The Death of the Southern African Development Community Tribunal’s Human Rights Jurisdiction

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1. Introduction

The Southern African Development Community (SADC) is a regional economic community in southern Africa consisting of fifteen Member States with a stated aim of creating a ‘Free Trade Area’ among its Members. SADC’s Tribunal (‘the Tribunal’) in Windhoek had the capacity, until the summer of 2010, to hear individual applications from the SADC Member States on human rights matters. The Tribunal was meant to act in cases where an individual’s human rights were not being protected by the legal system in their home state and they had exhausted all available legal remedies. In the most high profile case to come before the Tribunal, Zimbabwean farmers were able to apply for an order preventing state forces proceeding with the removal of farm land under a government land redistribution programme that was being executed against mainly white landowners, depriving them of their property without compensation.2

In 2010, following an effective lobbying campaign by the Zimbabwean Government at a SADC Heads of Government meeting, the Tribunal’s capacity

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1 SADC Member States are Angola, Botswana, Democratic Republic of Congo, Lesotho, Madagascar, Malawi, Mauritius, Mozambique, Namibia, Seychelles, South Africa, Swaziland, Tanzania, Zambia and Zimbabwe.

to hear individual applications was suspended and in August 2012, following another Heads of Government meeting, the Tribunal had its jurisdiction to hear individual cases terminated after deciding just sixteen cases in its short lifetime.\(^3\) This effectively ended its role as a human rights tribunal, confining the Tribunal to resolving inter-state disputes under SADC treaties. The Tribunal had, as Jan Norlander argues, become ‘inconvenient’ for the SADC Heads of Government by issuing decisions that were too ‘independent’ from their wishes.\(^4\) It is hard to see this as anything other than a seriously retrograde step for the protection of human rights in southern Africa and the leading anti-apartheid campaigner and Nobel Laureate Archbishop Desmond Tutu, has stated that the countries of SADC lost a ‘vital ally of its citizens, its investors and its future’.\(^5\) This article sets out an overview of the dispute and argues that, whilst the legal foundations of the Tribunal could have been stronger, what undermined the Tribunal was an effective collusion amongst the SADC Heads of Government to ignore the rule of law.

2. The Legal Framework of the SADC Human Rights Tribunal

SADC’s forerunner, the Southern African Development Coordination Conference (SADCC), was an association of nine majority-ruled southern African countries who were signatories to the 1980 Lusaka Declaration.\(^6\) The SADCC evolved into SADC with the signing of the 1992 Windhoek Declaration, which brought into existence the Treaty of the SADC, established the Community’s main administrative and political organs, and stated its common aim of greater economic, political and security co-operation in the region.\(^7\) The Treaty included commitments to develop policies aimed at the progressive elimination of obstacles to the free movement of capital and

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\(^7\) All SADC Treaties and Documents referred to are available on the SADC website, see: http://www.sadc.int/english/key-documents/ [last accessed 26 January 2013]; see also Chinsinga, ‘The Challenges of Globalisation and Regional Integration: The Case of Southern African Development Community’, in Milazi (eds), Democracy, Human Rights and Regional Co-operation in Southern Africa (South Africa: Century Publications, 2002) 115.
labour, goods and services, and of the people of the Region generally’, phrasing which appears to emulate the framework of economic cooperation as developed by the European Union.8 Article 4 of the SADC Treaty commits Member States to a general set of organisational principles that include ‘human rights, democracy and the rule of law’ but does not directly refer to specific human rights instruments.9 This provision of the SADC Treaty has been previously used at SADC Heads of Government meetings as the legal and political basis for the suspension of Madagascar, following a coup in 2009.10 Article 6 obliges SADC Members to ‘take all steps necessary to ensure the uniform application of this Treaty’ and ‘to accord this Treaty the force of national law’.11 As Gerhard Erasmus argues, the literal meaning of this provision is that SADC Member States are required to pass any necessary additional legislation to give effect to the Treaty and the national judiciary, when interpreting domestic legislation, should take it into account.12

SADC has fostered values-based organisational policies that have progressively incorporated human rights considerations. The SADC Organ for Peace, Defence and Security, launched in 1996, has the stated aim of promoting the ‘peaceful settlement of disputes’ through the application of ‘common political value systems’.13 The SADC Organ on Politics, Defence and Security Cooperation has as a stated objective the promotion and observance of ‘universal human rights as provided for in the Charters and Conventions of the Organisation of African Unity and the United Nations’.14 Following the 2001 SADC Summit, a revised Treaty was adopted that committed the Organisation to common values ‘transmitted through institutions which are democratic, legitimate and effective’.15 Research by Oliver Ruppel has identified twenty-one separate SADC Protocols directly or indirectly referring to human rights or containing provisions designed to protect specific rights, such as the right to a fair trial and the right to equal treatment.16 Therefore, some of the denunciations of the SADC Tribunal’s human rights mandate made by heads of government, such as Tanzanian President Jakaya Kikwete’s exclamation that ‘we have created a monster’, were rather cynical given that SADC Heads of States

10 Communiqué of the Extraordinary Summit of SADC Heads of State and Government, 30 March 2009.
11 Articles 6(4) and 6(5) Amended SADC Treaty 2001.
15 Article 5(1)(b) Amended SADC Treaty.
had explicitly agreed to instruments supporting human rights and had on further occasions agreed to instruments increasing the human rights capacity of the organisation.\textsuperscript{17} Yet the references to human rights in SADC instruments are opaque and framed in overarching general terms with only limited references to specific international human rights treaties and other sources of international human rights law. Whilst reflective of a commitment to what is sometimes termed the ‘global script’ of human rights among Member States, the references to human rights in SADC instruments were far from a commitment of the sort that could be used to provide a basis for judicial action in cases of human rights violations.

In common with similar sub-regional organisations in Africa, such as the Economic Community of West African States (ECOWAS) and the East African Community (EAC), the parties to the SADC Treaty established a Tribunal. Under Article 9 of the SADC Treaty, the Tribunal has express powers to adjudicate on inter-state disputes and resolve questions on the interpretation of the Treaty. Article 16 of the Treaty empowered the SADC Summit to adopt a protocol for the purpose of setting out the composition, powers and procedures of the Tribunal and in 2000 the Protocol of the Tribunal and the Rules of Procedure (‘the Protocol’) were adopted. The first judges of the Tribunal were appointed under the Protocol in 2005, when the Tribunal became fully operational. Under Article 14 of the Protocol, the Tribunal’s jurisdiction extends to interpretation of the 1992 SADC Treaty, SADC Protocols and ‘all matters specifically provided for in any other agreements that States may conclude among themselves or within the community and which confer jurisdiction on the Tribunal’.\textsuperscript{18} Solomon Ebobrah notes the Treaty was ‘central to the [jurisdictional] competence of the Tribunal’ and the Tribunal remained heavily dependent upon the political will of the SADC Heads of Government.\textsuperscript{19} Human rights disputes between an individual and a state were not explicitly mentioned in the Protocol, although Articles 17 to 20 detail a series of different complaints that the Tribunal may entertain, such as disputes between states and natural or legal persons, and Article 15 allows an applicant to bring an action against a state if they have ‘exhausted all available remedies’ or are ‘unable to proceed within their domestic jurisdiction’.\textsuperscript{20}

Crucially, in the course of drafting the Protocol, the possibility of a separate human rights instrument, such as a Protocol on Human Rights or a separate Southern African Convention on Human Rights, was discussed but never

adopted. A human rights mandate was constructed by the Tribunal judges by reading Article 14 of the Protocol in tandem with the Treaty's preamble and Article 4(c), thereby making human rights either a Treaty principle or a matter on which jurisdiction is conferred for adjudication. This meant that the human rights mandate of the Tribunal was on a fragile political footing—it was dependent on the Tribunal using a particular interpretation of its own mandate as the basis for judgments against state parties. Regardless of the legal merits of this position, from its inception the Tribunal was open to accusations that it was activist or overstepping its mandate by ruling on human rights matters, as the substantive content of human rights provisions within the Treaty were, as Thoko Kaime argues, from a textual perspective of 'secondary importance'. The Tribunal also lacked a clear enforcement mechanism. Article 24 of the Protocol stated that the Tribunal's decisions were final and binding, which notionally meant that they were binding in domestic courts and enforceable under Article 32 of the Protocol that required Member States to treat Tribunal judgments under the law of foreign judgement in their jurisdictions. It seems to have been taken for granted that the SADC summit would be able to intervene if there was a failure of enforcement in a domestic jurisdiction. Ruppel and Bangamwabo condemned this mechanism as a 'tiger without teeth'.

It should be noted that in contrast to the SADC Tribunal, the two other sub-regional courts in Africa, the ECOWAS Community Court of Justice and the East African Court of Justice, have continued to exercise and expand their human rights jurisdiction, and fears that sub-regional courts would contribute to 'lowering the quality of protection that victims of human rights violations enjoy' have largely proven to be 'unfounded'. In part this is due to the different structures and mandates of both Tribunals—for example, the ECOWAS Community Court of Justice in contrast to the SADC Tribunal has a specific protocol mandating the Court to hear cases where the applicant complained of human rights violations. This meant that the SADC Tribunal was on a much weaker footing compared to other institutions that were performing similar functions. Given this, it is reasonable to conclude that the structural problems of the Tribunal, which were to be highly instrumental in generating the levels of political controversy surrounding the Mike Campbell case, were foreseeable when the Protocol was drafted.

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21 See Ruppel, supra n 16.
23 Articles 24(2) and 32(1) Protocol on Tribunal and the Rules of Procedure Thereof 2000.
3. **Mike Campbell**: The Problematic Saga of the Tribunal’s First Human Rights Case

Land rights in Zimbabwe have been a source of political controversy and domestic and regional concern since independence in 1980. The pursuit of a policy of compulsory land redistribution in the late 1990s significantly contributed to the breakdown of the rule of law in Zimbabwe in the early 2000s. After commercial methods failed to fairly redistribute land, compulsory purchase was the next available option. In the late 1990s internal criticism of the Zanu PF-led Government began to grow and, seeking to mobilise the support of key political constituencies in the run up to elections in 2000, President Robert Mugabe made promises to accelerate the land reform programme.

The Land Acquisition Amendment Act of 2000 removed the Government’s obligation to pay full compensation and allowed for a Fast Track Resettlement Phase designed to accelerate the process of land acquisition and resettlement. The problem, as the UN Committee on the Elimination of Racial Discrimination observed, was that ‘ex-combatants of the liberation struggle had recently taken the law into their own hands and occupied farms’. In response the Minister of Justice and Legal Affairs, Patrick Chinamasa, reassured the Committee that the Government would ‘find a redistribution formula, which ensured that the commercial farmers were not put out of business’ and promised there would be a compensation and appeals process to any land redistribution programme. Despite these commitments forcible land redistribution, both by the Government and by gangs, continued. Furthermore, when the Zimbabwean Supreme Court ruled the Government’s actions to be unlawful, the Zimbabwean Constitution was amended retrospectively in 2005 to end any future litigation over the programme. By 2008, after a series of attacks on the judiciary and a weakening of their power by various legislative initiatives, the courts in Zimbabwe were unable to protect the rights of individuals. The judiciary had become ‘politicised’ and was effectively an arm of the...
ruling political party, with some High Court judges expropriating occupied commercial farms for their own personal use.34

This situation formed the basis of the application made by the seventy-nine applicants in Mike Campbell v Zimbabwe. They argued that the 2005 amendment to the Constitution—Amendment 17—acted as an ouster clause removing basic civil and political rights to which the applicants were entitled.35 The SADC Tribunal ruled in their favour on this point, citing decisions of the African Commission on Human and Peoples’ Rights that had condemned ouster clauses as an attack on the principles of the right to a fair trial as protected by the African Charter on Human and Peoples’ Rights.36 The second point of appeal was based on racial discrimination. After considering the international legal instruments that Zimbabwe was a party to, including the African Charter and the International Convention on the Elimination of All Forms of Racial Discrimination,37 the Tribunal ruled that the method of implementation, but not the redistribution policy itself, was discriminatory.38 The Zimbabwean Government was, however, reluctant to act against the individuals who were engaging in farm seizures because they were key Zanu-PF supporters and President Mugabe, claimed the Tribunal was making decisions that were ‘nonsense’ and ‘of no consequence’. In November 2009, the Zimbabwean Government announced their intention to withdraw from the Tribunal Protocol.39

Patrick Chinamasa, the Zimbabwean Minister of Justice and Legal Affairs, also advanced a series of legal arguments broadly maintaining that the Tribunal Protocol did not bind Zimbabwe even though they had agreed to both the Protocol and the Amended SADC Treaty. An opinion written by Justice Jeremy Gauntlett SC and Professor Jeffrey Jowell QC in November 2009 concluded that the Government of Zimbabwe was bound by the decisions of the Tribunal and had to enforce its decisions.40 Chinamasa claimed, in the alternative, that as the Protocol had been ratified by less than two thirds of SADC’s members, it was not in force.41 This interpretation ignored the amendments to the SADC Treaty in 2001, which accommodated the Tribunal and

35 Mike Campbell, supra n 2.
37 Article 2 of both instruments.
38 Naldi, supra n 30 at 311.
41 Zimbabwe Lawyers for Human Rights, ‘Hon Chinamasa’s attempt to pull out of SADC Tribunal futile and unjustifiable’, 3 September 2009.
authorised it to exercise its jurisdiction separately from the terms of the Protocol. Under the terms of the SADC Treaty, Article 16 provides that the decisions of the SADC Tribunal shall be final and binding on the parties to a dispute meaning that the Tribunal’s human rights jurisdiction was incorporated into the Treaty. Whilst the original procedures for implementing amendments to the 1992 draft of the Treaty had not been followed when adopting the 2001 Amendments, fresh procedures for adopting amendments to the Treaty had been adopted. This effectively overrode the provisions of the 1992 Treaty and Member States had acted as though the Treaty was in force for the years between 2001 and 2009.

In the Zimbabwean High Court in 2009, when the applicants in Mike Campbell sought to enforce the Tribunal’s decision, the Government attempted a new line of argument. The crucial question was whether, as a matter of law, the Zimbabwean High Court was under a duty to give effect to the decision. Judge Gowora argued that the supreme law in Zimbabwe was the Constitution that gave the High Court ‘superior jurisdiction’, and so he claimed that the SADC Tribunal could not oust its jurisdiction. Gauntlett and Jowell had noted that, during the first stage of the proceedings in Mike Campbell, the Zimbabwean Government had formally conceded to the Tribunal’s jurisdiction when Zimbabwe’s Deputy Attorney-General, who represented the Government of Zimbabwe in the proceedings before the Tribunal, responded to a question by Justice Tshosa, affirming that Zimbabwe was under the Tribunal’s jurisdiction. Regardless of this concession, once it was established that Zimbabwe was bound by the Amended 2001 Treaty, there was an obligation under Articles 6 and 16 to implement the decisions of the Tribunal. Therefore, Zimbabwe’s position was contrary to both the letter and spirit of the 1969 Vienna Convention on the Law of Treaties and customary international law.

In short the Zimbabwean Government had no legal basis upon which to resist the SADC Tribunal’s jurisdiction: the decision of the Tribunal was based on legal instruments freely entered into by the Zimbabwean Government, which had also voluntarily agreed to the legal framework of SADC. Given the absence of a legal foundation to their objections, it was therefore up to the Zimbabwean Government to pursue a political strategy to undermine the Tribunal.

43 Nathan, supra n 39.
44 Gauntlett and Jowell, supra n 40.
45 As Bartels, infra n 53 at 7, notes under Article 27 Vienna Convention on the Law of Treaties (1969), 1155 UNTS 331, a state may not cite domestic law as justification for not complying with the provisions of a treaty.
4. Opposition to the Tribunal and its Closure

Implementation of the decision in *Mike Campbell* was effectively in limbo by the beginning of 2010 and the applicants went back to the Tribunal to obtain an order against Zimbabwe to enforce the decision. In July 2011, the Tribunal found against the Zimbabwean Government in *Flick v Zimbabwe*, a joint application with the applicants in the *Mike Campbell* and other farmers to enforce the original Tribunal ruling. In *Flick* the Tribunal found in the applicants’ favour. It ruled that the ‘lives, liberty and property of all those whom the decision meant to protect [had] been endangered’ by the refusal of the Zimbabwean Government to enforce the Tribunal’s decision and that the Government was under a legal obligation to enforce the decision. Following this decision, and mindful of the impossibility of attempting this in Zimbabwe, the applicants initiated enforcement proceedings in South Africa. In February 2010 the North Gauteng High Court ruled that the decision was enforceable against Zimbabwean interests in South Africa. In response Chinamasa embarked on a series of visits to the capitals of SADC Member States where he began ‘furiously lobbying his counterparts’ as to the merits of Zimbabwe’s position.

During the SADC Heads of Government meeting in Windhoek in August 2010, President Mugabe threatened to block any discussion of Zimbabwe and its human rights record. Senior members of the SADC Secretariat issued press statements insisting that Zimbabwe would be on the agenda, but during the course of discussions the issue was avoided. The summit *communiqué* stated that it was decided ‘that a review of the role, functions and terms of reference of the SADC Tribunal should be undertaken and concluded within six months’. João Samuel Caholo, Deputy Executive Secretary of the SADC, told journalists that the Tribunal would not be able to conclude any ongoing cases or take on any new ones before the end of the review process that was to be carried out by SADC Justice Ministers. On 30 August 2010, President Mugabe again rejected the notion of any enforcement of the decision.

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47 Ibid.
49 Nathan, supra n 39.
in Mike Campbell. During a speech at the funeral of a ZANU-PF colleague, he stated that the SADC Tribunal would never be able to reverse the effect of the Land Acquisition programme and that the suspension of the Tribunal was a victory for land reform. The legal basis of this statement was dubious; the Zimbabwean Government were effectively seeking to use their decision to leave the Tribunal as a mandate to retrospectively annul any decision made whilst the Tribunal had jurisdiction over Zimbabwe.

The SADC Secretariat appointed Professor Lorand Bartels to conduct an independent review of the Tribunal and its legal powers, which was concluded on April 2011. The Bartels Report broadly affirmed the jurisdiction of the Tribunal and its legal authority and concluded that SADC Member States were, by suspending the Tribunal, in violation of their international legal obligations. A similar view was expressed by Professor Gerhard Erasmus, who argued that the suspension was ‘unlawful in terms of SADC legal instruments and international treaty law’ and that simply altering the Tribunal Protocol would not alter the 2001 Amended SADC Treaty that clearly delegated powers to the Tribunal. The response to the Bartels Report from an extraordinary SADC summit at Windhoek in May 2011, was to continue with the suspension of the SADC Tribunal and to arrange for the Ministers of Justice and Attorneys Generals of SADC Member States to submit a report on the Tribunal and its functions. When asked at a press conference whether the contents of these reports would be made public, SADC’s Executive Secretary Tomaz Salomão responded that ‘neither the media nor SADC citizens needed to know’ their contents. This decision further delayed any enforcement of the outstanding decisions against Zimbabwe and the summit communiqué expressly stated that judges whose term expired in 2011 would not be reappointed. This was a fairly clear signal that the Tribunal was being wound down. At a meeting of SADC Attorneys Generals in June 2012 various

53 Bartels, ‘Review of the Role, Responsibilities and Terms of Reference of the SADC Tribunal’ Final Report, 6 March 2011 [copy on file with author].
proposals for the future of the Tribunal were considered by the assembled delegates and whilst SADC Member States were prepared to make commitments about the importance of human rights within their domestic legal systems, they did not conclude that human rights should be enforced through SADC institutions.

The 2012 Heads of Government meeting, after considering the Report from the SADC Attorneys Generals, issued a resolution stating that a new Protocol for the Tribunal should be drawn up and in future its activities should be ‘confined to interpretation of the SADC Treaty and Protocols relating to disputes between Member States’.59 This completely terminated the capacity of the Tribunal to hear applications from individuals on human rights grounds. This move was described by the Court’s President, Judge Ariranga Pillay, the former chief justice of Mauritius, as ‘high-handed and imperious . . . worthy of potentates and kings who can do no wrong and who are not accountable for their actions’.60 However, Namibia’s Minister of Justice, Pendukeni Iivula-Ithana, responded that Member States were entitled to ‘fine-tune regional bodies’ and that the Tribunal existed to ‘serve us [the governments of SADC]’.61 In spite of this, the applicants in Mike Campbell continued their action in the South African courts and in September 2012 the South African Supreme Court rejected an appeal by the Government of Zimbabwe, who were contesting the earlier judgment that the Tribunal’s judgment was still enforceable in South Africa.62 This meant the applicants were entitled to some limited redress for their land seizures although the Tribunal remains closed for fresh individual applications. Thus Mike Campbell will remain a one off decision, unlikely to set any wider precedent. A new avenue for challenging the Heads of Government decision opened up, when a Namibian lawyer filed an application with the African Court of Human and Peoples’ Rights alleging that the suspension of the Tribunal constituted a breach of the African Charter of Human and Peoples’ Rights.63 The Executive Directive of the Southern Africa Litigation Centre (SALC), Nicole Fritz, commented that the Court was ‘one of

61 Melber, supra n 57 at 55.
the last remaining avenues to securing a revival of the SADC Tribunal and preserving the rule of law in southern Africa.’64

5. Conclusion

A disregard for the rule of law has become a regrettably common feature of the Mugabe regime in Zimbabwe but what is particularly alarming about the SADC Tribunal saga is how the Zimbabwean Government has managed to create a form of regional consensus about weakening the rule of law among SADC governments. SADC’s commitment to supporting the rule of law has been seriously undermined by the decision to terminate the Tribunal’s human rights jurisdiction. As Erasmus puts it, SADC leaders acted as though they did not consider ‘their own legal instrument worthy of compliance’.65 The statements from other SADC governments were highly worrying, as they showed an almost total disregard for the rule of law, and these actions have jeopardised the future human rights activity of SADC more generally. As Nathan argues, the politics around the suspension of the Tribunal’s human rights mandate have created the impression that, rather than human rights being a common core value of the organisation, there was ‘a common commitment to state solidarity and regime protection’.66

Yet in relation to the Tribunal there is a need to contextualise what happened, as the operations of the Tribunal were hamstrung by its structural weaknesses and intensely fragile human rights mandate. As Mwiza Jo Nkhata argues, ‘the lack of a deliberate and cogent explanation’ of the Tribunal’s human rights mandate in the organisation’s instruments could convince states that the Tribunal was overstepping its role even though the Tribunal had affirmed its human rights competence in this area with reference to SADC instruments that all Member States had agreed to.67 This created a dispute that in essence was about what states had actually agreed to when signing up to international instruments. At a political level, this was a dispute that national governments were almost certain to win, as they alone could plausibly account for their intentions. Given this, it is probably best to construct a somewhat narrower interpretation of the references to human rights contained in various SADC instruments. For example, Nkhata notes that

65 Ibid. See also Steinmann, supra n 55.
66 Nathan, supra n 39 at 136.
Article 4 of the Treaty, which states that Members of SADC should act in accordance with the principle of human rights, can in fact be read as dealing ‘with the principles that the organisation’s members supposedly subscribe to’ and not as one of the organisation’s objectives.68 Given the constraints of implied human rights mandates, Lucline Murungi and Jacqui Gallinetti have argued that Tribunals based on them do ‘not achieve optimum protection for rights’ and the termination of the SADC Tribunal’s human rights mandate appears to confirm this thesis.69

The wider problem Nathan identifies is that there is a ‘tendency by states in Southern Africa and elsewhere on the continent to reproduce European institutions’ which he argues ‘stems both from an African desire to emulate successful organisations and from the proclivity of the EU…to fund the replication of their models’.70 However, this tendency has simply not been backed up by instruments providing appropriate legal powers, and the termination of the SADC Tribunal’s human rights mandate should be seen both as a failure to construct appropriate legal instruments as well as an unfortunate case of regime protection trumping the maintenance of the rule of law among SADC Member States.

68 Ibid. at 97.
70 Nathan, supra n 39 at 134.