IMPLICATIONS OF THE DECISION TO REVIEW THE ROLE, FUNCTIONS AND TERMS OF REFERENCE OF THE SADC TRIBUNAL

AN OPINION

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Overview

1. The communiqué of the Southern African Development Community (SADC) Summit of Heads of State and Government, issued on 17 August 2010, announced that a review of the role, functions and terms of reference of the SADC Tribunal (the Tribunal) would be undertaken and concluded within six months. Additionally, it was determined that the Tribunal would not receive any new cases pending the completion of the review process. Further, the SADC Summit did not renew the tenure of office of five members whose terms had expired and failed to replace them and Zimbabwe's withdrawn Tribunal member. The members will continue to hold office only for purposes of finalising partly heard cases already before them.

2. Events leading to the SADC Summit's decision are as follows: in August 2009, the Zimbabwean government issued a legal opinion challenging the legality of the Tribunal and impugning its jurisdiction, mandate and powers to enforce decisions. Zimbabwe's position followed failure on its part to comply with several Tribunal judgments. The SADC Council of Ministers (the Council) was tasked with responding to Zimbabwe's objections and presenting a draft answering opinion at the thirtieth Jubilee SADC Summit in Windhoek, Namibia in August 2010. The Council had not completed their study by August 2010 but nonetheless recommended to the SADC Summit that there be a review of the role, functions and terms of reference of the Tribunal. That recommendation was acted upon and adopted as a binding decision by the SADC Summit.

3. It is submitted that the decision of the SADC Summit to review the Tribunal effectively amounts to a suspension. We say this for two reasons.

4. First, pending the completion of the review, the Tribunal will not take on new cases and as such the Tribunal is barred from fulfilling its function for at least six months.

5. Second, even if the Tribunal were not expressly prevented from hearing new cases, the decision not to renew the tenure of office of the five members whose terms have expired

coupled with the failure to appoint new members to fill the resultant vacancies means that, procedurally, it is unable to do so. This is because at present there are only four members of the Tribunal who are currently in office. Of those four only two are regular members. The Tribunal Protocol requires that the Tribunal be constituted by not less than ten members and that an ordinary bench of the Tribunal be composed of three members and a full bench of five members. The decision of the SADC Summit has left the Tribunal improperly constituted and incapable of performing its functions.

6. We acknowledge that a review of the role, functions and terms of reference of an international or regional court is not uncommon. The structure of the European human rights protection system has been reviewed several times by amending and supplementing the provisions of the 1950 Convention for the Protection of Human Rights and Fundamental Freedoms through additional and amending protocols.[1] In June 2010 the International Criminal Court (ICC) state parties, observer states, international organisations and NGOs gathered in Uganda to discuss proposed amendments to the Rome Statute.[2]

7. However, as will be demonstrated in the course of this opinion, in making such decisions, SADC and its institutions failed to comply with the provisions of SADC's constitutive instruments.

8. SADC, as an international organisation, is bound to act in accordance and within the scope of the constituent documents governing its institutions. It will be shown that although a decision to review the Tribunal is not itself problematic, the suspension of the Tribunal and failure to fill Tribunal vacancies is not authorised by nor compatible with the SADC Treaty, Tribunal Protocol and the Tribunal's Rules of Procedure and is therefore *ultra vires*.[3]

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[1] Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR).

[2] International Criminal Court, News Release/Communiqué, PR546, "Review Conference of the Rome Statute concludes in Kampala" (12 June 2010), online: http://www.icc-cpi.int/menus/icc/press%20and%20media/press%20releases/review%20conference%20of%20the%20rome%20statute%20concludes%20in%20kampala.

[3] The doctrine of *ultra vires*, although most frequently invoked within the realm of domestic administrative law, applies to international organisations and their organs. As will be demonstrated in the course of this opinion, strong support exists for the view, adopted by H.G Schermers and N.M Blokker *International Institutional Law: Unity Within Diversity* 4ed. (Leiden: Martinus Nijhoff, 2004), that–

9. Furthermore, SADC cannot act without considering the consequences of its decision, particularly where those consequences impact on fundamental rights recognised in customary international law. It will be demonstrated that the effective suspension of the Tribunal and failure to fill the resultant vacancies raises concerns about the independence of the Tribunal and threatens judicial guarantees essential for the protection of fundamental rights, namely the right to an effective remedy and access to justice.

10. It is also critical that a comprehensive review, as called for by the SADC Summit, involve the judicial institution being reviewed, court users such as civil society, victims and lawyers, parliamentary bodies and the intergovernmental organisation concerned. To date no such involvement has been facilitated.

11. This opinion is submitted by the following organisations:

    a. Southern Africa Litigation Centre, SALC;
    b. Centre for Human Rights and Rehabilitation, CHRR, Malawi;
    c. Ditshwanelo, the Botswana Centre for Human Rights
    d. International Commission of Jurists, ICJ – Africa Regional Office;
    e. Open Society Justice Initiative, OSJI;
    f. Socio-Economic Rights Institute of South Africa, SERI;
    g. Zimbabwe Exiles Forum

    All are concerned for the legality and effects of temporary suspension of the Tribunal, particularly as they relate to upholding of the rule of law and democracy, judicial independence, access to justice and the right to an effective remedy.

12. Together, these institutions combine expertise in international human rights law, public international law, the law of international institutions, as well as experience in the relevant laws and practice of regional human rights institutions in Africa and beyond. The urgency and gravity of the issues under consideration require that the SADC Summit, the

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> "... international organisations, as subjects of international law, are bound by general principles of law recognised by civilised nations, that is to say principles common to national legal systems. These ... include procedural rules and requirements"

Council, members of the Tribunal, member states and other interested parties be fully informed of the legal and human rights implications of the recent decision to review the role, functions and terms of reference of the Tribunal.

Introduction

13. The decision of the SADC Summit to review the role, functions and terms of reference of the Tribunal raises a number of complex legal issues.

14. This opinion aims to answer the following questions:
    a. What law is applicable to SADC as an international organisation?
    b. What is the effect of the decision to review the Tribunal?
        i. Is the decision to review tantamount to a suspension of the Tribunal?
    c. Did the Summit have the power to so decide and did it comply with any conditions for the exercise of this power?
    d. What are the consequences of the decision to review the Tribunal?
    e. What other considerations are relevant in determining the validity of the decision to review?
    f. In light of the answers to these questions how should SADC, its institutions and member states proceed?

The Effective Suspension of the SADC Tribunal

15. The SADC Summit communiqué of 17 August 2010 made reference only to a review of the role, functions and terms of reference of the Tribunal. It did not describe the decision as a "suspension" of the work of the Tribunal. However the Tribunal has been instructed that it may not hear any new cases during the period allocated the review process – instructions amounting to a suspension of the Tribunal, albeit temporary.

16. Even without such instructions, the SADC Summit has acted to ensure that the Tribunal is not properly constituted and unable to carry out its functions. Article 3(1) of the Tribunal Protocol requires that the Tribunal–

> "shall consist of *not less* than ten *(10) Members*, appointed from nationals of States who possess the qualifications required for appointment to the highest judicial offices in their respective States or who are jurists of recognised competence." (Emphasis added)

17. The Protocol is unequivocal in the requirement that the Tribunal consist of ten members. Article 3(2) further stipulates that of the ten members, the Council shall–

> "designate five (5) of the Members as regular Members who shall sit regularly on the Tribunal. The additional five (5) Members shall constitute a pool from which the President may invite a Member to sit on the Tribunal whenever a regular Member is temporarily absent or is otherwise unable to carry out his or her functions."

18. In terms of article 3(3) of the Tribunal Protocol:

> "The Tribunal shall be constituted by three (3) Members; provided that the Tribunal may decide to constitute a full bench composed of five (5) Members."

19. Read together, the above-mentioned provisions clearly require that the Tribunal be comprised of ten members and that at all times there are five members available to constitute a full bench.

20. Although Article 3(3) permits the Tribunal to sit with only three members, this situation is clearly contingent on the availability of other members to constitute a full bench of five members if necessary.[4] Even if it were to be argued that of the four members still in office

[4] There is no express provision in the Tribunal Protocol stipulating when the Tribunal is required to sit as a full bench of five members or when an ordinary bench will suffice. However in terms of the practice of the Tribunal, it is clear that the nature of the case and the identity of the parties will determine how many members will hear a case. Where a case deals with fundamental rights and issues of substantive law or a member state is party to the proceedings, the Tribunal will be constituted by a full bench of five members. See *Swissbourough Diamond Mines (Pty) v The Kingdom of Lesotho* [2009] SACD Case no. (T) 04/2009; *William Campbell and Others v The Republic of Zimbabwe* [2009] SADC Case no. (T) 03/2009; *United Republic of Tanzania v Cimexpan (Mauritius) and Another* SADC Case no. (T) 01/2009; *Bach's Transport (Pty) Ltd v The Democratic Republic of Congo* [2009] SADC Case no. (T) 14/2008; *United Peoples' Party of Zimbabwe v Southern African Development Community (SADC)* [2008] SADC Case no. (T) 12/2008; *Mike Campbell (Pvt) Ltd and Others v The Republic of Zimbabwe* [2008] SADC Case no. SADC (T) 11/08; *Nixon Chirinda and Others v Mike Campbell (Pvt.) Ltd and Others* [2008] SADC Case no. (T) 09/08; *Albert Fungai Mutize and Others v Mike Campbell (Pvt) Ltd and Others* [2008] SADC Case no. 8/08; *Luke Munyandu Tembani v The Republic of Zimbabwe* [2008] SADC Case no. (T) 07/2008; *Gideon Stephanus Theron v The Republic of Zimbabwe and Others* [2008] SADC Case no. (T) 2/08; *Mike Campbell (Pvt) Ltd and Others v The Republic of Zimbabwe*

three could constitute the Tribunal, the current composition prevents the sitting of the full bench of five members on the Tribunal, effectively disabling the Tribunal.

21. At present there are six judicial vacancies on the Tribunal. Five of these vacancies result from the SADC Summit's decision not to renew the tenure of those judges whose terms had expired. The other vacancy results from Zimbabwe's decision to withdraw its Tribunal member. To date none of these vacancies has been filled. Currently, there are only four sitting Tribunal members, two of whom are regular members designated in terms of article 3(2) and two of whom are pool members.

22. In maintaining the current makeup of only four members of the Tribunal, the SADC Summit has, contrary to articles 3(1), (2) and (3) of the Tribunal Protocol, left the Tribunal improperly constituted.

23. Therefore procedurally, even if the Tribunal were not instructed to desist from hearing new cases it would not have sufficient numbers to be properly constituted. In these circumstances there can be no doubting that the decision of the SADC Summit in both intent and effect is to secure suspension of the Tribunal.

24. The effective suspension of the Tribunal comes about through the SADC Summit's failure to renew the tenure of currently serving judges or to appoint new members to the Tribunal. But no powers are vested in the SADC Summit which permit it to do both: to not renew the tenure of existing members eligible for such reappointment and to not appoint new members to fill resulting vacancies.

25. Length of judicial tenure of Tribunal members is prescribed in article 6(1) of the Tribunal Protocol:

> "The Members shall be appointed for a term of five (5) years and may only be reappointed for a further term of five (5) years. However, of the Members initially appointed, the terms of two (2) of the regular and two (2) of the additional Members shall expire at the end of three (3) years. The Members whose term is to expire at the

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[2007] SADC Case no. 2/2007; *Ernest Francis Mtingwi v SADC Secretariat* [2007] SADC Case no. (T) 1/2007. In terms of the practice of the Tribunal it is clear that the current composition of the Tribunal precludes it from hearing certain matters.

end of three (3) years shall be chosen by a lot to be drawn by the Executive Secretary immediately after the first appointment."

26. From the aforegoing it is clear that the term of office of Tribunal members is ordinarily five years in duration. At the expiry of such term, members are eligible for reappointment. There is an exception provided for some of those Tribunal members appointed at the inception of the Tribunal, whose initial term shall only run for three years. This stipulation ensures staggered rotation of Tribunal members and guards against collective loss to the Tribunal of judicial experience.

27. Article 4 of the Tribunal Protocol regulates the nomination, selection and appointment of Tribunal members. It provides:

> "1. Each State may nominate one candidate having the qualifications prescribed in Article 3 of this Protocol.
>
> 2. Due consideration shall be given to fair gender representation in the nomination and appointment process.
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> 3. The Members shall be selected by the Council from the list of candidates so nominated by States. Nominations for the first appointment shall be called within three (3) months, and the selection shall be held within six (6) months, of the date of entry into force of this Protocol.
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> 4. The Members shall be appointed by the Summit upon recommendation of the Council.
>
> 5. Where a Member is appointed to replace a Member whose terms of office has not expired, the Member so appointed shall serve for the remainder of his or her predecessor's term.
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> 6. Any appointment to fill a vacancy referred to in paragraph 5 shall be conducted within three (3) months of the vacancy occurring. The procedure referred to in the preceding paragraphs shall apply mutatis mutandis."

28. Although no express mention is made of the steps to be taken when the term of office of a Tribunal member eligible for reappointment is not so renewed, it is evident that the procedure to be followed is the same as that if the Tribunal member completes the two terms he or she is permitted: a vacancy arises and stands to be filled. This is demonstrably

so as article 3(1) of the Tribunal Protocol requires that the Tribunal "shall consist of not less than ten (10) Members."

29. It is permissible that the SADC Summit not renew a Tribunal member's term but such non-renewal is to be treated as a vacancy and SADC is then required to replace these judges in accordance with the nomination and appointment procedure prescribed in article 4 of the Tribunal Protocol. In failing to do so – in depriving the Tribunal of less than the ten Tribunal members constitutionally required for the Tribunal to exist – SADC deals a fatal blow to the Tribunal.

30. No provision is made within SADC's constitutive instruments for the situation of a member state withdrawing its judicial representative from the Tribunal, as Zimbabwe has done. However the effect of such withdrawal is of a resignation and as per rule 4(4) of the Tribunal's Rules of Procedure is to be treated as a vacancy and "replaced in accordance with Article 4 of the Protocol."

The Framework within which the Effective Suspension is to be Assessed: SADC as a Subject of International Law

31. International institutions only hold those powers they have been attributed under their constitutive documents. They may therefore adopt binding measures only in those areas where the member states have expressly transferred powers to these institutions.[5]

32. International organisations are also subjects of international law with a legal personality distinct from that of their member states. As such they are capable of bearing various

[5] P. Sands and P.Klein *Bowetts Law of International Institutions* 5ed. (London: Sweet and Maxwell, 2001) at 292-296; H.G Schermers and N.M Blokker *supra* note 2 at 155-157 and 442; and N.D White *The Law of International Organisations* 2ed. (Manchester: Manchester University Press, 2005) at 23-24. See also *Reparations for Injuries Suffered in the Service of the United Nations*, Advisory opinion (1949) I.C.J Rep. at 174. The ICJ opined that the nature and range of duties and obligations of international organisations "must depend upon its purposes and functions as specified or implied in its constituent documents and developed in practice" at 179-180. The ICJ has "recognized that the internal practices of international organizations may have the force of law. But those practices must be lawful and must not offend…against the internal law of an organisation or the principles of due administratve process." ICJ Reports of Judgements, Advisory Opinions and Orders. Advisory Opinion of October 23rd, 1956. (Citations omitted)

rights and duties in the international legal order and can be held responsible for the violations thereof.[6]

33. SADC is a regional organisation established in terms of article 2 of the SADC Treaty. In terms of article 3(1) of the Treaty:

> "SADC shall be an international organisation, and shall have legal personality with capacity and power to enter into contract, acquire, own or dispose of movable or immovable property and to sue and be sued."

34. It is submitted that the governing instruments and international law set the parameters in which international organisations operate and carry out their functions. As in domestic law where the exercise of public power is constrained by national legislation, so the conduct of international organisations is limited.

35. Strong support exists for the view that:

> "The steadily growing participation of international organizations in international relations calls for a closer scrutiny of the question of legality of the acts of international organizations, understood as the proper fulfillment of their statutory functions with due respect to the rights of other subjects of international intercourse. …The fundamental role of international responsibility ensuring the proper functioning of the international legal order can be played effectively only when the rules governing responsibility in that order apply to all subjects."[7]

36. Although debate exists as to the exact nature of the law governing international organisations, a close look at the development and proliferation of public international organisations suggests that it is now possible to identify certain principles applicable to the functioning of these organisations. International law authority, Amerasinghe argues that uniformity exists in the interpretation of general principles of law such as the doctrine of *ultra vires*, interpretation of treaties and the application of customary law. He writes:

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[6] *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt*, (1980), Advisory Opinion, I.C.J. Rep. 73 at 90.

[7] E. Butkiewitz, "The Premises of International Responsibility of Inter-Governmental Organizations" (1982) 11 Polish Yearbook of International Law 117 at 117. See also M.H. Arsanjani, "Claims against International Organizations: Quis Custodiet Ipsos Custodes?" (1981) 7 Yale Journal of World Public Order 131 at 131 ff.

> "While in general there exist the individuality and uniqueness of each organisation in terms of its institutional operations and the law applicable to it, the manner in which the law has evolved shows that for certain purposes and in certain areas common principles of law, are indeed applicable. Uniformity or similarities exist, for instance in the general principles which apply (e.g., in interpretation), as a result of the application of conventional law (e.g., privileges and immunity), in customary international law which applies (e.g., responsibility of and to organizations), as a result of the application of general principles of law (e.g., *ultra vires* and employment relations), and because there are similarities between constitutional texts ... [B]ecause much of the institutional law applicable to organizations depends on interpretation of their constitutions, the principles which become relevant are not only general principles of interpretation of constitutional and other texts but general principles which have evolved through the interpretation of texts."[8]

37. Reference to the discourse and jurisprudence of other international and regional organisations, their constitutive documents and tribunal decisions, demonstrates that ample authority exists for discerning those common principles of law that are applicable to all organisations. In particular, SADC as a Regional Economic Community (REC) and a signatory to the Protocol on Relations Between the African Union and the Regional Economic Communities (AU/RECS Protocol) is, in terms of article 3(c) and 5(1)(b),[9] bound to act in accordance with AU principles and norms on human rights.[10]

38. It is within this legal context that the SADC Summit's decision to endorse the review of the Tribunal will be assessed and evaluated.

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[8] C.F Amerasinghe, *Principles of the Institutional Law of International Organisations*, 2ed. (Cambridge: Press Syndicate of the University of Cambridge, 2005) at 17.

[9] Article 3(1) provides that the objectives of the AU/RECS Protocol are to:

> "establish a framework of co-ordination of the activities of RECs in their contribution to objectives of the Constitutive Act and Treaty"

Article 5(1)(b) requires that:

> "(1)The RECs which have not yet done so, shall take the necessary steps to review their treaties in order to establish an organic link with the Union and in particular with view to:
>
> …
>
> (b) alignment of their programmes, policies and strategies with those of the AU"

[10] *Supra* note 5. The ICJ opined that international organisations are bound by any obligations under international agreements to which they are party.

The Doctrine of *Ultra Vires*

39. The doctrine of *ultra vires* emanates from the international recognition of fundamental principles of the rule of law and legality. Present in all systems of constitutional law, their content and application varying slightly due to different legal traditions and individual needs, these principles demand that conduct in violation of superior rules of law cannot be valid. Decisions made without any authority to act on a subject or outside or beyond the scope of powers of bodies are *ultra vires*.[11]

40. Even the most cursory survey of the jurisprudence emanating from SADC member states indicates that the concept of *ultra vires* is at the heart of the region's respective domestic legal systems. For example, the Constitutional Court of South Africa held:

> "[T]he principle of legality ... flows from the value of the rule of law enshrined in section 1 of the Constitution. This Court has held that '[t]he exercise of all public power must comply with the Constitution, which is the supreme law, and the doctrine of legality, which is part of that law.' The doctrine of legality, which requires that power should have a source in law, is applicable whenever public power is exercised."[12](Footnote omitted)

41. In *Mogwera v University of Botswana* the High Court of Botswana stated that:

> "It is trite law that when a power is vested in a public authority, and the public body does not act in terms of the statute establishing it, its decision will be *ultra vires* and invalid. It is essential that an administrative body created by statute, should not do as it pleases. It must not exercise any power or perform any function beyond that which is prescribed by law. If it does so, it is acting without legal authority and any action it performs that lacks legal authority is illegal and is of no force and effect ... It is a fundamental principle of the rule of law that the exercise of public power is only legitimate if it is legal."[13]

42. In *Mutale and Another v Newstead Zimba* the Supreme Court of Zambia held that:

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[11] *Supra* note 8 at 193.

[12] *AAA Investments (Proprietary) Limited v The Micro Finance Regulatory Council and Others* 2007 (1) SA 343 (CC) at para 68.

[13] [2007] BWHC 308 at paras 36-7.

> "Unless power to take the measures complained of is explicitly stipulated or it exists by necessary implication then the measures taken in the absence of such power would be regarded as *ultra vires*, null and void if not altogether illegal."[14]

43. But while the concept of *ultra vires* is most familiar in domestic legal systems of law, it is also recognised under international law and constrains the power of international political organisations.[15] The powers of international organisations are expressly mandated by their constitutive instruments or may arise by necessary implication as being essential to the performance of constitutionally endorsed duties, gleaned from the clear intention laid out in the constituent instruments or implied from what is deemed appropriate for the fulfilment of constitutionally authorised purposes of the organisation.[16] International organisations like the UN, AU and SADC are all obliged to operate within the framework of those powers conferred by the constitutions of their respective organisations. The political character of these international organisations does not release them from the observance of the relevant treaty provisions stipulating limitations on the exercise of their powers.[17] The International Court of Justice (ICJ) stated in *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt* that:

> "International organizations are subjects of international law and, as such, are bound by any obligations incumbent upon them under general rules of international law, under their constitutions or under international agreements to which they are parties."[18]

44. There exists general consensus that the concept of *ultra vires* operates under international law and that international organisations have the capacity to act *ultra vires,* however there

[14] (1988-1989) ZR 64 (SC) at 67.

[15] N.D White *supra* note 5 where the author asserts that:

> "[T]he legal character of the treaty constituting an organisation (contractual or constitutional) ... provides the legal framework within which the organisation should operate. If the organisation steps outside this framework, its actions can be analysed in terms of it acting illegally, either as a breach of contract or unconstitutionally. In the latter sense, the term, *'ultra vires'*, literally 'beyond powers', is normally used in discussing the parameters of action of international organisations." at 23-24

[16] M.N. Shaw, *International Law* 5 ed. (Cambridge: Cambridge University Press, 2003) at 1196.

[17] *Conditions of Admission of a State to Membership in the United Nations* (1947-48) I.C.J Rep. at 64.

[18] *Supra* note 5 at 90.

is debate as to the reviewability and legal status of *ultra vires* acts performed by international organisations.[19] As Amerasinghe explains:

> "Even though there is some disagreement on many matters concerning *ultra vires*, the better and more accepted view is that international organizations have the capacity to commit *ultra vires* acts and that their powers are not unbridled and uncontrolled. This view is a natural consequence of the fact that the functions and powers of organizations and their organs flow from constitutions and there are established procedures to be followed in the discharge of those functions and the exercise of powers. It is, therefore, possible that in the pursuit of their objects and purposes international organizations may engage in activities which are not authorised by their constitutions, and may adopt decisions in a manner which does not entirely correspond with the governing procedures. While the absence of compulsory judicial review in general may create problems, it does not entail the consequence that *ultra vires* acts cannot be committed by international organizations or that there is no doctrine of *ultra vires* in their acts."[20]

45. The International Court of Justice (ICJ), the principal judicial body of the UN, has had occasion to address the issue of *ultra vires* acts as performed by international organisations in several advisory opinions issued at the request of member states or organs of the UN.

46. In the *IMCO Case*,[21] the ICJ determined that action taken by the Inter-Governmental Maritime Consultative Organisation (IMCO) in electing its Maritime Safety Committee was *ultra vires* because it had misinterpreted certain provisions of its constitutive instruments. This was the first time the ICJ held that an exercise of power by a

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[19] See *supra* note 8 at 194 where the author states:

> "The issue concerns the legal status and effects of acts and decisions of international organizations which are not in conformity with provisions of their constitutional law or other governing law or with established rules and procedures. The questions asked are, for instance, whether such acts give rise to binding legal obligations, how objections can be raised against them, who is competent to decide such objections and what guarantees are available to protect their interests against such acts and decisions."

See also E. Osieke, "The Legal Validity of Ultra Vires Decisions International Organisations" (1983) 77 A.J.I.L. at 239.

[20] Amerasingh *ibid*. at 195-196.

[21] *Constitution of the Maritime Safety Committee of the Inter-Governmental Maritime Consultative Organization*, (1960), Advisory Opinion, I.C.J. Rep. at 150.

organisation was *ultra vires*.[22] The result of the *ultra vires* act was to nullify the 1959 election of the committee and a new committee was constituted pursuant to the interpretation by the ICJ of the IMCO Constitution.

47. In the case of the *Legal Consequences for States on the Continued Presence of South Africa in Namibia*, the ICJ examined whether the UN Security Council had acted pursuant to its UN Charter powers in seeking the withdrawal of South Africa from Namibian territory. Although the ICJ ultimately held that the UN Security Council had acted in accordance with the UN Charter, the willingness of the Court to determine this question demonstrates that even organs such as the Security Council cannot operate outside the bounds of conferred authority.

48. This is true too of SADC, its institutions and organs. It may only act within the parameters of its expressly mandated powers or those which arise by necessary implication as being essential to the performance of constitutionally endorsed duties or as appropriate for the fulfilment of constitutionally authorised purposes. No express provision contained in SADC's constitutive instruments confers on the SADC Summit authority to suspend the operation of the Tribunal nor is it permitted to both not renew the terms of office of Tribunal members and not appoint new judges to fill the resulting vacancies. These powers are also not implied. They could not be where such powers result, as the SADC Summit decision of 17 August 2010 does, in there being fewer than ten members of the Tribunal and so directly contradicting article 3(1) of the Tribunal Protocol which requires that the Tribunal "shall not consist of less than ten (10) members."

49. For these reasons, it is submitted that the SADC Summit has acted *ultra vires* the provisions of its constitutive instruments. SADC may resolve this invalidity by appointing six new judges to the Tribunal or renewing the terms of the previous mandate holders in compliance with the provisions of the Tribunal Protocol.

50. The SADC Summit however has not only acted *ultra vires* because of procedural irregularity, it is has also acted *ultra vires* because of substantive irregularity.

[22] See case discussion *supra* note 8 at 206.

51. It is a well established principle of treaty law that provisions of a treaty that contravene *ius cogens* are invalid.[23] This principle applies to–

> "decisions taken by virtue of or under the constitution by the organization. Apart from the limitation on powers which are written into the constitution of an organization or the limitations implicit in the express or implied grant of powers, it follows that an organization cannot exercise its powers so as to violate ius cogens , even though a constitution may permit or leave room for such an exercise ... *If such a resolution were to be adopted by organization it would be ultra vires the organization because of substantive irregularity, regardless of how the terms of the constitution may be interpreted."*[24] (Emphasis added)

52. The effect of the SADC Summit's decision is to leave SADC citizens without judicial recourse for the duration of the effective suspension. Although the right of judicial recourse in its undiluted form is not recognised as a norm of *ius cogens* or peremptory norm, those judicial guarantees essential for the protection of *ius cogens* rights – freedom from slavery, torture and cruel, inhuman and degrading treatment, etc – are considered themselves *ius cogens* norms.[25] A decision abrogating judicial guarantees of such rights would be *ultra vires* the organisation because of substantive irregularity. The SADC Summit decision draws no distinction between the judicial protection offered to SADC citizens by the Tribunal in respect of such *ius cogens* rights and other rights, instead suspending the Tribunal's protection in respect of all rights. In so doing, it acts *ultra vires* because of substantive irregularity.

The Consequences of the Effective Suspension of the SADC Tribunal

53. SADC cannot act without considering the consequences of its decision, particularly where those consequences impact on fundamental rights. It is submitted that the effective

[23] *Vienna Convention on the Law of Treaties*, 22 May 1969, 1155 UNTS 331 (entered into force 27 January 1980), Art. 53.

[24] *Supra* note 8 at 214. See also P. Sands and P. Klein *supra* note 5 at 458; and N.D White *supra* note 5 at 24.

[25] See *Judicial Guarantees in States of Emergency (Arts. 27(2), 25 and 8) of the American Convention on Human Rights) (Uruguay)* (1987), Advisory Opinion OC-9/87, Inter-Am. Ct. H.R. (Ser.A) No. 9.

suspension offends judicial guarantees of judicial independence and the rights of access to justice and an effective remedy.

Judicial Independence

54. At the heart of the rule of law and democracy lies an independent judiciary, protected from interference. So important is judicial independence to these principles that provisions mandating its realisation and enforcement are to be found in almost all international and regional human rights instruments.[26] The protections surrounding that independence are well known. They include transparent appointment procedures, security of tenure, separation of powers, freedom from any outside pressure or interference and appropriate social protection.[27] An international court must be exemplary in this respect. It must both be, and be perceived to be, wholly independent of the Contracting Parties, who may also be respondents before it.

55. Judicial independence is not solely about the question of the impartiality of an individual judge, but also involves the institutional framework in which judges function. One such structural safeguard is that all judges should be accorded a high degree of security of tenure of office. The UN Basic Principles on the Independence of the Judiciary requires that judges shall have guaranteed tenure until a mandatory retirement or expiry of their term and that their terms of office and independence shall be adequately secured by the law.[28]

56. Article 6(1) of the Tribunal Protocol provides that the members shall be appointed for a term of five years and may only be re-appointed for a further term of five years, giving content to the SADC Treaty's own stipulation that members of the Tribunal shall be

[26] *Basic Principles on the Independence of the Judiciary,* GA Res. 40/32 and 40/146, UN GAOR, 7th Sess., UN Doc. E.86.IV.1 (1985) at para 1. See also *Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa,* art. A(4) G, M. and. R; *Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights* Art. 17; *International Covenant on Civil and Political Rights* (*ICCPR*) Art. 14(1); *Universal Declaration of Human Rights* (*UDHR*) Art.10; *Grand Bay (Mauritius) Declaration and Plan of Action* Organization of African Unity (*OAU)* MIN/CONF/HRA 12 to 16 April, 1999 Art. 4; *Kigali Declaration*, MIN/CONF/HRA/Decl.1 (I) Art. 5.

[27] See *Campbell and Fell v United Kingdom* (1984), 80 E.C.H.R. (Ser.A) at 78 and *Incal v Turkey* (1998), 78 E.C.H.R. at 65.

[28] *Basic Principles on the Independence of the Judiciary,* GA Res. 40/32 and 40/146, UN GAOR, 7th Sess., UN Doc. E.86.IV.1 (1985) at paras.11 and 12.

appointed for a specified period.[29] Clearly, the intent of such provisions is to provide Tribunal members with secure, settled tenure allowing them to engage in deliberation and render judgement safe from the threat that unpopular judgment may expose them to removal from office. In the present case, the SADC Summit has not appointed Tribunal members as per the SADC instruments' requirements but simply retained them in office without any contractual terms specifying the period that they will continue to hold office. The members are currently holding office solely for the purpose of finalising cases before them. In so doing, the SADC Summit violates the seminal requirement of judicial independence.

The Right of Access to Justice and an Effective Remedy

57. The right of access to courts and to an effective remedy are key aspects of the rule of law. Justification for these rights, enshrined in the legal systems of SADC member states and inscribed in countless international and regional human rights instruments,[30] is to be found in the idea that in a constitutional democracy founded on the rule of law disputes between the state and its subjects, and amongst its subjects themselves, should be adjudicated upon in accordance with law. The more potentially divisive the conflict is, the more important that it be adjudicated upon in court. That is why a constitutional democracy assigns the resolution of disputes to an impartial and independent tribunal, court or forum.

58. The Tribunal held in the case of *Mike Campbell (Pvt) Ltd and others v Zimbabwe* that:

> "It is settled law that the concept of the rule of law embraces at least two fundamental rights, namely the right of access to courts and the right to a fair hearing before an individual is deprived of a right, interest or legitimate expectation … Article 4 (C) of the Treaty obliges SADC states to respect principles of human rights, democracy and the rule of law and to undertake under article 6(1) of the Treaty 'to refrain from

[29] Art. 16(1) of the SADC Treaty.

[30] With regard to the right to access to justice see for example *ICCPR* Art. 2 and 14(1); *UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power,* (1986) GA Res. 40/34 Art. 5, 6 and 8. The right to an effective remedy is guaranteed by the *UDHR* Art. 8; *African Charter on Human and Peoples' Rights* (*ACHPR*) Art. 7(1); 2003 *Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa* DOC/OS(XXX)247 Art. C; *American Charter on Human Rights* (*ACHR*) Art. 25; *European Convention on Human Rights* (*ECHR)* Art. 13.

> taking any measure likely to jeopardise the substance of its principles, the achievement of its objectives and the implementation of the provisions of the Treaty."[31]

59. Although these rights are invoked most frequently in a domestic context, the very rationale for the establishment of regional and sub-regional courts and tribunals over the past half-century has been to remedy deficiencies in realising and enforcing these rights in domestic contexts.[32]

60. The complementary role of regional and sub-regional tribunals has been thus characterised:

> "The role of international tribunals is subsidiary and only becomes necessary when the state has failed to afford the required relief. However, the role of the international tribunal is important to the integrity of the human rights system and victims of violations, particularly when the state deliberately and consistently denies remedies, creating a climate of impunity." [33]

61. Regional and sub-regional courts manifest the right of access to justice and an effective remedy for those persons and bodies for whom the domestic context offers no such access or does so inadequately and they thereby ameliorate the deficiencies of the domestic system in respect of these rights. They provide, as it were, the safety-net or last resort in respect of the right of access to justice and to an effective remedy. In establishing a court or tribunal, such regional or sub-regional initiatives voluntarily and expressly undertake to realise the right of access to justice and to secure an effective remedy for those falling within their jurisdiction. Thus, even if one is denied the right of access to justice or an effective remedy at the domestic level, the existence of a sub-regional court, such as the SADC Tribunal, guarantees it at the supra-national level.

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[31] *Mike Campbell (Pvt) Ltd and Others v The Republic of Zimbabwe* [2008] SADC Case no. SADC (T) 11/08 at 35.

[32] Most treaties and protocols establishing regional and sub-regional tribunals and their procedures stipulate that such tribunals will only assume jurisdiction in matters where the applicant has exhausted all domestic remedies. See for example: Art. 46(a) of the *ACHR*; Art. 26 of the *ECHR*; Art. 50 *ACHPR* and Art. 15(2) of the SADC Treaty. Although interpretations of this requirement vary it is clear that the purpose of regional tribunals is to guarantee legal recourse where despite attempts at the domestic level legal recourse is denied or is unavailable.

[33] D. Shelton, *Remedies in International Human Rights Law* 2ed (Oxford University Press, 2001) at 15.

62. However, the SADC Summit decision means that the Tribunal is unable to receive and adjudicate on legal disputes between citizens and SADC states or institutions and is unable to exercise its jurisdiction as a labour court for SADC employees.[34] For the period allocated for the review process, persons suffering violations of those rights protected within the SADC framework will have no access to justice at the sub-regional level once domestic remedies have been exhausted. The inability of citizens to access the Tribunal has also rendered the right to an effective remedy illusory within the SADC context. Those suffering violations of the rights protected under the SADC framework have therefore been denied the possibility of any redress at the sub-regional level as the Tribunal is unable to hear any new petitions until the review exercise has been completed.

Other Considerations

Failure to Ensure Institutional Balance within SADC

63. In evaluating the validity of the Summit's decision to effectively suspend the Tribunal regard must also be had for the principle of institutional balance. Resembling the principle of separation of powers observed in most constitutional democracies, institutional balance serves to prevent the concentration of uncontrolled power in a single institution. It governs the relationships between institutions in international organizations requiring that all, "institutions, in exercising their competences, have to respect each other's competences."[35] This principle has been enunciated by the European Court of Justice (the ECJ) where, in relation to institutions in the European Union, the ECJ held that:

> "Observance of the institutional balance means that each of the institutions must exercise its powers with due regard for the powers of other institutions. It also requires that it should be possible to penalize any breach of that rule … it is the Court's duty to ensure that the provisions of the treaties concerning the institutional

[34] Art. 19 SADC Tribunal Protocol.

[35] H.G Schermers and N.M Blokker *supra* note 2 at 164.

> balance are fully applied and to see to it that the Parliament's prerogatives, like those of other institutions, cannot be breached."[36]

64. The East African Court of Justice (the EACJ) has also shown itself concerned for the principles animating the concept of institutional balance. Affirming the principles of independence and separation of powers between key organs (the Summit, Assembly, the Council and the Court) of the East African Community (EAC), the EACJ held in relation to the independence of the Assembly and Council, that:

> "[T]he Assembly is a representative organ in the Community set up to enhance a people centred cooperation, its independence under Article 16 of the Treaty should be preserved *because the Treaty has not endowed the Council with any power to interfere in the operation of the Assembly*."[37] (Emphasis added)

65. In referencing specific spheres of competence, the EACJ acknowledges that organs and institutions of the EAC must act as checks and balances with regard to each other, ensuring that none dominates the other.

66. The principle of institutional balance is also applicable to SADC and its institutions in carrying out their functions. SADC institutions must operate independently, discharging their mandates within their respective spheres of competence. The Tribunal has been mandated the critical competence of ensuring adherence to the law and procedures governing SADC institutions. Yet the SADC Summit's decision prevents the Tribunal from fulfilling these functions, interfering with the judicial sphere and so violating the principle of institutional balance.

The Motivation for the Effective Suspension

67. The decision to undertake review of the Tribunal and additionally to not renew the terms of office of sitting judges or appoint new judges to replace them appears to have been

[36] *Parliament v Council* Case C-70/88 ECR 1990 at 2073.

[37] *Mwatela and Others v East African Community* [2006] EACJ 1 at 20.

precipitated by Zimbabwe's challenge to the legality of the Tribunal. The Tribunal has earned Zimbabwe's enmity by rendering judgment against Zimbabwe in respect of a line of cases dealing with land disputes. Zimbabwe has long ousted the jurisdiction of its own domestic courts to deal with land disputes and through its challenge of the Tribunal now appears to have secured a temporary ouster of the jurisdiction of the Tribunal.

68. Various legal opinions in response to Zimbabwe's challenge suggest that the challenge is without merit.[38] Thus far, however, no official response has been elicited from SADC and certainly no defense of the Tribunal has been raised. Nor has the Council responded to the Tribunal's referral of Zimbabwe's defiance of Tribunal rulings to it for appropriate action, such as suspension. Given this silence, and the failure to adopt less drastic action – for instance a review of the Tribunal not coupled with its effective suspension – the apprehension arises that the SADC Summit decision has been propelled by Zimbabwe's objectives and was accordingly taken in bad faith.[39]

The Absence of Public Participation

69. The SADC Summit's drastic decision to effectively suspend the Tribunal was taken without adequate consultation with and participation of civil society, the SADC Parliamentary Forum or Pan-African Parliament. Nor did the SADC Summit indicate that the review process itself would involve such consultation and participation. It is doubtful even that the Tribunal will be involved in the review process. Accordingly, appropriate regard was not had for article 23 of the SADC Treaty which provides:

> "1. In pursuance of the objectives of this Treaty, SADC shall seek to involve fully, the people of the Region and key stakeholders in the process of regional integration.

[38] See "In Re: The Status Of Rulings By The South African Development Community (SADC) Tribunal Vis-À-Vis The Government Of Zimbabwe," an opinion prepared by JJ Gauntlet (SC) *et al* available at: http://www.zimbabwedemocracynow.com/2009/09/04/legal-opinion-re-zimbabwe-and-the-juristiction-of-the-sadc-tribunal/; "Re: Submissions made by the Minister of Justice, Zimbabwe, as to The Legal Competence of The SADC Tribunal, The Enforceability of its Decisions, and the Legal obligations of the Zimbabwean Government as they Relate to the Tribunal" an opinion prepared the Southern Africa Litigation Centre available at: http://www.southernafricalitigationcentre.org/library/folder/24.

[39] See the discussion of decisions made in bad faith by the East African Court of Justice (EACJ) in *East African Law Society and Others v The Attorney General of the Republic of Kenya and Others* (*EALS case*) [2008] EACJ 1 at 31-40.

2. SADC shall co-operate with, and support the initiatives of the peoples of the Region and key stakeholders, contributing to the objectives of this Treaty in the areas of co-operation in order to foster closer relations among the communities, associations and people of the Region.

3. For the purposes of this article, key stakeholders include:

a) private sector;

b) civil society;

c) non-governmental organisations; and

d) workers and employers organisations."

70. Further, the absence of mandated participation and consultation of all interested parties is in violation of principles of democracy as provided for in article 4(c) of the SADC Treaty. The African Charter on Democracy, Elections and Governance provides in article 3 for "the effective participation of citizens in democratic and development processes and in governance of public affairs."[40] Although it has not yet entered into force the African Charter on Democracy, Elections and Governance is being promoted by the AU as one of the key instruments for the achievement of peace, development, good governance and promotion of human rights on the continent. It provides guidance on the scope and content of democracy and good governance. SADC, its institutions and its member states have already flouted its provisions.[41]

[40] *African Charter on Democracy, Elections and Governance*, (2007) AU Assembly, 8th Sess., Art. 3 (not yet entered into force).

[41] See the *EALS case supra* note 39 where the EACJ held in relation to article 30 of the East African Community Treaty, the content of which is similar to article 23 of the SADC Treaty, that:

> "It is common knowledge that the private sector and civil society participated in the negotiations that led to the conclusion of the Treaty among Partner States and, and as we have observed, continue to participate in the making of Protocols thereto. Furthermore, as we noted earlier in this judgment, Article 30 entrenches the people's right to participate in protecting the integrity of the Treaty. We think that the construing the Treaty as if it permits sporadic amendments at the whims of officials without any form of consultation with stakeholders would be a recipe for regression to the situation that lamented in the preamble of '*lack of strong participation of the private sector and civil society'* that led to the collapse of the previous community ... failure to carry out consultation outside of the Summit, Council and Secretariat was inconsistent with a principle of the Treaty and there constituted an infringement of the Treaty" at 30-3.

Although this infringement did not convince the court to declare the amendments invalid, the court did recommend that the challenged amendments be revisited.

Length of the Review Process

71. Although the SADC Summit indicated that the review process is to be completed within a six month period, the reality is that it will take far longer for a draft amending protocol to be finalised, adopted, ratified, enter into force and implemented. It should be understood that the review itself is a contentious process which raises political as well as legal questions. For example, it took the European Union nine years to draft, adopt, and implement Protocol number 14 to the European Charter – an amendment intended to strengthen the European Court's effectiveness as well as guarantee the independence and impartiality of its judges.

72. No assurances have been given that the Tribunal will be returned to full operation at the completion of the review process and there exists the prospect that its incapacitation may remain in place for the entire duration of resulting amendment, adoption and entry into force – a process likely to take, at a minimum, several years.

Recommendations

73. In light of the legal implications of the decision to review the role, function and terms of reference of the Tribunal, we call on the SADC Summit of Heads of State and Government to:

    a. Immediately call an extraordinary summit for the purposes of remedying its decision of 17 August 2010.
    b. Immediately renew the terms of those Tribunal members eligible for reappointment or appoint new Tribunal members in terms of article 4 of the Tribunal Protocol so as to ensure the proper functioning of the Tribunal.
    c. Immediately repudiate any instruction, course of action or policy to the effect that the Tribunal may not hear any new cases during the review process.
    d. Respect, in accordance with international law, the independence of the judiciary by upholding the right of Tribunal members to security of tenure and independence;
    e. Ensure SADC citizens have access to justice and an effective remedy at the sub-regional level.

f. Facilitate the participation by all interested parties in the review process in terms of article 23 of the SADC Treaty.
g. Formulate a systematic process for review of the Treaty, including by establishing a multi-stakeholder Task Force or Committee, and giving it clear terms of reference, timelines, benchmarks and milestones, to ensure that the process and its outcome is comprehensive and in the best interests of SADC and its peoples.