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Regional Court's Future Hangs in the Balance

Q&A: The SADC Tribunal

The Tribunal for the Southern African Development Community (SADC) was established in 1992 as a sub-regional court, to provide, among other things, a remedy to citizens of the 15 SADC countries when their own countries were unwilling or unable to act on their complaints.

In November 2008, in one of its first human rights cases, the tribunal ruled on Zimbabwe's land redistribution in favor of the plaintiffs, white landowners trying to block government acquisition of their farms. Zimbabwe refused to enforce the judgments. In a clear move to avoid taking action against Zimbabwe, SADC members at the 13th SADC Summit in Windhoek, Namibia, in August 2010 ordered a review of the tribunal's role, functions, and terms of reference. The SADC instructed the tribunal not to take on any new cases, and it blocked the re-appointment of eligible judges.

The tribunal, as a result, has not been able to function properly. With only four judges, and needing 10 for a full bench, it could not legally hold regular hearings on a range of cases, including those related to fundamental rights and those involving a SADC member state as a party.

In early 2011 consultants at the World Trade Institute Advisors (WTIA) completed the review ordered by the Windhoek summit. Drawing on the recommendations, the SADC Committee of Ministers of Justice/Attorneys General, meeting in April in Namibia, dismissed Zimbabwe's contention that the tribunal was not legally constituted. The committee recommended finalizing "the reappointment and replacement of the Members of the SADC Tribunal."

Despite the recommendation, the member states, at their extraordinary heads of state summit meeting in May, did not reappoint or replace tribunal members whose terms had expired or were about to expire. Instead, they ordered a more far-reaching review reportedly aimed at amending relevant provisions of the SADC treaty and of the protocol establishing the tribunal. Following these developments, with the tribunal unable to take on any new cases until the review process is completed, the tribunal's future clearly hangs in the balance.

With the 2011 Ordinary Summit of SADC Heads of State and Government scheduled for August 16 and 17 in Luanda, Angola, the following questions and answers are provided to shed more light on issues surrounding the effective suspension of the SADC Tribunal:

How do you explain the recent actions of SADC leaders regarding the Tribunal?

When pressed on the challenges the tribunal faces today, SADC leaders contend that their decisions to subject the tribunal to a series of reviews were made in good faith. Review processes for institutions like the SADC tribunal are not inherently improper – the International Criminal Court itself underwent a review exercise during an ad hoc conference in Kampala from May 31 to June 11, 2010.

But the circumstances surrounding the order to review the role and mandate of the SADC tribunal are different. First, the order to review the tribunal's role, functions, and terms of reference originated from its judgments against a particular member state, Zimbabwe, and from Zimbabwe's campaign to elude enforcement of those judgments. Second, the SADC's failure to act on the recommendations of the first review suggests that the ultimate goal of the review order was not to strengthen the tribunal's mandate and its ability to provide justice. It is an alarming sign that the member states, faced with a contested ruling, failed to take any steps to enforce it and instead paralyzed and try to weaken the tribunal itself.

How did Zimbabwe come to be at the center of the controversy?

In November 2008, the tribunal ruled in favor of 79 Zimbabwean white commercial farmers who took the government to the tribunal in an effort to block the compulsory acquisition of their farms by the government. The first applicant, Mike Campbell, filed his case in October 2007 contesting the seizure of his mango and citrus farm by the Mugabe government, contending that seizing his farm without compensation was illegal and racist, and thus violated the SADC treaty. He had exhausted all domestic remedies since the Zimbabwe Supreme Court issued an unfavorable ruling in his case in January 2008.

Against the wish of the Zimbabwean government, The SADC tribunal assumed jurisdiction over the Campbell case and agreed to hear dozens of other commercial farmers with similar grievances. According to the tribunal, the basis for assuming jurisdiction was that the dispute concerned "human rights, democracy and the rule of law," which are binding principles for members of the SADC. After the SADC tribunal ruled in favor of the farmers, the Zimbabwean government categorically refused to enforce the ruling. It instead began a campaign against the tribunal, challenging its legality and the validity of its rulings.

The SADC's response to the Campbell vs. Zimbabwe case is a test of the commitment of the SADC states to uphold the rule of law and human rights that they say the community stands for.

How should SADC leaders have responded to Zimbabwe's defiance?

In response to Zimbabwe's refusal to comply with the tribunal's judgments, SADC leaders should have taken action, not against the Tribunal, but against the government of Zimbabwe. It should have compelled enforcement of the judgments, either by suspending Zimbabwe's membership or imposing other sanctions.

Why is the de facto suspension of the SADC tribunal a worrying development with regard to respect for the rule of law in the Southern African region?

Regional courts are designed to complement national courts and may facilitate access to justice when states are unable or unwilling to act on individual complaints. Like national courts, they need to operate in total independence to carry out their mandate. The current situation at the SADC tribunal signals a lack of commitment on the part of SADC member states to the principles of rule of law and judicial independence. The dissatisfaction of a party to a judicial case with a ruling by a tribunal does not warrant measures that call into question the tribunal's role and mandate and seek to alter its operations.

Could the projected revisions undermine the tribunal's effectiveness?

Several members of civil society organizations following this issue are concerned that individual access to the tribunal will be blocked. Some officials have said publicly that they do not want to see the tribunal become "another court of appeal." Such a change would deal a serious blow to the ability of the tribunal to protect rights in Southern Africa and would deny victims of human rights violations redress. Such a change would also set a potentially disastrous precedent for other sub-regional courts, namely the ECOWAS Community Court of Justice and the East African Court of Justice, which do secure the right of individual access.

What was the substance of recommendations from the first review commissioned by SADC?

The recommendations by the WTI Advisors, who conducted the first review commissioned by the SADC, include:

- SADC member states should ensure that they give the force of law to SADC law by amending national law;
- Member states should consider amending the SADC treaty to state that SADC law is supreme over national law, including constitutional law;
- The tribunal should be given power to determine its own rules of procedure;

- The tribunal's protocol should be amended to provide that membership and rights of member states may be suspended, with the summit taking account of the possible consequences of suspension;
- The tribunal should be able to order remedies, including fines, for non-compliance. These recommendations, if carried out, could contribute to strengthening the SADC tribunal's mandate and would help to avert future problems.

What could the upcoming SADC summit do and what should be expected from it?

The upcoming SADC summit is an opportunity for SADC leaders to reverse the decisions that effectively suspended the SADC tribunal. The summit could also allow Southern African leaders to adopt reform measures that strengthen, rather than weaken, the tribunal's human rights mandate.

Considering the importance of regional tribunals in promoting human rights, SADC leaders should remove the barriers that are keeping the tribunal from functioning by ordering the reinstatement of its full bench (10 judges). They should also immediately end the moratorium on hearing new cases; and put in place an action plan to carry out the recommendations from the first independent review of the tribunal.