



Perspectives on the SADC Tribunal's Demise and Absence of a Regional Court in Southern Africa

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FIRMLY BELIEVING THAT

(i) In addressing the needs of refugees and the challenges of refugee protection regard must be given to the African values and hospitality, human rights and relevant humanitarian principles of refugees protection enshrined in the 1951 Convention and its 1967 Protocol relating to the Status of Refugees as well as the 1969 OAU Convention Governing the Specific Aspects of Refugees problems in Africa

(ii) The 1969 OAU Convention governing the specific aspects of refugee problems in Africa has continuing validity as the regional foundation for providing protection and finding solutions for refugees in Africa

Refugee Protection in Southern Africa – A SADC Heads of State or Government Declaration, 1998



Importance of Regional Courts

Regional courts and institutions play a crucial role in upholding the rule of law, protecting human rights, and addressing transnational legal issues within a defined geographic area.

- safeguard human rights and fundamental freedoms

Provide a forum for transnational interpretation and application of regional treaties and protocols

Adjudicate disputes between member states and individuals

Promote the harmonization of laws and legal practice

THE SADC TRIBUNAL

- Established in 1992 and operationalized in 2005 to effectively and efficiently ensure compliance and resolve disputes related to the interpretation and application of SADC treaty and subsidiary legal instruments. – Article 9 and 16 SADC Treaty
- Mandated to hear cases from States, individuals, organizations or institutions, staff of the SADC Secretariat and the Community and SADC – Article 15, 17, 18 and 19
- Delivered landmark rulings on human rights and land reform issues
- Suspension of the Tribunal 2010 due to political tensions
- Restrictive protocol adopted in 2014, limiting the Tribunal's jurisdiction to only inter-state disputes e.g, removed individual complaints track
- Effective abolition of the Tribunal's individual access and human rights mandate



Understanding the Impact of the SADC Tribunal

United Republic of Tanzania v Cimexpan (Mauritius) Ltd and Others (SADC (T) 01/2009)

- Case arose from a memorandum of understanding which the Government of Mauritius had entered into with the Government of Zanzibar. Ajaye Jogoo, the third respondent, a Director of Cimexpan (Mauritius) Ltd started investment operations in Zanzibar by signing a concession contract with the Government of Zanzibar through a joint venture by creating a new company named Cimexpan (Zanzibar) Ltd, the second respondent).
- The Government of Zanzibar in 2003 informed the first respondent that the contract had been terminated and deported Ajaye Jogoo
- Tanzania raised a preliminary objection that the Tribunal had no jurisdiction over the matter since the respondents had not exhausted local remedies and had no standing to institute proceedings before the Tribunal. Further, no international issues were raised for liability under international law as well as concerns under Article 14 and 15 of Protocol
- The Tribunal concluded that it
 - had jurisdiction because the application was between legal persons and a natural person, on the one hand, and a SADC member state, on the other under Article 14 and 15
 - had no jurisdiction because the respondents had not exhausted local remedies and had no standing to institute proceedings as deportation alone did not amount to denial of access to the courts within the applicant's territory.
 - Mr Jogoo failed to substantiate torture as defined in the 1984 Convention Against Torture as he had not adduced any evidence.
 - the right to admit or to expel an alien remained squarely within the preserve of the applicant's sovereignty - subject to the observance of minimum human rights standards - for the treatment of aliens.

Understanding the Impact of the SADC Tribunal

Mike v Republic of Zimbabwe - SADC (T) (Case No. 2/2007, 28-11-2008) Campbell (Pvt) Ltd and Others

- Case involved 79 white Zimbabwean commercial farmers who sued the Zimbabwean government under President Mugabe to stop the compulsory acquisition/expropriation of their farms.
- Their case was based on discrimination by the government due to race, as well as a lack of due process in terms of compensation after the deprivation of their property
- The Tribunal found for the farmers on the basis that they were deprived of their land without the right of access to the courts and the right to a fair hearing
 - essential human rights – economic freedom and property rights
 - Constitutional protection
- The Tribunal held that the Zimbabwean government breached the provisions in the SADC Treaty.
- Zimbabwean government refused to comply with the order and questioned the Tribunal's jurisdiction and powers to enforce decisions
- The Tribunal called on the SADC Summit of Heads of State and Government to assist with the enforcement – Article 32(3)(4) Protocol
 - Article 32(3) Protocol – rulings final and binding
 - The Summit instead, decided to review the Tribunal's role, functions and terms of reference.
 - also placed a moratorium on the Tribunal receiving any new cases and on hearing any part-heard matters until the review had taken place and was approved.
 - decided not to renew the terms of the Tribunal's judges.



Speaking Impact

An independent review affirmed the supremacy of SADC law in relation to domestic laws and confirmed that the Tribunal had jurisdiction on human rights issues apart from the economic and political issues

Individuals and organizations and businesses in the SADC region lost a critical avenue for legal redress- weakened the rule of law and regional integration efforts-

Undermined the protection of human rights and fundamental freedoms

No dedicated regional court to address cross-border displacement and migration issues

- increased reliance on national courts with varying levels of capacity and independence
- challenges in ensuring consistent interpretation and application of regional protocols



Final Thoughts

SADC citizens as well as refugees and migrants have no sub-regional forum for legal remedies should their domestic court systems fail them.

- increases vulnerabilities as well as human rights violations
- inaccessibility of courts or biased systems

Significant gap in the sub-regional judicial landscape of Southern Africa, particularly in refugee and immigration law.

Non-availability of the Tribunal undermines the rule of law, especially looking at the provisions of Article 4 , 5 and 6 of the SADC Treaty

- heightened risks of arbitrary detention, exploitation, and refoulement, with no regional mechanism to hold states accountable for breaches of international or regional commitments.

SADC countries have varying laws on asylum and immigration, leading to inconsistent treatment of refugees and immigrants and the continued absence of a sub-regional court exacerbates the situation

Tribunal was a mechanism to harmonize standards and avoid divergent interpretations of rights – strategic importance

- creates disparities in protection, rights, and treatment across the region

Thank you
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kwambiri

