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Operation Restore Legacy 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 in light of the 2017 change of power in Zimbabwe. That year, the country underwent a correction of governance from a Mugabe-contrived family dynasty to sovereign control of Zimbabwe’s peoples. This Article shows that this constitutional norm is a blunt tool. 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

¹ See Muna Ndulo, *The Prohibition of Unconstitutional Change of Government*, in THE AFRICAN UNION: LEGAL AND INSTITUTIONAL FRAMEWORK—A MANUAL ON THE PAN-AFRICAN ORGANIZATION 251–74 (Abdulqawi A. Yusuf & Fatsah Ouguergouz eds., 2012); Ademola Abass, *Prosecuting International Crimes in Africa: Rationale, Prospects and Challenges*, 24 EUROPEAN J. INT’L L., 933–46 (2013); Gerhard Kemp & Selemani Kinyunyu, *The Crime of Unconstitutional Change of Government (Article 28E)*, in THE AFRICAN CRIMINAL COURT: A COMMENTARY ON THE MALABO PROTOCOL 57–70 (Gerhard Werle & Moritz Vormbaum eds., 2017); AFRICA’S NEW PEACE AND SECURITY ARCHITECTURE: PROMOTING NORMS, INSTITUTIONALIZING SOLUTIONS (Ulf Engel & João Gomes Porto eds., 2010); Hélène Tigroudja, *The African Charter on Democracy, Elections and Governance*, in THE AFRICAN UNION: LEGAL AND INSTITUTIONAL FRAMEWORK—A MANUAL ON THE PAN-AFRICAN ORGANIZATION 275–90 (Abdulqawi A. Yusuf & Fatsah Ouguergouz eds., 2012); SOLOMON AYELE DERSSO, UNCONSTITUTIONAL CHANGES OF GOVERNMENT AND UNCONSTITUTIONAL PRACTICES IN AFRICA (2016), <https://sites.tufts.edu/wpf/files/2017/07/2.-UCG-Dersso-f.pdf>.

themselves into the SADC Assembly of Heads of States and Governments.² Had it been successfully implemented against Zimbabwe's Operation Restore Legacy as intended by Zambia and others, the norm would have severely restricted Zimbabwe's ancient and enduring constitutional convention of Chimurenga/Inkululekho/Resistance of oppression, which has the support of United Nations standards on good governance.³ This Article recommends the urgent development by the SADC of a parallel constitutional normative structure requiring the absolute sanctity of the national assembly ballot as a precondition to implementation of the absolute prohibition of unconstitutional takeover of power. The new norm should also have a similar, if not stronger, monitoring and enforcement mechanism.

INTRODUCTION

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 on November 6, 2017, when President Mugabe sacked the Vice President of Zimbabwe, accusing him of disloyalty.⁴ This was a high watermark in the long-running leadership succession battles within the ruling Zimbabwe African National Union–Patriotic Front Party (ZANU–PF) to replace President Mugabe, who had ruled the country for thirty-seven years. The move was widely characterized as the last move to ensure that the President's wife, Grace Mugabe, would be in place to succeed her husband as President of Zimbabwe. In December 2014, Grace Mugabe had been elevated to Head of the ZANU–PF National Women's League,⁵ a position that

² The SADC Assembly of Heads of States and Governments is the SADC's executive decision-making body.

³ See G.A. Res. 2200A (XXI), at 25 (Mar. 23, 1976).

⁴ See MacDonald Dzirutwe, *Robert Mugabe Sacks Zimbabwe Vice President Emmerson Mnangagwa*, THE INDEPENDENT (Nov. 6, 2017), <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 November 24, 2017, following an application by Emmerson Mnangagwa before his inauguration as President on the same day); see also Charles Laiton, *Court Nullifies Mugabe's Dismissal of Mnangagwa*, NEWSDAY (Nov. 25, 2017), <https://www.newsdaily.co.zw/2017/11/court-nullifies-mugabes-dismissal-mnangagwa/>.

⁵ See Andrew England, *Grace Mugabe Named as Head of Zanu-PF Women's League*, FINANCIAL TIMES (Dec. 7, 2014), <https://www.ft.com/content/ebbc6fc-7e35-11e4-87d9-00144feabdc0>.

instantaneously catapulted her into the ruling party's policy-making body—the politburo.

The sacking of Vice President Mnangagwa—later annulled by High Court Order⁶ on November 24, 2017—was followed immediately by two developments. The first was the swift public endorsement of Grace Mugabe as the person most suited to replace 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 shaped Zimbabwe's response to the question of whether the contrived family dynasty governance of Zimbabwe would prevail.

The Zimbabwe Defence Forces (ZDF) launched Operation Restore Legacy with an address on November 13, 2017, by General Constantino Chiwenga:

The current purging of which is clearly targeting members of the party with a liberation background must stop forthwith. The known counter-revolutionary elements who have fermented the current instability in the Party (ZANU (PF)) 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.”⁷ The only clarification offered was as follows:

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.

⁶ Justice Chiweshe ruled that “[t]he 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.” Maveriq, *High Court Says Mugabe's Decision to Fire Mnangagwa is Null and Void*, PINDULA NEWS (Nov. 24, 2017), <https://www.herald.co.zw/in-defence-of-the-nations-founding-values-gains-of-independence-2/>.

⁷ *In Defense of the Nation's Founding Values, Gains of Independence*, THE HERALD (Nov. 16, 2017, 12:11 AM), <https://www.theguardian.com/world/2017/nov/15/the-situation-has-moved-to-another-level-zimbabwe-army-statement-in-full> (citing statement by military spokesman Major General S.B. Moyo).

As soon as we have accomplished our mission we expect that the situation will return to normalcy.⁸

President Mugabe was placed under house arrest.⁹ 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 the intervention largely as a messianic move to stop the Mugabes' attempt to capture and subvert Zimbabwe's revolutionary legacy that is traceable to the first Matabele rebellion of 1893,¹⁰ followed by the First *Chimurenga* (1896–97),¹¹ and later by the *Chinhoyi* Battle of 1966 or, as it is better known—the Second *Chimurenga*.¹² The latter had escalated the protracted, armed struggle for independence until the cease-fire of 1979, followed by granting of political independence from Britain the next year.

The legacy invoked under Operation Restore Legacy was one of rejecting and actively resisting oppression—known as *Chimurenga* in the Shona language and *Inkululekho* in the Ndebele language. In this instance, the oppression was summed up in Mugabe's attempt to

⁸ *Id.*

⁹ See Jeffrey Moyo & Norimitsu Onishi, *Zimbabwe's Military, in Apparent Takeover, Says It Has Custody of Mugabe*, N.Y. TIMES (Nov. 14, 2017), <https://www.nytimes.com/2017/11/14/world/africa/zimbabwe-mugabe-mnangagwa-chiwenga.html> [hereinafter Moyo & Onishi, *Zimbabwe's Military*]; Jeffrey Moyo & Norimitsu Onishi, *Robert Mugabe Under House Arrest as Rule Over Zimbabwe Teeters*, N.Y. TIMES (Nov. 15, 2017), <https://www.nytimes.com/2017/11/15/world/africa/zimbabwe-coup-mugabe.html?action=click&contentCollection=Africa&module=RelatedCoverage®ion=Marginalia&pgtype=article> [hereinafter Moyo & Onishi, *House Arrest*].

¹⁰ This was “the first serious fight between blacks and whites in Rhodesia.” J.V. Woolford, *The Matabele War, Part I*, 28 HISTORY TODAY, (Aug. 1978), <http://www.historytoday.com/jv-woolford/matabele-war-part-i>.

¹¹ The First Chimurenga war broke out in the Zimbabwean plateau from 1896 to 1897 between the white colonizers 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.” *First Chimurenga*, PINDULA (Aug. 28, 2018, 11:50 AM), https://www.pindula.co.zw/First_Chimurenga.

¹² On April 28, 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 Manyerenyere, Godwin Dube, and Chubby Savanhu were overcome after running out of ammunition, but not before they had downed a Rhodesian helicopter and killed twenty-five 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. See Farirai Machivenyika, *Chinhoyi Seven Declared National Heroes*, THE CHRONICLE (July 31, 2017, 2:07 PM), <https://www.chronicle.co.zw/chinhoyi-7-declared-national-heroes/>.

arbitrarily impose family dynasty governance on Zimbabwe. Placards¹³ displayed at the demonstrations against Mugabe during the operation, particularly on November 18, left no doubt about what Operation Restore Legacy was all about—namely, the outright and resounding rejection of arbitrary rule. One placard read, “No to Mugabe Dynasty.” Another read, “Leadership is Not Sexually Transmitted.” Yet another read, “SADC and AU stay out of our affairs. This is what we want as Zimbabwe. Mugabe Out!!!”

The Southern African Development Community (SADC) leadership responded swiftly and vociferously to Operation Restore Legacy in the name of SADC and Zimbabwean constitutionalism, which came as no surprise. As one of the architects of 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 both individually and collectively in the Assembly of States Parties of both the SADC and the African Union (A.U.). In a sense, Operation Restore Legacy became an unexpected but severe test of the SADC leadership’s loyalty to their “master and mentor” Mugabe.

In a 2018 interview,¹⁴ 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 defense and security ministers dispatched on November 15 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 no need for intervention.”¹⁵ 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].”¹⁶

¹³ See Image Results, Google Images, <https://www.google.com/imghp?hl=en> (search “Operation Restore Legacy”), https://www.google.co.uk/search?hl=en&biw=1536&bih=872&tbn=isch&sa=1&ei=g_g5W9OAH8rYgAb5s5f4Dw&q=grace+mugabe%2C+leadership+is+not+sexually+transmitted&oq=grace+mugabe%2C+leadership+is+not+sexually+transmitted&gs_l=img.12...18779.21754.0.24197.12.12.0.0.0.93.591.12.12.0...0...1c.1.64.img..0.0.0...0.GsQelvYy62Q.

¹⁴ Harare, *SA Could Have Done “Much More” to Save Me: Mugabe*, NEWS 24 (Mar. 24, 2018), <https://www.news24.com/Africa/Zimbabwe/sa-could-have-done-much-more-to-save-me-mugabe-20180323>.

¹⁵ *Id.*

¹⁶ *Id.*

I

THE PROBLEM: AFRICAN STATES EMBRACE CONSTITUTIONALIZATION OF INTERNATIONAL LAW AND ESTABLISH REGIONAL ENTITIES FOR GOVERNANCE

African states appear to have embraced constitutionalization¹⁷ of international law and established regional and subregional intergovernmental entities for ensuring deeper economic integration among themselves, human rights protection, and the rule of law. These intergovernmental entities and institutions must be evaluated for their potential to achieve their declared goals,¹⁸ which they often fall short of doing. This raises serious questions about their legitimacy.¹⁹ One such institution, the SADC, was established by treaty in 1992 to promote regional integration, including economic development and ensuring peace and security.²⁰ However, enormous constitutional law issues were raised consequent upon Zimbabwe's membership in the SADC during Operation Restore Legacy.

A. SADC Treaty

Zimbabwe is a founding member state of the organization that has a wide range of objectives, including ensuring peace and security in the subregion. Chapter VIII of the United Nations (U.N.) Charter is the constitutional basis for the involvement of regional organizations and agencies in the maintenance of international peace and security.²¹ Consequently, Zimbabwe has peace and security obligations under the SADC Treaty.

¹⁷ See RULING THE WORLD? CONSTITUTIONALISM, INTERNATIONAL LAW AND GLOBAL GOVERNANCE (Jeffrey L. Dunoff & Joel P. Trachtman eds., 2009); Armin von Bogdandy, *Constitutionalism in International Law: Comment on a Proposal from Germany*, 47 HARV. INT'L L.J. 223 (2006); Christine E.J. Schwöbel, *Situating the Debate on Global Constitutionalism*, 8 INT'L J. CONST. L. 611 (2010).

¹⁸ See Moritz Baumgärtel et al., *Hierarchy, Coordination, or Conflict? Global Law Theories and the Question of Human Rights Integration*, EUR. J. HUM. RTS., no. 3, 2014, https://www.researchgate.net/publication/277710817_Hierarchy_Coordination_or_Conflict_Global_Law_Theories_and_the_Question_of_Human_Rights.

¹⁹ See Ben Chigara, *What Should a Re-constituted Southern African Development Community (SADC) Tribunal be Mindful of to Succeed*, 81 NORDIC J. INT'L L. 341 (2012).

²⁰ See Consolidated Treaty of the Southern African Development Community, Oct. 21, 2015.

²¹ See Repertoire of the Practice of the Security Council, Regional Arrangements (Chapter VIII), http://www.un.org/en/sc/repertoire/regional_arrangements.shtml.

Briefly, Article 52 of the U.N. Charter provides for the involvement of regional arrangements or agencies in the peaceful settlement of disputes.²² 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.²³ 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 African Union or the U.N. Security Council intervenes.²⁴

1. On the Absolute Prohibition of Unconstitutional Takeover of Power

SADC peace and security initiatives have been extensively developed and codified. They encompass ongoing interstate 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 Politics, Defence and Security Cooperation (SIPO), which was revised at Maputo on August 5, 2010.²⁵ SIPO is itself a mechanism for the implementation of the Protocol on Politics, Defence and Security Cooperation, which was revised at Blantyre on August 14, 2001 (Blantyre Protocol).²⁶

The Blantyre Protocol seeks to implement the overarching SADC objectives contained in Article 5 of the SADC Treaty.²⁷ The norm on

²² See U.N. Charter art. 52, 1 UNTS xvi.

²³ *Id.* at art. 53.

²⁴ Michael Barnett, *Partners in Peace? The UN, Regional Organizations, and Peace-Keeping*, 21 (4) REV. OF INT'L STUDIES 411–33 (Oct. 1995); UN Security Council Report, *Cooperation between the UN and Regional Organizations/Arrangements in a peacekeeping environment: Suggested Principles and Mechanisms* (Mar. 1999), <https://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3CF6E4FF96FF9%7D/UNRO%20Cooperation%20between%20the%20UN%20and%20Regional%20Organizations.pdf>.

²⁵ Southern African Development Community [SADC], *Strategic Indicative Plan for the Organ on Politics, Defence and Security Cooperation* (rev. ed. Aug. 5, 2010), http://www.sadc.int/files/6313/6880/3040/03514_SADC_SIPO_English.pdf [hereinafter SIPO].

²⁶ Southern African Development Community [SADC], *Protocol on Politics, Defence and Security Co-operation* (Aug. 14, 2001), http://www.sadc.int/files/3613/5292/8367/Protocol_on_Politics_Defence_and_Security20001.pdf [hereinafter Blantyre Protocol].

²⁷ Southern African Development Community [SADC], *Treaty of the Southern African Development Community*, (Aug. 17, 1992), http://www.sadc.int/files/9113/5292/9434/SADC_Treaty.pdf; see also Southern African Development Community [SADC], *Regional*

the absolute prohibition of unconstitutional takeover of power is the centerpiece of the SADC's peace and security apparatus. However, the United Nations has made human rights protection its core value for promoting and protecting international peace and security.²⁸

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, most unmistakable contradiction of present times. Zimbabwe is not even a State party to the African Charter on Democracy Elections and Governance.²⁹ Zimbabwe has yet to even place its signature on that treaty.

Yet, one of the core achievements of Mugabe's thirty-seven years and seven months in power is the entrenchment of the absolute prohibition against unconstitutional takeover of power in the constitutional law of the SADC. Why did Mugabe invest so much effort into such a project and neglect institutionalizing the requirement for dependable national assembly ballots?

Under the norm established, it is illegal to mount a coup d'état. Perpetrators face political oblivion. This has become a constitutional norm of extreme importance for both the SADC and the African Union. The Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights (Malabo Protocol)³⁰ recognizes the jurisdiction of the African Court of Justice and Human Rights (ACJHR) over fourteen international and transnational crimes, including an unconstitutional takeover of power.³¹ 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

Indicative Strategic Development Plan, http://www.sadc.int/files/5713/5292/8372/Regional_Indicative_Strategic_Development_Plan.pdf.

²⁸ See U.N. Charter art. 1 (Preamble).

²⁹ See African Charter on Democracy, Elections and Governance, African Union, date of adoption Jan. 30, 2007 (entered into force Feb. 15, 2012).

³⁰ See Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights, at art. 28E, African Union (June 27, 2014), https://au.int/web/sites/default/files/treaties/7804-treaty-0045_-_protocol_on_amendments_to_the_protocol_on_the_statute_of_the_african_court_of_justice_and_human_rights_e.pdf; see also Abass, *supra* note 1; Kemp & Kinyunyu, *supra* note 1.

³¹ *Id.* Other crimes under the jurisdiction of the ACJHR include 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.

aim of illegally accessing or maintaining power” and lists the following:

- a) A putsch or coup d’état against a democratically elected government;
- b) An intervention by mercenaries to replace a democratically elected government;
- c) Any replacement of a democratically elected government by the use of armed dissidents or rebels or through political assassination;
- d) Any refusal by an incumbent government to relinquish power to the winning party or candidate after free, fair and regular elections;
- e) 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;
- f) Any substantial modification to the electoral laws in the last six (6) months before the elections without the consent of the majority of the political actors.³²

Institutions for ensuring the absolute prohibition of the unconstitutional takeover of power have already been elaborately developed by the SADC. The SADC’s Strategic Indicative Plan for the Organ on Politics, Defence and Security Cooperation (SIPO)³³ and the African Union’s Peace and Security Council (PSC)³⁴ are both robust and reliable mechanisms that African leaders now look to for restoration of 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. It is not matched by an equal and necessary absolute guarantee of safe, reliable, and dependable national assembly ballots to determine who legitimately governs these states, as required under Article 25 of the U.N. International Covenant on Civil and Political Rights (ICCPR).³⁵ The prohibition of the unconstitutional takeover of power is brazenly championed under the guise of peace, security, and political stability.

³² Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights, *supra* note 30.

³³ SIPO, *supra* note 25.

³⁴ See *Peace and Security Council (PSC)*, AFRICAN UNION, <https://au.int/en/organs/psc> (last visited Nov. 27, 2018).

³⁵ G.A. Res. 2200 (XXI), at 49 (Dec. 16, 1966).

Yet SADC countries' recent history on the question of the dependability of their national assembly ballots as an authentic process for ensuring that citizens decide 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 ensuring good governance in the SADC.³⁶ This is an anomaly that requires urgent correction if the SADC wishes to 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.³⁷

Operation Restore Legacy had to overcome the SADC trap against any military takeover of power in the subregion to succeed in restoring citizen choice in Zimbabwe.

2. ZDF and the Absolute Prohibition of Unconstitutional Takeover of Power

In light of the norms present and endorsed by the SADC, from the beginning of its intervention, the ZDF engaged the media and unambiguously and meticulously communicated that Operation Restore Legacy was not a coup d'état. Consequently, it could not be perceived as a breach of any strictures of constitutional law of Zimbabwe, the SADC, or the African Union. Throughout Operation Restore Legacy, the ZDF deliberately referred to Mr. Mugabe as commander in chief and as the president of the Republic of Zimbabwe, even though they had placed him under house arrest. The ZDF let Mugabe have international calls with other SADC leaders. He was even able to perform his ceremonial duties as Chancellor of the Open University of Zimbabwe and to give a televised address to the nation.

³⁶ Khabele Matlosa, *Survey of Electoral Systems and Reform Imperatives in the SADC Region*, THE ELECTORAL INST. OF S. AFR., (Sept. 2003), https://www.researchgate.net/publication/228435353_Survey_of_Electoral_Systems_and_Reform_Imperatives_in_the_SADC_Region.

³⁷ See Nobert Kersting, *Electoral Reform in Southern Africa: Voter Turnout, Electoral Rules and Infrastructure*, 6 J. AFR. ELECTIONS 134–51 (2007).

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 the address where he had been expected to resign the presidency and pave the way for a new leader but had not done so.³⁸

The ZDF even established negotiation teams comprising South African and Zambian envoys to help resolve the political conundrum. For ten days, the ZDF tried to persuade Mr. Mugabe to resign from the Presidency of Zimbabwe. Perhaps mindful of the unemployment statistics, which showed a national unemployment figure of ninety-five percent, Mr. Mugabe repeatedly scorned that request. All these facts combined to give Operation Restore Legacy 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 was not in any way a coup d'état, appeared to confuse and freeze the hand of the SADC leadership from triggering the SADC constitutional norm on the absolute prohibition of unconstitutional takeover of power.³⁹

3. International Reporting on Operation Restore Legacy

International media, used to understanding and reporting situations in clear terms, was baffled by the unfolding military intervention. Although Operation Restore Legacy had been triggered by the ZDF, it immediately attracted the spontaneous, voluntary, and universal support of all Zimbabweans. The citizens fanned the operation's power fervently and unrelentingly from literally every part of the country. This *sui generis* operation compelled western media to introduce new vocabulary—namely, a coup-that-wasn't-a-coup⁴⁰—as the best way to characterize Operation Restore Legacy. In this light, it appears more appropriate to describe the operation as a measure to correct Zimbabwe's governance destiny from the Mugabe's contrived family dynasty rule to, hopefully, people's sovereignty, which early signs suggest is the case.

³⁸ See Robert Mugabe Stuns Zimbabwe by Failing to Quit—As it Happened, THE GUARDIAN (Nov. 19, 2017, 4:55 PM), <https://www.theguardian.com/world/live/2017/nov/19/robert-mugabe-set-to-resign-as-president-of-zimbabwe-live>.

³⁹ See Chigara, *supra* note 19, at 341.

⁴⁰ See Eliza Mackintosh, *Is Zimbabwe's Military Takeover the World's Strangest (non) Coup?*, CNN (Nov. 21, 2017), <https://www.cnn.com/2017/11/20/africa/zimbabwe-military-takeover-strangest-coup/index.html>.

II

SADC PRACTICE RE THE NORM ON THE ABSOLUTE PROHIBITION OF UNCONSTITUTIONAL TAKEOVER OF POWER

The SADC has consistently upheld its norm on the absolute prohibition of unconstitutional takeover of power since its inauguration. Previous to Operation Restore Legacy, the SADC condemned unconstitutional takeover of power in Madagascar, Lesotho, and the Democratic Republic of Congo.

A. Madagascar (2010)

By its Double Troika Summit Communiqué⁴¹ of January 14, 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 African Union, the United Nations, and other international organizations and institutions to apply the same measure.

The Troika rejected “any attempt to use democratic means, institutions and processes to legitimize Governments that came to power through unconstitutional means, and urges 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.”⁴²

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 reject and penalize the new regime. The African Union immediately imposed targeted sanctions against Mr. Rajoelina and his administration. The European Union suspended development aid to Madagascar by adoption of what it called “appropriate measures”⁴³ of the European Council, based on Article 96

⁴¹ *Double Troika Summit Communiqué*, Southern African Development Community [SADC] (Jan. 14, 2010), https://www.sadc.int/files/9213/5292/8385/Double_TROIka_Summit_Communique-Jan2010.pdf.

⁴² *Id.*

⁴³ See *Madagascar*, EUROPEAN COMMISSION, https://ec.europa.eu/europeaid/countries/madagascar_en.

of the Cotonou Agreement,⁴⁴ which refers to partner states' approaches to human rights, democratic principles, and the rule of law. The measures entailed the suspension of the 10th European Development Fund Country Strategy Paper as well as all cooperation projects implemented through the government.⁴⁵

This was not the first time that the SADC had intervened to stop an attempted unconstitutional takeover of power. President Nelson Mandela's government had invoked the SADC Organ for Conflict Prevention⁴⁶ in 1998 to put down a civilian-backed military coup in Lesotho.

B. Lesotho (1998)

Pursuant to Article 5(1) of the Protocol on Politics, Defence and Security in the Southern African Development Community Region,⁴⁷ Pakalitha Mosisili, Prime Minister of Lesotho on September 16, 1998, requested that South Africa, Zimbabwe, and Mozambique rescue to his government from a couple.⁴⁸ Article 5(1) of the Protocol⁴⁹ provides that a member State can request the Organ to convene in order to bring the existence or imminent threat of a conflict to its attention, at any time.⁵⁰

The South African government obliged by sending a dawn advance party of 600 troops, later joined by 250 from nearby Botswana, armored

⁴⁴ *Partnership Agreement Between the Members of the African, Caribbean and Pacific Group of States of the One Part, and the European Community and its Member States, of the Other Part, signed in Cotonou on 23 June 2000*, 15.12.2000 OFF. J. EUR. UNION L. 317/3 (June 23, 2000), https://ec.europa.eu/europeaid/partnership-agreement-between-members-african-caribbean-and-pacific-group-states-one-part-and_en.

⁴⁵ *Double Troika Summit Communique*, *supra* note 41.

⁴⁶ "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." Southern African Development Community [SADC], *Organ on Politics, Defense and Security*, TOWARDS A COMMON FUTURE, <http://www.sadc.int/sadc-secretariat/directorates/office-executive-secretary/organ-politics-defense-and-security/>.

⁴⁷ *Protocol on Politics, Defence and Security in the Southern African Development Community (SADC) Region*, 11 AFR. J. INT'L & COMP. L., 197, 200 (1999) [hereinafter *The Protocol*].

⁴⁸ P. Hawthorne, *The Battle for Lesotho*, 152 TIME 39 (Oct. 5, 1998).

⁴⁹ Fako Johnson Likoti, *The 1998 Military Intervention in Lesotho: SADC Peace Mission or Resource War?*, 14 J. INT'L PEACEKEEPING 251 (2007), <https://www.tandfonline.com/doi/pdf/10.1080/13533310601150875?needAccess=true>.

⁵⁰ *Id.*

cars, helicopters, gunships, and tanks. This appeared to be entirely consistent with Article 5(2)⁵¹ of the Protocol.

South Africa's intervention ended with violence, including 30 dead at the end of the first day. The facts leading to the SADC force's intervention raise issues that the SADC Protocol never addresses, including the guarantee to individuals' right to democratic governance,⁵² the right to self-determination,⁵³ and individuals' peace and security.

Neither President Mandela nor Security Minister Mufamadi had considered the sovereign right of the Sotho people to democratic governance under Article 25 of the ICCPR or exercise of their right to self-determination as paramount. The sole concern of the president and his security minister was the prevention of anarchy and chaos, which they had only guessed might follow (there was no guarantee of their forecast coming to fruition) in the little kingdom of 2.23 million people. People were killed *by* the intervention and not before the intervention. As pleaded by the requesting authorities, the object of the intervention was to rescue the authorities and maintain them as the rulers. This would deny 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 defense forces 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."⁵⁴

C. Democratic Republic of Congo (1998)

Previous to Operation Restore Legacy, the SADC intervened in the Democratic Republic of Congo. On August 2, 1998, a rebellion occurred against President Kabila of the Democratic Republic of

⁵¹ "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." The Protocol, *supra* note 47.

⁵² See Thomas M. Franck, *The Emerging Right to Democratic Governance*, 86 AM. J. INT'L L., 46-91 (Jan. 1992).

⁵³ See G.A. Res. 1514 (XV), at 66 (Dec. 14, 1960); HURST HANNUM, *Legal Aspects of Self-determination*, in THE PRINCETON ENCYCLOPEDIA OF SELF DETERMINATION, <https://pesd.princeton.edu/?q=node/254>.

⁵⁴ *World: Africa "Shoot to Kill" in Lesotho*, BBC NEWS, <http://news.bbc.co.uk/2/hi/africa/178605.stm> (Sept. 23, 1998, 11:26 PM).

Congo. Pursuant to the Protocol on Politics, Defence and Security in the SADC Region⁵⁵ a commission was established on August 8, 1998, in Harare to try and broker a peaceful settlement among the warring parties. The Commission comprised the foreign ministers of Zimbabwe,⁵⁶ Zambia, Namibia, and Angola. On August 18, the Commission met in Goma with rebel and civilian leaders in an effort to determine first, whether Rwanda and Uganda had violated Congo's borders and second, what help, if any, the rebels were receiving.⁵⁷ This gathering followed earlier meetings with Ugandan officials, Rwandese officials, and President Kabila in Kinshasa.⁵⁸ On August 19, the Commission reported its findings. Zimbabwe's Defense Minister Moven Mahachi announced, "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."⁵⁹

The foregoing illustrations show that SADC leadership is ever so keen to implement the norm on the absolute prohibition of unconstitutional takeover of power. Enjoyment of that power must presuppose a sound human rights record on behalf of SADC governments. However, international monitoring organizations' periodic reports on human rights and democracy are less than flattering for this region.⁶⁰

⁵⁵ The Protocol, *supra* note 47, at 197.

⁵⁶ As Chairman of the proposed Organ on Politics, Defence and Security in the Region, and in response to President Kabila's request for help, Zimbabwe convened the meeting as required under Articles 5(1) and 5(2)(2) of the Protocol. Article 5(1) provides that "[a]ny 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." *Id.* at 200; Article 5(2)(2) provides that "[i]n 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." *Id.* 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)." *Id.*

⁵⁷ 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, *Kabila's Grasp Slipping*, ABC NEWS (Aug. 19, 1998), <http://archive.abcnnews.com/world/DailyNews/Congo980818.html>.

⁵⁸ *Id.*

⁵⁹ *DRC: Zimbabwe Says SADC to Back Kabila*, (Aug. 19, 1998), <https://reliefweb.int/report/democratic-republic-congo/drc-zimbabwe-says-sadc-back-kabila>.

⁶⁰ See, e.g., *Annual Report on Human Rights and Democracy in the World in 2016*, 97–172 (2016), https://eeas.europa.eu/sites/eeas/files/annual_report_on_human_rights_and_democracy_in_the_world_2016_0.pdf.

The E.U. Annual Report on Human Rights and Democracy in the World states that with regard to Angola, “In 2016 the human rights situation was characterized by shrinking political space ahead of parliamentary and presidential elections scheduled for August 2017.”⁶¹ Regarding Lesotho, where President Mandela’s government had intervened in 1998, the report points to political instability, which affected the rule of law and undermined the work of oversight institutions.⁶² The situation was no better in Madagascar, where the SADC had intervened in 2010, citing crime and corruption for weighing “heavily on the respect for human rights. Police violence as well as public lynching happens frequently.”⁶³

Zambia is cited for “constrains regarding the implantation of legislation and policies in the area of human rights and democracy.”⁶⁴ President Mugabe’s Zimbabwe is reported to be characterized by police brutality against opposition party political rallies, including those previously sanctioned by the courts, intimidation and jailing of hundreds of protesters without due process, and documented cases of abduction and torture of social movement participants and their families.⁶⁵

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 human rights culture espoused by the United Nations.

III

SUPPOSITION OF GOOD GOVERNANCE IMPLIED BY THE SADC NORM ON THE ABSOLUTE PROHIBITION OF UNCONSTITUTIONAL TAKEOVER OF POWER

The SADC norm on the absolute prohibition of unconstitutional takeover of power compels a deeper inquiry into the question of whether SADC governments have the human rights credentials that merit possession and application of such a power. An impeccable human rights qualifying record could be established by SADC member states if each could demonstrate the following as a minimum: (1)

⁶¹ *Id.* at 97.

⁶² *Id.* at 133.

⁶³ *Id.* at 136.

⁶⁴ *Id.* at 168.

⁶⁵ *Id.* at 170.

participation in at least fifteen of the current stock of eighteen international human rights instruments; (2) participation in all nine current human rights treaty monitoring bodies and recognition of individuals' rights to petition/communicate any alleged human rights breaches to the appropriate treaty monitoring body; (3) establishment of a National Human Rights Committee with powers and means to expeditiously process human rights claims within the state; (4) demonstration of a clear record of holding verifiable free and fair national assembly elections.

Additionally, to insist on benefiting from the SADC norm on the absolute prohibition of unconstitutional takeover of power, SADC states must continually demonstrate adherence to the good governance criteria of the United Nations.

A. International Requirement to Recognize, Promote, and Protect Good Governance

The U.N. Office of the High Commission of Human Rights (OHCHR) writes that good governance 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.⁶⁶

In Resolution 2000/64, the U.N. Commission on Human Rights⁶⁷ identified transparency, responsibility, accountability, participation, and responsiveness to the needs of the people as the key performance indicators of good governance.

⁶⁶ U.N. Office of the High Comm'r for Human Rights, Good Governance and Human Rights, <http://www.ohchr.org/EN/Issues/Development/GoodGovernance/Pages/GoodGovernanceIndex.aspx>.

⁶⁷ U.N. Comm'n on Human Rights Res. 2000/64 (Apr. 26, 2000).

In Zimbabwe, the ZDF spokesperson stated that Operation Restore Legacy had evidently been motivated by criminality of those closely linked to Mr. Mugabe, both inside and outside the government. Mr. Mugabe's Zimbabwe seemed to be a state far removed from the good governance standards of the United Nations, with no hope of recovery. National unemployment was at ninety-five percent and corruption appeared to reign everywhere.⁶⁸

B. SADC Lip Service to Democratic Governance?

Democratic governance is habitually referenced in regional human rights documents that are pertinent to Zimbabwe. They include the Constitutive Act of the African Union,⁶⁹ the Lomé Declaration on Unconstitutional Changes of Government,⁷⁰ and the African Charter on Democracy Elections and Governance (ACDEG). The ACDEG, adopted on January 30, 2007,⁷¹ is a holistic treaty that targets the entrenchment of democracy, human rights, and good governance. It focuses on credible elections, the promotion of human rights, the rule of law, the improvement of political, economic, and social governance, and challenging all recurrent issues relating to unconstitutional changes of government among African states.⁷²

Article 48 of the ACDEG required only fifteen ratifications out of fifty-five possible states to bring it into force.⁷³ However, it took a full five years, one month, and two weeks to bring it into force. The Charter has since been ratified by thirty states and signed by forty-five states.⁷⁴ This hardly inspires confidence in the continent's attitude toward the implementation of free and fair elections as a means to enhancing good governance among African states.

⁶⁸ See 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* 291, 291–301 (2012).

⁶⁹ Constitutive Act of the African Union, Organization of African Unity, May 26, 2001, 2158 U.N.T.S. 3.

⁷⁰ U.N. Office of the High Comm'r for Human Rights, Lomé Declaration of July 2000 on the Framework for an OAU Response to Unconstitutional Changes of Government, U.N. Doc. AHG/Decl.5 (XXXVI) (July 12, 2000).

⁷¹ *African Charter on Democracy, Elections and Governance*, African Union (Jan. 30, 2007), <https://au.int/en/treaties/african-charter-democracy-elections-and-governance>.

⁷² *See id.*

⁷³ *Id.* at art. 48.

⁷⁴ Chike Charles Aniekwe et al., *The 10th Anniversary of the African Charter on Democracy, Elections and Governance*, INST. OF DEV. POLICY (2017), <http://cris.unu.edu/10th-anniversary-african-charter-democracy-elections-and-governance>.

Ominously, Zimbabwe has neither signed nor ratified the ACDEG. Yet, Mr. Mugabe was a champion for installation and recognition of the prohibition of unconstitutional takeover of power in the SADC and beyond. His wariness of the idea of democratic governance was matched only by his determination to stop others from assuming power undemocratically.

C. The SADC Norm: A Blunt Tool to Counter Good Governance

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

For instance, only three of the fifteen SADC member states have ratified the U.N. Convention for the Protection of all Persons from Enforced Disappearances (CPED).⁷⁵ This convention could be described as the litmus test of good governance. Yet, only one-fifth of SADC states are parties to it.

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 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.⁷⁶

The Convention has a treaty body for monitoring a state's compliance with its obligations which include, *inter alia*, the requirements to (1) enact specific laws establishing the crime of enforced disappearance; (2) investigate complaints and reports of enforced disappearance and bring those responsible to justice; (3) 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

⁷⁵ See International Convention for the Protection of All Persons from Enforced Disappearance, entered into force Dec. 23, 2010, 2716 U.N.T.S. 3. (Lesotho, Dec. 6, 2013; Malawi, July 14, 2017; and Zambia, Apr. 4, 2011), <https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&msgid=IV-16&chapter=4&lang=en> [hereinafter CPED].

⁷⁶ *Id.*

prisoner can be released from unlawful detention, that is, detention lacking sufficient cause or evidence); (4) prevent concealment of the whereabouts of arrested persons so that no one finds themselves placed outside the protection of the law; (5) observe the right of victims and their families to know the truth regarding the circumstances and fate of the disappeared person; (6) 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.⁷⁷

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 on December 21, 2009,⁷⁸ the Working Group requested investigatory visits to Zimbabwe following reports of Mugabe's failure to protect people from disappearances.⁷⁹

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

Until the very end of Operation Restore Legacy, Mugabe appeared to exude confidence that the sophisticated ZDF action would suffer delegitimation by both the SADC and the African Union, which he had nurtured to react only one way in such circumstances. He had also given them the legal norm to justify putting down “unconstitutional power takeovers.”

This norm is referenced directly and indirectly throughout the Strategic Indicative Plan for the Organ on Politics, Defence and Security Cooperation.⁸⁰ It is explicitly codified in paragraph 1.2.8, which states “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 . . .” (emphasis added).⁸¹

The treaty obsesses over protection against unconstitutional takeover of power without linking or coupling it with the requirement

⁷⁷ *See id.*

⁷⁸ U.N. Office of the High Comm'r for Human Rights, Report of the Working Group on Enforced or Involuntary Disappearances, U.N. Doc A/HRC/13/31 (Dec. 21, 2009).

⁷⁹ *Id.*

⁸⁰ SIPO, *supra* note 25.

⁸¹ *Id.* at ¶ 1.2.8.

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.⁸²

Mr. Edgar Lungu, the Zambian President and SADC leader most astute regarding the virtues of the norm on the absolute prohibition of unconstitutional takeover of power, was the first to swing into action by declaring. Local media outlets further reported Lungu stating that his troops were ready to support and uphold Mugabe’s regime.⁸³

Lungu’s behavior is a perfect fit for political unawareness, noticeably because Zimbabweans of all persuasions, backgrounds, and political affiliations unanimously endorsed the ZDF intervention. Zimbabweans instantaneously and spontaneously flooded the streets across the country, and any form of social media accessible to them, to implore the SADC and the African Union not to meddle in their affairs.

There were tweets and retweets 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.”⁸⁴

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 in Zimbabwe’s modern history.⁸⁵ 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

⁸² *Id.* at ¶ 5.2.

⁸³ Wilbert Mukori, *Zambian Army to Invade Zimbabwe to Help Mugabe: Lungu, Keep Your Nose Out of Zimbabwe Affairs*, BULAWAYO24 NEWS, (Nov. 16, 2007, 6:43 PM), <http://bulawayo24.com/index-id-opinion-sc-columnist-byo-122178.html>.

⁸⁴ Liesel Louw-Vaudran, *The Zimbabwe Dilemma Illustrated the Weaknesses of the Organisation’s Governance Instruments*, INST. FOR SEC. STUDIES (Nov. 22, 2017), <https://issafrica.org/iss-today/the-african-unions-chequered-history-with-military-coups>.

⁸⁵ See Franck, *supra* note 52.

human security concerns instead of the previous state security concerns.⁸⁶

Lungu's remarks also contradict Zimbabwe's enduring ancient convention manifested by Operation Restore Legacy: *chava-Chimurenga/sesi-Inkululekho/time to resist oppression*. The remarks pit people's sovereignty against protectionism of the ruling elite. Those who remained in support of Mugabe were of the elite, such as South African President Jacob Zuma, who is reported to have telephoned Mugabe during Mugabe's house arrest and soon afterwards dispatched his security chiefs to meet with Mugabe in Harare.⁸⁷

IV HUMAN RIGHTS DISINCLINATIONS OF SADC MEMBER STATES AND KELSEN'S THEORIES ON THE *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 the total number of international human rights instruments to eighteen.⁸⁸ SADC states' participation in these instruments is worryingly low, particularly their participation in treaty bodies that monitor member states' compliance with their obligations under each corresponding treaty.

⁸⁶ See U.N. TR. FUND FOR HUM. SEC., <http://www.un.org/humansecurity/humansecurity-unit/human-security-approach>; U.N. TR. FUND FOR HUM. SEC., 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 *PROTECTING HUMAN SECURITY IN AFRICA* 274–77 (OXFORD U. PRESS 2010); S. NEIL MACFARLANE & YUEN FOONG KHONG, *HUMAN SECURITY AND THE UN: A CRITICAL HISTORY* (Ind. U. Press 2006); Alex J. Bellamy & Matt McDonald, "The Utility of Human Security": *Which Humans? What Security? A Reply to Thomas and Tow*, 33(3) SEC. DIALOGUE 373, 373–77 (2002).

⁸⁷ #Zimbabwe: Zuma Says Mugabe Under House Arrest but Is "Fine," IOL (Nov. 15, 2017, 12:41 PM), <https://www.iol.co.za/news/special-features/zimbabwe/zimbabwe-zuma-says-mugabe-under-house-arrest-but-is-fine-12010473>; see also *Zimbabwe's Mugabe Told Zuma He Was Confined to Home but Fine: S. African Presidency*, REUTERS (Nov. 15, 2017, 2:48 AM), <https://af.reuters.com/article/topNews/idAFKBN1DF1EF-OZATP>.

⁸⁸ U.N. Office of the High Comm'r for Human Rights, *The Core International Human Rights Instruments and Their Monitoring Bodies*, <https://www.ohchr.org/EN/ProfessionalInterest/Pages/CoreInstruments.aspx> (last visited Nov. 23, 2017).

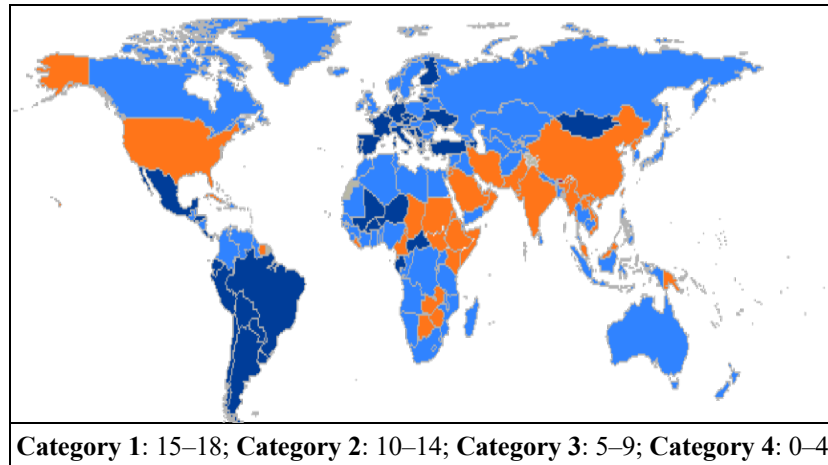
There is a universal constitution for the recognition, promotion, and protection of the inherent dignity of citizens called the International Bill of Human Rights.⁸⁹ SADC states' circumvention of this constitution, coupled with its lip service to the recognition, promotion, and protection of the inherent 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. The failure of national assembly ballots alone undermines the SADC leadership's concern about being removed from office by their populations. In fact, elections are the least likely way of doing that because of the ruthlessly efficient electoral fraud practices in the African subregion.

A. SADC's Ratifications of the Current Stock of Eighteen International Human Rights Instruments

Figure 1 and Table 1 on the following pages illustrate SADC countries' participation in various human rights measures. Figure 1 shows that, of the eighteen international human rights instruments, no SADC state has ratified fifteen to eighteen instruments. Moreover, only two-thirds of the SADC states have ratified ten to fourteen instruments; those states include Madagascar, Seychelles, Mozambique, South Africa, Namibia, Angola, Malawi, Tanzania, Lesotho, and Swaziland. Also, three SADC states—Zimbabwe, Zambia, and Botswana—have ratified a mere five to nine of the human rights instruments available.

⁸⁹ Refers to the norms contained in five U.N. treaties for the advancement of fundamental freedoms and protection of basic human rights of all people: Universal Declaration of Human Rights (1948); International Covenant on Economic, Social and Cultural Rights (1966); International Covenant on Civil and Political Rights (1966)—(ICCPR); Optional Protocol to the ICCPR; and Second Optional Protocol to the ICCPR on the abolition of the Death Penalty.

Figure 1. Standing of SADC in Comparison to World Regions



Source: United Nations Human Rights, Office of the High Commissioner for Human Rights.⁹⁰

Table 1. Africa/SADC Participation in International Human Rights Instruments

Human rights treaty	No. of African states parties	No. of SADC states parties	Treaty monitoring body	Optional protocol	No. of African states parties	No. of SADC states parties
ICERD (1965) ⁹¹	52 less Angola, South Sudan	14 less Angola	CERD	None	N/A	N/A
ICESCR (1966) ⁹²	51 less South Sudan, Mozambique, Botswana	13 less Mozambique, Botswana	CESCR	(2008) ⁹³	4 out of 54	0
ICCPR (1966) ⁹⁴	53 less South Sudan ⁹⁵	15	HRC	(1966) ⁹⁶	35 out of 54	10 out of 15
			HRC	(1989) ⁹⁷	14 out of 54	5 out of 15

⁹⁰ See *Status of Ratification Interactive Dashboard*, U.N. OFFICE OF THE HIGH COMMISSIONER FOR HUMAN RIGHTS, <http://indicators.ohchr.org/> (last visited Nov. 27, 2018).

⁹¹ International Convention on the Elimination of All Forms of Racial Discrimination, adopted Dec. 21, 1965, 660 U.N.T.S. 195 (entered into force Jan. 1, 1969).

⁹² International Covenant on Economic, Social and Cultural Rights, adopted Dec. 16, 1966, 993 U.N.T.S. 3 (entered into force Jan. 3, 1976).

⁹³ G.A. Res. 63/117 (Dec. 10, 2008).

⁹⁴ International Covenant on Civil and Political Rights, adopted Dec. 16, 1966, 999 U.N.T.S. 171 (entered into force Mar. 23, 1976).

⁹⁵ See *Status of Ratification Interactive Dashboard*, UNITED NATIONS HUMAN RIGHTS, OFFICE OF THE HIGH COMMISSIONER (Aug. 20, 2018), <http://indicators.ohchr.org/> (select International Covenant on Civil and Political Rights in the Select a Treaty drop-down box).

⁹⁶ Optional Protocol to the ICCPR, *supra* note 94.

⁹⁷ Second Optional Protocol to the International Covenant on Civil and Political Rights,

During Mugabe's thirty-seven year rule of Zimbabwe, the country showed very little appetite to subscribe to international human rights procedures that allow individuals to submit claims to human rights treaty monitoring bodies.⁹⁸ 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 fell under SADC norm⁹⁹ is symptomatic of the decrepit values of the SADC and a mockery of logic because (1) in his November 21, 2017, notice to the Speaker of Parliament Jacob Mudenda, Mugabe made it clear that he had voluntarily reached the decision to step down as head of state, allowing for procedures for his replacement;¹⁰⁰ (2) in his last address to the nation as President of Zimbabwe on November 19, 2017, Mugabe repeatedly stressed that the Military High Command's intervention, namely, Operation Restore Legacy, was constitutional;¹⁰¹ (3) even the Chairperson of the African Union Commission, Moussa Faki Mahamat, welcomed the decision by President Mugabe on November 21, 2017, to step down from his position as head of state following a lifetime of service to the

Aiming at the Abolition of the Death Penalty, adopted Dec. 15, 1989, 1642 U.N.T.S. 414 (entered into force July 11, 1991).

⁹⁸ See *Ratification Status for Zimbabwe*, UNITED NATIONS HUMAN RIGHTS, OFFICE OF THE HIGH COMMISSIONER, https://tbinternet.ohchr.org/_layouts/TreatyBodyExternal/Treaty.aspx?CountryID=195&Lang=EN, (last visited Nov. 27, 2018).

⁹⁹ See *Communiqué of The Summit of The Organ Troika Plus SADC Chair on The Political Situation in The Republic of Zimbabwe*, SOUTHERN AFRICAN DEVELOPMENT COMMUNITY, TOWARDS A COMMON FUTURE (Nov. 21, 2017), <http://www.sadc.int/news-events/news/communique-summit-organ-troika-plus-sadc-chair-political-situation-republic-zimbabwe/>; see also Media Advisory, Southern African Development Community, SADC Organ Troika Plus Council Chairperson Ministerial Meeting on Zimbabwe Situation (Nov. 16, 2017), http://www.sadc.int/files/8515/1076/4955/Media_Advisory_-_SADC_meet_on_Zimbabwe_situation.pdf; SADC: *SADC Organ Troika Plus Council Chairperson Ministerial Meeting on Zimbabwe Situation*, POLITY (Nov. 17, 2017), <http://www.polity.org.za/article/sadc-sadc-organ-troika-plus-council-chairperson-ministerial-meeting-on-zimbabwe-situatio-2017-11-17>.

¹⁰⁰ *Full Letter: Robert Mugabe's Resignation Notice*, NEWS24 (Nov. 21, 2017, 6:40 PM), <https://www.news24.com/Africa/Zimbabwe/full-letter-robert-mugabes-resignation-notice-20171121>.

¹⁰¹ *Zimbabwean President Mugabe Addresses Nation*, CNN (Nov. 19, 2017), <http://edition.cnn.com/videos/world/2017/11/19/robert-mugabe-addresses-nation-full-remarks.cnn>.

Zimbabwean nation;¹⁰² and (4) the High Court of Zimbabwe Order of November 24, 2017, declared that the ZDF's intervention to stop Mugabe's unconstitutional actions were themselves constitutional under the Zimbabwean Constitution.¹⁰³

B. SADC Maneuverings Contrary to Kelsen's Theory on the Change of Grundnorm

The heads of states of Angola, South Africa, Zambia, and others convened at an SADC Summit meeting under the Organ on Politics, Defence and Security Cooperation on November 21, 2017, at Luanda, Angola, to discuss Zimbabwe's Operation Restore Legacy in light of the SADC norm on the absolute prohibition of unconstitutional takeover of power. The heads of states

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.¹⁰⁴

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 the SADC comes 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.

Because of the SADC's cautious approach to international human rights protection, it should not be allowed under International Law—not even under Article 52 of Chapter VIII of the U.N. Charter¹⁰⁵ on Regional Arrangements—the power to stop citizens from using

¹⁰² Addis Ababa, *Statement of the Chairperson of the Commission of the Africa Union on the Situation in Zimbabwe*, PEACE AND SEC. DEP'T OF AFR. UNION (Nov. 21, 2017), <http://www.peaceau.org/uploads/auc-statement-zimbabwe-21nov2017english.pdf>.

¹⁰³ Case No. HC 10820/17.

¹⁰⁴ *Communiqué of The Summit of The Organ Troika Plus SADC Chair On The Political Situation In The Republic Of Zimbabwe*, S. AFR. DEV. CMTY. (Nov. 21, 2017), <http://www.sadc.int/news-events/news/communique-summit-organ-troika-plus-sadc-chair-political-situation-republic-zimbabwe/>.

¹⁰⁵ 1 U.N.T.S. XVI.

revolutionary means to rid themselves of unpopular or illegitimate leadership. This is probably one of the unintended consequences of implementation of this norm in situations like Operation Restore Legacy. That would be contrary to the purposes and mission of the U.N. Charter.¹⁰⁶

Operation Restore Legacy recommends that the discretionary authorization of regional entities (and by implication subregional entities like the SADC) to take peace and security initiatives requires the U.N. Security Council to continually audit all regional and subregional peace and security arrangements for two things: fitness for purpose in view of human rights law and their legitimacy.

The International Court of Justice (ICJ) ruled in the Asylum case¹⁰⁷ that the party invoking regional law must show that the other party had actually consented to be bound by that norm and had 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 can bypass their state representatives and recuse themselves from previously agreed-upon 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 U.N. 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*,¹⁰⁸ 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 heads of state because, by their nature, they are neither required nor expected in the office bearer's role. It could be argued that entering into counter-good governance agreements that prevented political leaders from being removed from public office is not one of the reasons why the public invests its trust in those whom it elects. Under international law,

¹⁰⁶ See U.N. Charter art. 1 (Preamble).

¹⁰⁷ 1950 I.C.J. 266.

¹⁰⁸ *R. v. Bow Street Metropolitan Stipendiary Magistrate, Ex Parte Pinochet Ugarte* [2000] 1 A.C. 147 (HL).

should citizens be unable 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, he or she 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. According to 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. . . . [T]he 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*.¹⁰⁹

In Operation Restore Legacy, Zimbabwean citizens may have cut themselves loose from the SADC indifference to good governance. Although international law requires good governance, the SADC appears to be indifferent to it. Perhaps there are at least two completely different views 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 prioritizes 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 as 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 unpopular or illegitimate leadership on the other.

¹⁰⁹ *Id.*

The citizenry's ideals are closer to the values of good governance and democratic rule espoused by the United Nations than is the protection of political leaderships. But it is the political leadership that has international responsibility for Zimbabwe's foreign relations. However, that responsibility is held only in trust for the citizens and their collective benefit. Therefore, where state authorities franchise citizens' trust against citizens' interests to deny them good governance, those same authorities can no longer claim to be appropriately exercising the trust of their citizens. This is because the United Nations has reconceptualized state security, moving away from

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-centered approach to advancing peace, security and development within and across nations.¹¹⁰

Additionally, it seems appropriate to recommend that any requests related to "peace and security" from the SADC to the African Union, United Nations, European Union, and other entities to implement punitive measures against any named SADC state should always be treated with caution. This is because unconstitutional takeover of power in the subregion 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.

More importantly, Operation Restore Legacy recommends that any SADC intervention in any takeover of power scenario should be restricted. What turned out to be, in the words of both Robert Mugabe and the High Court of Zimbabwe, a very constitutional takeover of power from Mugabe had been declared illegal by both President Edgar Lungu of Zambia, the A.U. Chairperson, and the President of Gabon as it unfolded.¹¹¹

¹¹⁰ Human Security Unit, *Human Security in Theory and Practice: Application of the Human Security Concept and the United Nations Trust Fund for Human Security*, U.N. TRUST FUND FOR HUMAN SECURITY (Apr. 8, 2009), http://www.tr.undp.org/content/dam/turkey/docs/news-from-new-horizons/issue-41/UNDP-TR-HSHandbook_2009.pdf; see also Amartya Sen, *Why Human Security*, INT'L SYMPOSIUM ON HUMAN SEC. (July 28, 2000), <http://www.ucipfg.com/Repositorio/MCSH/MCSH-05/BLOQUE-ACADEMICO/Unidad-01/complementarias/3.pdf>; Chigara, *supra* note 86, at 81.

¹¹¹ See A.U. WEBSITE, <http://www.peaceau.org/uploads/statement-by-the-chairperson-of-auc-on-zimbabwe-ff.pdf>.

President Lungu went further than others to threaten military action against Operation Restore Legacy. This is surprising because the majority of SADC states fought against foreign rule by the British, the Portuguese, and the Germans, protesting human rights abuses by their colonial masters. In some cases, the same liberators have become worse abusers of individual 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 (*grundnorm*)—a revolution.¹¹² 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 clamors for the suppression of events like Operation Restore Legacy. This casts the SADC as a primitive safeguard of authoritarian rule. But, democratic entitlement has become the first building block of legitimacy and of good government under human rights law of the United Nations. Consequently, force alone is no longer sufficient to govern people.

More importantly, through Operation Restore Legacy, Zimbabweans may have declared that they have entered an era in which only democracy and the rule of law¹¹³ will be the recognized test for governmental validity. This is because

[t]o be effective, law needs to secure the habitual, voluntary compliance of its subjects; it cannot rely entirely, or even primarily, 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. . .¹¹⁴

The U.N. 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,

¹¹² Hans Kelsen, *The Pure Theory of Law: Its Method and Fundamental Concepts, Part I*, 50 L.Q. REV. 474, 475 (1934).

¹¹³ See TOM BINGHAM, *THE RULE OF LAW* (2010).

¹¹⁴ Franck, *supra* note 52, at 48.

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, separation of powers, participation in decision-making, legal certainty, avoidance of arbitrariness and procedural and legal transparency.¹¹⁵

In spite of its best efforts to appear in agreement with this principle, the SADC needs to do more to merit the status of being in favor of the rule of law. Liesel Louw-Audran writes that the SADC's intervention in Zimbabwe in the mid-2000s that led to the Government of National Unity (GNU) from 2008–2013 was severely criticized 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.”¹¹⁶ This certainly disenfranchised Zimbabweans and protected SADC 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 African Union approved it as a free exercise of Zimbabweans' will.¹¹⁷ 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 July 31 elections.¹¹⁸ He argued that both the African Union and the SADC had turned a blind eye to irregularities in last year's [2013] Zimbabwe harmonized polls and accused the blocs of endorsing the elections even though they were not fair.¹¹⁹

On November 15, the Chairperson of the Commission of the African Union, Moussa Faki Mahamat, urged that “all stakeholders . . . 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.”¹²⁰ This obsession

¹¹⁵ U.N. Secretary-General, *The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies*, U.N. DOC. S/2004/616 (Aug. 23, 2004); United Nations and the Rule of Law, *What Is the Rule of Law?*, <https://www.un.org/ruleoflaw/what-is-the-rule-of-law/>.

¹¹⁶ Liesel Louw-Vaudran, *The African Union's Chequered History with Military Coups*, INST. FOR SEC. STUDIES (Nov. 22, 2017), <https://issafrica.org/iss-today/the-african-unions-chequered-history-with-military-coups>.

¹¹⁷ Botswana “Breaks Ranks With SADC, AU,” NEWS24 (Jan. 27, 2014), <https://www.news24.com/Africa/News/Botswana-breaks-ranks-with-SADC-AU-20140127>.

¹¹⁸ *Id.*

¹¹⁹ *Id.*

¹²⁰ *Statement of the Chairperson of the Commission of the Africa Union on the Situation in Zimbabwe*, PEACE AND SEC. DEP'T OF AFR. UNION (Nov. 15, 2017),

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 African Union and the SADC have previously ensured a free and fair election in a member state, they should not invoke democratic legitimacy to protect non-democratically installed regimes. This delegitimizes them both as intellectual wobblers that are ignorant of the value to good governance of what Thomas Franck described more than a quarter century ago as the “prescient glimpse of the legitimating power of the community of nations.”¹²¹

Guinea’s President Alpha Condé, the then A.U. Chairperson, reacted in a similar vein at the start of Zimbabwe’s Operation Restore Legacy, stating that the African Union “will never accept a military coup d’état. We insist on the respect of the constitution and a return to constitutional rule.”¹²² Through various treaty instruments, the African Union has proscribed unconstitutional change of government, leading to the establishment of the Peace and Security Council,¹²³ the African Union’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 shows, democracy has become the *sine qua non* for legitimacy. In a nutshell, Operation Restore Legacy 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 governance. . . . The transformation of the democratic entitlement from moral prescription to international legal obligation has evolved gradually. . . . [but] has accelerated. Most remarkable is the extent to which an international law-based entitlement is now urged by governments themselves.”¹²⁴ Until the SADC can ensure that national assembly elections always guarantee a free and fair expression of the will of the states beyond a reasonable doubt, the SADC has a very weak

<https://au.int/en/pressreleases/20171115/statement-chairperson-african-union-commission-situation-zimbabwe>.

¹²¹ Franck, *supra* note 52, at 46.

¹²² Louw-Vaudran, *supra* note 116.

¹²³ *Peace and Security Council (PSC)*, *supra* note 34.

¹²⁴ Franck, *supra* note 52, at 47.

and unsustainable case for insisting upon the implementation of its norm on the absolute prohibition of unconstitutional takeover of power.

C. The Right to Internal Self-Determination: A Fundamental of the United Nations' Nomenclature on Peace, Security, and Development

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 (1945) 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 preemptory or *jus cogens* status.¹²⁵

Self-determination of peoples certainly belongs to the premier norms of the United Nations. This is specifically inscribed into the preamble of the U.N. Charter as one of the purposes for which the organization was established to achieve.¹²⁶ Thus, the U.N. Trusteeship Council¹²⁷ for overseeing the granting of political independence to non-self-governing territories was established as one of the five organs of the United Nations.

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.”¹²⁸

¹²⁵ James Summers, *Self-Determination in International Law*, OXFORD BIBLIOGRAPHIES (June 27, 2017), <http://www.oxfordbibliographies.com/view/document/obo-9780199796953/obo-9780199796953-0033.xml>.

¹²⁶ U.N. Charter, art. 1 (Preamble).

¹²⁷ *Id.* at art. 75–91. This replaced the institutions of the mandate under the Covenant of the League of Nations; see also MANUAL OF PUBLIC INTERNATIONAL LAW 508 (Max Sorensen ed., MacMillan & Co. 1968).

¹²⁸ *R. v. Bow Street Metropolitan Stipendiary Magistrate, Ex Parte Pinochet Ugarte* [2000] 1 A.C. 147 (HL).

Consequently, any treaty calculated to place restrictions on jus cogens or to deny its effect is null and void under international law.¹²⁹ SADC treaties that conflict with the jus cogens guarantees of internal self-determination of peoples may not be valid after all.

The U.N. General Assembly confirmed the significance of the self-determination of peoples norm under modern international law in Resolution 1514 (XV) of December 14, 1960.¹³⁰ The resolution's preamble¹³¹ sets out the following principles: (1) the need to remove all impediments to freedom as a means of abating serious threats to world peace; (2) the need to promote social progress and better standards of life and larger freedom; (3) 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.¹³²

Paragraph six of the resolution states that “[a]ny 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.”¹³³

The resolution concludes with the clarion call upon all states to “[o]bserve faithfully and strictly the provisions of the Charter of the United Nations, 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.”¹³⁴

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 resolution refers to “sovereign rights of all peoples.”¹³⁵ These rights must include the right of a population to

¹²⁹ ANTONIO CASSESE, *INTERNATIONAL LAW IN A DIVIDED WORLD* 136 (1994).

¹³⁰ *UN Monthly Chronicle*, Vol. II No. 5 (June 1965) p. 55; G.A. Res. 1514 (XV), at 66 (Dec. 14, 1960).

¹³¹ Often cited as a good example of soft law or binding resolutions. See OBED ASAMOAH, *THE LEGAL SIGNIFICANCE OF THE DECLARATIONS OF THE GENERAL ASSEMBLY OF THE UNITED NATIONS* (1966); MARTINUS NIJHOFF, *THE HAGUE*; ROSA HIGGINS, *THE DEVELOPMENT OF INTERNATIONAL LAW THROUGH THE POLITICAL ORGANS OF THE UNITED NATIONS* (1963).

¹³² See G.A. Res. 1514, *supra* note 130.

¹³³ *Id.* at ¶ 6.

¹³⁴ *Id.*

¹³⁵ *Id.* (Declaration on the Granting of Independence to Colonial Countries and Peoples).

remove a government that, in its eyes, has lost legitimacy to continue to govern—internal self-determination, which is quite apart from external self-determination. The latter refers to the independence of a state to freely determine matters of its external relations with other states without prior authorization of other states.

Each time the SADC has partially intervened (Zimbabwe, 2017, Operation Restore Legacy) or fully intervened (Lesotho, 1998; DRC, 1998; 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.

V

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 subregion.¹³⁶ The Protocol establishing the Organ on Politics, Defence and Security in the SADC Region¹³⁷ (the Treaty)¹³⁸ was signed and opened for ratification in 1997. On August 14, 2001, SADC heads of state and government signed in Blantyre, Malawi, a new Protocol on Politics, Defense and Security Cooperation, which provides an institutional framework by which member states can coordinate policies and activities in the areas of politics, defense, and security, thereby formalizing the SADC Organ first launched in 1996.¹³⁹ Subsequently, the Strategic Indicative Plan for the Organ (SIPO) was signed in 2004, and provided a view to operationalizing the objectives set forth in the new Protocol signed at Blantyre.¹⁴⁰

SIPO appears to be a perfectly valid international treaty, as it satisfies the general and specific requirements for treaties outlined in

¹³⁶ *Organ on Politics, Defence and Security*, *supra* note 46.

¹³⁷ The Protocol, *supra* note 47.

¹³⁸ See Vienna Convention on The Law of Treaties art. 2(1)(a), opened for signature May 23, 1969, 1155 U.N.T.S. 331 (entered into force Jan. 20, 1980).

¹³⁹ *Organ on Politics, Defence and Security*, *supra* note 46.

¹⁴⁰ Southern African Development Community [SADC], Protocol on Politics, Defence and Security Co-Operation, https://www.sadc.int/files/3613/5292/8367/Protocol_on_Politics_Defence_and_Security20001.pdf.

the 1969 Vienna Convention on the Law of Treaties (VCLT).¹⁴¹ International tribunals and national courts habitually rely on the material provisions of the VCLT to ascertain traditional rules on the law of treaties.¹⁴² Nonetheless, the legality of treaties in international law must be tested against the relevant and applicable provisions of the United Nations Charter.¹⁴³ Moreover, in several of its provisions, the Organ itself makes it explicitly clear that it remains subservient to the U.N. Charter. Article 52(1) of the U.N. Charter authorizes regional arrangements for the maintenance of international peace and security, but withholds recognition by the United Nations of any regional treaty arrangements that undermine the “Purposes and Principles of the UN.”¹⁴⁴

But for the intervention of the SADC, the governments of target states would have collapsed. Whatever the SADC executive’s initial intentions, practice of the norm on the absolute prohibition of unconstitutional change of government shows that this norm has become a double-edged cutting sword that on the one hand potentially could be applied to limit intrastate conflicts, but on the other hand 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 September 22, 1998, against Lesotho¹⁴⁵ and SADC attempts to invoke it against Zimbabwe’s perfectly constitutional Operation Restore Legacy show that, absent another robust countervailing SADC Organ for protecting citizens from national assembly electoral fraud of incumbent governments, SIPO, which operationalizes the Blantyre Protocol on Politics, Defence and Security Cooperation, can frustrate democracy by perpetuating oppressive illegitimate governments. For Zimbabweans, that would be unacceptable because it would effectively undo the expression of their

¹⁴¹ *Id.* at art. 1, 6, 7, 9 and 24.

¹⁴² See Daniel Reichert-Facilides, *Down the Danube: The Vienna Convention on the Law of Treaties and the Case Concerning the Gabcikovo-Nagymaros Project*, 47 INT’L & COMP. L. Q. 837 (1998); SHABTAI ROSENNE, DEVELOPMENTS IN THE LAW OF TREATIES: 1945–1986 (1989); CHRISTINE CHINKIN, THIRD PARTIES IN INTERNATIONAL LAW (1993).

¹⁴³ See U.N. Charter.

¹⁴⁴ U.N. Charter, art. 52(1).

¹⁴⁵ Puleng Thetela, *Critique Discourses and Ideology in Newspaper Reports: A Discourse Analysis of the South African Press Reports on the 1998 SADC’s Military Intervention in Lesotho*, 12 Discourse and Society 347–70 (2001).

dignity, summed up in their ancient constitutional convention of *Chimurenga* (Shona) or *Inkululekho* (Ndebele).¹⁴⁶

Chimurenga/Inkululekho is Zimbabwe's foremost practiced constitutional convention.¹⁴⁷ It is evident in both their precolonial and postcolonial histories. It is what Operation Restore Legacy was all about—namely, to stop the Mugabes from treating the nation as personal property. *Chimurenga/Inkululekho* opposes all the adverse effects of the SADC norm on the absolute prohibition of unconstitutional change of government.¹⁴⁸ Zimbabweans themselves executed Operation Restore Legacy in a peaceful medium that the intended operationalization of the SADC norm would have shattered. Moreover, Zimbabwean courts have ruled that Operation Restore Legacy did not breach any of the strictures of the Constitution of Zimbabwe.¹⁴⁹ 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.

VI

OPERATION RESTORE LEGACY AND THE NEW INTERNATIONAL CONSTITUTIONAL ORDER¹⁵⁰

Advocates of international constitutionalism often exaggerate some of their claims by making replete assumptions from which they then cascade arguments for the proposition that emergent international and regional value systems are valid processes for the reorganization and reallocation of competencies among the traditional and post-1945 emergent subjects of the international legal system.¹⁵¹

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

¹⁴⁶ See Online Translator, <https://vashona.com/en/translator>.

¹⁴⁷ Woolford, *supra* note 10; *First Chimurenga*, *supra* note 11; Machivenyika, *supra* note 12.

¹⁴⁸ Blantyre Protocol, *supra* note 26.

¹⁴⁹ Maveriq, *supra* note 6.

¹⁵⁰ See U.N. International Law Commission, *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law*, A/CN.4/L.682 (Apr. 13, 2006).

¹⁵¹ See Erika de Wet, *The Emergence of International and Regional Value Systems as a Manifestation of the Emerging International Constitutional Order*, 19 LEIDEN J. INT'L L. 611 (2006).

through the action of states alone.¹⁵² They tend to invoke norms of jus cogens, which refer to no more than a handful of norms in public international law,¹⁵³ 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 appears to be a robust challenge of some of these exaggerations. It points to the resilience of ancient national conventions that contradict subregional and even regional constitutional frameworks that lack logical diligence to capture the United Nations' aspirations for democratic rule and the United Nations' normative requirements on internal self-determination of peoples.¹⁵⁴ By failing to accommodate cardinal principles of the United Nations and requirements of jus cogens in its normative framework, the SADC norm on the absolute prohibition against unconstitutional takeover of power shows a very low logical diligence as no later norm of a lesser quality could challenge the United Nations' 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."¹⁵⁵ Consequently, "other states should not, through appeals or pressure, seek to prevent a people from freely selecting its own political, economic, and social system."¹⁵⁶

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.¹⁵⁷ However, the core constitutional value set of the regional African Union and subregional SADC includes the requirement to submit even to governments enthroned amid justifiable claims of electoral fraud. Certain entities help to ensure these values,

¹⁵² Aoife O'Donoghue, *International Constitutionalism and the State*, 11 INT'L J. CONST. L. 1022 (2013).

¹⁵³ See JAMES CRAWFORD, *BROWNIE'S PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 243–44 (8th ed. 2012).

¹⁵⁴ See Kalana Senaratne, *Internal Self-Determination in International Law: A Critical Third-World Perspective*, 3 ASIAN J. INT'L L. 305 (2013).

¹⁵⁵ THE PRINCETON ENCYCLOPEDIA OF SELF-DETERMINATION, <https://pesd.princeton.edu/?q=node/254> (last visited Sept. 1, 2018).

¹⁵⁶ Salvatore Senese, *External and Internal Self-Determination*, 16 SOC. JUST. 19 (1989).

¹⁵⁷ See DAVID MARTIN, *THE STRUGGLE FOR ZIMBABWE* (Faber & Faber 1982); DAVID COLTART, *THE STRUGGLE CONTINUES: 50 YEARS OF TYRANNY IN ZIMBABWE* (2016).

such as the African Union’s Peace and Security Council (PSC)¹⁵⁸ and the SADC’s Strategic Indicative Plan for the Organ on Defense, Politics and Security.¹⁵⁹ The African Union’s website describes the PSC as “the standing organ of the AU for the prevention, management and resolution of conflicts. It is 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.”¹⁶⁰

The attempt by the Mugabes to institutionalize a dynasty rule of Zimbabwe in 2017 resulted in a clash between the ancient national convention of the *Chimurenga/Inkululekho/Resistance to oppression* and the SADC and African Union norm on the absolute prohibition against unconstitutional takeover of power. Professor Philip Rosessler¹⁶¹ protests that by not intervening to halt Operation Restore Legacy, the African Union 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 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.¹⁶²

In Rosessler’s view, ancient national conventions that have the support of the norms of the United Nations’ cardinal International Bill of Human Rights and jus cogens count for nothing. While he correctly observes that the African Union 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

¹⁵⁸ The PSC is the standing organ of the African Union for the prevention, management, and resolution of conflicts. The A.U. 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.” *Peace and Security Council (PSC)*, *supra* note 34.

¹⁵⁹ SIPO, *supra* note 25.

¹⁶⁰ *Peace and Security Council (PSC)*, *supra* note 34.

¹⁶¹ Philip Rosessler, *How the African Union Got It Wrong on Zimbabwe*, ALJAZEERA (Dec. 5, 2017), <http://www.aljazeera.com/indepth/opinion/african-union-wrong-zimbabwe-171204125847859.html>.

¹⁶² *Id.*

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.¹⁶³

Clearly, Operation Restore Legacy had to climb behind the steep protections of both the African Union and SADC regime protectionist values in order to ensure a stop to the contrived Mugabe dynasty rule. This highlights the tension between the national core value of *Chimurenga/Inkululekho/Resistance to oppression* and the protectionist value sets that champion the sanctity of de facto governments, whatever their disposition—even over one of the United Nation's most cherished goals of democratic governance under Article 25 of ICCPR or the SADC and the African Union's professed democratic governance among their member states.

The success of Operation Restore Legacy is underlined by the following: (1) a stop to the Mugabe contrived dynasty rule of Zimbabwe; (2) a successful circumvention of both SADC and African Union de facto government protectionist mechanisms; (3) achievement of the popular will of Zimbabweans adverse to African Union and SADC mechanisms; and (4) manifest national peace and security greater than that immediately preceding the operation.

This outcome tentatively recommends the view that national conventions can potentially penetrate and bust subregional and regional value systems that have the potential to subvert cardinal principles and aspirations of international law. This includes 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 has exposed fundamental flaws in the constitutional values of the SADC. These flaws pertain to the SADC norm on the absolute prohibition against unconstitutional takeover of power. Where the normative structures of subregional or

¹⁶³ *Id.*

regional institutions have not developed diligently enough to inscribe the cardinal requirements of United Nations law into their constitutive formulations and operational mechanisms, the U.N. Security Council has a close monitoring responsibility. Such monitoring ensures the peace and security competencies delegated to regional institutions and agencies are not applied inconsistently to local general constitutional principles, which are enshrined in enduring ancient national conventions of member states and backed by human rights standards of the United Nations. *Chimurenga/Inkululekho/Resistance of oppression* is an example of such principles.

First, the recognition under public international law of general principles of law 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.¹⁶⁴ Second, any failure of the U.N. Security Council to ensure the aforementioned will likely result in grave breaches of international peace and security. Citizens will not stand by while unpopular or illegitimate leaders seek to remain in authority by invoking the rules of leaders' survival organizations, such as the SADC. Citizens will, as Operation Restore Legacy has shown, reject the application of any such rules to their affairs by actively challenging them and 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 actually consented to be bound by that norm and not merely acquiesced to it.¹⁶⁵ By invoking the ancient Zimbabwean constitutional norm 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 the United Nations' requirements on good governance and international law 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 United Nations, the African Union, and the SADC to draw from Operation Restore Legacy. For the United Nations, the hyperbole about the decline of the significance of the state in the normative arrangements for peace and security often rehearsed

¹⁶⁴ See BEN CHIGARA, *LEGITIMACY DEFICIT IN CUSTOM: A DECONSTRUCTIONIST CRITIQUE*, (Ashgate, Aldershot 2001).

¹⁶⁵ 1950 I.C.J. 266.

in the literature on constitutionalism is questionable. Ancient national conventions of constitutional significance can still, as Operation Restore Legacy has shown, prevail over subregional and regional institutions unless the latter have been diligently established and their implementation mechanisms synchronized consistently with the aspirations of both the United Nations and local populations' constitutional values.

Membership of the SADC does not necessarily dispense with ancient fundamental conventions of states. 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 ancient and enduring conventions of member states. The conflict between the SADC norm on the absolute prohibition of unconstitutional takeover of power and Zimbabwe's constitutional convention of *Chimurenga/Inkululekho/Resistance of oppression* was resolved in Operation Restore Legacy in favor of the latter, thereby casting enormous doubt on the legitimacy of the SADC's value system.

If the SADC prioritized the promotion and assurance of good governance in the subregion, it could wipe out all the costs associated with implementation of the norm on the absolute prohibition of unconstitutional takeover of power in defense of unpopular or illegitimate leadership. Additionally, if it chose to promote good governance, it would serve to enhance economic performance of member states by building the confidence of foreign investors. Similar benefits could accrue to the African Union if it prioritized 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 appears to have stemmed from a recognition of the SADC's democratic deficit. Absent a practice of genuine democratic governance among SADC member states, third party states will generally find it difficult to condemn events like Operation Restore Legacy. Therefore, the SADC urgently needs to promote and ensure democratic governance among member states by establishing a parallel constitutional normative structure of equal weight to the norm 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 a similar if not stronger monitoring and enforcement mechanism than the SADC's current norm.

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 of removing 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 African Union on January 30, 2007.¹⁶⁶ In fact, Zimbabwe has not even signed the Charter.

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, the norm on the absolute prohibition of unconstitutional takeover of power is nonsense on stilts.¹⁶⁷ Insisting upon this norm in the absence of such a guarantee makes the SADC a surrogate for all unpopular or illegitimate regimes in the subregion. 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 respecting the absolute sanctity of national assembly ballots. It is unconscionable that a subregional 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 to change leadership.

Operation Restore Legacy could also be characterized as a warning to the SADC, the African Union, and the new Zimbabwe administration of what to expect from this unique people comprising

¹⁶⁶ See African Commission on Human and People's Rights, <http://www.achpr.org/instruments/charter-democracy/>.

¹⁶⁷ See Philip Schofield, JEREMY BENTHAM'S NONSENSE UPON STILTS, 15 UTILITAS 1–26 (2003).

several tribes that are bound by the same common trait. In fact, throughout Operation Restore Legacy, Zimbabweans forgot any other inclination of personal identity and immersed themselves in *Chimurenga/Inkululekho/Resistance to oppression*—the struggle that had to be accomplished.¹⁶⁸ Zimbabweans prevailed against maneuverings by the SADC and the African Union, 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 unchanging ancient national conventions that seek to promote and uphold cardinal principles of the United Nations for ensuring international peace and security by advocating and advancing good governance and promoting international human rights law.

¹⁶⁸ See generally DAVID MARTIN, *THE STRUGGLE FOR ZIMBABWE* (1982); DAVID COLTART, *THE STRUGGLE CONTINUES: 50 YEARS OF TYRANNY IN ZIMBABWE* (2016).

