this obligation, which "constrains the State from acting freely" in the interval between the signature of an international agreement and its ratification, and Section 231(2) of the Constitution—according to which an international agreement "binds the Republic only after it has been approved by resolution" in Parliament—because it is a relatively weak obligation (paras. 39–40).

Turning to the merits, the majority stressed that, according to the "principle of legality" enshrined in domestic law, the president "may only exercise power . . . lawfully conferred on her . . . in the manner prescribed" and in good faith (paras. 46–49). It pointed out that the Treaty contains "provisions . . . that regulate its amendment" by the SADC member states (para. 49), among them South Africa, whose representative is the president (para. 43). While these provisions require only two-thirds of the SADC membership to ratify a protocol, they require three quarters of the heads of state or government of the SADC membership to adopt amendments to the Treaty,[7] which includes the Tribunal's existing

[6] Vienna Convention on the Law of Treaties, Art. 18, May 23, 1969, 1155 UNTS 331.

[7] *Compare* Treaty of the Southern African Development Community, Art. 36(1), Aug. 17, 1992 *with id.* Art. 22(4). SADC currently has sixteen member states. Southern African Development Community, *Member States*, *at* www.sadc.int/member-states. It has been suggested that the Court failed to appreciate that, due to the difference in decision makers, it is not necessarily more difficult to amend the Treaty, despite the higher threshold of agreement that must be attained. Andreas Coutsoudis & Max du Plessis, *We Are All International Lawyers Now: The*

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protocol.[8] In the majority's view, the president and his colleagues went beyond the power of amendment provided for in the Treaty by attempting to revise it by means of a protocol (paras. 49–50), undermining "the entrenchment of a human rights culture, a democratic order and adherence to the rule of law" in the Preamble and Article 4 of the Treaty, to which the Tribunal was set up to "give teeth" (paras. 51–53). Moreover, the attempted modification of the Treaty was not merely ineffective due to the noncompliance with the amendment provisions: because the attempt was inconsistent with the Treaty, it also violated the customary norm of *pacta sunt servanda* codified in Article 26 of the Vienna Convention (paras. 54–55). The same was true of the suspension of the Tribunal. The majority thus concluded that the president had acted unlawfully (para. 56).

The majority then explained that, under domestic law, decision-making processes must be rational—that is, each process must "be rationally related to the purpose" of the decision (paras. 61–65). In the circumstances of the present case, the question was accordingly whether "the suspension or amendment [was] effected in terms of a process that ensure[d] that our President and his counterparts [did] not lightly veer off the fundamental guarantees and progressive provisions of the Treaty and the spirit of our Constitution" (para. 66). The majority took the view that only the amendment process could have satisfied this test of rationality (paras. 67–71).

Finally, the majority addressed the scope of the power conferred on the president by Section 231(1) of the Constitution, which provides that "[t]he negotiating and signing of all international agreements is the responsibility of the national executive" (para. 29). The starting point of its analysis was that the 2014 protocol "seeks to take away a pre-existing individual right of access to the Tribunal" (para. 72). It observed that, although "it is always open to the Executive to participate in negotiations," the president cannot "align" South Africa "with decisions that are inimical to our constitutional dream" (para. 76). Consequently, "[t]he President may . . . not approve anything that undermines our Bill of Rights and international law obligations" (para. 77). The majority reasoned that, in seeking to curtail individual access to the Tribunal inconsistently with the Treaty's amendment provisions, the 2014 protocol falls afoul of this standard (paras. 79–84) and the president's decision to sign it was therefore unconstitutional (para. 85).

On this basis, the majority confirmed the High Court's order and directed the current president, Cyril Ramaphosa, to withdraw the signature (para. 97).

Justice Cameron and Justice Froneman concurred in a minority judgment with which Justice Mhlantla and Acting Justice Petse agreed. The minority sought to draw a sharper distinction than the majority between the international and domestic consequences of President Zuma's conduct. The judges in the minority agreed that the breaches of the Treaty constituted internationally wrongful acts attributable to South Africa (para. 99), but observed that the president could not himself be said to have violated the relevant treaty obligations because they bound the state rather than any individual (para. 100). Instead, the minority concluded

Constitution's International-Law Trifecta Comes of Age, 136 S. AFR. L.J. 433, 453 n. 16 (2019). However, the thrust of the majority's reasoning was not that the proposals for the Tribunal's future could only be implemented through the most onerous procedure, but rather that the SADC member states had to honor the terms of their agreement.

[8] *See* Treaty of the Southern African Development Community, *supra* note 7, Art. 16(2).

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that, "[b]y agreeing to amend the Treaty and by thus agreeing to strip away pre-existing rights of access to justice that the Treaty had conferred on South Africans," the president had violated his constitutional obligation to "respect, protect, promote and fulfil" the Bill of Rights and in particular the right of access to justice (para. 101). Similarly, while the judges in the minority agreed that the president's conduct was "irrational and irregular . . . under our Constitution," they held that "this same conduct . . . did not constitute an international law violation on the part of the President himself" as "[o]nly . . . the conduct of the South African State" could constitute such a violation (para. 102). This approach, they contended, avoided the need to address "when and how an international treaty becomes domesticated within South Africa" or "engage in the debate on [the] President's individual capacity in the realm of the law of treaties" (paras. 104–05).

* * * *

Although the Tribunal remains in stasis for now, the Constitutional Court's unanimous order suggests that reports of its demise may have been premature.[9] President Ramaphosa has duly withdrawn the signature from the 2014 protocol.[10] Moreover, a Tanzanian court has invoked the reasoning of the first-instance judgment confirmed by the Constitutional Court in ordering the Tanzanian government to cooperate in the appointment of new judges to the Tribunal.[11] But the Tribunal's future remains unclear. For example, shortly before the Constitutional Court's order, the Court of Appeal of Singapore dismissed an appeal against a judgment setting aside an arbitral award that concluded that Lesotho had acted unlawfully by undermining the Tribunal.[12]

Its practical consequences aside, the judgment should be studied by those interested in the manner in which domestic law can limit state attempts to modify international legal obligations.[13] Comparison with the first round of litigation between Gina Miller and the government of the United Kingdom over Brexit may be fruitful. Enthusiasm for Brexit has often been linked to concern over the role of the Court of Justice of the European Union (CJEU).[14] A consequence of Brexit is that UK residents will eventually lose the right to

[9] *See, e.g.*, Frederick Cowell, *The Death of the Southern African Development Community Tribunal's Human Rights Jurisdiction*, 13 HUM. RTS. L. REV. 153 (2013).

[10] Communique of the 39th SADC Summit of Heads of State and Government, para. 20 (Aug. 18, 2019), *available at* www.sadc.int/files/1915/6614/8772/Communique_of_the_39th_SADC_Summit-English.pdf.

[11] Tanganyika Law Society v. Ministry of Foreign Affairs and International Cooperation (High Ct. Tanzania June 4, 2019), *available at* africanlii.org/sites/default/files/Judgment.%20TLS%20vs%20Ministry%20of%20Foreign%20Affairs%20and%20International%20Cooperation%20%26%20AG%2C%20Misc%20Civil%20Cause%20No.%2023%20of%202014._0.pdf. In contrast to the tenor of the Tanzanian court's judgment, the Tanzanian government recently "withdrew its declaration allowing individuals and [nongovernmental organizations] to directly submit applications against it at the African Court on Human and Peoples' Rights." Nicole De Silva, *Individual and NGO Access to the African Court on Human and Peoples' Rights: The Latest Blow from Tanzania*, EJIL:*TALK!*, *at* https://www.ejiltalk.org/individual-and-ngo-access-to-the-african-court-on-human-and-peoples-rights-the-latest-blow-from-tanzania.

[12] Swissbourgh Diamond Mines (Pty) Ltd. v. Kingdom of Lesotho [2018] SGCA 81.

[13] *See, e.g.*, Harold Hongju Koh, *Presidential Power to Terminate International Agreements*, 128 YALE L.J. F. 432 (2018).

[14] *See, e.g.*, Boris Johnson, *There is Only One Way to Get the Change We Want—Vote to Leave the EU*, TELEGRAPH, March 16, 2016, at 18.

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request that a domestic court make a preliminary reference to the CJEU; they will also be unable to approach the CJEU directly.[15] It was partly because withdrawal from the European Union entails the deprivation of these rights that the High Court of England and Wales ruled in 2016 that the prime minister could not trigger this process without legislative approval.[16] On appeal, however, the UK Supreme Court focused solely on EU rights "capable of replication in UK law," such as certain employment protections, as opposed to those concerning participation in EU institutions.[17] It is consequently unclear whether the access-to-justice concerns that underlie the Constitutional Court's order would have led to a similar outcome.

By contrast, if the South African Parliament legislates to withdraw from the Rome Statute,[18] the majority's reasoning in the present case likely predicts the result of any subsequent litigation. The case[19] concerning South Africa's previous attempt to withdraw has attracted a great deal of commentary.[20] As that commentary reflects, the High Court upheld the challenge to the attempt on purely procedural grounds,[21] expressly reserving[22] the question whether withdrawal from the Rome Statute would be substantively irrational or a violation of the government's duty to "respect, protect, promote and fulfil" the Bill of Rights."[23] Given the majority's emphasis in the present case on the rights of the nationals of other SADC member states, along with South Africans, to access justice, it now seems likely that this question would be resolved in the affirmative. This is because South African withdrawal from the Rome Statute would negatively affect the ability of victims of international crimes of all nationalities to access the International Criminal Court if these crimes are committed by a South African or on South African territory.[24] It is true that the High Court's approach might signal judicial caution about overturning legislation enabling withdrawal.[25] In the present case, the minority's conscious avoidance of broader questions about the relationship between international law and South African law may reflect something similar. However, the majority embraced Articles 18 and 26 of the Vienna Convention even though doing so limited Parliament's overall constitutional role in international lawmaking. Upholding a substantive challenge to withdrawal from any single treaty—even one as important as the Rome Statute—seems to be a comparatively less assertive exercise of judicial power.

The litigation in the United Kingdom over Brexit and in South Africa over the Rome Statute was as much about the role of international courts as about the constraints that domestic law may place on a state's engagement in international lawmaking in general. The

[15] *But see, e.g.*, Agreement on the Withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community, Art. 86(2), Jan. 24, 2020.

[16] R. (Miller) v. Secretary of State for Exiting the European Union [2017] 1 All E.R. 158, paras. 61, 92.

[17] R. (Miller) v. Secretary of State for Exiting the European Union [2018] A.C. 61, paras. 69–73.

[18] Rome Statute of the International Criminal Court, July 17, 1998, 2187 UNTS 3.

[19] Democratic Alliance v. Minister of International Relations and Cooperation and Others 2017 (3) SA 212 (GP).

[20] *See, e.g.*, Hannah Woolaver, *Domestic and International Limitations on Treaty Withdrawal: Lessons from South Africa's Attempted Departure from the International Criminal Court*, 111 AJIL UNBOUND 450 (2018).

[21] *Democratic Alliance*, *supra* note 19, para. 71.

[22] *Id.*, paras. 72–76.

[23] S. AFR. CONST. § 7(2).

[24] *See* Rome Statute, *supra* note 18, Arts. 15(3), 19(3), 68, 75, 82.

[25] I am grateful to Elisha Kunene for this point.

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majority's approach in the present case should inform discussion about international courts and their interaction with their domestic counterparts. For example, after the Tribunal's suspension, it was argued that the episode demonstrated the need for a modest conception of the role of international courts in order to avoid alienating the domestic actors on which their effectiveness was said to depend.[26] Backlash was seen as an almost inevitable consequence of the Tribunal's rulings in favor of a politically unpopular group in Southern Africa—white Zimbabwean farmers—on the basis of an unconventional interpretation of international law.[27] Yet it appears that the Tribunal did not alienate all of the region's domestic judges, many of whom have since demonstrated their capacity and willingness to support it. Prior to the present case, the Constitutional Court confirmed a lower court's ruling that the Tribunal's judgments are enforceable in South Africa.[28] Now South African and Tanzanian judges are pressuring executive officials alienated by the Tribunal to reinstate it. This is noteworthy, especially because the Constitutional Court is joining in despite its incentive, as the court at the apex of the South African judicial hierarchy,[29] to resist the international adjudication of issues over which it would otherwise have the last word.[30] That said, the majority took care in the present case to "alert" the South African government to the possibility "that disputes relating to issues provided for by both the Treaty and national constitutions are 'appealable' or justiciable before the Tribunal even after the highest court of any SADC country has finally disposed of the matter" (paras. 57–60). This hints at potential conflict if the Tribunal emerges from its slumber and challenges the Constitutional Court's "final say."[31]

This storm cloud on the horizon is a further reminder that the place of international courts in today's world is contested.[32] But consider: the Tribunal has its seat in Windhoek, the capital of Namibia, which the rulers of apartheid South Africa occupied from 1966 until 1990 in repudiation of the "sacred trust" committed to their state after the Great War.[33] Doing so defied not only the political organs of the United Nations,[34] but also the International Court of Justice.[35] Although many South African judges must have been aware of the illegality of this conduct, having represented the state before the International Court, they proved

[26] *See, e.g.*, Erika de Wet, *The Rise and Fall of the Tribunal of the Southern African Development Community: Implications for Dispute Settlement in Southern Africa*, 28 ICSID Rev. 45, 62 (2013).

[27] *See, e.g.*, E. Tendayi Achiume, *The SADC Tribunal: Socio-Political Dissonance and the Authority of International Courts*, *in* International Court Authority 124 (Karen J. Alter, Laurence R. Helfer & Mikael Rask Madsen eds., 2018).

[28] Government of the Republic of Zimbabwe v. Fick and Others 2013 (5) SA 325 (CC).

[29] S. Afr. Const. § 167(3)(a).

[30] Karen J. Alter, Establishing the Supremacy of European Law: The Making of an International Rule of Law in Europe 48–49 (2003).

[31] *Cf.* Franz C. Mayer, *Rashomon in Karlsruhe: A Reflection on Democracy and Identity in the European Union*, 9 Int'l J. Const. L. 757, 762 (2011).

[32] *See, e.g.*, Tom Gerald Daly, *Kindred Strangers: Why Has the Constitutional Court of South Africa Never Cited the African Court on Human and Peoples' Rights?*, 9 Const. Ct. Rev. 387 (2019).

[33] Kasikili/Sedudu Island (Bots./Namib.), 1999 ICJ Rep. 1045, 1054–58, para. 14, 1215–1216, para. 27 (diss. op. Parra-Aranguren, J.) (Dec. 13).

[34] *See, e.g.*, GA Res. 2145 (XXI) (Oct. 27, 1966).

[35] Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, 1971 ICJ Rep. 16, 54, para. 118 (June 21)

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unwilling to ensure respect for the Court's pronouncements concerning the Mandate for South West Africa.[36] The stark contrast of the Constitutional Court's defense of the Tribunal is a sign of how far things have come since.

SEBASTIAN BATES
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International Court of Justice—Vienna Convention on Consular Relations—consular communication, access, and visitation—customary international law—espionage—terrorism

JADHAV CASE (INDIA V. PAKISTAN). Judgment, Merits. *At* https://www.icj-cij.org/files/case-related/168/168-20190717-JUD-01-00-EN.pdf.
International Court of Justice, July 17, 2019.

Jadhav Case (India v. Pakistan) concerned Pakistan's arrest, detention, conviction, and death sentence of Kulbhushan Sudhir Jadhav, asserted by India to be an Indian national, who had been convicted of engaging in acts of terrorism and espionage in Pakistan.[1] This is the third dispute over the interpretation of Article 36 of the Vienna Convention on Consular Relations (VCCR) to come before the International Court of Justice (ICJ).[2] In contrast to the Applicants in the previous consular rights cases, India sought relief that included the annulment of Jadhav's conviction in Pakistan, his release from custody, and his safe transfer to India.[3] After unanimously finding it had jurisdiction, fifteen judges of the ICJ, with only Judge ad hoc Jillani dissenting, held on the merits that Pakistan had breached VCCR Article 36 by failing to inform Jadhav without delay of his rights under that provision; by failing to notify without delay the appropriate consular post of India in Pakistan of his detention; and by depriving India of its right to communicate with Jadhav, to visit him in detention, and arrange for his legal representation. In addition, the Court, with only Judge ad hoc Jillani dissenting, found that Pakistan is under an obligation to inform Jadhav of his rights without further delay and is obliged to provide Indian consular officers access to him. The Court further found that appropriate reparation required Pakistan to provide, by means of its own choosing, effective review and reconsideration of Jadhav's conviction and sentence to ensure that full weight is given to the effect of the violation of his rights. Finally, the ICJ, again with Judge ad hoc Jillani dissenting, declared that a continued stay of execution constituted an indispensable condition for the effective review and reconsideration of Jadhav's conviction and sentence.

[36] *See, e.g.*, John Dugard, *The South African Judiciary and International Law in the Apartheid Era*, 14 S. AFR. J. HUM. RTS. 110, 116–18 (1998). This is not to say that these pronouncements were universally ignored by the judiciary. *See, e.g.*, S. v. Sagarius en Andere 1983 (1) SA 833, 836 (SWA).

[1] Jadhav Case (India v. Pak), Judgment, Merits (Int'l Ct. Just. July 17, 2019).

[2] The other cases were: LaGrand Case (Ger v. U.S.), Judgment, Merits, 2001 ICJ Rep. 466 (June 27) [hereinafter *LaGrand* Case]; and Case Concerning Avena and Other Mexican Nationals (Mex. v. U.S.), Judgment, Merits, 2004 ICJ Rep. 12 (Mar. 31) [hereinafter *Avena* Case].

[3] *See* Jadhav Case (India v. Pak), Application Instituting Proceedings, para. 60 (Int'l Ct. Just. May 8, 2017), *available at* https://www.icj-cij.org/files/case-related/168/168-20170508-APP-01-00-EN.pdf.