Silencing a Supranational Court: The Rise and Fall of the SADC Tribunal

https://www.e-ir.info/2012/10/25/silencing-a-supranational-court-the-rise-and-fall-of-the-sadc-tribunal/

MERRAN HULSE, OCT 25 2012

The Southern African Development Community set up the SADC Tribunal as the region's dispute settlement mechanism.[1] It was, for a brief period, the region's only (quasi-)supranational body, before it was shut down by the SADC Summit.[2] It was the Tribunal's rulings against the Zimbabwean government that resulted in its death knell, but it is somewhat puzzling why South Africa, the regional hegemon with little to fear from a supranational court, would raise no objection. The South African government claims one of its foreign policy goals is to 'contribute to the formulation of international law and enhance respect for the provisions thereof'. So why did South Africa, a progressive democratic state that claims respect for human rights and rule of law as a cornerstone of its foreign policy, collude with the autocratic Zimbabwean government in stifling the SADC Tribunal?

The Evolution of a Regional Court

The SADC Tribunal was established (*de jure*) in 1992, at the same time as the Treaty officially establishing SADC was signed. It was felt that SADC required a credible dispute settlement mechanism in order to grant the market-building objectives of SADC legitimacy, especially in the eyes of European donors and investors (Lenz, 2012). Initially, member states were concerned about the potential erosion of national sovereignties by the court, and the Summit agreed internally that the court would be one of 'the central *intergovernmental* organs of the community' (SADC Council of Ministers, 14 August 1992, quoted in Lenz, 2012). The Treaty states: 'the Tribunal shall be constituted to ensure adherence to and the proper interpretation of the provisions of this Treaty and subsidiary instruments and to adjudicate upon such disputes as may be referred to it' (SADC Treaty, 1992, Article 16.1). The Treaty also states that 'SADC and its Member States shall act in accordance with the principles…[of] human rights, democracy, and the rule of law (SADC Treaty, 1992, Article 4.c). This establishes the legal principle that the SADC Tribunal can hold member states to account over such principles, even though the Tribunal was not envisaged as a human rights court *per se*.

On the 7th August 2000, at the annual meeting of the SADC Summit, the Summit signed the Protocol on the SADC Tribunal, setting out the functions and jurisdiction of the court. This Protocol makes clear that both individual persons and companies may bring a case against a member state, so long as they have first exhausted all available remedies, or are unable to proceed through national courts (Article 15). This went beyond the intergovernmental court originally envisaged. Tobias Lenz (2012) argues that EU influence in the region spurred decisions to emulate features similar to the European Court of Justice, thus creating the potential for a court with more supranational features. However, there was the sense that the Tribunal remained something of a paper tiger, as the Protocol stipulated that in cases where member states do not comply with the Tribunal's rulings, the matter must be referred to the Summit (where all decision-making is by unanimity) for 'appropriate action', thus maintaining the Summit's ultimate authority over the court.

By 2005 the Tribunal was up and running in Windhoek, the Namibian capital. The first case was lodged in 2007. In the 2007-2010 period during which the Tribunal was operational, it adjudicated in 18 disputes. Cases tended to fall within one of three categories: individuals versus SADC itself (employment disputes), incorporated companies versus national governments (commercial disputes), and individuals versus national governments (human rights cases). It is

the human rights cases, every one of them brought against the Zimbabwean government, that are of particular relevance for explaining the disintegration of the court. As previously noted, the Tribunal was not intended as a human rights court *per se*, but due to the rather vague wording of the Treaty and Protocol, the Tribunal judges were able to establish jurisdiction over human rights matters without the explicit acquiescence of the other institutions of SADC. They did this in 2007, in an interim ruling on the now infamous Campbell v Republic of Zimbabwe case.

Mike Campbell Versus the Republic of Zimbabwe

Prior to 2000, land reform in Zimbabwe was operated on a willing-buyer/willing-seller model, with financial assistance from the UK under the terms of the Lancaster House Agreement, the 1979 settlement that brought an end to the Zimbabwean Liberation War. In 2000, the Zimbabwean government organized a referendum on constitutional changes that would have allowed it the power to expropriate land without consultation or compensation. The official reason given for the proposed changes was the slow pace of reform due to white landowners' reluctance to sell, but Martin Meredith (2003) suggests the move was primarily a diversionary tactic to distract the electorate from the poor state of the economy, as well as to placate the increasingly disillusioned and vocal veterans of the Liberation War, who were yet to receive the compensation they had been promised at Independence. Voters rejected the referendum, but the government nonetheless proceeded with a policy that supported and encouraged the (frequently violent) expropriation of land without due process.

Mike Campbell's farm, purchased after Independence in 1980, first became a target in 1997. While fighting various acquisition notices through Zimbabwe's court system, the Campbell family and the local community of 500 farmworkers were subjected to a campaign of harassment by 'war veterans' intent on taking over control of the farm.[3] Frustrated by the lack of objectivity in the Zimbabwean legal system[4], in 2007 Mike Campbell lodged a case with the newly operational SADC Tribunal.

Shortly after the interim ruling establishing jurisdiction in matters of human rights and rule of law, the SADC Tribunal issued its main decision in the case: the Zimbabwean government had discriminated against Mike Campbell on the basis of race, had failed to offer adequate compensation for the confiscated land, and had denied the applicants proper access to national courts, thus infringing on both human rights and the principles of rule of law. After the ruling was issued, 78 other white farmers facing similar circumstances successfully applied to join the case, with the same ruling now applying to them as well. The Zimbabwean government was ordered to cease any ongoing evictions, and pay adequate compensation to those already evicted from their farms. The Zimbabwean government did not comply with the ruling, and many farmers actually experienced an increase in harassment and intimidation, much of which was carried out with the active collusion of the security forces (Meredith, 2003). The case was to reappear before the Tribunal judges three times over the next three years. Each time a contempt of court ruling was issued, with referral to the Summit for 'appropriate action' to be taken against Zimbabwe.

Unsurprisingly, the Zimbabwean government was vehement in its opposition to the Tribunal's rulings. Despite having signed both the Treaty establishing the Tribunal and SADC itself, and the Protocol on the Tribunal establishing individual right of access, the Zimbabwean government argued that it was not in fact bound by the Tribunal's rulings on the grounds that the national parliament had not yet ratified the Protocol. However the legal consensus is that, under the commonly accepted principles of international law, Zimbabwe is indeed subject to the court's jurisdiction (Matyszak, 2011). Within the Zimbabwean media (much of it state-controlled), the Tribunal was largely depicted as a neo-colonial imposition designed to affect regime change in Zimbabwe and elsewhere, while Robert Mugabe himself is reported to have dismissed the Tribunal's judgements as 'nonsensical and of no consequence'.

Silencing the Tribunal

By the time the third and final contempt of court ruling was issued in 2010, the situation was becoming increasingly awkward for the Summit, which was coming under ever-increasing pressure to sanction one of their own. In what appeared to be a delaying tactic, the Summit passed the matter onto the SADC Council of Justice Ministers, who in turn commissioned an independent six-month review of the Tribunal, during which time it was barred from taking on new cases or issuing rulings in existing cases. The independent review, carried out by international law expert, Dr.

Lorand Bartels of Cambridge University[5], found that the Tribunal was in fact properly established and should be allowed to continue to function as it had before. Despite this, the Summit took the decision to continue the suspension of the Tribunal and initiate a process to amend its legal instruments, a decision that was met with unparalleled fury by the Tribunal judges and various human rights groups throughout the region. The suspension was continually renewed until August 2012, when the Summit formally announced that the Tribunal was to be reconstituted, with jurisdiction limited to inter-state disputes and interpretation of SADC Protocols. Since SADC states have never before brought cases against each other, it seems likely that the Tribunal will remain an empty shell and a waste of taxpayers' money.

We should be in no doubt that it was the Summit that killed off the Tribunal. The Council of Justice Ministers unanimously agreed with the findings of the independent review (African Commission, 2011), and the Summit's decision to go against the recommendations of their own Justice Ministers indicates a disdain for the principles of the rule of law that is truly retrogressive. Perhaps it is not so surprising that the autocratic Heads of State[6] would be in favour of disbanding the court, but what of the democratically elected Heads of State? Botswana, Mauritius, Namibia and South Africa are the four most consolidated democracies in the region, which regularly elect their leadership in free and fair elections, and should (in theory) uphold the principles of democracy, rule of law, and human rights. However, Botswana was the only state asides from Zimbabwe open in its opposition to the Court, most likely to due to concerns that indigenous peoples forced from their traditional lands in the Kalahari Desert would use the Tribunal as a court of appeal. Mauritius, as a small island nation, is not powerful enough to have much influence over the Summit. One would expect Namibia, as the home of the Tribunal, and a democratic state with little to fear from a supranational human rights court, to be in favour of maintaining the court, but the Justice Minister is on record as saying that law 'has to serve and be at the convenience of the political rulers, not the people' (Sasman, 2012). This position seems to have more to do with an outdated view on national sovereignty and a reluctance to disagree with regional neighbours, than any real threat to Namibian government policy. But why South Africa's acquiescence on this matter? As a democratic state allegedly committed to respect for the principles of international law, one would expect South Africa's interest to lie in the maintenance of the Tribunal. And as the undisputed regional power, it has the power to sway others to its will. So why did the South African leadership abdicate its international responsibilities and collude with Zimbabwe in the suspension of the Tribunal?

South African Collusion

The first potential explanation is one based on domestic institutional concerns within South Africa. The most obvious explanation for the Summit's decision is that Heads of State presiding over countries with democratic deficits were worried that one day they would be held to account. Allowing citizens the right to litigate against governments would open the gate to a potential flood of cases alleging infractions against human rights, democracy and rule of law in numerous countries. Given the poor human rights record of many states in the region, it is little wonder that, once the Summit realized the full implications of a supranational court with individual access, Tanzanian President Jakaya Kikwete is alleged to have remarked to his fellow heads of state: 'We have created a monster that will devour us all' (quoted in Christie, 2011). This is able to explain authoritarian leaders' opposition to the court, but does not explain South Africa's motivations particularly well. As a democratic state with a robust court system, South African citizens are already able to hold their government to account through the nation's powerful Constitutional Court. The SADC Tribunal could not therefore have represented much of a threat to the South African leadership.

Domestic Destabilization?

A more likely domestic factor explanation can be found in the issue of land reform. This is a politically sensitive issue in all states that experienced significant settlement by European immigrants[7] during the colonial period. At the end of Apartheid in 1994, white South Africans owned 87 percent of the land, despite representing less than 10 percent of the population (Atuahene, 2011). As part of the negotiated settlement to end Apartheid, the ANC pledged to redistribute 30 percent of that land to black communities. Support for land reform policies to redress the inequalities of Apartheid remains very high among South Africa's black population (Gibson, 2010). However, the ANC has largely failed to meet its redistributive pledge, a fact that has been described by some observers as 'a sea of oil waiting for a match' (Atuahene, 2011: 122). As of 2010, some 77 percent of land is still held by the white community. This may

have lost the ANC some votes, but not sufficiently so as to threaten the party's dominance of national politics. As the party of the Liberation movement, the ANC still commands around two-thirds of the vote, but growing disillusionment among the urban and rural poor has the potential to create social unrest and propel more militant elements of the party to the fore. In this context, condemnation of Mugabe's land reform programme in Zimbabwe, however illegal under the principles of international law, might provide the match that ignites the sea of oil and results in the current conservative leadership of the ANC being unseated by the youthful, radical element of the party which has professed support for a Zimbabwe-style fast-tracking of the land reform programme.

The Founding Fathers?

On the other hand is the suggestion that the Summit complied with Mugabe's position on the Tribunal because of SADC's identity. SADC's roots lie in the Frontline States, an organization that was dedicated to opposing colonialism and Apartheid in South Africa, and has developed an organizational identity based on political and economic liberation, regime solidarity, and anti-imperialism (Nathan, 2012). Five states experienced armed struggles to rid themselves of minority-rule, and for the most part, the individuals that led the Liberation movements continue to enjoy a reputational cache as the 'Founding Fathers' of SADC. Robert Mugabe, a veteran of a 15 year liberation struggle, whose government assisted the ANC in bringing majority-rule to South Africa, and the longest-serving Head of State in the region, occupies a particularly privileged position among the states that continue to venerate the symbols of the Liberation, as former President of Botswana, Festus Mogae has illustrated well:

Your Excellency President Robert Gabriel Mugabe, you did it all for us, thank you! It was fitting that you had the foresight to do it as the advent of freedom and democracy in Zimbabwe 25 years ago is specially linked to the birth of SADC (Address to the SADC Summit, 17 August 2005).

South Africa's position as the former pariah state, whose current leadership owes some symbolic debt to neighboring countries due to the destabilization they suffered at the hands of the Apartheid government, makes it nigh impossible for South Africa to openly criticize Mugabe. Combined with the region's emphasis on the importance of unity and solidarity in the face of adversity, it would have been relatively easy for Mugabe to exploit the politics of symbolism to achieve his own ends. The South African leadership, recognizing that Zimbabwe was prepared to throw everything at resisting the Tribunal's rulings, was forced to make concessions to Zimbabwe in order to retain some semblance of unity on the regional integration issue (Christie, 2011). The Zimbabwean leadership was successfully able to portray the Tribunal as an obstacle standing in the way of fulfillment of the promises of the Liberation era (especially land reform). No other member state, least South Africa, would wish to publicly dissent from this view, for it would be seen as betraying the region's revered history of Liberation, and risk accusations of being an agent of neocolonialism.

Conclusion

Ultimately, South Africa's acquiescence on the matter of the Tribunal is due to the ideological importance of the land issue in Southern Africa. Condemning Mugabe's land reform programme by supporting the Tribunal would have exacted a high ideological cost on the South African leadership, both domestically and with neighbouring states. The literature on the principle-agent problem might provide some insights into the fall of the Tribunal. As the agent of the SADC member states, the Tribunal saw an opportunity in the vague formulation of the Treaty and Protocol to extend its mandate and power. However, in trying to run before it could walk, the Tribunal stumbled when it took on Mugabe's government in its second-ever ruling. As the Tribunal was only recently operational, path dependency did not have time to take root, and the Summit was able to roll back institutional development by reigning in the Tribunal. Such an extensive roll-back of regional integration is, to my knowledge, unique to SADC. Other regional organizations in Africa have instituted courts with individual access, and member states have complied with their rulings, including in cases of human rights. The Summit's decision may impact negatively on future integration in the region. Other regional institutions may be wary of pushing for greater powers for fear of meeting a similar fate, while foreign investors may be more wary of investing in countries with weak courts, now that the regional court is no longer available to them.

Restricting individual access to the Tribunal may be a blow for the future of human rights and rule of law in the SADC

region, but it is likely that there will interesting developments in this respect in the near future. In September 2012, South Africa's Supreme Court handed down a ruling enforcing the legitimacy of the Tribunal's original ruling in the Mike Campbell case. The ruling ordered the seizure and sale of property owned in South Africa by the Zimbabwean government, in order to compensate the farmers. It is believed to be the first sale of property belonging to a state that has committed human rights violations in another state. Furthermore, the decision by the Summit to restrict the jurisdiction of the Tribunal could be challenged in the African Court on Human and People's Rights. The African Commission has agreed to consider bringing a case on behalf of two Zimbabwean farmers against the SADC Summit, challenging the legality of their decision to restrict the Tribunal's jurisdiction. If this were to come to fruition, it would be the first time in legal history that multiple Heads of State are cited as respondents in an international court (SADC Tribunal Rights Watch, 2012). This would be a highly embarrassing scenario for many SADC states, particularly South Africa, which stands to lose legitimacy in the eyes of the eyes of the international, law-abiding community. Whether such judicial activism will lead to the re-instatement of the Tribunal remains to be seen. In the meantime, those who suffer human rights abuses at the hands of their government will have little recourse to justice.

—

Merran Hulse *is a PhD candidate at Radboud University, Nijmegen. She received her masters in International Relations from University College Dublin. Her research interests include comparative regionalisms, regional organizations as international actors, EU promotion of regional integration in Africa, EU external relations, ECOWAS and SADC, and the role of transnational identities in regionalism.*

References

Atuahene, A. (2011) South Africa's Land Reform Crisis: Eliminating the Legacy of Apartheid. *Foreign Affairs*, 90 (4) pp. 121-129.

African Commission (2011) *Founding Affidavit: Tembani, Freeth, and Zimbabwean Human Rights NGO Forum versus SADC Summit*, Banjul: The Gambia.

Christie, S. (2011, June 2011) The SADC Tribunal's last gasp. *The Mail and Guardian* (South Africa). Retrieved 25 September 2012 from www.mg.co.za

Christie, S. (2011, August 19) Killed off by 'kings and potentates'. *The Mail and Guardian* (South Africa). Retrieved 25 September 2012 from www.mg.co.za.

Gibson, J.L. (2010) Land Redistribution/restitution in South Africa: A Model of Multiple Values, as the Past Meets the Present. *British Journal of Political Science*, 40, pp. 135-169.

Lenz, T. (2012) Spurred Emulation: The EU and Regional Integration in Mercosur and SADC. *West European Politics*, 35(1) pp. 155-173.

Matyszak, D. (2011) The Dissolution of the SADC Tribunal, *Research and Advocacy Unit*, Retrieved 14 September 2012 from http://www.researchandadvocacyunit.org/

Meredith, M. (2003) *Mugabe: Power, Plunder, and the Struggle for Zimbabwe*. New York: PublicAffairs.

Nathan, L. (2012) *Community of Insecurity: SADC's Struggle for Peace and Security in Southern Africa*, Farnham: Ashgate.

SADC (1992*) Declaration and Treaty of SADC*, Gaborone: Botswana.

SADC (2001) *Protocol on Tribunal and the Rules of Procedure Thereof*, Gaborone: Botswana.

SADC Tribunal Rights Watch (2012, March 12) African Commission prepared to consider application for re-instatement of SADC Tribunal. *Press Release*.

Sasman, C. (2012, August 21) SADC leaders neuter Tribunal. *The Namibian* (Namibia). Retrieved 28 September 2012 from www.nambian.com.na

[1] Angola, Botswana, DRC, Lesotho, Madagascar, Malawi, Mauritius, Mozambique, Namibia, Seychelles, South Africa, Swaziland, Tanzania, Zambia, Zimbabwe.

[2] The Summit consists of the 15 Heads of State of each of the SADC member states, which consists of leaders elected in free and fair elections to leaders who have seized or maintained power through unconstitutional means.

[3] As Meredith (2003) notes, most of the farm invaders were far too young to have been genuine veterans of the Liberation War, and were later discovered to be in the employ of government forces.

[4] Since 2002, all but one of Zimbabwe's Supreme Court judges have received seized land for free (Freedom House, 2012).

[5] The report was issued by WTI Advisors Ltd, and affiliate of the World Trade Institute, and funded by the German technical Cooperation Programme towards Governance reform Effectiveness of SADC Structures.

[6] Dos Santos of Angola, Kabila of the DRC, King Mswati of Swaziland, and, of course, Mugabe of Zimbabwe.

[7] South Africa, Namibia, Zimbabwe, and to a lesser extent Botswana, Zambia and Tanzania.