



IS AFRICA READY FOR SUPRANATIONAL COURTS?

In the heated discussions on the role of the International Criminal Court (ICC) in Africa, the idea to create a regional criminal court for the African continent has emerged. Such a court would take away much of the critique that the North is targeting Africa, and would enable an African solution to African problems. There is no doubt that an African court has the potential to enhance the legitimacy of international criminal law. The question is whether it is realistic to expect much from such a court.

Regional and Sub-Regional Courts in Africa

In the course of the last decade, Africa has witnessed the establishment of various supranational courts, including the African Court on Human and Peoples' Rights and, at the sub-regional level, the Economic Community of West African States (ECOWAS) Court of Justice, the East African Community (EAC) Court of Justice and the Southern African Development Community (SADC) Tribunal.

The creation of each of these courts was initially hailed as an important contribution to the strengthening of the rule of law and the protection of human rights. Yet, only a few years later, the initial optimism seems to have disappeared and been replaced with scepticism. None of these courts have an impressive track record and, more worrisome, some of them cannot fulfil their functions independently.



The Plight of the SADC Tribunal

Consider the SADC Tribunal. Problems started in late 2008 when this Tribunal in *Campbell vs. Zimbabwe* and a series of similar cases held that Zimbabwe had breached the SADC Treaty by compulsorily acquiring farms from white landowners without offering them proper compensation and denying them access to court. Zimbabwe refused to honour the judgments. As President Mugabe put it, the judgments were ‘nonsense’ and ‘of no consequence’. Land issues would be Zimbabwean affairs, not SADC affairs. The SADC Summit did not push Zimbabwe to comply with its treaty obligations. Rather, in August 2010, it ordered a review of the Tribunal’s role, functions and terms of reference. The review, initially conducted by the World Trade Institute Advisors (WTIA), was completed in the early part of 2011 and resulted in a series of recommendations, all aimed at strengthening the Tribunal and the enforcement of its decisions.

The outcome of the WTIA review was not what SADC’s leaders had hoped for. At the Extraordinary SADC Summit held in Namibia on 20 May 2011, the SADC leaders appeared still unwilling to take a stance against Zimbabwe. They decided not to endorse the WTIA recommendations and to assign the Ministers of Justice/Attorneys General to conduct yet another review. The SADC leaders further decided not to reappoint or replace judges. Also, they prohibited the Tribunal from receiving any new cases or hold hearings until the review process is completed by August 2012. In essence, the Tribunal has been suspended for at least one year, and one wonders when, if ever, it will resume its work.



The East African Community Court of Justice

In the East African Community (EAC) politics seem to prevail over the rule of law as well. In 2006 the EAC Court of Justice, in *Anyang' Nyong'o vs. the Attorney General of Kenya*, prevented the swearing in of nine Kenyans as members of the EAC Legislative Assembly on the ground that they had been appointed and not elected as prescribed by the Treaty. Similar to the SADC example, the EAC politicians took their revenge. Instead of upholding the Court's decision and requiring Kenya to comply with its treaty obligations, the EAC legislators amended the Treaty and extended the grounds for removal of judges.



Is Africa Ready for a Regional Criminal Court?

Against this background, is it realistic to have high hopes for an African regional criminal court? African States sign treaties and protocols creating supranational courts only to undermine their efficacy as soon as the judges show independence. The political climate in Africa does not seem to favour judicial independence, both at the regional and national levels. African Judges of the ICC, far removed

from the atrocities and politics of African States and the African Union, have shown themselves to be independent and can be credited for some of the high profile ICC indictments against African rulers.

The notion of a regional criminal court for Africa is appealing, but the continent and its people can only welcome it when the court can truly function as an independent body. If it were to end up as an extended arm of those occupying the political driver's seat, a regional court would have no added value and become yet another example of politics prevailing over the rule of law.



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