



**STATEMENT OF THE PARTICIPANTS
IN A ROUND TABLE ON THE RESTORATION OF THE SADC TRIBUNAL
HELD AT CENTRE FOR HUMAN RIGHTS, FACULTY OF LAW, UNIVERSITY OF PRETORIA
28 and 29 AUGUST 2014**

1 The SADC Summit has made a number of decisions regarding the SADC Tribunal that have severely undermined, if not destroyed, the rule of law at the regional level.

2 The rule of law, upon which human rights depend, is a basic feature of a democratic society. In its absence, a society cannot be considered democratic. One of the core elements of the rule of law is access to justice. This means that individuals have the right to approach a court of law in order to protect their human rights. The SADC Summit has amended the Tribunal Protocol to remove this right of access to justice at the regional level. Individuals will no longer have access to the Tribunal. This is a step backward for democracy in the region.

3 The Centre for Human Rights, Faculty of Law, University of Pretoria, in collaboration with the Konrad Adenauer Stiftung, held a Round Table to discuss the restoration of the Southern African Development Community (SADC) Tribunal. The Round Table was attended by different stakeholders including former judges of the SADC Tribunal; a former judge of the East African Court of Justice (EACJ); officials from the SADC Tribunal, EACJ and Economic Community of Western African States (ECOWAS) Court of Justice; lawyers from private and academic practice and officials from the Department of Justice, South Africa; the South African Law Society; researchers; and members of civil society. The objective of the Round Table was to discuss the implications of the adoption of a new Protocol by the SADC Summit.

BACKGROUND

4 At its most recent session, on 18 August 2014, Victoria Falls, Zimbabwe, the SADC Summit adopted the new Protocol on the SADC Tribunal. The main difference between this Protocol and the previous version lies primarily in article 33, which reads as follows: 'The Tribunal shall have jurisdiction on the interpretation of the SADC Treaty and Protocols relating to disputes between Member States.' The effect of article 33 is to eliminate a previously existing right of natural and legal persons (individuals) to approach the Tribunal.

5 This Protocol is not yet in force. Only 8 out of the 15 member states signed the new Protocol. The new Protocol is therefore not yet in force and will only enter into force after 2/3 of member states (10 states) have ratified the Protocol. (Article 52 provides: 'This Protocol shall be ratified by Member States who have signed the Protocol in accordance with their constitutional procedures'. Article 53, in turn, provides: 'This Protocol shall enter into force thirty (30) days after the deposit of the instruments of ratification by two-thirds of the Member States.')

At the same occasion, the SADC Summit mandated the SADC Ministries of Justice to propose a mechanism for the resolution of pending cases, and to report on this issue to the SADC Summit by August 2015.

6 Courts (or 'tribunals') have been established under most intergovernmental organisations (IGOs) in Africa, including sub-regional economic communities. Prominent amongst them are the Courts of Justice of the ECOWAS and the East African Community (EAC). All courts that function effectively allow access by both individuals and states. However, the experience in the ECOWAS and East African Courts are unequivocal: in practice, only individuals make use of the courts; not states. Without individual access to these Courts, they would have been totally inactive.

7 This reality is confirmed by SADC's own experience. Prior to its purported suspension, the SADC Tribunal received 30 and finalised 24 cases, all instituted by individuals. In other words, not a single case had been received from SADC member states. Of the 24 cases instituted by individuals, six are still pending.

8 A sub-regional Court that does not allow for individual access is a white elephant. States are highly unlikely to make use of such courts. The main reasons for states' reluctance to use courts are their preference for friendly settlement of disputes and the fear of reprisals by states against which they may institute judicial proceedings.

CONCERNS

9 The Round Table noted the following with great concern:

9.1 Upon its entry into force, the new Protocol will deprive the people of SADC access to the SADC Tribunal.

9.2 The new SADC Tribunal gives access only to states. The experience with other African sub-regional communities is that no case has been brought to these courts by any state.

9.3 The abolition of individual access before the SADC Tribunal contradicts the global trend. Over the last decades, a distinct trend has emerged towards allowing individuals greater access to international courts. In Africa, this appears from the establishment of the African Court on Human and Peoples' Rights, the evolution of individual access before the ECOWAS Court of Justice, and the introduction of individual access before the East African Court of Justice. Going in the opposite direction, by withdrawing the right of access by individuals, SADC is an aberration.

9.4 A perplexing anomaly has been created in Tanzania and Malawi, which are also SADC members. These states have accepted direct individual access to the African Court and Tanzania accepts direct individual access to the EAC Court without the requirement of the exhaustion of local remedies. Under the COMESA Treaty, member states, including some SADC member states, also allow individual access to the COMESA Court.

9.5 The processes of the negotiation and adoption of the new Protocol were done in a non-transparent manner and excluded SADC citizens and civil society organisations, contrary to the letter and spirit of the SADC Treaty. SADC is committed 'to seek to involve fully' the 'people' of the SADC region and all 'key stakeholders' in the process of regional integration. The process of adopting the new Protocol completely lacked involvement of the 'people' and 'key stakeholders' such as the judiciaries, law associations, business community/leaders, civil society organisations and national parliaments. The suspension of the SADC Tribunal was also a closed process, allowing for no consultation. The 'people' of SADC were left in the dark, and were not allowed an opportunity to participate in or influence, the decision.

9.6 The SADC Tribunal initially allowed access to its employees to settle their disputes with SADC as its employer, but by abolishing individual access, employees no longer have any legal recourse. Responding to this dilemma, the SADC Summit mandated the establishment of an ad hoc Administrative Tribunal to deal with these disputes. The establishment of such a body would lead to the anomaly that some, but not all individuals, have access to judicial recourse.

OPPORTUNITIES AND STRATEGIES

10 All possible means should be explored to restore individual access to the SADC Tribunal and to understand the underlying concern for the rule of law in the SADC region.

Legal strategies

Legal bases

11 The purported suspension of the Tribunal lacks legality, inter alia, because the SADC Treaty does not allow for suspension. Moreover, the SADC Summit did not act in accordance with the Treaty's own amendment procedures. Therefore, the legality of the purported suspension of the Tribunal can be challenged.

12 The SADC Treaty and Protocols foresee the role of the SADC Tribunal in their 'applications, interpretation and implementation'. When a dispute on these issues cannot be settled amicably (see for examples, article 36(2) of the SADC Protocol on Gender and Development; article 22 of the SADC Protocol against Corruption; article 30 of the SADC Protocol on Health), these disputes may, logically, be brought by individuals. In the absence of individual access to the

SADC Tribunal, these provisions are effectively unenforceable before the Treaty's and Protocols' intended adjudicative organ.

Request for advisory opinion from the African Court on Human and Peoples' Rights

13 Legal avenues that could be explored include an advisory opinion from the African Court on Human and Peoples' Rights. In fact, a request for an advisory opinion had already been instituted. The African Court previously ruled that the case was inadmissible at the time because it was related to a case then pending before the African Commission. Since the Commission has now disposed of the matter before it, the request can be re-submitted to the Court in amplified form.

Domestic litigation

14 Cases may be filed at the domestic level, to argue that the abolition of individuals' access violates domestic constitutional law. The SADC Lawyers' Association is pursuing this route at the domestic level in SADC member states. The Law Society of South Africa is engaged in raising this matter before the appropriate South African courts.

Direct access to the African Court

15 It is possible for individuals in Tanzania and Malawi to allege a violation of the SADC Treaty before the African Court once domestic remedies have been exhausted.

Political strategies

Political actions

16 Key role players such as the Heads of State, domestic parliaments and the SADC Council of Ministers could be lobbied to desist from ratifying the new Protocol.

Cooperation

17 There should be better coordination and collaboration between interested partners to strengthen the strategies. A coalition for the Restoration of the SADC Tribunal, comprising of all SADC countries, should be formed, to bring together various organisers, institutions and participants to work towards a common objective. The coalition should lodge a campaign against the ratification of the new Protocol at the domestic level of each SADC member state, and assist in the formulation of legal arguments.

Awareness-raising

18 Civil society coalitions, including law associations, the media and academics, have the opportunity to create a critical mass to raise awareness among SADC citizens about the role of individual access.

Broader political context

19 Individual access is not a goal in itself, but aims to contribute to improve the rule of law within SADC member states. Efforts to restore individual access should be undertaken against this background.

RESOLUTIONS

20 The Round Table urges the Heads of State and Government of SADC member states to reconsider their decision to suspend the SADC Tribunal and adopt the new Protocol.

21 The Round Table urges SADC citizens to reject and protest against the decisions of the Summit adopted from August 2010 to August 2014 regarding the SADC Tribunal. This should be done through all lawful means, including petitioning national parliaments.

22 The Round Table calls on the SADC Heads of State and Government and all institutions of SADC, in consultation with all stakeholders as provided for in the SADC Treaty, to immediately embark on the revision of the SADC Treaty to

- strengthen and democratise SADC institutions, including the SADC Secretariat;
- establish a regional parliament with law-making powers; and
- create a sub-regional court with adequate jurisdiction accessible to individuals.

23 The Round Table calls on the relevant SADC organs/institutions to ensure that the process of establishing a mechanism for the resolution of cases that had been pending before the SADC Tribunal is transparent and participatory, so as to involve the 'people' and 'key stakeholders' in line with article 23 of the SADC Treaty.

24 The Round Table resolves to collaborate and support the establishment of a Coalition for the Restoration of the SADC Tribunal, comprising stake holders in all SADC countries, to campaign against the ratification of the new Protocol and to explore and coordinate alternative strategies to restore individual access to the SADC Tribunal and to strengthen democracy and improve the rule of law within SADC.

25 The Round Table calls for the restoration of individual access so that an authentic sub-regional court, the SADC Tribunal, capable of responding to the particularities of the region, would be able to dispense justice to the people of the region.