

Politics and International Law: Analyzing Zimbabwe's Rejection of the SADC Tribunal's Dicta

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Abstract: Zimbabwe's rejection of the Southern Africa Development Community (SADC) Tribunal ruling in 2008 and subsequent withdrawal from it in 2009 raised a lot of questions pertaining to the interplay of law and politics in resolving conflicts. The ruling sought to press the Zimbabwean government to put an end to the grabbing of farms and properties of white land owners in Zimbabwe. This followed the Fast Track Land Reform Programme which Zimbabwe embarked on in 2000. The programme received condemnation from the international community. Among the affected white farmers were Mike Campbell who and others, brought the matter to be heard in the SADC Tribunal in accordance with Article 15 (1) of the SADC Protocol. The case became known as Campbell and 78 others v Zimbabwe, the Campbell case in short. The decision of the SADC Tribunal in Campbell and 78 others v The Republic of Zimbabwe Case 2/2007 in which judgment was delivered on 28 November, 2008 will be used to analyze the nexus between politics and international law in resolving conflicts. Zimbabwe dismissed the ruling on the constitutional basis that the SADC Tribunal is not superior to Zimbabwean national courts. Various other conflicting reasons are to account for the country's stance towards the ruling of the court. From a political perspective, this study analyses the complex relationship between international law and politics in settling disputes. The conclusion drawn from this contribution is that politics takes centre stage in resolving conflicts involving international law. To fail to recognise this is a fools errand which encourages wishful thinking which confronted with reality will fail.

Key words: Politics, international law, conflict, SADC Tribuna, Zimbabwe

INTRODUCTION

Since Aristotle, law and policy have never been separable. No matter what theory of law or political philosophy is professed, the inextricable bonds linking international law and politics must be recognised (Shaw, 2003). In contextualizing the issues arising from the SADC Tribunal ruling and Zimbabwe's rejection of the ruling, therefore one would safely argue that due to the centrality of politics, international law fails to create an environment that is efficacious and just. It should, however be noted that international law is not a source of instant solution to problems of conflict and confrontation facing the international community (Shaw, 2003), partly because of the importance of politics in international relations. In other words, politics is the point of departure in settling in disputes involving any legal system. That is why realists would contend that issues to do with human rights, democracy and the rule of law among others are lower politics and state survival and power are higher politics.

THE CAMPBELL CASE AND THE SADC TRIBUNAL'S RULING

In the Campbell case which revolved around the controversial land reform programme in Zimbabwe, the

tribunal's final ruling in May, 2008 found Zimbabwe guilty of violating the applicants right to property, right not to be discriminated and the right of access to justice. The tribunal ordered the Zimbabwean government to take no steps or permit no steps to be taken, directly or indirectly, whether by its agents or by orders to evict from or interfere with the peaceful residence on and beneficial use of their properties in respect of the applicants', Campbell and others (SADC Tribunal Ruling, 2008). This was aptly stated. But, Zimbabwe's response was stunning.

Defiantly, Zimbabwe openly challenged the jurisdiction of the SADC Tribunal. The government of Zimbabwe through the Attorney general's office repudiated the ruling on the grounds that constitutionally, Zimbabwe does not consider the SADC Tribunal superior to national courts in the land. Admittedly, this reflects the superiority municipal law has over international law, although not in all circumstances. The office of the Attorney general clearly stated that the provisional ruling of the SADC Tribunal could not override the constitutional powers vested in his office to prosecute violators of any of Zimbabwe's criminal laws, such as section 3 of the Gazetted Land Act. In addition, the government vowed to proceed with prosecutions.

This was without consequence simply because compliance with rules and principles of international law and court orders is based on the consent of states. Under the doctrine of consent, states may opt to agree or disagree to be bound by rules of international law. They often disagree to recognize certain rules and court orders which might negatively affect their national interests. This was the case with Zimbabwe's repudiation to the SADC Tribunal ruling. National interests of Zimbabwe defined in terms of land redistribution could have been distracted had Zimbabwe accepted the ruling. The position Zimbabwe took was more political than legal. Undoubtedly, this reflects the superiority of politics and its unshakable grounding in international legal and political systems.

Be that as it may, Zimbabwe's rejection of the SADC Tribunal's ruling is justified from a political perspective. This is because of the trite doctrine that the international legal system is built on, the notion of consent (Brand, 2007). In legal theory, no state can be held bound to a rule of international law, other than *jus cogens*, unless that state has consented to the rule by way of signing a treaty or in recognition of customary norms through state conduct. Sovereignty is the underlying factor for this. All states are equal in legal theory due to the concept of sovereign and states more often than not invoke this concept as a moral imperative to justify their political objectives and actions. Whilst recognising the SADC Tribunal's mandate to resolve conflicts in member states, Zimbabwe's repudiation to the ruling indirectly hurled the dice of sovereignty to the court's face.

CONTENDING ISSUES FROM THE DICTA

Political environments are premised on two logics of actions what James March and Johan Olsen called logic of consequences and logic of appropriateness (Krasner, 2001). The international political environment is not an exception. According to the logic of consequences, political actions and outcomes are a result of rational calculating behavior designed to maximize a given set of unexplained preferences. The logic of appropriateness understands political action as a product of rules, roles and identities that stipulate appropriate behavior in given situations. These 2 logics are not mutually incompatible but their importance varies across environments. Exercising its jurisdiction to settle the dispute between Campbell and others v the Republic of Zimbabwe, the SADC Tribunal was informed by the logic of appropriateness. On the contrary, Zimbabwe's perceived defiant behavior can best be envisaged along the lines of the logic of consequences.

From the perspective of international law, the SADC Tribunal's dicta can potentially warrant analysis from three different angles. First, Article 16 (5) of the SADC Treaty empowers the tribunal to make final and binding judgments and decisions (SADC Treaty). This implies that the court has compulsory jurisdiction which is not the case. The SADC Tribunal Protocol 6 does not establish the tribunal as a court of superior jurisdiction in the territories of the SADC member states. This is in accordance with the protocol of the tribunal and the Rules of Procedure thereof adopted in 2000.

On 28 November, 2008, the SADC Tribunal's jurisdiction was challenged when Zimbabwe refused to be bound by the ruling. This amounts to disregarding the powers vested in the tribunal. Under international law, states are permitted to refuse to be bound by court's rulings. In view of this, it is clear therefore that political not legal decisions carry the day. Second, Zimbabwe's rejection of the court's decision disfigured the tribunal and proved it to be incompetent. Nothing was done to sanction Zimbabwe for being defiant. Third, the existence of the SADC Tribunal and its purported jurisdiction on Zimbabwe was unlawful. According to Zimbabwe's Justice and Legal Minister, Patrick Chinamasa, the court did not exist by law and as such Zimbabwe would not appear before it anymore and neither would the government be bound by any decisions already made or future ones emanating from there (The Herald, September 2007). This holds much water given the upright fact that the protocol has not been ratified by two thirds of SADC member states.

This followed a meeting of SADC Justice Ministers and Attorneys-General in South Africa from July 27 to August 3, 2009 that proved the protocol on the Tribunal and rules of providing for the composition and powers governing the court had not yet been ratified by two thirds of SADC members (The Herald, September 2007). To reiterate, there was never any legal basis upon which the tribunal could have purported to found jurisdiction on Zimbabwe grounded on the protocol not yet ratified by two thirds of SADC member states as required by the rules and principles governing the 15 nation regional grouping. Therefore, Zimbabwe's rejection of the ruling and subsequent withdrawal from the tribunal has legal and legitimate justification based on the mentioned earlier.

Consequently, the application of the provisions of the SADC Protocol on Zimbabwe was a serious breach of international law, Chinamasa reiterated (The Herald, November 2007). For the same reasons, any decisions that the tribunal made or might make in future against the Republic of Zimbabwe are considered null and void.

From the view point of politics the same dicta warrant analysis from 2 different fronts. First, Zimbabwe's rejection of the ruling can best be explained in political terms. Whether or not the existence of the SADC Tribunal is lawful, Zimbabwe's refusal to be bound by SADC Tribunal rules was more political than legal. For political reasons, under international law it is permissible to refuse to consent to certain rules and principles as well as court judgments. This is because international law is essentially based on consent and international tribunals do not have compulsory jurisdiction. The SADC Tribunal is not an exception. International law is not imposed on states (Wallace, 2005). States have to agree to be bound by rules and principles of the international legal system. Critics point to this as an inherent weakness of international law. Their basis is on comparing international law and municipal law which is not logical. One should realize and appreciate that these 2 are unique in their own domains. This can only be understood if one approaches international law from the prejudice of a politician not a lawyer. Taking the issue of the doctrine of consent into consideration, it is imperative to note that those who crafted international law did so with the importance of politics in mind.

Second, the issue of national interests is the point of departure in making political decisions. National interests are basic determinants that guide government policy in relation to the external environment (Newnham and Evans, 1990). In realist terms, the international system is a jungle in which the fit survives. Actors always look for opportunities to devour, exploit and manipulate each other. States cannot entrust their welfare and security even with the organizations (in this case SADC) they created themselves. Against this background, Zimbabwe's repudiation of the tribunal's judgment occurred in safeguarding the country's economic interests defined in terms of black empowerment through land acquisition. The tribunal had ruled that Zimbabwe should stop grabbing white-owned farms as part of the land reform programme. Essentially, the purpose of the programme was to resettle the land with landless blacks.

It is trite to point out that since independence Zimbabwe has always tended to follow the realist worldview or in other words pragmatic realism. It follows that Zimbabwe's relations in the international environment have not been guided by fixed ideas. Pragmatism or contingency has rather dictated the nature and type of relations in the international system. The underlying denominator has been the sustained pursuit of national interests. For that matter, no state or organization of any kind has been perceived as indispensable.

As applied to Zimbabwean politics, realists view the state, as the most important actor on the international plane. The basis for this is that the state answers to no higher authority since there is no world government. International organizations and tribunals are there but they do not possess full legal personality and lack compulsory jurisdiction under international law. Since there is no world government, the anarchic environment warrants self-help as the most important principle. Hence, Zimbabwe's rejection of the SADC Tribunal ruling can be explained from this angle. State sovereignty, a cornerstone of international law, gives states the right and responsibility to do what they deem necessary to advance their interests and guarantee survival.

Moreover, hardcore realists view the respect for moral principles, as wasteful in the continued pursuit of national interests. In the Campbell case, compliance with the SADC Tribunal's ruling was constrained by national interests. Such a phenomenon is not new to international relations and international law. Usually states comply with international law when rules align with their self-interests. The Campbell case saw Zimbabwe's economic interests undermined. They were undermined in the sense that the tribunal ordered the government of Zimbabwe to put an end to the historic programme of seizing white-owned farms. Tampering with a country's interests usually invokes untold hostility. It is as good as undermining its national security. To this end, Zimbabwe's response to the tribunal's dicta was in such a way that her security was impinged. The response, ruling out the dicta on the basis of the court's jurisdiction and withdrawal from the tribunal was designed to guarantee maintenance of and safeguarding Zimbabwe's economic interests.

IMPLICATIONS OF THE TRIBUNAL'S RULING AND ZIMBABWE'S ACTIONS

It should be borne in mind, therefore that politics and international law often do not work hand in hand especially in resolving conflicts. The explanation is simple. What actually exists between international law and politics is a zero-sum game. What transpired in the Campbell case depicts that the relationship between international law and politics is a game of pure conflict and there is no cooperation at all. Instead of cooperating to settle disputes, the two are totally antagonistic. In a majority of cases political decisions surpasses legal ones, just like in the Campbell case.

Because of the influence of politics, skeptics would point to international law's lack-luster performance and dismal failure in resolving conflicts as a weakness of the

international legal system. Others would question the legal quality of international law. There is an argument that international law does not qualify to be called law partly because it lacks compulsory legal binding effect. Arguably, international law has in many cases successfully failed to resolve conflicts because of the above reason. Concerning its legal quality, international is law because states accept and recognize it as such. It should, also be understood that international law is still developing and it is designed to ensure co-existence of states in the international political and legal environment in which politics and political survival is the name of the game.

Another borne of contention in the Campbell case is related to the controversial concept of sovereignty. Sovereignty refers to having supreme independence, freedom and authority over a territory (Steiner *et al.*, 1994). Though controversial, sovereignty is the central concept of political and legal arrangements of the modern world. The theory of sovereignty states that sovereignty means independence that is non-interference by external powers in the internal affairs of another state (Krasner, 2001). By and large, sovereignty implies exclusive right against intervention by any foreign or international power. Therefore, the concept implies that there is no higher authority than the state, hence no international law rule is legally valid unless the state has consented to it. Zimbabwe's repudiation of ruling was centered on this. However, it should be noted that sovereignty should not be exercised without due regard to reason.

Faithful analysis of Zimbabwe's repudiation of the dicta partly reveals how sacred sovereignty is to Zimbabwe. The country does not tolerate any state or any organization to meddle in her internal affairs. As stated before, Zimbabwean politics is guided by the realist school of thought. One of the tenets of realism contends that states should never entrust the task of self-protection to international security organizations or international law and should by all means resist efforts to regulate international behavior through international governance (Krasner, 2001). Judged by these standards, Zimbabwe refused to entrust the task of safeguarding her national interests, measured in terms of land redistribution for economic development to the SADC Tribunal, as this would have had obvious drastic consequences on them.

Because of what transpired in the Campbell case, cynics would point to the ineffectiveness of the

international legal system and its respective courts or tribunals. Such, skeptics often expect international law to be a source of solution to problems of conflict which is and should not be the case. Others would argue that international law is not a form of law because it fails to create an environment that is predictable and just. Austin (1961) offers an interesting and ground-breaking observation pertaining to arguments against international law. According to him, the existence of law is one thing, its merits or demerits is another. Whether it be or not be is one inquiry whether it be or not be conformable to an assumed standard is a different inquiry. A law which actually exists (and can be described as such) is a law, though researcher may happen to dislike and though it may vary by text, it is the means by which researchers regulate the approbation and disapprobation (Austin, 1961). Judged by Austin's argument, failure by the SADC Tribunal to handle or adjudicate the Campbell case in favor of the white farmers should not be used as pretext to disqualify legal quality of international law and the importance of international tribunals.

CONCLUSION

The many faces of politics surpass international law in resolving conflicts. One does not need to be harangued by a rocket scientist to acknowledge the importance and centrality of politics in resolving internal conflicts. Politics is the departure point in settling disputes in international relations. International law as a body of rules and principles designed to administer international relations fails to perform its duties whenever politics is involved.

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