Journal of Power, Politics & Governance
March 2014, Vol. 2, No. 1, pp. 79-106
ISSN: 2372-4919 (Print), 2372-4927 (Online)

Published by American Research Institute for Policy Development

International Law in Domestic Politics: The Case of Zimbabwe and the SADC Tribunal

Torque Mude[1]

Abstract

The increasing involvement of international law in the internal affairs of states is an ongoing phenomenon in the contemporary international system. International law is assuming a dominant role in domestic political affairs of states in matters which exclusively belonged to the jurisdiction of domestic law. This paper seeks to examine and validate the claims on the increasing role of international law in domestic politics. Methodologically, the research used largely desktop research. Journal articles, books and newspaper articles were also used as sources of information. The conclusion drawn from this paper is that although debatable majority of states resist the influence of international law in their national politics, international law is assuming an important dominant role in domestic politics.

Keywords: International law, domestic politics, Zimbabwe

Introduction

The nexus between domestic politics and international law has for long received considerable attention among political scientists and international lawyers. The focus of attention is no longer on the relationship between domestic politics and international law. The increasing role of international law in domestic politics has generated a lot of debate among political and legal scholars and practitioners.

[1] Lecturer of International Relations, Midlands State University, P. Bag 9055, Senga Road, Gweru, Zimbabwe.

On the one hand, international law is said to have no effective influence in domestic politics due to state sovereignty. On the other, international law is said to be assuming a dominant role in domestic politics signifying a paradigm shift from state sovereignty as control to sovereignty as responsibility, including to protect own citizens. International law has traditionally been concerned primarily with interstate relations. It has long governed relationships among states. Non- state actors such as individuals and international organizations enjoyed a minute fraction of international legal personality. Under traditional international law, domestic politics such as the claims of individuals could reach the international plane only when a state exercised diplomatic protection and espoused the claims of its nationals in an international forum. Contemporary international law reflects a shift from governing interstate relations to direct interference in domestic political issues, particularly state-citizen relations in the context of human rights.

Contending Issues

According to Slaughter and Burke (2002: 43), "more recently, international law has penetrated the once exclusive zone of domestic affair to regulate the relationships between government and their own citizens, particularly through the growing bodies of human rights law and international criminal law". Domestic political affairs have long known to be the exclusive zone governed by domestic law. Since its inception, the role of international law in domestic political affairs has been limited and dependent on a state's conception of and attitude towards the international legal system (Martin and Ortega: 2009). A state could completely disregard international law if it had a negative attitude towards it. Furthermore, the concept of sovereignty empowered states to exercise absolute authority even if it meant violating rules of the international legal system. Today many states, Zimbabwe inclusive, still emphasise state sovereignty as basis for non-compliance with certain or all rules of international law. They still regard sovereignty as sacrosanct. Zimbabwe's rejection of the SADC tribunal's ruling in the Campbell case was based on sovereignty. The justice minister, Patrick Chinamasa, argued that Zimbabwe does not take orders from an organization such as SADC because the country recognizes the principle of non-interference in the internal affairs of another country. Non-interference is one of the pillars of Westphalian sovereignty. From a realist point of view, a state answers to higher authority. Realists also claim that states should not entrust their welfare with international and regional organizations.

International organizations are imperialistic in nature, it is argued. There is no doubt that the position taken by Zimbabwe in the Campbell case was informed by realist principles.

However, it ought to be recognized that international law is still developing and developing fast. The emergence of international human rights law, international criminal law, the doctrine of responsibility to protect, international and regional tribunals such as the SADC tribunal is evidence that the international legal system is growing. Consequently, the emergence of the above branches of international law has culminated in the involvement of international law in shaping domestic politics particularly protecting citizens from oppression by their governments. More so, it should be noted that this continued development of international law has had a revision effect on Westphalian concept of state sovereignty which many states are failing to recognize. If they are aware of the shift in state sovereignty they might be reluctant to embrace new sovereignty.

Traditional purposes of international law have been interstate, not intra-state. The traditional foundation of international law reflects the principles of Westphalian sovereignty often seemingly made up of equal parts myth and rhetoric (Krasner, 1999: 20). Formerly Westphalian sovereignty is the right to be left alone, to be free from external meddling or interference. At its inception, sovereignty was the golden rule of international law. This is because the conclusion of the Westphalia Treaty in 1648 and the birth of sovereignty were geared towards eradicating war in Europe. Sovereignty became a rule beyond the continent of Europe. According to principles of Westphalian sovereignty, no entity or entities challenges the power of a state. Non-interference in the domestic affairs of other states, border inviolability and state as the sole arbiter for making laws and administration are the golden principles of the Westphalian notion of sovereignty.

States can be part of international legal system to the degree they choose by consenting to particular rules (Dugard, 2007). International law is based on the consent of states. States possessed the power to agree or disagree with rules of international law. As a result, states had and still have the opportunity to manipulate international law for political ends by aligning themselves only to those rules which favor their national interests. Moreover, they had solutions to their internal problems.

Today however, challenges facing states and the international community alike demand very different responses and thus new rules for the international legal system (Slaughter and Burke, 2006). It has come to the attention of non-state actors that states do not have solutions to problems that befall the international community. Such problems, it has been realized, emanate from within states and states are reluctant, unable or unwilling to find lasting solutions. In contemporary international politics, individual states cannot be trusted to provide amicable remedies to, for instance, human rights abuses. The doctrine of responsible to protect among others has come on board to make sure that international law alters domestic politics to make sure that states do not abuse their power in their interaction with non-state actors such as individuals.

Furthermore, the process of globalization and the emergence of new transnational threats in the international system have fundamentally changed the nature of governance and the necessary purposes of international law (Leuprecht et al, 2012). From cross border pollution to terrorist training camps, from refugee flows to weapon proliferation, international problems have domestic roots than the interstate legal system in often powerless to address (Slaughter and Burke, 2006:70). In this regard, majority of international problems that threaten both national and international security have domestic origins. The sources of, for instance, refugee problems and human rights abuses emanate from within states. Most of these problems are a result of failure by domestic institutions to execute their policies and handle their mandates. In this study, the government of Zimbabwe is partly to blame for the land question problems that resulted in the fast track land reform programme which gave birth to the Campbell case. The political complexities of land question in Zimbabwe involved multiple parties, Britain, USA, white farmers and Zimbabwe herself, which had opposing interests. Zimbabwe's failure to deal with these complexities at home led to political and legal contestation, the Campbell case, in which the SADC tribunal acted as the court of last resort to resolve the issue. Other parties particularly Britain are to blame for the land problems that led to the Campbell case.

In the Chair's introduction of the Africa All Party Parliamentary Group (AAPPG) Report of 2009, it is claimed that Britain has a positive role to play on the basis of good faith in addressing the land issue in Zimbabwe (AAPPG Report, 2009: 12).

To this effect Britain had initially recognized colonial responsibility for funding land redistribution in Zimbabwe a promise that was later betrayed when the Labor Party came into power in Britain in 1997. However, some say they were never an agreement on funding land reform in Zimbabwe (AAPPG Report, 2009: 14). This could be true given that no agreement was put in writing. According to Linnington (2000: 37), the Zimbabwean government was disappointed that its views on the land issue was not reflected in the text of the Lancaster House constitution, but there was text on property rights meant to protect rights of white farmers.

Although the land question involved several actors some whose commitment was doubtful, the government of Zimbabwe should have resolved the matter amicably through its domestic institutions without employing retribution, reprisal and retorsion actions. Domestic political and legal institutions were not used by the government because there was too much politicking on the part of the government. It appears the government wanted to farmers. Speaking at the ZANU PF Congress in December 2000, President Robert Mugabe aptly stated that,

"Our party continues to strike fear in the heart of the white man, they must tremble…The white man is not indigenous to Africa. Africa is for Africans…The white man part of an evil alliance" (……..)

In 2001 he said that,

"The white farmers will not be treated like special creatures. Why should they be treated as if they are next to God? If anything, they are next to he who commands evil and resides in the inferno"

And in September 2001 in Bulawayo he was quoted saying,

"Yet there are hardships but if they (whites) leave, it's a good thing, because we will take over farms and companies. To those of you who support whites, we say down with you".

From the above statements, it is clear that the government's raison d'être was on vengeance not utilizing domestic institutions to resolve the land question.

Palmer observed that on both sides the issue of land had become emotionally charged defying all attempts at rational analysis (Magaisa, 2010). It is these emotions and high levels of acrimony that obfusticated rational policy and action on the part of the government of Zimbabwe. To the nationalists what and is still happening in Zimbabwe since 2000 is a "war without guns". A war they say is being fought not only to safeguard the honour, integrity, and sovereignty of the nation, but also a war to resolve once and for all the land question in e country in favor of the black majority whose ancestral land was taken by force of arms by be white colonial governments (New African, 2013: 18). Somehow the methodology Zimbabwe used to execute the land reform was justified, albeit to a limited extent. It was impolitic for the western countries to try to frustrate, even stop, the land reform programme the way they did, knowing that land reform is necessary if countries suffering from skewed land tenure systems are to achieve prosperity. These western countries know pretty well from experience that land reform is panacea to economic development. For example the USA redistributed land in Japan after World War 2 and that paved way for Japan's economic prosperity, with evidence of success in Japan, the USA shuffled General Douglas MacArthur to Taiwan to sort out the island nation after Chiang Kai Shek's government had been defeated by the Communist Party in 1949and one of e first things the general did was to redistribute land which became the nation's economic miracle, also China, South Korea followed that route (New African, 2013: 20). But when Zimbabwe took the same path as Japan, Taiwan, South Korea and China had trodden before it, the West particularly and Britain and USA became the leading opponents of e land reform.

In conjunction with the above, whether or not external parties were and are directly involved, domestic governance institution in the country dismally failed to resolve the matter amicably. Mike Campbell and other white farmers mounted a legal challenge in the Supreme Court in May 2006 against Constitutional Amendment No. 17 which stated that no compensation would be paid for land and which they argued discriminated them racially (Dore, 2012: 1). The Supreme Court reversed judgment for six months and failed to respond to inquiries about the case when six months had lapsed (Dore, 2012: 2). Since the Supreme Court ha d not responded to the applicants, they assumed that it had declined to exercise its jurisdiction. Furthermore, in 2007 the Chegutu magistrate rejected the white farmers' court appeal against eviction (Dore, 2012: 2). They then sought relief from the SADC Tribunal.

The SADC tribunal took the matter seriously as it made Zimbabwe appear before it and delivered a ruling that the country had violated international law by acquiring land without compensating white farmers. Despite Zimbabwe's justification for Britain's refusal to honour the Lancaster House unwritten compensation agreement, the tribunal aptly stated in its judgment:

"It is difficult for us to understand the rationale behind excluding compensation for such land, given the clear legal position of international law. It is the right of the Applicants [Campbell, et al] under international law be paid and the corrective duty of the Respondent [Zimbabwe Government] to pay fair compensation. Moreover, the Respondent cannot rely on its national law, its Constitution, to avoid an international law obligation to pay compensation. Similarly, in the present case, the Respondent cannot rely on Amendment 17 to avoid payment of compensation to the Applicants for their expropriated farms. This is regardless of how the farms were acquired in the first place, provided that the Applicants have a clear title to them. We hold, therefore, that fair compensation is due and payable to the Applicants by the respondent in respect of their expropriated lands" (SADC (T) Case 2/2007).

Judging by the above, it is evident that international law has a role to play in domestic politics if effective domestic governance and international peace and security are to be realized. International law has to be involved in domestic governance where domestic governmental institutions have failed or are not willing to pay attention to critical internal governance issues as what happened in the case between Zimbabwe and the white farmers, the Campbell case. The government was unwilling neither to pay compensation to white farmers nor to go the legal and legitimate path to solve the land question in the country. Domestic courts, the Supreme Court and the Chegutu Magistrate Court, turned down appeals by white farmers. This is tantamount to human rights abuse by the government as it failed to grant the white farmers legal relief, thanks to international law and the SADC tribunal.

Therefore, domestic political institutions are not sufficient to deal with all problems facing domestic governments and their citizens in the contemporary world. Such problems threaten international peace and security; hence the international legal system should ensure that it complements the domestic political systems of states as it did in Zimbabwe.

However, states have a political price to pay as this implies surrendering a layer of sovereignty to the international legal system and institutions. It should be noted therefore that the changing nature of the international legal rules today responds to a new generation of worldwide problems. The most striking feature of these problems is that they arise from within states and some of them are caused by state actors themselves. If the contemporary international legal system does not respond to these problems, international peace and security will always be at stake.

According to the 2004 Report of the Secretary-General's High Level Panel on Threats, Challenges and Change problems such as "poverty, diseases, environmental degradation, civil wars, genocide and other large scale atrocities, nuclear, radiological, chemical and biological weapons, terrorism and transnational organized crime" are to a large extent of intrastate origin (Secretary-General's Report, 2004). The 'large scale atrocities' part of this report fit in this study as this can include, but not limited to, human rights abuses. The surfacing of these problems is a sign of problems with domestic politics. All these problems can be prevented if domestic political governance geared towards and executed in such a way that aims to prevent their occurrence. The problem with some domestic governments is that they lack the capacity, resources, skill and will to adequately prevent, respond and counter such challenges. International law must therefore play a coordinating role to deal with such threats. Slaughter and Burke, 2007: ??) were correct when they said where national governments are unable or unwilling to address the origins of these threats themselves, international law may step in to help build their capacity or stiffen their will.

More so, to offer an effective response to these new challenges, the international legal system must be able to influence the domestic policies of the state and harness national institutions in pursuit of international objectives. Influencing the domestic policies of a state is a mammoth task, but the international legal system must strive to achieve that. One way of doing that is for the global legal system to harness domestic political institutions. Harnessing the domestic political and legal system is also a tall order, but continued efforts will yield results. The SADC tribunal made effort to harness domestic political institutions and influencing domestic policies by ordering the government of Zimbabwe to pay compensation to the white farmers who lost their land through the fast track land reform programme.

The international legal system can influence domestic policies ordering states either to comply with a particular obligation or to put an end to particular acts such as those that violate human rights law. In the Campbell case, the international legal system through the SADC tribunal ordered the government of Zimbabwe to put an end to the fast track land reform programme which the tribunal found unlawful under international law. It was argued that the programme was conducted in manner that violated the human rights of white farmers. In this case, the government failed to fulfill its responsibility to protect. It was therefore the role of international law to remind the government of its obligations and responsibility to protect own citizens.

Scholars in international politics and law have for long called for the shift in the primary terrain of international law from independent regulation above the nation state to direct engagement in domestic political affairs. This implies clipping the sovereignty wings of the state. The paradigm shift is already manifesting in many instances in many regions of the world. In the European Union for instance, international law's influence in domestic politics has been embraced on the basis of good faith by the EU member states. The European Court of Human Rights was established and member states are bound by its rulings. So far it has not been disrespected and that is a sign of the EU's recognition of the importance of international law in domestic politics. Since international law is said to be of European origin (Dugard, 2007), its development to include regulating domestic politics has also begun in Europe. This has culminated into the emergence of the doctrine of responsibility to protect, human rights discourse and international criminal law among others. From this perspective, it ought to be understood therefore that it is not negative attitude towards international law that makes countries in other regions find it odd to have their domestic affairs altered by the international legal system. Rather, it is because they need enlightenment pertaining to the new role of international law.

Zimbabwe is in the bandwagon of countries which does not recognize the importance of the new role of international law in domestic politics, at least for now. The country still values Westphalia sovereignty and recognizes it as sacrosanct. The country is inclined to the realist principle that urges states no to entrust their political welfare with international organizations and international law. Testimony to that is the rejection of the SADC tribunal's dicta. The old constitution unequivocally stated that any rule of international law that is inconsistent with the national law of Zimbabwe is rendered invalid (Constitution of the Republic of Zimbabwe, 1979).

Such a provision prohibited international law to influence Zimbabwe's domestic affairs. However, the new constitution that came into force in 2013 ushers in a ray of hope for the role of international law in Zimbabwe's domestic politics. Chapter four provides that the country "must take into account international law and all treaties and conventions to which Zimbabwe is a party" (Constitution of the Republic of Zimbabwe, 2013).

It should be noted that the objectives of contemporary international law and the very stability of the international system itself depends critically on domestic political choices traditionally left exclusively to the determination of domestic political processes whether to enforce particular rules, established institutions or even engage in effective governance. By ensuring that domestic governance actually functions in pursuit of collective aims, international law is starting to play a far more active role in shaping domestic political choices.

According to Slaughter and Burke (2006: 23), the three principal forms of such engagements are strengthening democratic institutions, backstopping them and compelling them to act. The most striking feature of this conception of international law is a direct emphasis on shaping or influencing political within sovereign states in accordance with international legal rules. What makes these new functions of international law different from the past is that international law now seeks to influence political outcomes within sovereign states. Consequently, sovereignty is and will no longer be as sacred as it used to be. A layer of it has been eroded.

In 1945, the drafters of the UN Charter maintained the classical position that international law and institutions shall not "intervene in matters which are essentially within the domestic jurisdiction of any state" (UN Charter, 2,paragraph 7). It should be noted that the drafters of the Charter were influenced by the events of that time. Thing have changed and are still changing. Governance issues have undergone rapid changes ever since 1945. It has come to light that problems that befell the international system originate for within states and the effort of international law and institutions will assist dealing with these challenges. This is because states are either unwilling, incapacitated and lack resources to curb the problems or they are preoccupied with power politics to the detriment of other socio-economic and so called low political issues such as human rights protection.

The contemporary international legal system has a direct role to play in matters within the domestic jurisdiction of a state. The involvement of SADC through its judicial organ, the SADC tribunal, in the domestic matters of Zimbabwe depicts the functions of contemporary international law in domestic politics of a state. It is important that the UN Charter be revised to encompass issue pertaining to the jurisdiction of the international legal system in the domestic politics of states. Maybe that way states outside the European context will begin to embrace the role of international law in their domestic politics without reservations.

According to Leonard (2005: 43), the functions of international law in domestic politics are already known to the members of the European Union. Leonard observed that members of the EU rely on EU law as its primary tool of reform and socialization. This has and is still spreading to other parts of the world. It ought to be argued that the functions of international law in domestic politics were first embraced in Europe because that is where the legal system originated from. Europe becomes a pace setter in as far as the development of the international legal system is concerned. Assuming this current political, economic and technological trend continue the future effectiveness of international law will turn on its ability to influence and alter domestic politics.

Some have argued that these new functions of international law have no applicability outside the European context in which they were first embraced (Posner, 2005: 93). Posner claimed that;

"There is no reason to think that a court that works for Europe where political and legal institutions in most countries are of high quality, would work for the world political community that lacks the same level of cohesion and integration. Whatever one thinks about the EU, it is nothing about the international community"

The argument being put forward here is that the role of international law in domestic politics is no applicable in Africa, Asia and other parts of the world. While this is not a comparative study, citing the EU example is to some extent useful in examining the assumed role of international law in domestic politics. This is because the conception of international law involvement in domestic politics is spreading outward from Europe, where some say the legal system originated from.

Just as EU law has migrated from a thin set of agreements based on the functional needs (Haas, 1958: 7) of states into a far more programmatic and comprehensive legal order (Burca ,2003: 28) international law has moved and is still moving in a more programmatic direction.

Political and legal institutions in other parts of the world are said to be incomparable to the European standards and that alone makes the role of international law in domestic politics of non-EU countries a fiasco. Indeed there is a considerable measure of truth in this argument because domestic governance institutions in many African countries for example lack the level of cohesion and integration present in the EU. This is not an appraisal of EU governance, but the fact remains that the increasing influence of international law in their domestic political affairs has not been met with intense resistance.

However, the three means through which international law has coming to influence domestic political outcomes; strengthen domestic institutions, backstopping national governance and compelling domestic action have spread beyond the continent of Europe. The role of international law in domestic politics has also reached the African continent. It has been in the pipeline for years and has culminated in the formation of for example the SADC tribunal in southern Africa with jurisdiction over case involving states and their citizens, such as in the Campbell case. However, this paradigm shift is still in its infancy. Many states, Zimbabwe inclusive, are resisting the changing role of international law. A case in point is Zimbabwe's rejection of the SADC tribunal's ruling in the Campbell case. The dissolution of the SADC tribunal pending revision of its mandate and jurisdiction is also clear indication that states are resisting the role of international law in domestic politics.

As already mentioned earlier in this chapter, the emergence of the human rights discourse and the doctrine of responsibility to protect among others have necessitated the influence of international law in domestic politics. Members of international community have signed human rights treaties; embracing international human rights law. They have also been urged to embrace the doctrine of the responsibility to protect. However, some states have embraced these doctrines for the sake of embracing them. Such states are not serious in as far practicing what is required of them in terms of the procedures and standards to be followed, for instance the protection of human rights on the domestic front.

The modern conception of international law is regulating the conduct of states towards their own citizens. The use of international law has now gone beyond its classical definition of regulating interstate relations. At its inception, the international legal system was designed to govern interstate relations. Initially, dynamics of interstate relations were the defining source of international stability. Recently, trends in the global system reflect that dynamics of intrastate relations determine international peace and security. Relations between governments and their own citizens contribute a bigger percentage to international stability or threats thereof. A cocktail of reasons explain this. Bad governance is one of those reasons as it can lead, for instance, to uprisings such as those which erupted in North Africa. Such problems are a direct threat to international welfare. For instance, it can lead to the increasing number of refugees and the increased need for international financial capacity to handle such a problem. This means that money that could have been used towards other international development projects could now be diverted towards a problem domestic governance could avoid if they are effective. Human rights abuse is another byproduct of bad governance that threatens international peace and security. A case in point is that human rights abuses in Zimbabwe have resulted in the influx/genesis/migration of Zimbabwean to other countries like South Africa where they have been used and abused.

It is evident that the contemporary relevance and future potential of international law lie in its ability to backstop, strengthen and compel domestic law institutions to improve governance. It has been tried and tested that international law is needed in domestic political organization for better governance. The involvement of international law in the Campbell case bears this testimony. Before seeking to the SADC tribunal, Mike Campbell and co-applicants had explored domestic procedures in Zimbabwe which failed to provide a solution to their grievances of property expropriation by the Zimbabwean government. In fact, relevant domestic institutions in Zimbabwe were reluctant to pay legal attention to their grievances. When they went to the tribunal, their matter was taken seriously as it ruled in their favor that they been discriminated against and that they were entitled to compensation, thanks to international law.

For many countries ranging from the United States to Russia, Middle East to Africa, this new use of international law is far more frightening (Slaughter and Burke, 2007). Indeed, many members of the international community are frightened by the new role of international law in their domestic politics. The United States for instance refused to ratify the treaty establishing the International Criminal Court (ICC). Russia is also not a signatory to the ICC. In the Middle East countries such as Iraq, Iran and many others are have refused to ratify the treaty the created the international court. In Africa Zimbabwe is one of the countries that have for long refused to be governed by international criminal law. Most recently, Zimbabwe rejected the ruling of SADC tribunal ordering her to put an end to the fast track land reform programme and to pay compensation to Mike Campbell and other applicants who had lost their land and other properties as a result of the land reform programme in the country. Such resistance to the role of international law raises a lot of questions pertaining to the relevance and effectiveness of the international legal system. However, it ought to be understood that the international legal system is not to blame for the shortcoming caused by states in as far as compliance with rules of international law is concerned. The legal and political will of states is what should be questioned and scrutinized. Of importance is the need by states to take EU route. In the European Union, most of the contracting parties to the European Convention on Human Rights have incorporated the Convention into their own national legal systems, either through constitutional provision or judicial decision (Keller and Sweet, 2008: 17). If international law is working in the domestic politics of EU member states, then states in other parts of the world ought to properly institutionalize, embrace and incorporate international law into their constitutions and respect its role in their domestic governance.

Allowing international law to influence domestic politics does not imply that the legal system will cease to recognize the will of states. In other words, International law continues to reflect the will and practice of states, but to the degree it depends upon the effective functioning of national institutions, getting those institutions to operate is quickly becoming a functional imperative of the international legal order. (Nolkaemper and Nijman, 2007: 45). International rules now seek to promote effective and good governance at the national level. More often than not, politicians find themselves obsessed with issues of high politics defined in terms of power politics. From a realist point of view, issues of high politics are those matters to national security, state survival and military buildup.

Power pursuit propensity sometimes results in neglecting some important aspects of governance by looking down upon certain important domestic institutional mechanisms and standards, such those to do with the welfare of citizens. Issues to do with the welfare of citizens such as human rights protection are labeled low politics issues. If a state is not in a position to meet her obligations for instance to uphold human rights, the international legal system takes charge. One ought to note that the continued development of international law is unfolding in such a way that the legal system penetrates domestic political system to ensure that it operates effectively and to restrict the abuse of power by states against their own citizens.

Long ago Travers (1922) developed the concept of "la superposition des competences legislatives concurrentes" suggesting that the layering of overlapping jurisdiction of a number of states would allow national courts to reinforce one another. This concept is problematic due to diplomatic immunity in accordance with the law of diplomatic relations. The concept concurs with efforts by South African national courts to attach properties belonging to the Zimbabwean government to pay punitive costs to the white former farmers who lost their land as a result of fast track land reform programme. The North Gauteng High Court in Pretoria authorized the attachment of Zimbabwe's properties in Kenilworth, Cape Town; to be sold and compensate farmers who lost their land (Mail and Guardian, June 28-July, 2013: 11). The Zimbabwean government responded by conferring diplomatic immunity on the properties it owns in Cape Town (Mail and Guardian, July 5-11, 2013: 4).

What is new, however, is that international law through international institutions and their specialized agencies rather that national courts of third states are making a conscious effort to backstop their national politics.

James Rosenau (1997: 4) popularized the concept of the "domestic-foreign frontier". On this frontier "domestic and foreign issues converge, intermesh or otherwise become indistinguishable. According to him,

"we can no longer allow the domestic-foreign boundary to confound our understanding of world affairs…domestic and foreign affairs have always formed a seamless web".

The scholar makes no distinction between domestic and international politics as they are two sides of the same coin. Such an argument makes a lot of sense because on the one hand problems encountered on the domestic front are threats to the welfare of the international system. On the other hand, problems which befell the international front affect the domestic front. Relations among the domestic-foreign frontier are that individuals work out a wide range of solutions to various problems through a mix of domestic and international rules rather than through the nation-state system (Rosenau, 1996: 69). Rosenau endorses the direct engagement of international law in domestic politics. Unlike other scholars, he calls for the triangulation of domestic and international rules to govern the domestic-foreign frontier. In view of this, a combination of international and domestic rules can be used in domestic governance. In other words, international rules combined with domestic rules can improve domestic-foreign governance.

Functions of International Law in Domestic Politics

Nolkaemper and Nijman (2007) claimed that the future purpose of international law becomes to reach within states, permeating domestic institutions, governance structures and even political for a so as to enhance their effectiveness. The scholars were correct; international law is already permeating domestic politics. According to Slaughter and Burke (2006: 334), one function international law can perform in domestic politics is strengthening domestic institutions. They argued that a primary limitation of the international system is the weakness of government institutions in so many states all over the world. As a result of violence, poverty, corruption, limited training; national governments often lack the resources, skills and ability to provide adequate solutions to local and transnational problems (Slaughter and Burke, 2006: 335). Since domestic politics and domestic law in many instances have dismally failed to provide solutions to local as well as transnational threats to peace and security, international law has to permeate domestic political institutions to strengthen them to operate effectively. One might be tempted to argue that if international law is failing to influence state behavior at the international level how then can it achieve influencing domestic politics effectively. Put simply, if states allow international law to penetrate their domestic political spheres by way of embracing and institutionalizing the legal system, international law will be able to effectively influence both domestic and international politics using the bottom up approach.

There is no doubt that states need the assistance of international law in dealing with national security threats. They can be assisted by having their domestic institutions strengthened. The function of international law in strengthening domestic political institutions can be a success if states embrace rather than resist that role of the international legal system. A report of the Commission on Weak States and US National Security in 2004 identified as a key national security concern the need to assist states "whose governments are unable to do things that their own citizens and the international community expect from them: offer protection from internal and external threats, deliver basic health services and education, and provide institutions that respond to the legitimate demands and needs of the population" (Weinstein et al, 2004: 12). The international legal system has a fundamental role to play in assisting states deal with the above problems. For example, when Zimbabwe was unable to do what its citizens, white farmers, and the international community expect from her, human rights protection, the international legal system through the SADC tribunal assisted in making sure the grievances of the white farmers were heard in the tribunal.

Fukuyama (2004: 93) observed that,

"For the post-September 11th period, the chief issues for global politics will not be how to cut back on stateness but how to build it up"

At its inception, international law aimed at cutting back on stateness. Now international law has a key role to play in the building up of states. The international legal system can improve the capacity of domestic government officials such as regulators, judges and legislators to govern effectively (Krasner, 2001: 23). The question always remains on the methodology to be employed to achieve such a romantic role of the international legal system. The answer is also always simple; states should desist from obsession with power politics and comply with rules of international law that permeate their domestic political systems. International law should not be treated as an alien legal system.

A critically important tool international law can play in strengthening the institutions of domestic governance is the formalisation and inclusion of government networks as mechanisms of global governance in pursuit of national goals. Krasner (2005: 69) suggests that international law and institutions can strengthen state capacity by engaging in processes of shared sovereignty with national governments.

Such shared sovereignty "involves the creation of institutions for giving specific issue areas within a state – areas over which external and internal actors voluntarily share authority" (Krasner, 2005: 76). The concept of shared sovereignty suggested by Krasner implies that states surrender a layer of their sovereignty to international institutions and international law to allow a degree of influence by these entities. Surrendering a layer of sovereignty simply means shedding some of their absolute powers allowing domestic governance to be altered by the international legal system in pursuit of both national and international objectives; achieving peace and security.

Such shared sovereignty, Krasner (2005: 70) claims can "gird new political structures with more expertise, better-crafted policies and guarantees against abuses of power". In this regard, institutional arrangements will facilitate the implementation of shared sovereignty. Examples of these arrangements include the creation of specific international, regional and hybrid courts such as the International Criminal Court, SADC tribunal, Special Court for Sierra Leone, hybrid court in East Timor, Cambodia and many others involving a mix of international and domestic law. The focus of this research is in the case of Zimbabwe and the SADC tribunal. The intervention of the tribunal in the Campbell case was in realization of strengthening of domestic governance in Zimbabwe through a regional network such that is the SADC Tribunal. The government of Zimbabwe emphasized sovereignty as the basis to reject the ruling of the tribunal ordering the country to pay compensation to the applicants. Rejecting the ruling of the tribunal was defiant of shared sovereignty which the country embraced once it became a state party to the treaty establishing the tribunal. Given this evident dichotomy and conflict between political theory and political reality, SADC member states must feel compelled to properly institutionalize the shared sovereignty concept in the context of highlighting to each other the importance of surrendering parts of their sovereignty to the regional judicial body as it is necessary to strengthen their domestic governance.

In realization of the importance of the importance of the assumed role of international law in domestic politics, the international legal system has employed a range of mechanisms to strengthen the hand of domestic governments. Legal instruments and codes of international best practices have been used to set standards to give domestic governments benchmarks for enhancing their own capacity (ICCPR, 1966).

The establishment of the SADC tribunal and the treaty that contains principles governing the operation of the tribunal is amongst the legal instruments set to guide domestic governance. Promotion of human rights, especially the treatment of citizens by their own governments is one of the priorities the international system has set to give governments benchmarks for enhancing their capacity. With the creation of the SADC tribunal and its jurisdiction over cases concerning states and their own citizens, the international legal system also sought to strengthen domestic politics and institutions by complementing them.

Abraham and Antonia Chayes (1995: 3) have explained how international rules have given domestic governments benchmarks and standard to enhance their capacity through a "managerial model" of compliance. According to this model, the task of maximizing compliance with a given set of international rules is a task more of management than of enforcement, ensuring that all parties know what is expected of them, that they have the capacity to comply and that they receive the necessary assistance (Chayes and Chayes, 1995: 3). To the degree Chayes and Chayes are correct, formal international legal regimes are recognizing and promoting the capacity-building needs of domestic governance through benchmarks and standards and other forms of cooperation. However, there are setbacks as states more often resist the influence of the international legal system even in regulating international policies. Majority of the members of the international community resist the regulation of their international political relations policies by international law. Chayes and Chayes' managerial model is already encountering problems of this nature. Zimbabwe's rejection of the SADC tribunal's ruling in the Campbell case and the dissolution of the tribunal pending revision of its mandate testifies the inherent problems associated with the attitude of states towards the assumed role of international law in domestic political organization.

More broadly, the success of many policies at the international level depends on political choices at the national level. The effectiveness of international law may thus depend on its ability to shape political outcomes and institutional structures within states

Another means through which international law fosters more effective domestic governance is by backstopping domestic institutions where they fail to act (Slaughter and Burke, 2006: 27).

States may fail to act as a result of reluctance, lack of political will, lack of resources and skills on a particular issue area. Usually, states fail to act on matters requiring them to meet their obligations for instance to protect the rights of their own citizens or citizens of other countries. All states in the international system have a duty to meet obligations *erga omnes,* rules of state responsibility (Wallace and Ortega, 2007: 23). As mentioned before, this involves protecting own citizens as well as aliens. States often fail to comply with rules of state responsibility because of their preoccupation and obsession with power politics. Though it's a new phenomenon, international law has been seen intervening in domestic politics to backstop domestic governance where states seem to have fallen short of meeting their state responsibility obligations. Through the doctrine of humanitarian intervention under international law, the North Atlantic Treaty Organization (NATO) intervened in Kosovo in the 1990s to solve a human catastrophe that resulted from the former Yugoslavia's failure to her obligations *erga omnes* (Dugard, 2007:). NATO's intervention was to backstop the government of former Yugoslavia because it had failed to do what is expected of it. In southern Africa, the SADC Tribunal made massive efforts to backstop the Zimbabwe government, even though the government refused to comply, when it failed to work to protect rights of white farmers in the Campbell case.

With international institutions such as the International Criminal Court, European Court of Human Rights, SADC Tribunal and many others cooperation among the international criminal justice mechanisms provide a modern form of backstopping by ensuring that states would adhere to principles of justice by making sure they treat their citizens in accordance with the law. It is said that necessity is the mother of invention. The establishment of international courts and tribunal was meant to provide mechanisms of backstopping and complementing domestic politics. One can say that the future of the mandate and jurisdiction of these international courts and tribunal is entirely domestic. Their increasing dominant role in domestic politics is enough evidence to substantiate that claim. This is not to say that domestic courts are losing relevance, rather domestic judicial institutions in many states are at the mess of political of political interference to the extent that separation of powers is no longer practiced. The executive in many states, including Zimbabwe, meddle with the legislature and judiciary for selfish political end to the detriment of ordinary citizens. This could have always been the case but modern democracy is emerging with modern remedies.

Contemporary of those remedies is the involvement of international law through international courts and tribunals to backstop domestic political and legal institutions.

As early as 1625, Hugo Grotius who is considered 'the father of international law' recognized that the domestic courts of various states could backstop one another (Dugard, 2007). He anticipated that domestic courts of various states could provide mechanisms for backstopping one another in the event of failure of function to set benchmarks and standards. Grotius' ideas were not disregarded; they were rather used differently to suit events of the contemporary times, contemporary problems call for contemporary measures and solutions. Today international courts and tribunals are the ones which can backstop domestic judicial institutions. They can do that through the applying international law in domestic politics where domestic law could have failed to act or yield desirable and fair results.

Obvious example of international law as a backstop is the complementarity provisions of the Rome Statute of the ICC and protocol of the SADC tribunal among others. The ICC is designed to operate only where national courts fail to act a first time line means of prosecutions. Article 17 of the Rome Statute provides that the court shall determine a case is inadmissible if "the case is being investigated or prosecuted by a state which has jurisdiction over it unless the state is unwilling or unable genuinely to carry out the investigation or prosecution" (Rome Statute, 2003). This is not peculiar with the ICC alone. Article 15 of the Protocol and Rules of Procedure of the SADC Tribunal, Tribunal Protocol, gives the Tribunal the authority to deal with inter-state disputes as well as cases between natural or legal persons and states. Like the ICC, article 15(2) of the tribunal protocol provides that no natural or legal person shall bring an action against a member state unless he or she has exhausted all available remedies or is unable to proceed under the domestic jurisdiction. In accordance with article 15(3) the consent of other parties to the dispute shall not be required. The involvement of the SADC tribunal in the Campbell case was in compliance with article 15.

The SADC Tribunal held in the case of Mike Campbell (Pvt) Ltd and others v Zimbabwe that:

It is settled law that the concept of the rule of law embraces at least two fundamental rights, namely the right of access to courts and the right to a fair hearing before an individual is deprived of a right, interest or legitimate expectation … Article 4 (C) of the Treaty obliges SADC states to respect principles of human rights, democracy and the rule of law and to undertake under article 6(1) of the Treaty 'to refrain from taking any measure likely to jeopardize the substance of its principles, the achievement of its objectives and the implementation of the provisions of the Treaty (SADC Case no. SADC (T) 11/08 at 35)

The complementary role of regional and sub-regional tribunals has been thus characterized:

The role of international tribunals is subsidiary and only becomes necessary when the state has failed to afford the required relief. However, the role of the international tribunal is important to the integrity of the human rights system and victims of violations, particularly when the state deliberately and consistently denies remedies, creating a climate of impunity (Shelton, 2001: 15)

Indeed, the role of international tribunals is very important especially to the dignity and integrity of the human rights system. However, it should be noted that international law and international courts and tribunal are not a sources of instant solution to problems facing the international community (Shaw, 2003). Their importance comes when they provide the second line of defense in cases where their domestic counterparts fail to act. For instance, the ICC can step in and provide a second line of defense in cases where domestic institutions fail "due to a total or substantial collapse or unavailability of its national judicial system" (Art 17.3) or "where a state is unwilling to prosecute independently or impartially" (Art 17.20) In various human rights courts, the requirements that individuals first exhaust local remedies gives states and particularly their domestic courts an incentive to reach conclusions acceptable to the international institution so the international court need not intervene to review the case. But in a majority of cases human rights courts intervene as a result of unwillingness on the part of states to handle human rights cases accordingly.

According to Slaughter and Burke (2006: 13), the actual backstopping provision in international legal institutional design is twofold.

First, the provision of a second line of defense when national institutions fail second is the ability of the international process to catalyze action at national level. The first provision is easy to implement as evidenced by the role the SADC tribunal has played in the Campbell case in Zimbabwe. It is easy because there are treaty provisions outline how international courts and tribunals can provide the second line of defense in the event that national courts have failed are not willing to act. Many states have approved of such provisions, though in practice they defect. Examples are the Rome Statute of the ICC, the Protocol and Rules of Procedure of the SADC tribunal and the Convention of Human Rights of the European Court of Human Rights. In the case of the European Court of Human Rights, EU law is superior to domestic law of member states. The second provision attracts a lot of resistance from states especially those that emphasize the Westphalia concept of sovereignty, Zimbabwe inclusive. Such states recognize and emphasize the superiority of domestic law to international law as they are aligned to the monist view of law. There is nothing wrong with that but the contemporary world in which we live international law has and is assuming an important influential role in domestic politics. This is due to the failure of domestic law to solve some domestic political problems that threaten international stability. Political integration has long been achieved; the new role international law has assumed is in the interests of legal integration in the international system.

The backstopping effect of international law institutions takes different forms and often case specific. This may be because the engagement of international law in domestic politics is a new phenomenon. Sometimes, the international institution will generate incentives for domestic governmental authorities to act at home as an alternative to international prosecution. At other times, particularly where powerful actors within a national government lack the political will to act at home, the international institution may alter the balance in domestic power struggles, strengthening the hand of those national officials who want to act. In the African context this is a tall order since majority of states in the continent resist the influence of international law in their domestic politics. At other times, international institutions threaten to impose sanctions on domestic governments that fail to meet international legal standards. Imposition of sanctions is an uphill task because states may threaten to or withdraw from an international organization if sanctions are imposed or to be imposed against them.

When Zimbabwe was found guilty in the Campbell case she withdrew knowing that sanctional measures could have been imposed against her in accordance with article 32 (5) of the Protocol and Rules of Procedure of the SADC Tribunal for refusing to comply with the tribunal's *dicta.* Article 32 (5) of the Tribunal Protocol and Rules of Procedure states that the tribunal shall report to the Summit for appropriate action if any state fails to comply with ruling of the tribunal.

Moreover, in domestic politics international law can compel action by domestic governments. Despite the proliferation of international courts and tribunals domestic governments have retained the nearly exclusive use of their instruments of coercive authority (Tomuschat, 1981: 92). In most cases, national governments alone can use the police power, national judiciary or military as tools necessary to address transnational threats before they grow and spread. At times domestic governments may be unwilling to use these institutions either due to differing perceptions of national interests , a lack of political will or infighting within government themselves. In these cases, international law can be effective only by finding new ways to ensure that domestic governments actually use the tools at their disposal to address such threats before they spread.

International legal rules have long sought to constrain or mandate the behavior of states toward other states, their citizens and other state's citizen. The international legal system recorded considerable success on constraining the behavior of states towards other states. This is evidenced by the way states comply with laws of diplomatic relations, consular relations, laws of the sea and airspace and other rules of international law that give other states incentives to reciprocate in the event that a state defects from them. On constraining the behavior of states towards their own citizens, the international legal system is facing major challenges, so far. One of the modern limits to Westphalia concepts of sovereignty is the obligations imposed by international law particularly human rights law on the conduct of states towards their own citizens. However, domestic governments have a tendency of co-opting the force of international law to serve their own objectives.

The involvement of international law in domestic politics has impacted negatively on the Westphalia concept of sovereignty. It has placed limits on traditional notions of state sovereignty.

For instance, under contemporary international law modern domestic governments can no longer treat their citizens the way they see fit. A presage of this shift is the new doctrine of responsibility to protect.

The Responsibility to protect launched in 2001 essentially called for updating the UN Charter to incorporate a new understanding of sovereignty (International Commission on Intervention and State Sovereignty, The Responsibility to Protect: Report of the ICSS, 2001). In the Commission's conception, the core meaning of UN membership has shifted from "the final symbol of independent sovereign statehood and thus the seal of acceptance into the community of nations" to the recognition of a state "as a responsible member of the community of nations". To this effect, promotion of human rights has been added as an attribute of statehood in addition to other qualifications of statehood contained in the Montevideo Convention of 1933 (Dugard, 2007). Being a responsible member of the international community of nations entails effort, ability, and commitment to protect human rights among other things.

According to the ICSS (2001) "there is no transfer or dilution of state sovereignty. But there is a necessary re-characterization involved: from sovereignty as a control to sovereignty as responsibility in both internal functions and external duties". Internally, a government has a responsibility to respect the dignity and basic rights of its citizens. Externally, it has a respect the sovereignty of other states. Further the ICSS places the responsibility to protect on both the state and on the international community as a whole. It insists that an individual state has primary responsibility to protect the individuals within it. However, where the state fails in that responsibility, a secondary responsibility falls on the international community acting through the UN and other international and regional organizations such SADC and their specialized agencies. According to article 53 of the UN Charter, regional organizations such as SADC should assist the UN in executing its mandate and objectives. In this regard, the involvement of the SADC tribunal in the domestic politics of Zimbabwe was in fulfillment of the new doctrine of responsibility to protect and in recognition of article 53 of the UN Charter. In other words, it was in fulfillment of international objectives.

The responsibility to protect has it that, "where a population is suffering serious harm, as a result of interwar, insurgency, repression or state failures and the state in question is unwilling or unable to halt or avert it, the principle of non-intervention yields to the international responsibility to protect" (ICSS, 2001). The international responsibility to protect has been invoked several times in current international politics to justify humanitarian intervention. Examples are the NATO's intervention in former Yugoslavia in the 1990s, NATO's intervention in Libya and Egypt recently. It should be noted that the SADC tribunal intervened in the Campbell case in Zimbabwe because the country was unwilling to avert the land conflict in accordance with the domestic law of the country.

International law promotes the responsibility to protect while also reframing the sovereignty debate to cover a principle of both effective and legitimate sovereignty through international assistance and conditioning sovereignty on state behavior (Eide, 2004: 10).

EU's intervention in the domestic affairs of EU member states is the hallmark of EU-style "post-Westphalian sovereignty" described by Robert Cooper (2003) in The Breaking of Nations. Cooper argues that post-modern states can no longer rely on the unities that have characterized the political order. This is, according to the author, a significant change between the recognition of national sovereignty and the separation of domestic- and foreign affairs as counted for the pre-modern and modern states. The post-modern agenda is centred on international bodies, international agreements, and national sovereignty therefore becomes a matter of having a seat at the negotiating table and reaching common agreements. Additionally, openness and mutual interference makes the post-modern states more vulnerable. Cooper argues that pre-modern regimes cannot be disregarded since they may either sympathize with or protect such groups. This implies the need for interventions which can harness national sovereignty to allow international law to structure domestic politics. Thus the genesis/ provenance of SADC seek to perform the above function.

Not so long ago, Oppenheim (1908: 29) observed that international law has grown into the most effective weapon for preserving global peace and security.

Today, international law governs not only how states relate with each other, but also how states deal with their own subjects, especially concerning the protection of human rights. International law now provides a system of checks and balances in domestic political governance through backstopping government action and strengthening domestic government institutions.

According to Tomuschat (1999: 23), international law has a general function to fulfill namely to safeguard international peace, security and justice in relation between states. To say that international law aims at peace 'between states' sounds perhaps to narrow the scope of international law. The scholar questioned the methodology international law can use to perform the above functions. To reiterate, Tomuschat (1999: 33) asserts that international law must also seek to advance human rights as well as the rule of law domestically inside states for the benefit of human beings. Advancing the protection of human rights and the rule of law domestically requires international law to be directly involved in domestic governance. Sovereignty could be the only stumbling block, but its revision which many states in the international community seem to have failed to embraced promises a ray of hope.

In conclusion, International law's influence on domestic politics, a process that is already underway, requires a broader thinking of and attitude towards the functions of international law. As in Europe, the focus of a growing number of international rules is no longer interstate relations, it is increasingly government's capacity and will to act in prescribed was towards their own peoples. The result is a growing interaction between international law and domestic politics in ways that have lasting implications for both. This role of international law in domestic politics is facing stiff resistance in the southern African context. Zimbabwe's rejection of the SADC tribunal ruling in the Campbell case and subsequent withdrawal of her signature from the tribunal protocol as well as the country's influence in the disbandment of the tribunal speak volumes of the attitude of states in the sub region towards the role of international law in domestic politics.

Reference

Dugard, J. 2007. International Law: A South African Perspective, Pretoria, Juta Publishers.

K. J. Alter, The New Terrain of International Law: Courts, Politics, Rights, Northwestern University and Courts Center of Excellence, Princeton University Press.

D. Bodansky, The Legitimacy of International Governance: A Coming Challenge for International Environmental Law" (1999) 93,American Journal of International Law 596.

Goldsmith J and Posner E.A, Legal Theory, University of Chicago, May 2006, 126 (23)

E Posner, Evaluating the Effects of International Law: Next Steps, University of Chicago, Global Policy Volume 1, Issue 3, October 2010.

Martti Koskenniemi, The Politics of International Law

Leuprecht et al, Evolving Transnational Threats and Border Security: A new research agenda, Centre for International and Defence Policy, Queen's University, Kingston, Ontario, Canada, Canada, 2012.

Magaisa A, The Land Question and Transitional Justice in Zimbabwe: Law, Force and History's Multiple Victims, 30 June, 2010.

New African, IC Publication, April 2013, Zimbabwe Land Reform Bears Fruit, UK, London.

Campbell and Others vs Republic of Zimbabwe SADC (T) Case NO. 2/2007.

Leonard M, Why Europe Will Run the 21st Century, Cambridge Scholars Publishing, 2005.

Haas E.B, The Uniting of Europe, Stanford University Press, 1958.

Burca G, The Constitutional Challenge of New Governance in the European Union, 2003, 28 ELR 814

Travers M.M, Le Doit Penal International et sa Mise en Temps de Paix et en Temps de Guerre, Paris, librairie de la Societe, 1922

Mail and Guardian, June 28-July, 2013, South Africa may Forfeit Zimbabwean Property.

Mail and Guardian, July 5-11, 2013: 4, Zimbabwe Shuts Door on Asserts Seizure.

Keller H and Sweet A.S, A Europe of Rights: The Impact of the ECHR on National Legal Systems, Oxford University Press, 2008.

Nolkaemper A and Nijman J, 2007, New Perspectives on the Divide between International and National Law, Oxford University Press.

Weinstein J et al, On the Brink, Weak States and US National Security: A Report of the Commission for Weak States and US National Security, 2004.

Mike Campbell (Pvt) Ltd and Others v The Republic of Zimbabwe [2008] SADC Case no. SADC (T) 11/08 at 35)

Shelton D, Remedies in International Human Rights Law 2ed (Oxford University Press, 2001) at 15

Constitution of the Republic of Zimbabwe, 2013

Shaw, M. 2003. International Law, Palgrave, USA.

Wallace, R.M.M and Ortega, O.M. 2007. International Law, Sixth Edition, Pretoria, Juta House.