

» Solidarity Triumphs Over Democracy – The Dissolution of the SADC Tribunal

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In 2011, the heads of state of the countries comprising the Southern African Development Community (SADC) decided to dissolve the SADC Tribunal, a regional court modelled on the European Court of Justice. Four years earlier, the tribunal had ruled that the Zimbabwe government's expropriations of land owned by white farmers violated the SADC Treaty principles on the rule of law and non-discrimination. The tribunal ordered the government to refrain from interfering with the farmers' occupation and ownership of their properties. The government ignored the court's decisions and embarked on a campaign to smash the tribunal and nullify its rulings. The SADC Summit was thus confronted with the choice of backing either the Zimbabwe government or the tribunal. By abandoning the court in favour of Harare, it elevated the norms of solidarity and regime protection above the democratic and legal principles espoused in the treaty. The head of the tribunal, Judge Ariranga Pillay, denounced the summit's decision as 'worthy of potentates and kings who can do no wrong and who are not accountable for their actions' (Christie 2011a). This article first outlines the relevant provisions of the treaty and the protocol governing the tribunal and then discusses the scrapping of the regional court.

A Treaty and Protocols Championing Democracy

SADC's legal instruments champion democracy. The 1992 treaty provides that the organisation's objectives include the evolution of common political values, systems and institutions, and that the regional body and its members must act in accordance with the principles of sovereign equality of member states, solidarity, peace and security, and human rights, democracy and the rule of law. The member states pledge to adopt adequate measures to promote the attainment of SADC's objectives and to refrain from taking measures likely to jeopardise the sustenance of its principles, the achievement of its objectives and the implementation of the provisions of the treaty. They commit themselves to taking all steps necessary to accord the treaty the force of national law (SADC 1992).

In 2001, the summit revised the treaty and reinforced the emphasis on democracy. The objective relating to common values was reformulated so as to ‘promote common political values, systems and other shared values which are transmitted through institutions which are democratic, legitimate and effective’ (SADC 2001a). The amended treaty added a further objective, namely to ‘consolidate, defend and maintain democracy, peace, security and stability’.

SADC’s legal instruments posit a close linkage between democracy and peace and security. The protocol on regional security stipulates that one of the objectives of the SADC Organ on Politics, Defence and Security Co-operation is ‘to promote the development of democratic institutions and practices within the territories of the State Parties and encourage the observance of universal human rights as provided for in the charters and conventions of the UN and the OAU’ (SADC 2001b). According to the Regional Indicative Strategic Development Plan of 2003, the underlying logic is that economic growth and development ‘will not be realised in conditions of political intolerance, the absence of the rule of law, corruption, civil strife and war’ (SADC 2003: 5).

As far as the tribunal is concerned, the treaty provides that the regional court is an institution of the SADC that will adjudicate disputes between states and ensure adherence to the provisions of the treaty (SADC 1992). In 2000, the summit approved the protocol for the tribunal and in 2005 the body was inaugurated, with the seat of the court being Windhoek. According to the tribunal registry, the tribunal is an international court like the European Court of Justice and the East African Court of Justice: it bases its judgements on international law and SADC law, the latter comprising the treaty, the protocols and any other legal instruments that are in force; and can rule that a member state’s conduct or legislation is in violation of SADC law or international law (SADC Tribunal Registry undated).

The tribunal protocol provides that the regional court comprises jurists who are citizens of SADC states and qualified to be appointed to the highest judicial office in their country (SADC 2000). They are selected by the summit on the basis of nominations submitted by member states. The tribunal’s jurisdiction covers disputes between states and between natural or legal persons and states over the interpretation and application of the treaty, the interpretation, application and validity of the organisation’s protocols and the validity of acts undertaken by SADC institutions. No person may bring an action against a member state unless he or she has exhausted all available domestic remedies or is unable to proceed under the relevant domestic jurisdiction. Where a dispute



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Secretary-General Ban Ki-moon (right) meets with Joaquim Chissano, Southern African Development Community (SADC) Mediator for Madagascar and former President of Mozambique. Photo: UN Photo/Evan Schneider

is referred to the tribunal by any party, the consent of the other parties to the dispute is not required. The decisions and rulings of the judicial body are final and binding.

The protocol's provisions on the enforcement and execution of the tribunal's decisions suggest, on paper at least, that member states are willing to subordinate their sovereignty to the regional court. The states must enforce the tribunal's judgements in accordance with their laws on the registration and enforcement of foreign judgements and they 'shall take forthwith all measures necessary to ensure execution of the decisions of the Tribunal' (SADC 2000). The decisions shall be binding upon the parties to the dispute and enforceable within the territories of the member states concerned. According to the protocol, if a member state fails to comply with a ruling of the tribunal, the tribunal shall report that failure to the summit for appropriate action. The treaty empowers the summit to impose sanctions on a member state that persistently fails, without good reason, to fulfil its treaty obligations or implements policies that undermine SADC's principles and objectives.

While the tribunal does not have enforcement powers, it will be evident from the above that the SADC states are expected to abide by and give effect to the court's rulings and that failure to do so must be addressed by the summit. Between 2007 and 2010, the enforceability of the tribunal's decisions was put to the test in a series of cases challenging the Zimbabwe government's harassment of white farmers and seizure of their farms and land. As discussed below, the summit failed the test dismally, turning its back on the tribunal and the treaty.

The Tribunal versus Zimbabwe

In 2000, Zimbabwean war veterans who had fought in the liberation struggle, and whose socioeconomic plight had since been neglected by the government, began a violent campaign of invading and occupying white-owned land and farms. The land question had long been a smouldering political and economic problem. In the late 1990s, acute racial inequities in land ownership – arising from colonial conquest and white minority rule and then entrenched by Zimbabwe's negotiated settlement in 1979 – were still in place. The government backed the land invasions and launched a programme of compulsory land expropriations. The programme was characterised by disregard of judicial rulings, the emasculatation of the judiciary, violence perpetrated by state-sponsored militia, the accumulation of farms by the ruling elite and the impoverishment of farm workers (International Crisis Group 2001).

In 2007, a group of white Zimbabwean farmers petitioned the SADC Tribunal for relief over the government's confiscation of their farms (hereafter 'the Campbell case'). The confiscations had taken place in terms of a constitutional amendment dealing with the state's expropriation of agricultural land for resettlement and other purposes (hereafter 'Amendment 17'). Amendment 17 excludes from the jurisdiction of the Zimbabwe courts any plea contesting such expropriation. When the tribunal heard the Campbell case, it noted that the Zimbabwe Supreme Court had recently denied Campbell and the other applicants the right to institute domestic proceedings relating to the seizure of their land: the supreme court had accepted that its jurisdiction to hear the matter had been ousted by Amendment 17. Consequently, the tribunal held that the applicants did not have domestic legal remedies available to them and were entitled to lodge their complaint with the regional court (SADC Tribunal 2007).

The tribunal observed that article 4(c) of the SADC Treaty requires member states to act in accordance with the principles of human rights, democracy and the rule of law. The tribunal concluded that it therefore had jurisdiction in respect of any dispute pertaining to these principles. It found that the Zimbabwe government was in breach of article 4(c) because the ouster clause in Amendment 17 violated two essential elements of the rule of law, namely the right of access to the courts and the right to a fair hearing before being deprived of a right, interest or legitimate expectation (SADC Tribunal 2007).

The tribunal also found that Amendment 17 targeted white farmers alone and did so regardless of other factors, such as their citizenship, length of residence in Zimbabwe or proper use of their lands. The constitutional amendment thus amounted to indirect racial discrimination, which was contrary to Article 6(2) of the treaty and numerous international conventions, including the African Charter on Human and Peoples' Rights (SADC Tribunal 2007).¹ The tribunal added that it would have reached a different conclusion if the state's criteria for confiscating land were reasonable and objective rather than arbitrary, if fair compensation were paid for expropriated lands and if these lands were indeed distributed to poor, landless and other disadvantaged and marginalised individuals or groups (SADC Tribunal 2007: 53-4). The tribunal ruled that the state should pay the farmers fair compensation for the expropriated land. It ordered the Zimbabwe government to take all necessary measures to protect the pos-

¹ Article 6(2) of the SADC Treaty provides that 'SADC and Member States shall not discriminate against any person on grounds of gender, religion, political views, race, ethnic origin, culture, ill health, disability or such other ground as may be determined by the Summit'.

session, occupation and ownership of the applicants' other land and to ensure that no action was taken to evict the farmers or interfere with their peaceful residence of their properties.

The government ignored the tribunal's judgement, which President Robert Mugabe dismissed as an 'exercise in futility' (Newzimbabwe.com 2008). When some of the applicants in the Campbell case were beaten up and tortured in 2008, they submitted an urgent application to the tribunal, asking it to find that the government was in breach and contempt of the 2007 order.² The regional court held in favour of the farmers, rejecting the government's defence that there was a state of lawlessness in Zimbabwe and that the authorities were experiencing difficulty in tackling acts of intimidation and violence (SADC Tribunal 2008). In 2009, the farmers turned to the tribunal for a further declaration that the government was in breach and contempt of the tribunal's order. This time, the government declined to participate in the proceedings. The court noted that Mugabe had described its earlier decisions as 'nonsense' and 'of no consequence' and that these utterances had been followed by the intimidation and prosecution of the farmers and the invasion of their land (SADC Tribunal 2009). Once more the regional body found in favour of the farmers.



Patrick Antony Chinamasa,
Minister of Justice of the
Republic of Zimbabwe. Photo:
UN Photo/Jean-Marc Ferré

Harare was now set to mount a frontal attack on the tribunal. In September 2009, the Zimbabwe minister of justice, Patrick Chinamasa, announced that his government had withdrawn from the tribunal's jurisdiction. He argued that the tribunal was not legally constituted because its protocol had not been ratified by two-thirds of the member states, a requirement that he said was stipulated in the protocol (Sasa 2009). Chinamasa did not explain why, if this were a fatal impediment to the functioning of the tribunal, his government had accepted the regional court's jurisdiction in the Campbell case in 2007 and in several other cases heard by the court. Nor did he explain why, nine years after Mugabe had signed the protocol in his capacity as head of state, Zimbabwe was yet to ratify the document. Chinamasa's argument implied that the president's signature on an international agreement had no legal relevance and that the government could legitimately evade the tribunal's jurisdiction because of the government's own failure to ensure the ratification of the protocol.

Most strangely, Chinamasa relied on an outdated version of the protocol. When the summit revised the treaty in 2001, it scrapped the requirement that the tribunal protocol would only come into force after

² In April 2011, Mike Campbell, the leading applicant in the Campbell case, died as a result of the brain injuries he sustained during the 2008 assault (Dugger 2011).

ratification by two-thirds of member states. Instead, the protocol would be incorporated into the treaty and would enter into force on the date on which the Agreement Amending the Treaty of the Southern African Development Community entered into force by virtue of its adoption by three-quarters of the members (SADC 2001c). On 14 August 2001, the amending agreement was duly adopted and signed by 13 heads of state, including Mugabe. The tribunal protocol thus came into force on that date. The summit subsequently amended the protocol so as to reflect this substantial change and other modifications to the regional court. The preamble to the 2002 Agreement Amending the Protocol on Tribunal, signed by Zimbabwe and 12 other countries, notes that ‘the Protocol entered into force upon the adoption of the Agreement Amending the Treaty of the Southern African Development Community at Blantyre on 14 August 2001’ (SADC 2002).

In response to Chinamasa, the lawyers acting for the Zimbabwe farmers cited international case law and the law of treaties to show that a state may not act contrary to a treaty it has consented to but not formally ratified and may not invoke its constitution and other domestic law as an excuse to dishonour a treaty obligation (Gauntlett and Pelser 2009). The lawyers added that it is a well known principle of international law and domestic legal systems, including that of Zimbabwe, that once jurisdiction is established in a given matter it cannot be lost, least of all on the basis of a unilateral and belated disavowal of jurisdiction by one of the parties. Moreover, the Zimbabwe government had nominated a judge to serve on the tribunal and had relied extensively on the provisions of the protocol during many of the tribunal’s hearings. This exposed Chinamasa’s subsequent disavowal of the protocol’s validity as ‘humbug and a contrivance’ (Gauntlett and Pelser 2009).

In 2010, the farmers returned to the tribunal, exhorting it to report to the summit the Zimbabwe government’s failure to comply with the regional court’s rulings. The court stated that it had already reported the failure to the summit and that the government had persisted in flouting the tribunal’s decisions and endangering the lives, liberty and property of the applicants (SADC Tribunal 2010). In addition, the government had informed the tribunal that it would no longer appear before the regional court and that any decisions the tribunal might have made or might make in the future against Zimbabwe were null and void (SADC Tribunal 2010).

The Campbell applicants petitioned the Zimbabwe High Court to enforce the tribunal’s order, but the court dismissed the petition on the following grounds:

Having regard to...the overwhelmingly negative impact of the Tribunal's decision on domestic law and agrarian reform in Zimbabwe, and notwithstanding the international obligations of the Government, I am amply satisfied that the registration and consequent enforcement of the judgement would be fundamentally contrary to the public policy of this country. (quoted in SADC Tribunal 2010:3)

The critical issue, however, was not whether the tribunal's judgements were consistent or at odds with public policy, but whether the Zimbabwe courts were *legally obliged* to enforce the judgement in accordance with the tribunal protocol and the treaty. As the tribunal asserted in reaction to the high court's position, the protocol states unambiguously that a decision taken by the tribunal is binding on the parties to a dispute and enforceable in the territories of the member countries effected by the decision (SADC Tribunal 2010).

In another court case in Zimbabwe, the judge had offered legal rather than policy reasons for refusing to recognise the tribunal's authority and endorse its order in the Campbell case. Judge Gowora presented the argument thus:

The supreme law in this jurisdiction is our Constitution and it has not made provision for [Zimbabwe] courts to be subject to the tribunal. This court is a court of superior jurisdiction and has an inherent jurisdiction over all people and all matters in the country, and its jurisdiction can only be ousted by a statutory provision to that effect...I do not have placed before me any statute to that effect and the [Tribunal] protocol certainly does not do that. (quoted in Chimora 2009)



Do the SADC countries consider themselves legally bound by the treaty and protocols they have signed?

Whatever the merits of Judge Gowora's argument in terms of constitutional and international law, it highlights the fact that the underlying and most basic questions surrounding the tribunal are political and relate to sovereignty: Do the SADC countries consider themselves legally bound by the treaty and protocols they have signed? And are they willing to submit themselves to the judicial authority of the tribunal and comply with its rulings, just as the European Union countries comply with the rulings of the European Court of Justice? If the answers to these questions were 'yes', then the SADC states would take care of the jurisdictional implications by amending their constitutions or other laws as required. Zimbabwe's answer has been emphatically 'no'. What of the other states? On three occasions the tribunal referred Zimbabwe's failure to obey its rulings to the summit for appropriate action and on each occasion the summit, despite the urgency and importance of the matter, declined to act. But the worst was still to come.

In 2009 and 2010, Chinamasa travelled to the regional capitals, furiously lobbying his counterparts to support Zimbabwe's position. On 17 August 2010, after the annual summit meeting, he announced that the heads of state had resolved to suspend the tribunal for six months pending the outcome of a review by the region's justice ministers and attorneys-general (Zvayi 2010). He deplored the tribunal's attempts to rewrite Zimbabwe's constitution and reverse the decisions of its courts. He maintained that while the tribunal was a necessary instrument for regional integration, it should only deal with matters referred to it by member states. It had to be reconstituted in order to put it 'on a sound footing which recognises negotiations between member countries over those issues member countries want to refer to the tribunal' (quoted in Zvayi 2010: 2-3). In this scheme of things, the citizens of Southern African states would no longer have recourse to the regional court and democratic norms would probably be excluded from the tribunal's ambit.

On 18 August, the executive secretary of SADC, Tomaz Salamao, refuted Chinamasa's remarks, claiming that the summit had not suspended the tribunal (ZimEye 2010a). The correct position, he said, was that the body would not entertain new cases but it could proceed with those cases that were already before it. The summit communiqué was typically bland and insufficiently informative, stating simply that the 'Summit decided that a review of the role, functions and terms of reference of the SADC Tribunal should be undertaken and concluded within six months' (SADC 2010). Nevertheless, on 23 August Mugabe triumphantly proclaimed that the regional court had been suspended:

We [the heads of state] are the creators of this monster and we said we thought we had created an animal which was proper, but no, we had created a monster. We understand that there was interference or interventions by some countries (such as Britain) that the tribunal would be in place and the farmers would come to it. [But] now the house has collapsed and all those decisions which it made on Zimbabwe will become invalid. (ZimEye 2010b)

The vitriolic and conspiratorial tone of Mugabe's remarks was echoed by Simbi Mubako, a retired Zimbabwean judge and former minister (*The Herald* 2011a). Referring to the tribunal as an 'illegitimate monster', he called for an enquiry into its creation 'in order to establish its real motives'. 'The prime suspects', he suggested, 'must be the officials of the SADC secretariat who planned and orchestrated the judicial charade.' Also culpable were the tribunal judges, 'who seemed to lobby for upholding of their judgements even when it was plain that they were improperly constituted'. Mubako added that 'the spectacle of a



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panel of learned dignitaries in judicial regalia presiding over a kangaroo court would be a hilarious comedy if the matter was not so serious’.

Given the diatribes by Mubako and Mugabe, anyone unfamiliar with the tribunal’s legal history would be astonished to learn that Zimbabwe had signed the 1992 treaty, which establishes the regional court; the 2001 amendment to the treaty, which provides for the tribunal protocol’s entry into force (SADC 2001c); and the 2002 amendment to the protocol, which incorporates this provision on entry into force (SADC 2002). None of these documents was sprung on the summit without adequate notice and extensive regional consultation. All the legal instruments go through numerous iterations, being discussed and amended by committees of state officials before being considered by the SADC council of ministers and thereafter by the summit.

After the 2010 summit meeting, the SADC secretariat commissioned an independent review of the tribunal. Undertaken by University of Cambridge Professor Lorend Bartels and completed in April 2011, the review affirmed the jurisdiction of the tribunal and vindicated its decisions (*The Zimbabwean* 2011). The main conclusions were as follows: the tribunal has the legal authority to deal with individual human rights petitions; SADC law should be supreme in relation to domestic laws and constitutions; decisions of the tribunal should be binding and enforceable within the territories of member states; the tribunal was lawfully established in terms of the tribunal protocol; the SADC countries waived the requirement to ratify the protocol, which became part of the treaty by agreement and binding on all member states; the Zimbabwe government’s participation in the tribunal’s proceedings and nomination of a judge to serve on the court preclude it from arguing that the tribunal was not legally constituted; and a state may not rely on its constitution and national laws as a defence against a violation of an international obligation.

Notwithstanding these conclusions, Zimbabwe had triumphed by the time the summit met in May 2011. The heads of state announced that they would maintain the moratorium on the regional court hearing any extant, pending or new case until the tribunal protocol had been reviewed and approved (SADC 2011). They mandated the region’s ministers of justice and attorneys-general to initiate a process of amending the relevant SADC legal instruments and to submit a progress report in August 2011 and a final report in August 2012. The summit decided further that it would not reappoint the tribunal judges whose term of office had ended in August 2010, nor replace the judges whose term of office was due to expire in October 2011.

The four judges whose appointments would not be renewed wrote an angry letter to the executive secretary of SADC, pointing out that the summit's decision amounted to dissolving and not merely suspending the court (Pillay *et al.* 2011). They slammed the decision as illegal, *ultra vires* and taken in bad faith. The judges argued that the summit was at liberty to amend the treaty and the tribunal protocol according to the prescribed procedures, but prior to making such amendments it could not legitimately limit the tribunal's jurisdiction, to which the summit itself was subject, and it could not legitimately stop the tribunal from hearing the cases before it. This was a breach of the treaty and the principle of access to justice. The bottom line was inescapable: 'The highest authorities of SADC at best only pay lip service to the principles of human rights, democracy and the rule of law and do not scrupulously adhere to them' (Pillay *et al.* 2011). Judge Pillay scoffed at the summit's approach of ignoring the independent review conducted by an international legal scholar and then requesting a second review to be undertaken by politicians (Christie 2011a).

Whatever the outcome of the process for amending the protocol and reconstituting the tribunal, at some stage the heads of state will have to pronounce on the court's rulings against the Zimbabwe government. If the summit nullifies the rulings, as demanded by Zimbabwe and as appears likely, it will effectively condone the violations of the rule of law and make a complete mockery of the treaty and its institutions. The net effect, as a former Zimbabwe magistrate has argued, is that Zanu-PF has exported its distaste for the rule of law to the Southern African region as a whole (Kuveya 2011). According to Lloyd Kuveya, the ruling party ensured the subservient posture of domestic courts in Zimbabwe by intimidating independent-minded judges and hounding them out of office, packing the superior courts with compliant judicial officers and giving gifts of expropriated land to certain judges. None of these tactics was possible in the case of the tribunal and Harare was thus bent on securing the summit's agreement to scrap the regional court and invalidate its decisions.

Explaining the Gap between the Rhetoric and the Practice

The tribunal saga underscores the fact that the treaty and the SADC protocols on politics are rhetorical rather than substantive and legally binding instruments. On the one hand, the states that engage in undemocratic practices pay no heed to these instruments and, on the other, the states that adhere to democratic norms do so because of their constitutions and political histories rather than because of SADC's declarations. Most importantly, as a general rule the summit does not

criticise or sanction member states that breach the organisation's principles on human rights and the rule of law. The summit's failure to back the tribunal's rulings against Zimbabwe reflects the depth of this problem and the marginal relevance of the treaty. Indeed, the summit was so determined to avoid a confrontation with Zimbabwe that it was prepared to disband the tribunal at the very time that the regional court was seeking to uphold the treaty.

Given the mixture of political systems in the region, it is not surprising that the treaty and protocols are rhetorical rather than substantive and legally binding. The 2004 Freedom House survey of political rights and civil liberties classified Angola, the Democratic Republic of Congo, Swaziland and Zimbabwe as 'not free'; Botswana, Lesotho, Mauritius, Namibia, Seychelles and South Africa as 'free'; and Malawi, Mozambique, Tanzania and Zambia as 'partly free' (Piano and Puddington 2004). Most of these ratings remained the same in the Freedom House survey for 2009 (Freedom House 2010). The exceptions were Lesotho and Seychelles, which moved from 'free' to 'partly free'. Madagascar, a new member of SADC, was classified as 'partly free'. In these circumstances, it is not possible for the SADC states to be bound – either in the sense of being united or in the sense of being constrained – by democratic principles.

Why then do SADC's legal instruments champion democracy if its members span the political spectrum and are not collectively committed to democratic norms? The answer probably lies in a combination of three factors: the hegemony of the democratic paradigm in international forums and discourse; the adoption of this paradigm in the declaratory texts of the African Union (e.g., African Union 2000, 2007); and the weakness of SADC countries, whose national and regional projects are dependent on development aid from Western countries and international lending bodies that promote and, indeed, insist on observance of democracy. In this context, it would make no sense for SADC's treaty and protocols to adopt an anti-democratic or less-than-democratic stance.

According to Judge Pillay following his effective dismissal as the head of the tribunal, the formation of the regional court was simply a sop to Western donors:

For SADC's leaders, [the establishment of the Tribunal] had been a gambit to get funds from the European Union and others. It gave off all the right buzz words, you know, 'democracy, rule of law, human rights'. And then [the SADC leaders] got the shock of their lives when we said these principles are not only aspirational but also justiciable and enforceable. (Christie 2011a)

A similar perspective was voiced by Norman Tjombe, a Namibian human rights lawyer. He points out that the summit had never been enthusiastic about the tribunal, taking 15 years from the signing of the 1992 treaty until it appointed the tribunal judges in 2007. The regional court was never a priority: ‘All along it was actually just international powers pushing for it. Now that the geopolitics are shifting, with Southern Africa looking east, whatever interest was there is dead and to be frank the Swedes and Finns and Germans driving this thing are getting fatigued too’ (Christie 2011b).

The formation of the tribunal reflected a tendency by states in Southern Africa and elsewhere on the continent to reproduce European institutions. Broadly speaking, the AU was modelled on the EU; the AU Commission on the European Commission; the African Standby Force on the Nordic Stand-by High Readiness Brigade; the Southern African Development Coordination Conference, SADC’s predecessor set up in 1980, on the European Economic Community; SADC on the European Community; the SADC Tribunal on the European Court of Justice; the early versions of the SADC Mutual Defence Pact on the NATO Treaty; and the Conference on Security Stability, Development and Co-operation in Africa, which is now part of the AU, on the Conference on Security and Co-operation in Europe (Nathan 2012, forthcoming). This tendency stems both from an African desire to emulate successful organisations and from the proclivity of the EU and its member states to promote and fund the replication of their models in other parts of the world.

Because of its dependence on foreign funding, SADC is especially susceptible to donor influence. In 2011, its annual budget was US\$ 83 million, of which US\$ 31 million came from member countries and US\$ 52 million from donors (*The Herald* 2011b). As the government newspaper in Zimbabwe, *The Herald*, put it, ‘If the old adage holds true that he who pays the piper calls the tune, then SADC is not in control of its affairs at all.’ The editorial linked this problem directly to the tribunal:

A typical example of the challenges SADC is having charting its course is the SADC Tribunal. When we thought the Tribunal was dead and buried, the donors attempted to resurrect it at the Angola Summit [in August 2011]. It is reported the judges of the Tribunal fighting to keep it alive are being funded by a foreign donor and some of the countries were beginning to waver from the position they took just recently. Why would any country be keen to subordinate its own judicial system to a foreign-funded Tribunal, unless it is being arm-twisted through threat of losing funding for its budget at

home? Since the Tribunal is a Western project its existence is being tied to the funding of other SADC programmes. (*The Herald* 2011b)

In like vein, Chinamasa claimed that the tribunal did not bear the ‘DNA imprint’ of the SADC countries and was somehow the product of a conspiracy hatched by the SADC secretariat and the organisation’s Western donors (Zvayi 2011). He was scornful of the secretariat’s concerns that Zimbabwe’s determination to reconstitute the tribunal would antagonise the international community and tarnish the reputation of SADC:

[A regional] organisation must be rules based, not one run on the whims of the SADC Secretariat or the dictates of foreign interests. We shouldn’t be influenced on the path that we have to follow by our desire for development assistance. That should not be allowed to dictate the pace of the evolution of the organisation. (Zvayi 2011)

In July 2011, the Namibian minister of justice, Pendukeni Iivula-Ithana, made no bones about the fact that state interests and solidarity prevail over treaty principles and international law (Ekongo 2011). She explained that the tribunal was under review so that it better served the interests of member states. The members were entitled to ‘fine tune’ regional bodies. ‘What is cast in stone’, she said, ‘is our commitment to work together as a regional body, SADC. How we do so is not cast in stone and should suit our collective interest. The instruments serve us, they are for us, and this is not a reversible position’ (Ekongo 2011). Absent from this perspective was any sense of the interests of citizens (as distinct from the interests of states), any notion of the SADC states being constrained by democratic norms and any awareness that states are obliged in international law to adhere to the treaties they have signed.

The significance of the Namibian minister’s position is highlighted by the radically different approach of the EU, which regards the common values of member states, rather than their interests, as non-negotiable:

So, the policies and actions we develop are negotiated and mediated by the democratic process. It is the common values, which underlie them, that are not negotiable... Our common policies are, of course, negotiable because they do not constitute universal values.³

The common values of the EU member states are enshrined in the 1992 treaty on European Union, which declares that ‘the Union is

3 EU Commissioner Anna Diamantopoulou, quoted in Cremona (2001: 196).

founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, principles which are common to the Member States'. In the case of SADC, by contrast, member states are bound by a common commitment to state solidarity and regime protection.

Conclusion

In general, SADC has been adept at managing the contradiction between its official embrace of democracy and the undemocratic behaviour of some of its members. The tribunal's rulings against the government of Zimbabwe, however, posed a major political crisis. Unlike criticism of Harare from Western countries and local politicians and activists, which the summit has felt free to ignore or trivialise, the tribunal's rulings emanated from a judicial body that was established by the treaty and comprised Southern African judges who had been appointed by the summit. By scrapping the tribunal as a result of its efforts to uphold the rule of law, the heads of state deepened the crisis and did enormous harm to the integrity and reputation of the organisation.

After the tribunal was disbanded, the judges complained that the summit believed it was all-powerful and unaccountable, whereas in fact its actions were constrained by the treaty and the tribunal protocol (Pillay *et al.* 2011). The judges' perspective might be normatively appealing, but it is plainly wrong on the facts. The summit demonstrated that it is not constrained by the treaty and the protocols. With this brazen show of *realpolitik*, the heads of state made a farce of SADC's legal instruments and formal commitment to democratic principles.

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