Brussels Court of Appeal—Rwanda—genocide—UNAMIR—state responsibility—imputability of conduct of UN peacekeepers—effective control

MUKESHIMANA-NGULINZIRA AND OTHERS V. BELGIUM AND OTHERS. 2011/AR/292, 2011/AR/294. Appellate Judgment. *Available at* https://www.justice-en-ligne.be/IMG/pdf/bruxelles–2018-06-08–eto.pdf (in French).
Brussels Court of Appeal, June 8, 2018.

On April 11, 1994, approximately two thousand men, women, and children were brutally murdered by armed Hutu extremists after a group of Belgian UN peacekeepers abandoned the school facility where they had sought refuge upon the outbreak of the Rwandan genocide. Almost a quarter of a century later, the Brussels Court of Appeal (Court) on June 8, 2018 concluded the civil proceedings lodged by a number of Rwandan survivors and relatives against the Belgian commanding officers and the Belgian state. Overturning an earlier judgment of the Brussels Court of First Instance, the Court held that the decision to retreat from the facility was imputable only to the United Nations, to the exclusion of the Belgian authorities. Accordingly, the claims against the Belgian state were unfounded. The events—which inspired the movie *Shooting Dogs* (2005)—bear obvious similarities to the role of the United Nations Protection Force's (UNPROFOR) Dutch battalion (Dutchbat) in the evacuation of the Potoçari camp and the ensuing genocide of seven thousand Bosnian men and boys by Bosnian Serb forces in Srebrenica in 1995.[1] Like the Dutch judgments in the (more well-known) *Mothers of Srebrenica* proceedings,[2] the *Mukeshimana* appellate judgment provides a rare national court precedent that considers the imputability of the conduct of peacekeepers to troop-contributing countries. The *Mukeshimana* judgment, however, raises a high bar for finding such imputability.

Upon the outbreak of the Rwandan genocide on April 6–7, 1994,[3] hundreds of Rwandans—hoping to escape the massacres by Hutu extremists in Kigali and beyond—sought refuge at the *École Technique Officielle Don Bosco* (ETO). The school facility was at the time serving as the basis for the *Groupe Sud*, a ninety-person strong Belgian contingent of the United Nations Assistance Mission for Rwanda (UNAMIR).[4] More specifically, the *Groupe Sud* formed part of the roughly four-hundred-person Belgian battalion *Kibat*, which provided a sizable share of UNAMIR's troops in the "Kigali sector."

[1] Following the fall of the city of Srebrenica during the Yugoslav conflict, thousands of Bosnian men, women, and children sought refuge in the vicinity of the Dutchbat compound at Potoçari. Dutchbat subsequently made arrangements with the (far more numerous and better equipped) Bosnian Serb forces to evacuate the refugees out of the area. As the evacuation went on, it gradually became clear that the Bosnian Serb forces were singling out the Muslim men and boys, thousands of whom were later executed in cold blood.

[2] See in particular: Mothers of Srebrenica Ass'n v. Netherlands, ECLI:NL:GHDHA:2017:3376 (App. Ct. The Hague June 27, 2017); Mothers of Srebrenica Ass'n v. Netherlands, ECLI:NL:HR:2019:1284 (Sup. Ct. Netherlands July 19, 2019). Both judgments are available at https://uitspraken.rechtspraak.nl (in Dutch, unofficial translations in English).

[3] Important (and at times conflicting) accounts of the events include the following: Report of the Independent Inquiry into the Actions of the United Nations During the 1994 Genocide in Rwanda, UN Doc. S/1999/1257 (Dec. 16, 1999); Belgian Senate, Report of the Belgian Parliamentary Commission of Inquiry into the Events in Rwanda, Doc. 1-611/7 (Dec. 6, 1997), *at* https://www.senate.be/www/?MIval=/publications/viewPubDoc&TID=16778570&LANG=fr (in French) [hereinafter Belgian Senate Report]; ROMÉO DALLAIRE, SHAKE HANDS WITH THE DEVIL: THE FAILURE OF HUMANITY IN RWANDA (2004).

[4] UNAMIR was created pursuant to Security Council Resolution 872 (2013) of October 5, 1993.

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The first Rwandans began arriving at the camp on April 7, 1994. While the peacekeepers had initially tried to refuse entry to the encampment, access was eventually permitted. By April 10, more than two thousand men, women, and children were staying at the facility under dire circumstances, de facto transforming the facility into a cramped refugee camp. Outside, armed Hutu extremists known as the *Interahamwe* installed roadblocks, intended to intercept and exterminate Tutsis and moderate Hutus.

Meanwhile, also on April 7, Rwandan troops captured and executed ten Belgian blue helmets who had escorted the Rwandan prime minister.[5] Following that murder, the Belgian authorities were keen to withdraw the Belgian UNAMIR component as soon as possible. At the same time, recognizing the anti-Belgian sentiment amongst the *génocidaires* and the large number of Belgian expatriates in the country, Belgium's main concern was the safe evacuation of its nationals. Both France and Belgium flew troops into the country as part of *Operation Amaryllis* and *Operation Silverback*, respectively. These forces operated under national command and were tasked only with evacuating their own nationals as well as other foreign nationals.

On April 11, French forces arrived at the school to pick up foreign nationals present there. Shortly after that task was completed and the French forces had returned to the airport, the *Groupe Sud* moved out of the camp, firing shots in the air to prevent Rwandan refugees from impeding their departure. No measures were taken to ensure the safety of the refugees, who were left at the mercy of the militia members who had surrounded the school. Most of the two thousand men, women, and children present at the facility were brutally murdered in the hours following the departure of the *Groupe Sud*.

On April 12, Belgium confirmed to the United Nations that it had decided to withdraw its contingent from UNAMIR. By April 19, all Belgian troops had left the country. The Rwandan genocide would rage on until July 1994 when the *Front Patriotique Rwandais* secured a military victory. An estimated 800,000 people were slaughtered in the space of just one hundred days.

In 2004 and 2007, several survivors and relatives of those killed in or near the school brought proceedings against the Belgian commanding officers of the *Groupe Sud* (Captain Lemaire), of the *Kibat* battalion (Lieutenant-Colonel Dewez), and of UNAMIR's "Kigali sector" (Colonel Marchal), as well as against the Belgian state itself. In particular, the claimants sought to hold the defendants tortiously liable for their failure to prevent international crimes and to obtain compensation for the damages suffered.

On December 8, 2010, the Brussels Court of First Instance rendered an interim judgment.[6] While the judgment is mostly concerned with the defendants' objections that the claims had expired pursuant to the applicable statute of limitations,[7] it also contains important considerations on the questions of imputability and causality.

[5] Para. 16. Already in January 1994, an informant had told UNAMIR of plans to kill a number of Belgian peacekeepers with a view to provoking the withdrawal of the Belgian battalion (para. 12).

[6] Mukeshimana-Ngulinzira and Others v. Belgium and Others, RG No 04/4807/A, 07/15547/A, First Instance Judgment (Brussels Ct. First Instance Dec. 8, 2010) [hereinafter First Instance Judgment]. For relevant excerpts and a case note by Cedric Ryngaert, see OXFORD REPORTS ON INTERNATIONAL LAW IN DOMESTIC COURTS 1604 (BE 2010).

[7] First Instance Judgment, *supra* note 6, paras. 27–38; Ryngaert, *supra* note 6, at H7.

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Regarding causality,[8] the Court of First Instance noted that there could not have been the slightest doubt as to the fate of the Rwandan refugees upon the withdrawal of the Belgian peacekeepers.[9] The Court of First Instance observed that the *Interahamwe* militias had stayed at bay as long as the Belgian peacekeepers were present at the facility and that several Rwandans placed under the protection of UN peacekeepers at other locations had effectively been saved. The Rwandan refugees at the facility clearly lost a chance of survival due to the retreat of the *Groupe Sud*.

In terms of imputability, the interim judgment expressly noted that the evacuation of the school "is a decision taken under the auspices of the Belgian State and not those of UNAMIR."[10] This conclusion was based on a twofold finding. First, the Court of First Instance noted that parts of the Belgian UNAMIR contingent were de facto carved out of the UNAMIR chain of command—something which General Roméo Dallaire, the Canadian commander of UNAMIR, had expressly complained about. Second, there had been no coordination whatsoever between Colonel Marchal and General Dallaire on the actual evacuation, notwithstanding the fact that the latter had been in constant contact with the Belgian military headquarters.[11]

The question of imputability was at the heart of the debate during the appeal of the interim judgment before the Brussels Court of Appeal. According to the relatives of the victims (para. 39), the *Groupe Sud*'s withdrawal from school was imputable *exclusively* to Belgium, since: (1) the decision to withdraw from UNAMIR was taken unilaterally by Belgium as of April 8 or 10, 1994; (2) this withdrawal decision also implied the unilateral decision to evacuate Belgian nationals, which was not part of UNAMIR's mandate; and (3) the unilateral decision to evacuate Belgian nationals was carried out under the exclusive control of the Belgian government, which gave orders to the Belgian commanding officers within UNAMIR. Conversely, Belgium and the commanding officers objected that the departure from ETO was imputable exclusively to the United Nations, as the acts were undertaken pursuant to UN directives and under the UN's exclusive control (para. 40).

Upon consideration of the evidence before it, the Brussels Court of Appeal sided with the latter position, resulting in a complete reversal of the earlier findings of the Court of First Instance. The judgment first held that the decision to repatriate foreign nationals was taken jointly by a number of states, including Belgium, as well as the United Nations (paras. 47–51). UN involvement included its planning, since January 1994, for possible evacuation operations. In addition, the Court stressed that UNAMIR's mandate included "[assisting] in the coordination of humanitarian assistance activities in conjunction with relief operations."[12] As to the actual execution of the repatriation operations, the judgment recounted how UNAMIR's force commander, Dallaire, had agreed to a tripartite collaboration (para. 61), whereby a regrouped UNAMIR would assist in the evacuation by French and Belgian troops, and whereby Colonel Marchal was mandated to coordinate UNAMIR's activities with the French (para. 58). With regard to General Dallaire's critique that control over

[8] First Instance Judgment, *supra* note 6, paras. 39–52.
[9] *Id.*, para. 46.
[10] *Id.*, para. 38.
[11] *Id.*
[12] SC Res. 872, Art. 3(g) (Oct. 5, 1993).

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Kibat had de facto been entrusted to the Belgian *Operation Silverback*, the Court noted, among other things, that this critique related only to the *Kibat* contingent at Kigali airport and not the *Groupe Sud* as such (paras. 62–63).

In all, the Court of Appeal concluded that, notwithstanding the collaboration agreed between UNAMIR and the French and Belgian forces involved in *Operation Silverback*, UNAMIR retained "ultimate control" over *Kibat* (para. 65). There were no indications that *Kibat* had obeyed "direct and precise instructions from Belgium" nor that *Kibat* had been placed under Belgium's joint—let alone exclusive—control (*id.*).

It was therefore pursuant to their UNAMIR capacity and instructions that Colonel Marchal and Lieutenant-Colonel Dewez authorized the *Groupe Sud* to leave the ETO and to join the ongoing regrouping and repatriation exercise (para. 66). The fact that General Dallaire had not expressly approved, or ordered, the withdrawal from the facility was deemed to be of no relevance in this context (paras. 67–68).

Inasmuch as the withdrawal was imputable only to the UN—to the exclusion of the Belgian state—the Court concluded that the Belgian officers enjoyed immunity from jurisdiction pursuant to UNAMIR's Statute and rejected the claims against the Belgian state as unfounded. The Court of Appeal thus dismissed the case without examining whether the retreat from the school entailed a wrongful act. No challenge was raised against the ruling before the Belgian Court of Cassation.

* * * *

The *Mukeshimana* case is a rare judicial precedent tackling the imputability of the conduct of UN peacekeeping contingents, a topic heavily debated in legal scholarship in recent years.[13] As is well known, states that provide troops for peacekeeping operations accept in principle that these forces are placed under the UN chain of command and receive their orders directly therefrom. Accordingly, the presumption is that the conduct of UN peacekeepers is imputed exclusively to the UN. This is so, notwithstanding the fact that the troop-contributing country retains disciplinary powers and criminal jurisdiction over the members of the national contingent and ultimately remains free to withdraw its contingent at any time.

At the same time, as the Commentary to Article 7 of the International Law Commission's (ILC) Draft Articles on the Responsibility of International Organizations makes clear, there may be exceptional situations where the troop-contributing country interferes with the activities of the peacekeepers or where joint operations are being deployed. In such settings, the presumption that the conduct of UN peacekeepers is attributed exclusively to the UN may be rebutted if the state is found to have exercised "effective control" over this conduct. Whether this is the case is a factual question. Interestingly, one of the examples cited by the ILC in this context is precisely the—now overturned—first instance judgment in *Mukeshimana*.[14]

[13] *See, e.g.*, Paolo Palchetti, *The Allocation of Responsibility of Internationally Wrongful Acts Committed in the Course of Multinational Operations*, 95 Int'l Rev. Red Cross 727 (2013); Cedric Ryngaert, *Apportioning Responsibility Between the UN and Member States in UN Peace-Support Operations: An Inquiry into the Application of the "Effective Control" Standard After* Behrami, 45 Israel L. Rev. 151 (2012); Tom Dannenbaum, *Translating the Standard of Effective Control into a System of Effective Accountability: How Liability Should Be Apportioned for Violations of Human Rights by Member State Troop Contingents Serving as United Nations Peacekeepers*, 51 Harvard Int'l L.J. 113 (2010).

[14] Int'l L. Comm'n, Draft Articles on the Responsibility of International Organizations, with Commentaries, UN Doc. A/66/10, 58, para. 8 (2011).

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Imputability has important ramifications for the possibility of legal redress by individuals harmed by UN peacekeepers. Indeed, as the European Court of Human Rights, for instance, confirmed in the *Mothers of Srebrenica* case,[15] the UN's immunity from suit poses an insurmountable obstacle to claims against the UN itself. By contrast, where the conduct is imputable to the troop-contributing country, victims can seek compensation from that state by bringing claims before its domestic courts, as the Dutch cases relating to the Srebrenica genocide well illustrate.[16]

Where does the judgment of the Court of Appeal in *Mukeshimana* fit into all this? On the one hand, the judgment cites extensively from the Commentary to Article 8 of the ILC Draft Articles on the Responsibility of States for Internationally Wrongful Acts as well as the Commentary on Article 7 of the Draft Articles on the Responsibility of International Organizations (paras. 42–43), noting that all parties accepted that these rules codify pre-existing custom (para. 41). Extensive reference is made, moreover, to the treatment of imputability in the Hague Court of Appeal judgment in the *Mothers of Srebrenica* case (para. 44).

On the other hand, the judgment does not provide much conceptual clarity as to how the key criteria derived from this legal framework apply in the specific context of the *Groupe Sud*'s withdrawal from the *École Technique Officielle Don Bosco*, the underlying facts of which have long been heavily disputed. Some implicit lessons can nonetheless be drawn from the Court's analysis. Thus, the Court clearly starts from the presumption that the conduct of UN peacekeepers is ordinarily imputable only to the UN. The fact that officers of a troop-contributing country fulfill important functions in the UN chain of command does not affect this presumption—as was also confirmed by the Dutch Court of Appeal.[17] The judgment can also be read as implicitly corroborating the position that the hypothetical power of the troop-contributing country to prevent specific acts of "its" national contingent is insufficient to trigger imputability to the state.[18] In contrast to the *Mothers of Srebrenica* proceedings,[19] the Court does not expressly tackle the question of imputability of *ultra vires* conduct of UN peacekeepers, since the *Groupe Sud* was believed to have remained within the confines of the UNAMIR mandate and instructions.

In the end, notwithstanding the extensive references to the ILC Draft Articles' "effective control" test, the Court applies that test in a narrow and formalistic manner. The facts that there was no evidence that *Kibat*'s *Groupe Sud* had acted pursuant to "direct and precise instructions" from the Belgian authorities and that UNAMIR retained "ultimate control" (*le contrôle ultime*) over the unit (para. 65) appear to be decisive in the Court's reasoning.

[15] Stichting Mothers of Srebrenica v. Netherlands, App. No. 65542/12 (Eur. Ct. H.R. June 11, 2013). See also the case note by Jacob Katz Cogan in 107 AJIL 884 (2013).

[16] See in particular the *Mothers of Srebrenica* judgments *supra* note 2. In that case, the Court of Appeals of The Hague found that the Netherlands had acted unlawfully "by not offering male refugees inside the Dutchbat compound the choice to stay within the compound, thereby denying them the 30% chance of not being exposed to inhumane treatment and executions by the Bosnian Serbs." The Supreme Court subsequently reduced the compensation due by holding that the male refugees within the Dutchbat compound had lost only a "10% chance" of not being exposed to inhumane treatment and execution. *See also* Nuhanović v. Netherlands, ECLI:NL:GHSGR:2011:BR0133 (App. Ct. The Hague July 5, 2011); Mustafić v. Netherlands, ECLI:NL:GHSGR:2011:BR0132 (App. Ct. The Hague July 5, 2011). Both rulings were confirmed by the Supreme Court of the Netherlands.

[17] *See, e.g.*, *Mothers of Srebrenica Ass'n v. Netherlands* (App. Ct. The Hague), *supra* note 2, para. 12.1.

[18] In this sense: *Mothers of Srebrenica Ass'n v. Netherlands* (Sup. Ct. Netherlands), *supra* note 2, para. 3.5.3.

[19] *Id.*, para. 3.6.1.

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The notion of "ultimate control" is reminiscent of "ultimate authority," used by the European Court of Human Rights in the *Behrami* case[20] and since criticized by the ILC[21] and discarded by the UN itself.[22]

Interestingly, the Court of Appeal goes to some length to explain the difference between the case before it and the facts surrounding the assistance of the Dutch UNPROFOR contingent Dutchbat in the evacuation of the Potoçari camp by the Bosnian Serbs on the eve of the Srebrenica genocide.

In the *Mothers of Srebrenica* proceedings, the Dutch courts held that the decision to evacuate Dutchbat and the refugees had come about "by mutual consultation" ("*in onderling overleg*") between the French commander of UNPROFOR, on behalf of the UN, and the chief of staff of the Dutch armed forces.[23] Indeed, "the State decided together with the UN to evacuate the population from the mini safe area" and "[t]he Dutch government participated in this decision-making at the highest level" (para. 24.1). Accordingly, as of 11 p.m. on July 11, 1995, the courts found that a transition period set in, during which the Netherlands had effective control over the evacuation.[24]

In *Mukeshimana*, the Brussels Court of Appeal identified two alleged distinctions with the Srebrenica case, which explain its different answer regarding imputability (para. 69). First, it stressed that there had been no instruction whatsoever from the Belgian authorities ordering or authorizing the withdrawal from ETO. Second, in contrast to the situation in Srebrenica, the Court stressed that the withdrawal from ETO was "not indistinguishable" ("*indissociable*") from the Belgian decision to withdraw from UNAMIR, but was instead part of the broader evacuation operation decided by the UN (*id.*).

Whether the distinction drawn by the Court of Appeal is convincing is doubtful. As to the lack of instructions, one might argue that, just as the decision to evacuate the mini safe area in Potoçari had been taken pursuant to consultation between the UN and the Dutch authorities, the overarching decision to regroup and to repatriate foreign nationals—of which the decision to withdraw from the school was regarded by the Court as nothing but a corollary—was taken *jointly* by the UN and by the Belgian and French authorities.

Second, it is striking that the Court had no difficulty in asserting that the withdrawal from the school was distinct ("not indistinguishable" in the language of the Court) from Belgium's retreat from UNAMIR, but nonetheless left open the exact date at which the latter decision was taken, placing it somewhere "between April 10 and April 15" (para. 55). This is all the more striking considering that Court of First Instance's belief that, following the murder of ten Belgian peacekeepers on April 7, Belgium had become "obsessed" with withdrawing its

[20] Behrami v. France and Saramati v. France, Joined App. Nos. 71412/01 & 78166/01, paras. 133–35, 140 (Eur. Ct. H.R. May 2, 2007). The judgments and decisions of the European Court of Human Rights are available at http://hudoc.echr.coe.int.

[21] Draft Articles on the Responsibility of International Organizations, *supra*, note 14, 58–59, para. 10 ("'operational' control would seem more significant than 'ultimate' control, since the latter hardly implies a role in the act in question").

[22] *See* Report of the Secretary-General on the United Nations Interim Administration in Kosovo, para. 16, UN Doc. S/2008/354 (June 12, 2008) ("It is understood that the international responsibility of the United Nations will be limited in the extent of its effective operational control.").

[23] *Mothers of Srebrenica Ass'n v. Netherlands* (App. Ct. The Hague), *supra* note 2, para. 23.8. This finding was not challenged before the Supreme Court.

[24] *Id.*, para. 24.2.

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troops and evacuating its nationals as soon as possible.[25] Yet, if the political decision to pull out of UNAMIR was taken on April 10 or 11, it becomes very difficult to see what distinguishes the position of the *Groupe Sud* from that of Dutchbat. In *Mothers of Srebrenica*, the Court of Appeal found that the UN and the Netherlands had jointly decided that the withdrawal of Dutchbat would not take place before the evacuation of the mini safe area.[26] In fact, the "evacuation" of that area took place on July 12 and 13, 1995, while Dutchbat abandoned the compound on July 21, 1995.[27] By way of analogy, in Rwanda, Belgium did not formally withdraw its UNAMIR contingent until after the successful evacuation of its nationals—the last Belgian troops left the country on April 19, 1994.

Conversely, even if the Belgian decision to pull out of UNAMIR was only taken *after* the *Groupe Sud* left the school,[28] the question remains whether this suffices to rule out a form of *joint* control over the *Groupe Sud*. Indeed, in addition to the frequent exchanges between the Belgian UNAMIR officers and the Belgian military headquarters, the *Mukeshimana* case presents certain unique features, which cannot be found in the *Mothers of Srebrenica* case and which would seem to make *joint* control plausible. These factors include the deployment of Belgian troops in the context of *Operation Silverback*, acting in parallel to the Belgian UNAMIR contingent, as well as the fact that some *Kibat* units were allegedly no longer responding to the UNAMIR command, but were instead entrusted to *Operation Silverback.* Last but not least, it is worth recalling that while the French commander of UNPROFOR was directly involved in the (joint) decision to evacuate the mini safe area in Potoçari, UNAMIR commander Roméo Dallaire was not as such consulted over the *Groupe Sud*'s fatal retreat from the *École Technique Officielle.*

In the end, while the case is highly fact-specific, it is difficult to ignore the Court of Appeal's restrictive interpretation of the "effective control" test, which stands in stark contrast to that endorsed by the Court of First Instance.[29] The bottom line seems to be that the conduct of blue helmets will only be imputable to the troop-contributing country when the latter gives explicit instructions to "its" troops that depart from those of the UN chain of command. Even if the possibility is not explicitly ruled out by the Court of Appeal, it is difficult to see what room remains for a scenario of so-called "dual attribution."

Rather than embrace partial responsibility over the tragic events of April 11, 1994, the *Mukeshimana* appellate judgment has absolved Belgium from legal liability in respect of the two thousand men, women, and children massacred in the wake of the *Groupe Sud*'s retreat. Given the national trauma resulting from the murder of the ten Belgian peacekeepers and Belgium's role in the context of the Rwandan genocide, as well as the widespread attention for the *Mothers of Srebrenica* proceedings in the Netherlands, it is quite surprising that the judgment of the Court of Appeal has gone almost unnoticed, not just on the international plane, but even within Belgium itself. Nevertheless, the *Mukeshimana* judgment creates an

[25] First Instance Judgment, *supra* note 6, para. 14.

[26] *Mothers of Srebrenica Ass'n v. Netherlands* (App. Ct. The Hague), *supra* note 2, para. 24.2

[27] *Id.*, para. 2.61.

[28] In this sense: Belgian Senate Report, *supra* note 3, Sec. 4.13.

[29] In an article from 2012, Ryngaert nonetheless emphasizes how the Court of First Instance had "correctly applied the effective control standard" and how the decision "deserves considerable support in light of the control standard enunciated in Article 7 DARIO." Ryngaert, *supra* note 13, 176–77.

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

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

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

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

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

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

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

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

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

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

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

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