Workshop Report

Southern African Development Community (SADC) National Human Rights Institutions' Workshop on the SADC Tribunal

Theme: *Exploring the role of Southern African National Human Rights Institutions in regional efforts to create a strong SADC Tribunal*

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1.INTRODUCTION.

In August 2014 a new protocol on the Southern African Development Community (SADC) Tribunal was signed by some of the SADC member states in Victoria Falls, Zimbabwe. This followed the suspension of the SADC Tribunal in August 2010, in Windhoek, Namibia to pave the way for "a review of its roles, responsibilities and terms of reference." Although initially the review was to take only six months, it ended up taking four full years before a new protocol on the Tribunal was presented for signature in August 2014. The effect of the new Protocol is to curtail the functions of the regional court by making it an interstate court with powers to interpret only the SADC Treaty and SADC Protocols and no other legal instruments. As a result, there has been an ongoing debate among human rights advocates, scholars, legal minds and various sectors on the subject of the SADC Tribunal.

This ongoing debate has spurred many organisations and bodies to come up with various initiatives around the subject with the aim of interrogating and assessing the legitimacy, correctness as well as soundness of the SADC Heads of State and Government's decision to hamstring and review the roles of the Tribunal thereby reducing it to an inter State Tribunal.

The SADC Lawyers Association (SADCLA) and the Konrad Adenauer Stitung, (KAS) saw the need to join hands in an effort to continue with the debate on the SADC Tribunal with the hope that such debates and engagement may one day lead to the re-establishment of the SADC Tribunal as an institution that is accessible to the general citizens of the SADC region. It is against this backdrop that the two organizations hosted a regional workshop to explore the role of the region's National Human Rights Institutions (NHRIs) in the ongoing debates on the re-establishment of the SADC Tribunal.[1]

This report seeks to put on record and in perspective all the deliberations and outcomes of this important workshop. It shall provide a summary of papers presented at the workshop, the discussions that ensued and the conclusions and recommendations from the workshop which was held from 24-25 February 2016 at the Avani Hotel, Gaborone in Botswana.

[1] The Workshop was Held at Avani Hotel Gaborone- Botswana on 24 to 25 February 2016.

2.BRIEF DISCRIPTION OF KEY INSTITUTIONS AND PARTNERS.

2.1.The Konrad Adenauer Stiftung (KAS).

The Konrad-Adenauer-Stiftung (KAS) is a German political foundation. In Germany, it has 16 regional offices and two conference centers that offer a wide variety of civic education conferences and events. Their offices abroad are in charge of over 200 projects in more than 120 countries. The foundation's headquarters are situated in Sankt Augustin near Bonn, and also in Berlin.

The Foundation bears the name of Konrad Adenauer, the first chancellor of the Federal Republic of Germany. Established in 1955 as "Society for Christian-Democratic Civic Education", the Foundation took on the name of the first Federal Chancellor in 1964.

At home as well as abroad, KAS' civic education programs aim at promoting freedom and liberty, peace, and justice. They focus on consolidating democracy, the unification of Europe and the strengthening of transatlantic relations, as well as on development cooperation.[2]

The KAS Rule of Law Programme for Sub-Saharan Africa was instrumental in the conception and implementation of this activity.

2.2 The Southern African Development Community Lawyers' Association (SADC LA)

The SADCLA is a representative body of all lawyers, law societies and bar associations in the fifteen member SADC region. The SADCLA was formed in 1999 at an inaugural meeting of legal professionals in the SADC region that was held in Maputo, Mozambique.

The mission of the Association is to promote the rule of law without fear or favour. The Association also focuses on advancing and promoting Human Rights and democracy as well as good governance. In an effort to achieve this overall focus, the associations' constitution outlines succinctly the objectives of the association.[3]

2.3 The National Human Rights Institutions.

The major participants at the workshop were the SADC National Human Rights Commissions/ Institutions. Representatives from the NHRI of Malawi, Mozambique, Namibia, South Africa, Swaziland, Zambia and Zimbabwe were in attendance.

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[2] Source http://www.kas.de/wf/en/71.3628/

[3] See Article 4 of the Constitution of the SADC Lawyers Association accessed at www.sadcla.org/new1/constituion

It is generally accepted that NHRIs are fundamental in the promotion and advancement of Human Rights. These bodies where they exist[4] are creatures of the National Constitutions and their mandate is clearly defined therein.[5] As such the major thrust of the workshop was to identify the roles on the NHRIs in SADC can play in advocating for the re-opening of the SADC Tribunal with its original mandate. The objectives of the workshop in this regard were therefore:

- To spotlight the role of the NHRIs in Southern Africa in advocating for the reopening of the SADC Tribunal with its original human rights and individual access mandates.
- To discuss the link between the work of the NHRIs in Southern Africa and the SADC Tribunal
- To create a platform for engagement and collaboration between the NHRIs, the legal profession and other non-state actors in Southern Africa on the SADC Tribunal issue; and
- To come up with strategies for engagement between NHRIs and the Governments, judiciaries, Parliaments, civil society and other stakeholders in SADC on the SADC Tribunal issue.

3.OPENING SESSION

The first (opening) session was composed of the opening and welcome remarks as well as the keynote address. The Executive Director of Ditshwanelo-Botswana Centre for Human Rights, Ms Alice Mogwe chaired the first session of the workshop. She called upon the President of the Tanganyka Law Society and a SADCLA Councillor, Mr Charles Rwechungura to give his opening remarks

3.1 Welcome Remarks and Objectives of the Workshop: Mr. Charles Rwechungura.[6]

In his opening remarks, Mr Rwechungura outlined the objectives of the workshop as detailed above. He touched on key strategies to be employed towards the establishment of a strong SADC Tribunal.

[4] Not all countries in the SADC region have NHRIs.
[5] The Republic of South Africa is on the other hand one such with its Human Rights Institution style Commission with its mandate contained in Section 184 (1) of the Constitution of the Republic of South Africa Act 108 of 1996.
[6] SADCLA Councillor, President, Tanganyika Law Society.

He welcomed participants to the SADC Lawyers' Association (SADCLA) and Konrad Adenauer Stiftung (KAS) National Human Rights Commissions (NHRC) workshop (meeting) to discuss the role of the National Human Rights Institutions in advocating for the reopening of the SADC Tribunal with its original mandate. He indicated that as many of the participants were aware, a new protocol on the SADC Tribunal was signed in August 2014 in Victoria Falls, Zimbabwe.

He expressed that unfortunately the nature of the new proposed Tribunal as per the new protocol was such that it would become an interstate court and individuals, Non Governmental Organizations and even businesses would not be able to seek recourse from the Tribunal. He highlighted that it was against this background that the SADCLA, KAS and other organizations in the Southern Africa region and beyond had been and continued to engage in various efforts to ensure that the new SADC Tribunal was not a mere formality but an institution that is able to dispense justice to the citizens of the SADC region.

He added that the SADCLA in collaboration with law societies and other civil society organizations had been engaged in various advocacy, research and litigation efforts to achieve this objective.

The presenter indicated however that, during the engagements, it had been realized that key entities were being left out of the discourse on the SADC Tribunal. He further noted that some of these institutions and entities are and remain critical in ensuring that the discussion on the SADC Tribunal gets the necessary attention, in particular from our governments in the region. To this end, he indicated that SADCLA and KAS had realized that the National Human Right Commissions in the region have a particularly important role to play hence the decision to engage and collaborate with these institutions. He further expressed the hope that the workshop would not end with mere discussions, but would spur the NHRCs in the SADC region into action, in order to ensure that there is a functional and useable regional court in Southern Africa, just like in other regions in Africa. He indicated that SADCLA and KAS were ready to work with all stakeholders and provide insights from their experiences in addressing the SADC Tribunal conundrum with various entities in the region, including governments.

Mr Rwechungura thanked the participants for making the time to attend the workshop, which in his view was very important.

He spoke about the need for persistence in dealing with a difficult advocacy issue such as the SADC Tribunal issue, saying:

> *"You all know that waters have been muddied and as a result, the SADC Tribunal issue has ceased to be merely a legal or justice delivery issue but has become one of the most politicized issues in the history of SADC."*

He lamented that as a result, positions have been taken and lines have been drawn with countries basing their positions on political, historical and even sovereignty issues. As such, he said, there is therefore need to be nifty and be creative in dealing with the issue.

On the litigation efforts by the SADCLA and its member law societies/ bar associations on the SADC Tribunal issue, Mr Rwechungura noted that the litigation followed a resolution by the SADCLA at its Annual General Meeting (AGM) in Victoria Falls, Zimbabwe in 2014 that the legal profession in the region needed to take the SADC Tribunal issue before the courts for determination. Given that the SADC Tribunal itself was already suspended, the law societies were left with no choice but to take the issue before their national courts. He said the key issues that were before the courts in the countries that had undertaken the litigation were two, namely:

1). The law societies were challenging the failure by SADC regional governments to consult civil society before making the decision to suspend the SADC Tribunal. This challenge is based on Article 23 of the SADC Treaty.[7]

The SADCLA and the law societies were therefore of the view that the decision by SADC heads of state and government to suspend the Tribunal without putting the issue before the citizens of SADC for their input was contrary to the provisions of the Treaty.

2) The second issue for determination before the courts was on whether or not the suspension of the Tribunal had the effect of denying the citizens of the region access to justice. He added that this was an

[7] The Article provides that "In pursuance of the objectives of this Treaty, SADC shall seek to involve fully the peoples of the region and non-governmental organizations in the process of regional integration."

important issue, especially considering that the Tribunal was an institution that was already in place and being utilised by the citizens to obtain justice before its suspension. The suspension of the Tribunal therefore effectively meant that an institution of justice that was otherwise previously available to citizens was unilaterally withdrawn from the citizens.

He noted however that despite the disagreements between the legal profession, duly represented by the SADCLA and SADC governments on the SADC Tribunal issue and which disagreement led to the current litigation before the courts of law in various jurisdictions, an important aspect of the disagreement was that the legal profession never stopped the dialogue with the regional governments. He indicated that before lodging the applications in both Tanzania and South Africa, the legal profession in both countries advised their respective Ministers of Justice of the impeding litigation and what spurred them to take the litigation route.

Mr Rwechungura indicated that he believed that the NHRIs in Southern Africa are in a unique and strategic position to engage in advocacy efforts for the re-opening of the SADC Tribunal with its original mandate. This according to him is because the institutions have a clear and unambiguous relationship with both the State and civil society. Under normal circumstances therefore, he indicated, the NHRIs can work well with both civil society and governments in the promotion of human rights in their respective countries and at the regional level as they are trusted by both sides of the divide to take an unbiased approach in addressing human rights issues. This, he revealed, gives the NHRIs the huge responsibility of ensuring that where there are disagreements in terms of human rights issues, they can step in to provide the much needed guidance. He therefore expressed the hope that going forward, the leadership of the NHRIs in SADC on the SADC Tribunal issue would be apparent.

He wished the participants a successful meeting and indicated that he was particularly keen to see the action plan that the participants would come up with after the two days of deliberations, as this would determine the success in engaging with the SADC Tribunal issue once everybody was back in their respective countries.

3.2.Opening Remarks- Dr Arne Wulff[8]

Dr. Wulff wished participants a warm welcome on behalf of the Konrad-Adenauer-Stiftung.

[8] Director, KAS Rule of Law Programme for Sub-Saharan Africa

He proceeded to give a brief background of the Konrad-Adenauer-Stiftung and some of its work. He told the meeting that the Stiftung is a worldwide active foundation that is named after the former German chancellor Konrad Adenauer, the first German chancellor after the 2nd world war. Konrad Adenauer always believed in Democracy, Human Rights and Good Governance he added.

He further indicated that the foundation is found on five (5) continents as follows: in Bogota / Columbia for South and Middle America, in Beirut / Lebanon for North Africa and the Middle East, in Bucharest / Romania for East- and South Europe, in Singapore for Asia and in Nairobi / Kenya for Sub Saharan Africa.

Dr. Wulff noted that the more democracy is observed, the better the observation of human rights and implementation of constitutions. He highlighted existing challenges in the implementation of these principles, including the fact that leaders do not want to give up power and want to stay in office forever. The implementation of constitutions is still lacking, and the "Balance of Power" is undermined, for instance in countries like Burundi, he stated.

In line with this state of affairs, he highlighted the suspension of the SADC Tribunal and its proposed re-opening as an interstate court as an example of bad governance in that instead of promoting justice and an independent judiciary, the SADC leaders decided to disband the court.

Dr. Wulff added that every participant present in the meeting knew the reason behind the suspension of the Tribunal, which was effectively revenge by a President who felt offended by the decisions of the Tribunal. He highlighted that this was sad, and at the same time was a shame that the most developed region of Africa, the SADC region, no longer had a regional court for human rights yet the people of Southern Africa deserved such a court.

Finally he gave a vote of thanks, especially to Mrs. Makanatsa Makonese and Mrs. Prudence Mabena of the SADCLA for organizing the workshop stating:

> *"We like to cooperate with you because you are very creative and reliable. Thanks also to Gaborone and Botswana for hosting us. I am sure it will not be the last time that we are here. And last, but not least: thanks to all participants from 12 African countries for joining us. I wish us all a successful meeting."*

3.3.Keynote Address- Justice Oagile Key Dingake[9]

The above opening and welcome remarks were followed by the keynote address, which was delivered by the Honourable Justice Oagile Key Dingake. His presentation centred on the role of national human rights institutions in promoting justice and human rights through the use of international mechanisms. The Honourable Judge commenced his presentation with a quote by Justice Pillay, who stated as follows:

> *"For SADC leaders, (the establishment of the Tribunal) had been a gambit to get funds from the European Union & Others. It gave off all the buzz words, you know, democracy, rule of law, human rights". And then the SADC leaders got the shock of their lives when we said these principles are not only aspirational but also justiciable and enforceable"*[10]

The Judge went further to state that in most of the SADC member States, NHRI's are an important feature of a national human rights system and should ideally act as a bridge between civil society and governments. He indicated that these institutions should also link the responsibilities of the State to the rights of citizens and be able to connect national laws to regional human rights systems as NHRI's constitute important pillars of the regional and international system for the promotion and protection of human rights. He added that their mandate seems to resonate with the provisions of the SADC Treaty, which recognises the need to guarantee and protect democracy, the rule of law, and human rights. The SADC Tribunal, he added is a potential lead institution in this respect and a possible ally for the national human rights institutions.

He went on to indicate that, although the SADC treaty commits the regional block to democracy, rule of law and human rights, the SADC summit decision of August 2014 signals a retreat from those noble principles. This retreat according to Judge Dingake reflects the region's strong commitment to old fashioned notions of sovereignty and the principle of non-interference in the internal affairs of sovereign countries. He revealed that the above factors make it difficult to persuade governments in the SADC region to give independent judicial power to a regional court such as the SADC Tribunal. He noted that over the years the meaning of sovereignty under international law has shifted fundamentally and no longer refers to absolute power, but can best be

[9] Judge - Residual Special Court for Sierra Leone, Professor of Public Law - University of Cape Town
[10] Judge Pillay of Mauritius was the Judge President of the SADC Tribunal at the time of its suspension in 2010.

described as a dual responsibility consisting of an external duty to respect the sovereignty of other States and an internal duty to respect the basic rights of all people within the State.

He pointed to the fact that, it needs to be emphasized that the contract between the governor and the governed is binding only to the extent that the governor respects the basic human rights of the governed – a matter that is of interest not only to the citizens and their governments, but also to the world.

He indicated that on the whole, his paper discussed the arguments for and against allowing individual access to the court and attempted to make a case that NHRI's stand to benefit in the performance of their mandate from a tribunal that allows individual access than one that does not. For the audience to appreciate the essence of his intervention, Judge Dingake gave some background information on the SADC Tribunal issue. He stated that on or about August 2014, the SADC Summit adopted and signed a new protocol giving birth to the new Tribunal, following the suspension of the old Tribunal in 2010. In 2008, the Tribunal had given a ruling against the Republic of Zimbabwe in a dispute involving expropriation of private land without compensation and found Zimbabwe to be in violation of Articles 4 and 6 of the SADC Treaty. The aforesaid provisions enjoin Member States to act in accordance with the principles of democracy, human rights and the rule of law. The decision of the court was effectively brushed aside. When the matter was referred to the SADC Summit, which was the body enjoined to take action against member States for non-compliance with Tribunal rulings, the court was instead suspended. Ensuing developments led to the adoption of a new protocol in 2014 which had the effect of making the Tribunal an interstate court with no access for both natural and juristic persons.

Judge Dingake then proceeded to talk about the new SADC Protocol that established the new Tribunal with its new but diminished mandate.

He indicated that the new protocol would enter into force thirty days after the depositing of Instruments of Ratification by two thirds of member States. At the time of this presentation, the protocol had not come into force. The Judge indicated that ratification takes place in terms of the national constitutional procedures of member States.

He stated further that it is significant that, unlike the previous SADC Tribunal, the new tribunal does not enjoy comprehensive jurisdictional powers, with the new jurisdictional clause, Article 33, providing that:

> *"The Tribunal shall have jurisdiction on the interpretation of the SADC Treaty and Protocols relating to disputes between member States".*

This effectively means that individual access is not permissible.

He added that the decision not to allow non-State parties or institutions access to the court had far-reaching implications. For example, SADC employees can no longer bring employment related disputes before the Tribunal, as they used to under the previous protocol. The Judge added that he question that arises from the above is whether it matters at all that private parties and legal persons have lost the protections and locus standi that was otherwise available under the previous protocol?

This raises an important question of whether or not the individual citizens of the SADC region should be granted access to the regional court, The Tribunal. In an attempt to address this issue, Justice Dingake took the participants through an interesting and scholarly debate on the issue. He explored different points of view, both for and against the notion of individual access to the Tribunal. As a starting point to this crucial debate, he suggested that the decision to disband the SADC Tribunal and the subsequent reintroduction of the same albeit without individual access had generated a lot of debate across the continent. There are two dominant counter views to this debate, he added. There are those who are in support of the decision to reintroduce the tribunal without individual access to the court. On the other hand are those who are opposed to the decision and would want the Tribunal to retain its original mandate. Those in support of the decision to reintroduce the tribunal without individual access argue that, the primary purpose of the tribunal is to enforce the implementation of the SADC Treaty and its associated protocols.[11] They argue that the SADC treaty and its protocols govern relations between member States and impose duties upon member states rather than individual citizens of member States.[12] To them, it only makes sense that the tribunal must be a

[11] See Article 16 (1) of the SADC protocol

[12] This was the argument put forward by SADC heads of State who were lobbying for the suspension of the tribunal after the Mike Campbell case.

court that adjudicates over disputes which involve SADC member states rather than individual citizens.

He asserted that this group further argues that a tribunal, which allows individual access compromises the sovereignty of the SADC member States, because each member State has its own judicial system and final courts of appeal. To allow citizens to bring to the SADC tribunal, their disputes, against their Governments is tantamount to conferring upon the SADC tribunal, the de-facto status of a final court of appeal over all the State parties to the SADC Tribunal protocol. They argue that, in a way, this compromises the sovereignty of the member States' judicial systems.

He referred to the case of ***Mike Campbell (Pvt) Ltd and Ors v the Government of the Republic of Zimbabwe***, which is often cited as the case wherein the SADC Tribunal stands accused of undermining the sovereignty of a member State. After the Zimbabwean Supreme Court of Appeal had ruled that the land reform programme in that country was constitutionally valid, Mr. Mike Campbell and Ors brought the case before the SADC Tribunal and the Tribunal reversed the decision made by the Zimbabwean Supreme Court of Appeal. The Tribunal held that the land reform programme was racist and violated the SADC Treaty. The Judge stated further that those who are in support of the individual access to the Tribunal argue that the ultimate purpose of the Tribunal is to promote the rule of law, adherence to human rights and democracy.[13] He submitted that their argument is that, a SADC Tribunal which allows individual access provides citizens with access to justice.[14] Further that, where citizens are denied justice in their respective countries, the SADC Tribunal provides an avenue for them to access justice. Proponents of a stronger SADC Tribunal argue that reintroducing the Tribunal without individual access is tantamount to denying citizens of the SADC region the only genuine opportunity and avenue they had for getting justice.

The Honourable Judge in his presentation then considered the merits of both the arguments advanced by the two schools of thoughts. He noted that the position that, the mandate of the SADC tribunal must be limited to adjudicating disputes between member States is somewhat problematic.

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[13] See for instance Oliver C. Ruppel and Francois X. Bangamwabo. *The SADC Tribunal: a legal analysis of its mandate and role in regional integration* (

[14] See Precious N Ndlovu. *Campbell v Republic of Zimbabwe: A moment of truth for the SADC Tribunal.* SADC Law journal (2011)

He noted that the preamble to the SADC Treaty is instructive, and clear that member States must comply with their duties under the treaty and subsidiary protocols, in order to achieve progress and wellbeing of the individual citizens of SADC. He noted further that the SADC Protocol on the Free Movement of Persons imposes duties upon the member States to respect, protect and promote the freedom of movement for SADC citizens within the region.[15] The SADC tribunal, he remarked, is one of the critical institutions necessary for ensuring compliance with and implementation of the SADC protocols such as these by member States. If protocols are meant to protect and promote the rights of the SADC citizens, then citizens must be allowed to enforce the implementation of those protocols, he argued. According to Justice Dingake, there is no doubt that Governments must hold each other accountable for the implementation of the SADC Treaty and protocols. He noted however that that alone is not sufficient as citizens, as the intended beneficiaries to the treaty and its subsidiary protocols must also be able to hold Governments accountable regarding their compliance with the provisions of the treaty and the protocols. Additionally, a legal framework which allows both citizens and Governments to enforce the implementation of these protocols has a greater chance of leading to the full compliance and implementation of the protocols. Such a framework has a better chance of resulting in the realization of the objectives of the SADC Treaty.[16] In the circumstances, he said, it makes sense to allow SADC citizens to approach the court in order to enforce member states' compliance with their international obligations outlined in the different SADC Treaty and the different protocols.

He touched on the core reason behind the formation of the SADC block and noted that the spirit behind forming SADC as a regional block was to increase regional cooperation on issues of common interest. Those issues are codified in the various protocols adopted by the member States. By adopting these protocols, the member States have committed to cooperating with each other in order to enhance their chances of achieving their common goals. It therefore defies logic when individual States insist on doing things their own way. If member States have committed to cooperate with fellow States on issues of common purpose, then those States must not refuse to account when called upon to do so by the regional institutions established to monitor such cooperation, he argued.

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[15] See Article 2 of the protocol

[16] See Article 5 of the Treaty for a list of these objectives

Regarding the appointment of the judges of the Tribunal, Judge Dingake noted that the presiding officers of the Tribunal are appointed by the member States. It follows therefore that the SADC Tribunal is not a foreign court but a regional court which is established by the member States. In any case, the SADC Tribunal administers the implementation of the SADC protocols which member States have agreed to abide by. It is therefore difficult to understand how the Tribunal could be accused of undermining member States' sovereignty when it was merely enforcing the laws which the member States have freely agreed to be bound by.

In addressing one of the most controversial and sensitive issues, and one that has been used as a scape goat by most if not all members of the SADC Block in avoiding the application of the Treaty and obligations that come with it, the Learned Judge argued that the member States have the ***sovereign*** right to choose to be bound by the protocols or not. However, once they have agreed to be bound by the protocols, it means they would have freely agreed to be bound by the decisions of the institutions responsible for the enforcement of those protocols. Citizen access to the SADC Tribunal is simply for purposes of enforcing those protocols. It is merely a mechanism necessary for the enforcement of what the member States have agreed to abide by. There is therefore no conflict between allowing such access and the need to maintain the sovereignty of member States he noted.

Furthermore, by virtue of appending their signatures to the SADC Treaty and protocols, member States would have agreed to cede part of their sovereignty and therefore cannot conduct their affairs with absolute independence from regional scrutiny.

The Judge highlighted that, it is critically important that NHRI's and other civil society entities continue to engage their governments and persuade them that a strong regional court with meaningful enforcement powers is in the interest of the welfare of their people and that it will enhance investor confidence and help grow the SADC economy.

In dissecting the importance of the basic human rights of the peoples of SADC as envisaged in the protocols and Treaty, Judge Dingake noted that the rights secured for the people of SADC under the Treaty and its subsidiary protocols

are worth nothing, except when supported by individual access to a court that is competent to enforce those rights. It follows therefore that excluding citizens from accessing this court, is a direct negation of the very purpose of the SADC Treaty.

In the Judge's view therefore, there is a compelling case in favour of allowing individuals to have access to the tribunal. It is necessary for the purposes of effective enforcement of the State duties under the SADC Treaty and its associated protocols. It is necessary, particularly for purposes of enforcing Government compliance with their SADC Treaty duties to respect and protect fundamental and democratic rights.

The Learned Judge further pointed out that, a stronger regional court offers many advantages to NHRIs. Firstly, the mere existence of that court with meaningful enforcement powers would be a strong incentive for governments to promote and protect human rights; secondly, such a court would develop jurisprudence that would act as an intellectual resource for NHRIs, making it easy for them to carry out their mandate and; thirdly, it would hold governments accountable and ensure that human rights are not only talked about at high powered ceremonies whilst being undermined on the ground; and lastly, the jurisprudence coming from the court would serve an important educational purpose to the SADC community.

Judge Dingake noted that it is important to realise that for the regional court to serve its purpose, it must have meaningful enforcement powers, similar to those that exist in other regions, such as the European Union.

The Honourable Judge made reference to the Europe regional position and noted that in Europe, the European Court of Human Rights has repeatedly held that it is not sufficient for European States to simply enact domestic legislation as a means of implementing ECHR. This duty, he said, was affirmed in the 2009 case of ***Opuz v. Turkey***[17], which held that Turkey violated its obligation to protect women from domestic violence. The Turkish authorities had been aware of numerous attacks on the complainant by her violent spouse (including beatings and stabbings) but they issued only minor punishments and did not detain the husband when the applicant and her mother requested protection. The husband attacked again and ultimately killed the applicant's mother. The European Court ruled that Turkey had violated Article 2 of the ECHR (right to life), as well as Article 3 (prohibition of torture and inhuman

[17] This was Application N0: 33401/02 decided on 09 June 2009. And the full link to access the case is: http://cmiskp.echr.coe.int/tkp197/view.

treatment) and Article 14 (prohibition of discrimination). The Court affirmed that violence against women is a form of gender discrimination and that European states have an obligation to prevent and remedy it. Although the Court welcomed Turkey's decision to enact a law prohibiting domestic violence, it held that legislation is not sufficient if state authorities consistently fail to enforce it. Turkey was thus ordered to pay damages to the applicant to compensate her for her suffering and for the loss of her mother.

In concluding his presentation, Judge Dingake like the previous presenters emphasised that SADC citizens and civil society organisations must not give up but carry on with the fight for the re-establishment of an all inclusive Tribunal for the region. He stated that:

> *"As I draw to a close, it would be remiss of me not to end with a heartfelt plea. The time has now arisen for SADC NHRIs and civil society in its various formations to revisit, once again, the issue of establishing a stronger SADC court, without shouting at each other. There is a clear need to sit and discuss issues related to serving the interests of the citizenry by allowing them access to a strong regional court."*

He added that it is imperative, in the name of human rights, in the name of democracy and in the name of the rule of law, to persuade SADC governments to undertake an introspection that may result in the restoration – and even the improvement of the old SADC tribunal as we knew it. NHRI's and civil society should not tire to demand a better and stronger tribunal. It is the right thing to do. The ends of justice cannot be met if the regional court is perceived to be irrelevant for the needs of the people and suffers an integrity deficit.

Having regard to the above, he noted, the NHRIs have a crucial role to play in promoting and ensuring the indivisibility and interdependence of human rights and encourage member States to reconsider the creation of a regional judicial body that guarantees individual access to the courts and whose decisions are binding because such a strong body would help NHRIs in carrying out their mandate by developing a strong body of case law on various aspects of human rights.

3.4 Discussions.

Following the presentations for the first session, the Chair opened the floor for discussions. The first critical issue arose from the first presentation. Mr. Rwechungura highlighted that although the Tanganyika Law Society had lodged a challenge on the suspension of the Tribunal before the national courts, the issues before the court may have been overtaken by events. This was because following the institution of the case that sought to challenge the suspension, the tribunal was then re-instituted albeit with a different mandate which reduced it to an interstate court as opposed to an all inclusive and accessible Tribunal. The conclusion from the discussion of this issue was however that the facts before the court remained relevant as the Tribunal that was purportedly reinstated in August 2014 was not the same Tribunal that the Tanganyika Law Society was fighting to have reinstated. In addition the issue of lack of consultation with the citizens of SADC even in the re-establishment of the Tribunal in its 2014 form remained unresolved.

Dr Wulff in his comments urged for resilience in the fight for the reinstatement of the SADC Tribunal stating that in his work, he had seen many new and progressive constitutions being born in the most unlikely of places in the Sub Saharan Africa. He emphasized that democracy is not only about elections as many would want to believe but about effective implementation of constitutions and that for democracy to thrive, we need democrats in the mix. He opined that one of the challenges was that there is no power balance in governance as one would expect. He added further that the decision to suspend the SADC Tribunal was a sign of lack of respect by governments of the human rights of the citizens of the region.

It also emerged from the discussions that it was not so much the issue of how many cases were or would be lodged before the Tribunal. Instead the mere availability of an accessible court to the citizens of the region was an important assurance that their rights were or could be protected.

The meeting also noted that as the region advocates for the reopening of the Tribunal, we must not be too quick to compare SADC with the EU but should instead compare it with other regional economic communities in Africa where circumstances may be relatively comparable.

4.SESSION TWO.

4.1 Past Engagement Efforts with State Actors on the SADC Tribunal: Lessons Learned and Future Strategies

The session was chaired by Dr Teodosio Uate[18] and the topic for this session was:

"Past Engagement Efforts with State Actors on the SADC Tribunal: Lessons Learned and Future Strategies."

The presenters were Mrs Makanatsa Makonese[19] and The Honourable Justice Charles Mkandawire.[20]

Mrs. Makonese in her presentation noted that following the suspension of the Tribunal in 2010, the SADCLA amongst other civil society organisations sought to establish the real motive behind the SADC Heads of State and Government's decision and also tried to understand what their real fears regarding a strong and independent Tribunal were. She reported that various missions were held in various SADC countries to discuss the issue with leaders at various levels in the Executive, Legislatures and Parliaments of SADC countries. She noted that by and large, many of the States were very receptive to the SADCLA delegation. The lawyers amongst the government officials highlighted that they totally agreed with the SADCLA position on the SADC Tribunal issue but warned that SADCLA and other civil society actors must understand that the decision to suspend the Tribunal was not a legal but political decision and as such advocacy initiatives must be political in nature and not legalistic.

However, even with the almost fatalistic responses from the various government officials, they encouraged the SADCLA to continue with the engagement efforts and in many instances even gave advice on how to address the problem, citing the fact that time would eventually address the challenge.

Mrs Makonese gave an elaboration of what she perceived to have been some of the fears that the regional leaders had regarding the SADC Tribunal. One was that the existence of the tribunal threatened the viability of the national justice system and in particular the highest courts at the national level as the SADC Tribunal could overturn the decisions of the highest national courts in SADC.

[18] Dr Teodosio Uate is the Head of the Legal Affairs Unit of the SADC Secretariat in Gaborone, Botswana
[19] Mrs Makanatsa Makonese is the Executive Secretary of the SADCLA.
[20] Judge of the High Court of Malawi, Former Registrar of the SADC Tribunal 2006-2014, Council Member of the Commonwealth Magistrates' and Judges' Association (CMJA) 2015-2018, Commissioner of the International Commission of Jurists (ICJ) 2015-2019, Chairperson of the Malawi Police Service Commission 2015-2018 and Chairperson of the Special Law Commission on Spent Convictions 2015-2017.

There was also fear that the SADC Tribunal was acting as an appeal court against decisions of national court, an issue which she indicated required to be explained to national leaders. It was important she noted to explain to SADC Heads of State and Government that in deciding on cases, the SADC Tribunal was not acting as an appeal court but a court of first instance. This was because the point of reference of the Tribunal was not national laws, but the SADC Treaty, protocols and other international human rights instruments. This made the Tribunal a court of first instance and not a court of appeal as the law to be applied was completely different from national law, even though the facts before the Tribunal might be similar to those that would have been presented before the national courts.

Mrs. Makonese emphasised the need for dialogue with regional leaders over the SADC Tribunal issue, adding that the fact that the SADCLA did not agree with the decision to suspend the Tribunal has not stopped the organisation from seeking dialogue where necessary and where possible. Noting the general resistance by SADC leaders to individual access to the Tribunal, Mrs. Makonese called for strategies that could lead to a gradual acceptance of the Tribunal by SADC leaders. Such strategies included allowing the Tribunal at first to give advisory opinions and non-binding decisions as opposed to binding ones. She also suggested that another strategy would be to allow voluntary accession to the jurisdiction of the Tribunal by member states as happens at the African Court on Human and People's Rights through the Article 34 (6) declaration that is provided for in the Protocol establishing the court.

In dealing with the question of who should play a role in ensuring the creation of strong regional courts, Mrs. Makonese alluded to the fact that the various bar associations and law societies at national and regional levels played an important role in ensuring the establishment of strong and independent regional courts in East and West Africa. In addition, she noted and agreed with Justice Dingake that the national human rights institutions are key to promoting the establishment strong regional courts, just as non-governmental organisations and civil society are.

In support of this submission, she argued that engagement with civic society and various other institutions at the national level would work to create a critical mass of individuals and institutions that could advocate for the re-opening of the SADC Tribunal with its original mandate. She indicated that because the SADCLA is a regional body, they are not always in a position to engage with citizens or governments on the ground at national level, a role that should be played by NHRIs and other national civil society organisations.

She encouraged the participants to go back to their respective constituencies, be they NHRIs, the academia, the law societies and bar associations, human right groups and civic society in general and engage and discuss the Tribunal issue, that it is only when this is done through teamwork and cooperation that positive results will be achieved.

The Honourable Justice Charles Mkandawire stepped in to make his presentation after Mrs. Makonese's, which was focusing on the same topic. Being the first and last Registrar of the 1992 SADC Tribunal and having witnessed the events leading to the suspension of the Tribunal unfolding, he stated that he would make a modest contribution to the discussion. He noted that the fact that the topic around the Tribunal had refused to die shows that it is an important issue that should never be given up on.

He went further to state that a lot of things have been said about the SADC Tribunal review process. According to him, there were mixed feelings or views about the review process and its effect on the upholding of the rule of law and the independence of the judiciary in the region. The review process, he indicated also had implications on SADC's relationship with other regional economic communities (RECs) as the RECs are supposed to be the building blocks for a prosperous and integrated African continent. He also highlighted that the review process had provided a fertile ground for scholars and stakeholders on the African continent to rethink the way politics interfaces with rule of law fundamentals on the continent.

Following these introductory remarks, he expressed the view that the creation of the SADC Tribunal in 1992[21] was welcomed with enthusiasm and hope within the SADC region and beyond. He also stated that the SADC Tribunal is an important institution in the realisation of the regional integration dream, highlighting that other African sub-regional groupings have similar judicial organs[22].

He noted that since the year 2005, the 1992 SADC Tribunal had been operational and it handled several cases with the bulk of them being lodged against the Republic of Zimbabwe which refused to comply with the Tribunal's decisions and threatened to withdraw from the Tribunal. In raising its objections, the Republic of Zimbabwe challenged the legality and jurisdictional

[21] See The Windhoek Declaration of 1992
[22] These would include COMESA, EAC AND ECOWAS among others.

mandate of the Tribunal.[23] He said that although the SADC Tribunal has been largely associated with one case which is popularly called the Mike Campbell[24] case, it is imperative to mention that since its inception, the Tribunal had received 30 cases, adjudicated and completed 25 cases and by the time of its suspension, 5 were pending. These cases could be categorized as follows:

Individual versus SADC (employment related disputes), Legal Persons versus Member States (Commercial related disputes) and individuals versus Member States (human rights and rule of law related disputes).

He noted that the Tribunal delivered important decisions in human rights related matters, which if complied with would have had a huge impact in the region.

Judge Mkandawire stated that in November 2008, the Tribunal in the case of *Mike Campbell v. The Republic of Zimbabwe*[25] and a series of related cases ruled that Zimbabwe had breached the SADC Treaty by compulsorily acquiring farms from white land owners without offering them proper compensation and denying them access to the courts. The Tribunal also found that Zimbabwe had discriminated against the white landowners. Zimbabwe however did not comply with the Tribunal's decision. He indicated that realizing the Zimbabwean Government's reluctance and refusal to comply with the orders of the court, the Tribunal referred the matter to the Summit for appropriate action on Zimbabwe.[26] The Summit in turn referred the matter to the Committee of Ministers of Justice/Attorneys-General for consideration and advice on the action to be taken on Zimbabwe[27]. In 2009, the Committee of Ministers of Justice had to consider whether the Tribunal was properly and legally constituted following indications to the contrary by the Government of Zimbabwe. A recommendation was made by the Ministers of Justice, that in order to address this issue, a consultant had to be engaged. Thus in September 2009, the SADC Summit directed the Ministers of Justice/Attorneys General to commission a review on the roles, responsibilities and terms of reference of the Tribunal with urgency.[28] The SADC Summit decision of 2009 had therefore expanded the mandate of the Committee of Ministers of Justice/Attorneys-General. At that time, the Tribunal had just delivered two judgments in favour

[23] These objections were raised in communication to the Registrar of the Tribunal by the Minister of Justice of the Republic of Zimbabwe
[24] supra
[25] This case was registered under SADC (T) 02/07
[26] This was in line with the provisions of Section 32 of the SADC Protocol on the SADC Tribunal
[27] See the record of the 2008 Summit of the 16th to 17th August 2008 and in particular at paragraph 10.2.16
[28] See the Record of the 2009 Summit, Kinshasa, Democratic Republic of Congo held on 07th to 09th September 2009, decision 21 found at paragraph 7.5

of two Directors (employees of the SADC Secretariat) decisions which did not go down well with the Council of Ministers. The Tribunal was now being viewed with suspicion. Judge Mkandawire stated that:

> *"Up to this far, many stake holders in SADC did not closely follow what was happening with the Tribunal. However, when the mandate of the Ministers of Justice/Attorneys-General was expanded, it raised a lot of eyebrows. Panic buttons were then and there pressed."*

He shared with the participants his responsibilities during his tenure as the Registrar of the Tribunal and noted that as registrar and being responsible for all communications to and from the Tribunal, he suddenly realized that there was an influx of enquiries from stakeholders in the region who wanted to know what was happening with the Tribunal. Realizing that the review process was being coordinated by the SADC Secretariat, he kept on referring the stakeholders to the Executive Secretary of SADC who was better placed to explain the status of the Tribunal. Many stakeholders however came back to him as a registrar complaining that it was extremely difficult to get information from the SADC Secretariat.

He later on learnt that a behind the scenes consortium of stakeholders had been launched in order to save the SADC Tribunal. Some of the prominent institutions included: SADC Lawyers Association (SADCLA), Southern Africa Litigation Centre (SALC), International Commission of Jurists (ICJ) - Africa Regional Office, Social-Economic Rights Institute of South Africa (SERI), Open Society Justice Initiative (OSJI), Ditshwanelo (The Botswana Centre for Human Rights), Legal Assistance Centre-Namibia, Centre for Human Rights and Rehabilitation-Malawi and Zimbabwe Exiles Forum amongst others.

On the review process itself, the Learned Judge indicated that sometime in April 2010, the Committee of Ministers of Justice had approved an independent study on the roles, responsibilities and terms of reference of the Tribunal. The issue of enforcement of the decisions of the Tribunal was deferred pending the completion of the study.[29] The Summit in August 2010 decided not to re-appoint or replace the Members (Judges) of the Tribunal, but agreed that the members would remain in office pending the report of the Ministers of Justice/Attorneys-General. They were however not to entertain new cases until

[29] This was contained in the in the record of the meeting of Ministers of Justice and Attorneys General, in Kinshasa in the Democratic republic of Congo held on 29 to 30 April 2010 and in particular paragraph 4.2.8.

the Extra Ordinary Summit had decided on the legal status and roles and responsibilities of the Tribunal. Interestingly, the Summit decided that Members of the Tribunal should be involved in the study.[30]

He observed that the review process of the SADC Tribunal required the process of inclusivity. Section 23 of the SADC Treaty provides that in pursuance of the objectives of the SADC Treaty, SADC shall seek to involve fully, the people of the region and key stakeholders in the process of regional integration. Key stakeholders under Article 23 include:

- Private Sector
- Civil Society
- None-governmental Organization
- Workers and employers organizations

He shared with the participants that he had the privilege of attending all the review process meetings and he sadly observed that no stakeholder was involved in the review process. The process can therefore be said to have been non-inclusive and it therefore lacked legitimacy, he emphasized.

On the Extraordinary Summit of the SADC, he outlined that sometime in May 2011, a SADC Extraordinary Summit was held to consider the findings of the Ministers of Justice/Attorneys-General. And in that meeting, the summit noted that with the exception of Zimbabwe [31] all Ministers of Justice were of the view that the Tribunal was legally constituted and its decisions are binding on all SADC Members States. Summit however noted the concerns raised by the Ministers of Justice on the following:

a) The scope of the jurisdiction of the SADC Tribunal

b) The law to be applied by the SADC Tribunal

Submit therefore decided to mandate the Ministers of Justice/Attorneys-General to initiate the process aimed at amending the relevant legal instruments. Summit further decided not to reappoint the Members of the Tribunal

[30] See The Record of the Summit, Windhoek Namibia, 16- 17 August 2010.
[31] Record of Extra Ordinary Summit, Windhoek, Namibia, 20 May 2011

He shared with the participants that in August 2012, Ministers of Justice/Attorneys-General presented their final report[32] to Summit and concluded that:

- ✓ The SADC Tribunal is properly constituted
- ✓ SADC Law is international law binding on all Member States
- ✓ National laws of Member States should be consistent with SADC Law
- ✓ SADC law includes the Treaty, Protocols, Subsidiary instruments and acts of SADC institutions which are intended to have legal effect
- ✓ SADC Tribunal decisions are enforceable within the territories of all SADC Member States
- ✓ The 2001 agreement amending the SADC Treaty is valid amendment of the SADC Treaty under Article 36 of the SADC Treaty. Its effect was the incorporation of the Protocol on the Tribunal as an integral part of the SADC Treaty.

Ministers of Justice/Attorneys-General agreed that the Tribunal should have jurisdiction over disputes between natural or legal persons and Member States arising from Protocols concluded by Member States except that the Tribunal will exercise jurisdiction in Human Rights matters as shall be provided for in a Protocol on Human Rights to be concluded by Member States.[33]

Council of Ministers however differed with the findings of the Committee of Ministers of Justice/Attorneys-General. Council recommended to Summit for the extension of the mandate of the Committee of the Ministers of Justice/Attorneys-General in order to address their concerns.[34]

Summit decided[35] to extend the mandate of the Committee of Ministers of Justice/Attorneys-General to enable them to revise the current draft of the Protocol on Tribunal, to also include a review of the Treaty to take into account the concerns raised by the Council of Ministers.

[32] This emanated from the record of the Meeting of the Ministers of justice and Attorneys General in Maputo on 10 to 11 August 2012.
[33] Op cit
[34] See the Record of the Council of 14 – 15 August, Maputo.
[35] Record of the 2012 SADC Summit, Maputo, Mozambique 17-18 August, Decision 23 paragraph 11.5.7

In 2013, Summit directed the Ministers of Justice/Attorneys-General to fast track the negotiation of a new Protocol on the Tribunal.[36] Eventually in August 2014, Summit approved [37] a new Protocol on Tribunal, which reduced the 1992 SADC Tribunal to an Inter-State Tribunal barring access by natural and legal persons. As for access to the Tribunal by employees of SADC institutions, a new institution called SADC Administrative Tribunal (SADCAT) has been created.[38]

The 2014 Protocol on the SADC Tribunal provides:

> *"The Tribunal shall have jurisdiction on the interpretation of the SADC Treaty and Protocols relating to disputes between Member States."*[39]

The Tribunal no longer has jurisdiction on preliminary rulings on matters referred to it from national courts or tribunals.[40] The Tribunal can now only apply the SADC Treaty and applicable Protocols.[41]

On past engagements and efforts with State actors, the Judge observed that it is imperative to appreciate the institutional framework of SADC before even delving into this subject matter. He admitted that the institutions of SADC are established in the SADC Treaty.[42] For the purposes of this discussion, the Summit of Heads of States or Government, the Council of Ministers, the Ministerial Clusters such as the Committee of Ministers of Justice/Attorney-General and the Standing Committee of Senior Officials are the most relevant ones, he remarked. Accordingly therefore any meaningful engagement both at national and regional level would be with these institutions or individuals who are members of these institutions.

As he had already pointed out, Summit in 2010 directed that the review of the Tribunal should be driven by Ministers of Justice/Attorneys-General. It further

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[36] Record of Summit 17 – 18 August 2013 Lilongwe Malawi Decision 16 para 9.3
[37] Record of Summit 17 – 18 August 2014, Victoria Falls Zimbabwe.
[38] Record of Summit 17 – 18 August, Gaborone Botswana.
[39] Refer to Article 33 of the Protocol on Tribunal.
[40] Refer to Article 34 of the Protocol on Tribunal.
[41] Refer to Article 35 of the Protocol on Tribunal.
[42] Article 9 thereof.

specified that the Members of the Tribunal should be involved. The review process was therefore closed to the stakeholders. That did not however deter stakeholders from engaging with some State actors such as Ministers of Justice/Attorneys-General. He indicated that he was aware of some gallant efforts led by the SADC Lawyers Association and the International Commission of Jurists whereby country missions were conducted to specifically lobby with Ministers of Justice/Attorneys-General on the importance of retaining the human rights mandate and individual access to the Tribunal.

In making a comment and contribution on the progress made, he said he was also aware of the efforts done by the regional stakeholders in meeting with some selected Ministers of Justice/Attorneys-General at the margins of review meetings. It should also be pointed out that some eminent personalities were approached to intervene and persuade the Summit to approach the matter with objectivity. Moreover he was also aware that some international organizations such as the Commonwealth Magistrates' and Judges' Association (CMJA), the Commonwealth Lawyers' Association (CLA), the Commonwealth Legal Education Association (CLEA), the International Bar Association Human Rights Institute (IBAHRI) and the United Nations Special Rapporteur on the Independence of Judges had issued several statements on the events at the Tribunal.

It was registered by the Honourable Judge that it was also on record that the SADC Council of Non Governmental Organisations had also initiated several efforts on the matter such as obtaining signatures from SADC citizens and petitioning Summit. The SADC Lawyers Association also decided to initiate litigation in all the Member States challenging the legality of the entire review process. What is clear from all these efforts is that the concentration of engagement was from regional level to the Ministers of Justice/Attorney-General. The engagement almost paid dividends because in August 2012 in Maputo, Mozambique, the Ministers of Justice recommended a Protocol that had retained individual access before it was wished away by the Council of Ministers.

The learned Judge indicated that he has had occasion to observe several interesting facts about the Tribunal matter. He observed amongst other things that the engagement with State actors did not include the Council of Ministers which has a lot of influence in SADC affairs. Also that, it concentrated on the

Ministers of Justice/Attorneys-General who have no final say apart from giving legal advice to Council of Ministers. National stakeholders such as the Human Rights Commissions were not involved.

Having thus observed, he proposed that as far as the future engagements are concerned, there is need to bring on board national stakeholders and create room for deep dialogue, especially at the national level. The SADC National Contact Points should be incorporated as the main State actors.

In conclusion, he said, SADC without the involvement of its citizens is incomplete. There is a need to create an honest and non-emotional debate on the access of individuals to the Tribunal.

4.2 Discussions

The above presentations were followed by a robust discussion. One of the interesting issues that were raised was that the current issue of the Tribunal did not simply arise out of the question of access to the court, but rather out of the question of "how to deal with Zimbabwe that refused to comply with the decision of the Tribunal."

It also emerged from the discussions that indeed there was a fear from the executive arms of various member states that the Tribunal would in many ways question executive operations and decisions, and as a result, there was a call to review the role, mandate and terms of reference of the Tribunal. In addition to his presentation, Justice Mkandawire noted that it would seem the other problem which contributed towards failure to have convinced the leaders of the region to maintain an accessible Tribunal was the approach that the organisations that engaged with the state actors used in mobilization and engagements. He noted that much effort was misdirected as the message was send to the "wrong" people, or to use his words " focus was on the converted" being the Ministers of Justice who had already given their professional advice on the matter. He reckoned that instead, focus should have been and should still be on the Council of Ministers which is a decision making body of SADC.

For the second time in the discussion it re-emerged and was agreed upon that the matter was no longer a legal matter alone, but also a political one. It was agreed as well that the issue had also given rise to massive and various political debates that had gone quite extensive but which however required political dynamics to be brought into play. This point could no longer be over

emphasized. It was argued that a political aspect to this issue should be taken on board as well.

It was noted that it was quite surprising if not somehow absurd that some of the members states of the SADC region do enjoy dual or even triple membership of other regional blocks and organs such as the Common Market for Eastern and Southern Africa (COMESA) and the East African Community (EAC). These members that enjoy this "benefit" of dual/tripple membership seem to be playing double standards, a fact which was seen as unfortunate. In both COMESA and EAC, there is access by all citizens of the region, and such states which are members in these economic communities fail to raise similar arguments that they raise with regards to the SADC Tribunal. They have agreed and acceded to their citizens to have access to the courts in these communities and yet when they come to SADC, the approach is different.

The importance of the business sector in addressing the issue of access to the court was also discussed. It was noted that this is one influential and important sector that has not been brought on board. At the same time, they are the most affected as trade disputes across the region may have nowhere to be referred to without access to the court being available to individual entities and persons.

Over and above the business community, it was argued that there is a need to also engage with the employers' and employees' organizations. It was noted that the trade union movement is quite influential and can make an impact in future engagements on this matter.

Moreover, the citizens of the members states themselves should be taken on board in future. It was observed that the people on the ground are not even aware of this animal called the Tribunal. There is a need to conduct a massive public education about the tribunal and its relevance to the people. The people should learn about it until they own it. They need to know about the Tribunal much as they know about their national courts. Justice Mkandawire further noted that, he could not imagine the chaos that would be upon any member state if one day they were to wake up and close the national courts. That he argued would see the citizens up in arms to fight for the reinstitution of the national courts. Therefore, should the people know about the Tribunal and its importance, they would rise against leaders who seek to kill access by individuals to the Tribunal, for they would know how important it is to them as citizens.

It was also suggested that in future engagements, prominent people should be brought on board and these include elders in the region with a track record such as former Presidents Kaunda and Chissano.

It was noted that confrontation has not worked in the past and that it should be avoided and a more civil and pro-engagement approach should be adopted.

In making his comments, Justice Dingake argued that, the truth about the SADC region is that we have a very strong and powerful executive authority and in future, target should be on these most powerful authorities or presidents as the case may be.

Some of the questions of interest that came were whether during the engagement process with various governments in the region, it was explained to the leadership that this issue is not new to the SADC region and that there are similar structures and courts in other regions where individuals do have access to the courts. In response, Mrs. Makonese indicated that no leader in the region could claim not to know this state of affairs. She indicated that they are aware of the existence of other regional courts and how they operate in as much as some of the member's states of SADC are also members of those other regional blocks with stronger regional courts. She noted that there is information but for some other reasons, they opted to cut off access to the court by individual members of the SADC. She also noted that during the review process of the roles and terms of reference of the SADC tribunal, a analyses were made of other regional courts and such the information is readily available.

The other question that arose was whether it did not present challenges every time there was a change of leadership in each member state in terms of working progress. Mrs. Makonese conceded that this presented challenges as there was need to start the sensitization process all over again with new officials, but also that this was inevitable.

Lastly, it was pointed out that there is a need to dissect and unpack the actual practicalities of accessing the tribunal, bearing in mind that even at the national level, practical access to the courts was a challenge.

5. SESSION THREE

5.1 Establishing Independent and Effective regional Courts; Lessons Learned from the East African Community

Mr Abie Ditlhake, the Director of the SADC Council of Non- Governmental Organisations chaired this session. The topic for discussion was:

"Establishing Independent and Effective regional Courts; Lessons Learned from the East African Community.

The presenter for this session was the Honourable Justice Isaac Lenaola.[43]

In his introduction Honourable Justice Lenaola, introduced three key principles that the courts should adhere to namely; independence, jurisprudential development and innovation in the field of the law and lastly that the courts must be accountable to the people.

On independence, the Honourable Judge touched on the judiciary as an institution and arm of government. He quoted Honourable Chief Justice Mohamed's address to the International Commission of Jurists in Cape Town South Africa on 21 July 1998 where he said;

> *"The independence of the judiciary is crucial. It constitutes ultimate shield against that incremental and invisible corrosion of our moral universe, which is so much more menacing than direct confrontation with visible waves of barbarism,… Subvert that independence and you subvert the very foundations of the constitutional democracy. Attack on the independence of the judges and you attack the very foundations of the freedoms articulated by the constitution to protect humankind from injustice, tyranny and brutality."* [44]

Justice Lenaola in stressing this point indicated that the judicial institutional independence is intertwined with the doctrines of the separation of powers and that of checks and balances as articulated many years ago by the French legal philosopher Montesquieu in his work *" The Spirit of the Laws*"

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[43] Justice Isaac Lenaola is a Deputy Principal Judge of the East African Court of Justice, The Judge of the Residual Court for Sierra Leone and also the Presiding Judge of the Constitutional and Human Rights Division of the High Court of Kenya.

[44] Quote extracted from the works of Susannah Cowen in Judicial Selection in South Africa at page 17.

In line with the doctrine of separation of powers, he noted that detachment from the Legislature and Executive enhances public confidence in the decisions of Courts.

He expanded on the doctrine and indicated that when making reference to the independence of the judiciary as an institution, there is a need to observe independence of judges as individuals. He noted further that if individual judges are not independent themselves, it would be ironical to talk of independence of the judiciary as an institution. Therefore he stressed the importance of having independent individual judges.

He went on to outline the key elements that found the concept of independence and he named them as;

- Security of tenure

And;

- Transparent appointment process.

On the security of tenure he argued that security of tenure has a direct impact on the independence of the judiciary. He followed similar arguments that were raised by the Learned Former Chief Justice of South Africa Honourable Justice Arthur Chaskalson when he said

> *"Tenure is an essential component of 'independence' but it is not a sufficient guarantee of independence. Tenure of a compliant judge would be a disaster. Independence is a state of mind. It should be part of the culture of the courts as institutions, and needs continually to be nourished and reinforced. Assessing the independence and integrity of candidates is an essential part of the Judicial Service Commission (JSC's) work and should be foregrounded in the consideration of all judicial appointments.*

These sentiments, it would seem remain at the heart of the jurisprudence on independence of the judiciary.

He noted that the other important aspect of the independence of the judiciary lies in the appointment of judges. He noted that in most jurisdictions, the appointment of judges is opaque and at times even unknown at all. He gave an example of the appointments in the East African Court (EAC) of Justice and stated that the process was not as transparent as one would want it to be. He also spoke about the processes at the African Court on Human and Peoples

Rights (ACHPR) and shared that in both cases appointments are made by Heads of State and the criteria is not very clear.

Furthermore, he lamented that the a*d hoc* service in the African Court on Human and Peoples Rights and the East African Court of Justice has implications on commitment and independence. He indicated that this ad hoc service affects;

- Efficiency:
  - Jurisprudential orientation
  - Individual Independence
  - Accountability
  - Expeditious disposal of cases

He then proceeded to make a brief but informative history of the East African Court of Justice in an effort to take the participants through the evolution of this institution.

Before dealing with the East African Court, he dealt briefly with the East African Community itself.

The East African Community (EAC) is the regional intergovernmental organisation of the Republics of Burundi, Kenya, Rwanda, Uganda and the United Republic of Tanzania. The headquarters of the EAC are located in Arusha, Tanzania.

Together, the five East African countries cover an area of approaximately 1.82 million square kilometres and have a population of more than 133.5 million people who share history, language, culture and infrastructure. These advantages provide the Partner States with a unique framework for regional co-operation and integration.

The Treaty for the Establishment of the East African Community was signed on 30th November 1999 and entered into force on 7th July 2000, following its ratification by the three original Partner States, Kenya, Uganda and Tanzania. The Republic of Burundi and the Republic of Rwanda acceded to this EAC Treaty on 18th June 2007 and became full members of the Community with effect from 1st July 2007. The Treaty creating the community was *Amended on*

14th December, 2006 and 20th August, 2007.[45] The Judge dealt with the import of these amendments later in his presentation.

He noted that The East African Community once collapsed in 1977 for reasons that are not important to relate herein. However he indicated that on the 30th of November 1999, the Presidents of Uganda, Kenya and Tanzania signed the Treaty for the **Establishment of the East African Community as already indicated above** and that for him was the re-creation of the Community and its institutions.

Chapter 3 Article 9 of the Treaty establishes the Organs and Institutions of the Community. He indicated that one of the organs created under the provisions of Chapter 3 of the Treaty was the **East African Court of Justice** under **Article 9(1)** (e) of the said Treaty.

Article 23 (1) deals with the role of the court and provides inter alia that the court shall be..,;

> *"… a judicial body which shall ensure the adherence to law in the interpretation and application of and compliance with this Treaty."*

Article 27 on the other hand deals with issues of the jurisdiction of the court and provides that;

> *"(1) The Court shall initially have jurisdiction over the interpretation and application of this Treaty:*
> *Provided that the Court's jurisdiction to interpret … shall not include the application of any such interpretation to jurisdiction conferred by this Treaty to organs of Partner States.*
>
> *(2) The Court shall have such other original, appellate, human rights and other jurisdiction as will be determined by the Council at a suitable subsequent date or … The Partner States shall conclude a protocol to operationalise the extended jurisdiction."*

[45] See the home page of the community accessed at www.eac.int/treaty/

He highlighted that no such protocol referred to in the provisions of Article 27 has ever been concluded although a draft has been in place for about a decade.

After this background information, the learned Judge spoke about the *Anyang Nyong'o* case to bring into perspective comparable challenges that the East African Court of Justice has faced.

The Learned Judge indicated that for quite some time there was no action at the court. He noted that although the EACJ had a long period of inaction and while the Judges spent their time promulgating the **Court's Rules of Procedure and legal research**, matters changed in 2006 when **Reference No.1 of 2006 Prof. Peter Anyang' Nyong'o & 10 Others vs Attorney General & Other (2008) 3KLR (EP) 398** was filed.

He recorded that the legal issues arising from the case may not be important or relevant for the purposes hereof and it was whether one has to exhaust local remedies before accessing the EACJ and whether the Republic of Kenya properly elected its representatives to the East African Legislative Assembly. It was the drama that followed the Court's decision that is important. The issues that arose were:

(i) The fact that the Court had no appeal mechanism.

(ii) The fact that the two Judges from Kenya were before Tribunals in Kenya for alleged misconduct (Ole Keiwua, President of EACJ and Mulwa, Judge of the Court).

(iii) The fact that the said Judges refused to recuse themselves from the matter.

As a result of the above case and issues that arose therefrom, the following results were noticed.

In the first place there were discussions about disbanding the Court – the attempt was later dropped.

Secondly, The Treaty was then amended as follows;

- **Article 23** – by inserting **Sub-Articles 2** and **3** to create two Divisions of the Court.

- **Article 24** – to create the maximum number of Judges, and the Leadership of the Court.

- **Article 26** – a mechanism for removal of a Judge was enacted including Article 26(b) – if a Judge is removed from Judicial Office in a Partner State, he shall be removed from being a Judge in EACJ.

- **Article 27** – a proviso was added as above.

- **Article 30(2)** and **(3)** – Limitation of time to lodge a case with the EACJ was introduced – 2 months from the date of an enactment, directive, decision etc or when the matter came to the Applicant's knowledge.

- **Article 35 A** – grounds of appeal – largely matters of law and procedure.

The Judge commented that today, from the reading of the amendments one may find them reasonable and warranted but not in the 2006 poisoned environment.

Nonetheless the Court came out of that fire strengthened and with a fixed resolve to do justice at whatever cost.

The Judge noted that is clear from the above scenario that the court was under siege and had survived what the SADC Tribunal could not survive. In dealing with what really saved the court, the Honourable Judge indicated as follows:

- The Summit took advice from their Attorneys General who were divided on whether to disband the Court or not. Summit chose not to do so.

- National Bar Associations lobbied extensively as did the East African Law Society.

- Civil Society groups loudly argued against disbandment.

The Judge noted that following these efforts by various advocacy groups, some sense prevailed and the court was left to prosper.

Following the drama that arose from the Anyang Case, some critical issues were noted in that:

- Although the Court was expected to feel the heat and become timid, its decisions in fact became bolder;

- In **James Katabazi & 21 others vs SG of EAC Reference No.1 of 2007**; on whether the invasion of the High Court in Kampala premises by armed agents of the State and re-arrest of the Applicants soon after their release by a competent national court was a violation of the Treaty.

- The EACJ Court said;

> *"We therefore hold that the intervention by armed security agents of Uganda to prevent the execution of a lawful Court order violated the principle of the rule of Law and contravened the Treaty."*
>
> *AND*
>
> *"While the Court will not assume the jurisdiction to adjudicate on human rights disputes, it will not abdicate from exercising its jurisdiction of interpretation under Article 27(1) merely because the Reference includes allegations of human rights violations."*

The reasoning in the above matter has been followed in many subsequent decisions of the Court including in Land cases involving the Government of Burundi.

- **Articles 6(d)** and **7(2)** have been used by the Court as a basis for not sitting idly as violations are committed.

After the above discussions, the Judge gave an outline of some lessons learnt from the operations of the EACJ.

First and foremost, its vital to learn that while the Courts are creatures of the instrument that creates them and while being alive to the need to render justice in a given context, independence and effectiveness can only be achieved by boldness, Judicial innovation and a clear focus on the need to do substantive justice to parties that appear before the Courts.

Secondly and equally important is that, the role of the Bar Associations and Law Societies, Civil Society and the citizenry can never be ignored. He added that the role of the business sector is also key.

5.2 Discussions

The opening question during the question and answer session was on how the EACJ is able to enforce its orders and decisions.

In response the Judge noted that since its inception, there had never been an inter-state litigation before the court. Moreover, he indicated that the court could not be effective without access by all citizens and states alike. He emphasized that the court cannot be innovative without activities and litigation. He noted that access to the court by individuals, NGO's and other stakeholders is a foundation to an effective court.

On the question of compliance to the orders of the Court, the Learned Judge indicated that the treaty does have mechanisms to ensure compliance with the decisions of the court. He made specific reference to Articles 138 and 146, which speak of suspension of a Member State and 147, which provides for expulsion from the community.

On whether there were any other role players in assisting the court maintain its stance and boldness, the judge already had indicated that there were among others the Bar Associations and civic society and the general public at large.

He suggested that SADC if it were to achieve or at least emulate the EAC should consider going back to the drawing board and re-do its objectives if they were to have effective institutions. There is a need to have new structures in place and a much better Treaty than what is currently in place. Another point worthy of noting was that SADC is rather too huge and would need much more better structures and approach that would suit its special circumstances.

The Chairman of the session closed the session and thanked all the participants and presenters for the insights they shared with the participants.

6. SESSION FOUR

6.1 Presentation of the Research Findings of the SADCLA/University of Pretoria Research on ""The implications of the removal of the *in personam* jurisdiction of the SADC Tribunal on the promotion of human rights and the strengthening of the regional social, economic and political integration in SADC"

This session was chaired by Mrs Grace Malera[46]. And it focused on the presentation of the outcome and findings of a research conducted on the subject matter the meeting. The research was commissioned by the SADCLA and conducted by the University of Pretoria Centre for Human Rights. The research was titled:

> *"The implications of the removal of the in personam jurisdiction of the SADC Tribunal on the promotion of human rights and the strengthening of the regional social, economic and political integration in SADC"*

Professor Magnus Killander,[47] the lead researcher presented the findings.

The presenter commenced his presentation by examining the origins of the SADC Tribunal. He noted that The Southern African Development Community (SADC) Tribunal was established through a Protocol adopted in 2000 and decided its first case in 2007. Following the backlash orchestrated by Zimbabwe in response to the *Campbell* litigation, the SADC Tribunal has not been functional since 2010. He noted that in August 2014, the SADC Summit decided to adopt a new Protocol, which if and when it enters into force, will transform the functioning and role of the Tribunal

He indicated that there were two main differences between the new proposed Tribunal and the Tribunal established under the 2000 Protocol. Firstly, the new Tribunal would abolish access for individuals or other non-state actors to the Tribunal, leaving it with jurisdiction to hear only inter-state disputes. Secondly, it would no longer have jurisdiction to hear human rights or rights-related cases. In its short active life, spanning from 2007 to 2010, the 2000 SADC Tribunal produced a limited but diverse jurisprudence on various issues related to regional integration and human rights in the SADC region. It is very unlikely that the proposed new SADC Tribunal operating under the 2014 Protocol would be able to sustain this trend.

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[46] Mrs Grace Malera is the Executive Secretary of the Malawi Human Rights Commission.
[47] Professor Killander is an associate professior and Head of Research at the University of Pretoria Center for Human Rights, South Africa.

In a nutshell, the presentation provided an analysis of the cases that were brought before the old Tribunal prior to its suspension. Among the cases was the well-known Campbell case, which gave birth to many other related cases from Zimbabwe that were brought before the Tribunal. In his analysis, Professor Killander also highlighted the *Bach Transport PTY LTD v The Democatic Republic of Congo case*[48] as well as the *Swissbourgh Diamond Mines PTY LTD v The Kingdom of Lesotho*[49] to mention but a few.

Professor Killander reported that a total of five decisions emerged from the *Campbell* case before the SADC Tribunal.

He noted that the case of *Campbell & Another v Zimbabwe* (*Campbell 1* case) was the second case filed before the SADC Tribunal, but it resulted in the first ruling by the Tribunal, owing to the application for interim measures requested by the applicants. Filed on 11 October 2007, this case was a challenge to Zimbabwe's compulsory acquisition of the applicants' agricultural land. Alleging that they faced an imminent threat of seizure of their land in spite of on-going domestic legal action before the Supreme Court of Zimbabwe, the applicants relied on article 28 of the Protocol of the SADC Tribunal and rule 61 of the Tribunal's Rules of Procedure to request the Tribunal to issue interim measures to restrain Zimbabwe from removing the applicants from the land. While it did not oppose the granting of the interim measures *per se*,[50] Zimbabwe challenged the competence of the application on the grounds that, contrary to article 15(2) of the Tribunal's Protocol, the applicants did not first exhaust local remedies in Zimbabwe before the action was brought to the SADC Tribunal.

In its ruling granting the application for interim measures, the Tribunal took the opportunity of its first decision to declare its understanding of its mandate and the nature of its jurisdiction.

The Tribunal first established that under its 2000 Protocol, it could receive cases from natural and legal persons against Member States of the SADC.[51] In so doing, the Tribunal affirmed the elaborate non-state actor access that SADC Member States allowed under the 2000 Protocol of the Tribunal.

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[48] Case No: SADC (T) 14/2008
[49] Case No: SADC (T) 04 2009
[50] It could be speculated that Zimbabwe did not zealously oppose the granting of interim measures because it was confident that the application would be dismissed on grounds of non-exhaustion of local remedies.
[51] See p 3 of the *Campbell 1* ruling, dealing with art 15(1) of the 2000 SADC T Protocol.

In addition, the Tribunal established that its jurisdiction was guaranteed under article 14 of the 2000 Protocol in relation to its competence to interpret and apply the SADC Treaty.[52]

Significantly, the Tribunal asserted that the case and the application for interim measures involved the interpretation and application of article 4 of the SADC Treaty relating to Member States' commitment to act in accordance with the principles of human rights, democracy and the rule of law.[53]

The Tribunal equally used the ruling to give meaning to article 4(c) of the SADC Treaty by asserting that it imposed a legal obligation on SADC Member States (jointly as SADC, and in their individual capacities) to 'ensure that there is democracy and the rule of law within the region'. Consequently, the Tribunal ruled that the applicants' allegation of infringement of their 'property rights over that piece of land' is a matter that fell squarely within its mandate to interpret and apply the SADC Treaty.[54]

In dealing with the establishment, suspension and re-establishment of the tribunal, no new issues arose as he basically took the participants through the relevant protocols that established the tribunal and those that suspended and re-established it with revised roles, mandate and jurisdictional powers. These had already been dealt with earlier in the discussions.

Following the discussion on the analysis of the case law and the re-establishment of the tribunal, the presenter also provided a comparative analysis of the institutional framework of other regional courts on the African Continent. For the purposes of this report an outline of the EACJ will be skipped as this was provided under Session 5 as reported above.

On the ECOWAS Court the presenter noted that it is the only African sub-regional Court which is explicitly granted with a human rights jurisdiction. He remarked that the Court's human rights mandate has not been in doubt since the extension of its mandate to specifically deal with issues of human rights.

On the court's decisions he indicated that the ECOWAS Court's decisions range from issues of education, labour, socio-economic rights, slavery, employment

[52] As the Tribunal pointed out, the competence to interpret and apply the Treaty is only one of the bases of its jurisdiction. Others include the interpretation, application and validity of SADC Protocols and other subsidiary legal instruments and acts of SADC institutions as well as other agreements by which states agree to confer jurisdiction on the Tribunal. See art 14 of the 2000 Protocol of the Tribunal.

[53] See p 3 of the *Campbell 1* ruling.

[54] As above

and trade. The scope of its decisions has undoubtedly shaped the integration process in West Africa.

Moreover, the Court has consistently developed to be the most active and bold adjudicator of human rights issues among the sub-regional courts in Africa and this has been associated with its broad access and standing rules which permit individuals and non-state actors to bypass national courts and file cases directly with the Court. It is a fact that the ECOWAS Court has already decided more human rights cases than the continental court – the African Court.

On the COMESA Court of Justice, Professor Killander noted that very little is documented about the Court. In fact the Court is almost invisible he said. In spite of the COMESA Treaty containing human rights norms, similar to the EAC and ECOWAS Treaties, the COMESA Court has not been active in human rights and related matters. The Court has overwhelmingly adjudicated disputes between COMESA and its employees and some few cases on trade.

There is little mobilisation initiatives from non-state actors and regional bar associations to make COMESA Court active. The current seat of the Court in Khartoum, Sudan, has not provided a base for the litigants in the same way as Arusha, Tanzania has for the EACJ and Abuja, Nigeria, has for the ECOWAS Court. The COMESA Court has received only one inter-state dispute, he noted.

Having made the above observations and comparisons with other regional courts, the conclusion was that, by suspending the SADC Tribunal, the Summit acting as a collective of the political will of the Member States, and indeed the individual Member States acting through the agency of their respective heads of state or government, clearly violated article 6(6) of the SADC Treaty. Article 6 (6) obliges Member States 'to co-operate with and assist institutions of SADC in the performance of their duties'. Instead of taking action in response to Zimbabwe's disdain for the Tribunal culminating in a concerted effort to seriously incapacitate the Tribunal, the Summit and the Member States failed in their duty to assist the Tribunal in the performance of its duties.

It was also noted that in the contemporary world of international diplomacy, states rarely opt to sue each other before an international court. Diplomacy

and geopolitics tend to prevail over legal recourse in dispute settlement between states. If the 2014 Protocol would enter into force in its current form it is likely that the Tribunal, even if officially revived, will in practice be dormant due to the restriction on individual access. The 2014 Protocol turns back the clock. While the mandate of the ECOWAS Court was expanded, SADC has moved in the other direction and removed access to justice.

Further to the above conclusion he remarked that individuals from the SADC region face many limitations in accessing their rights in the international arena. He recorded that only six of the fifteen SADC members have subjected themselves to the African Court's contentious jurisdiction. Of these only two - Malawi and Tanzania - have accepted direct individual access. Individuals of the nine remaining states cannot access the continental human rights court. The decision of Council and Summit in August 2010 to suspend the Tribunal consequently affects the rights of access to justice and to an effective remedy for litigants in SADC, both natural and legal persons, when domestic courts are unwilling or unable to offer effective relief.

The yet to be established Tribunal with inter-state jurisdiction and the SADC Administrative Tribunal will be inadequate to ensure that the objectives set out in the SADC Treaty are met.

According to article 16 of the Treaty, which remains in force, the role of the Tribunal is 'to ensure adherence to and the proper interpretation' of the Treaty and subsidiary instruments. This cannot be achieved with a Tribunal left with severely limited jurisdictional powers.

Following the above conclusions, Professor Killander proffered the following recommendations:

- There is need for awareness raising amongst the people of Southern Africa on the importance of individual access to the SADC Tribunal
- Secondly there should be Lobbying and advocacy on the issue targeting human rights friendly states in the region.
- Thirdly, States should refrain from ratifying the new SADC Protocol.
- Fourthly, the SADC Summit should operationalise the Tribunal to allow it to function in accordance with the old Protocol through election of members of the Tribunal and the re-establishment of the Tribunal registry in Windhoek.
- Fifthly, any revision of the Protocol should be transparent with full involvement of SADC citizens and key stakeholders, including civil

society and non-governmental organizations, in accordance with article 23 of the SADC Treaty.

- Sixthly, the SADC Summit should put pressure on Member States which have not implemented the judgments of the SADC Tribunal to do so.
- Seventhly, in the event that it becomes functional, there is need to find alternative strategies to ensure effective functioning of the rebranded Tribunal; and
- Lastly, there is need to engage African human rights institutions to persuade SADC officials to reinstate the previous SADC Tribunal/individual access.

7.SESSION FIVE.

7.1 "Some thoughts on the link between the work of the National Human Rights Commissions and the SADC Tribunal"

This session was chaired by Mr Tebogo Moipolai[55]and the topic for discussion was:

"Some thoughts on the link between the work of the National Human Rights Commissions and the SADC Tribunal"

The presenters earmarked for this topic were Commissioner Bahame Tom Nyanduga who is the Chairperson of the Tanzania Commission on Human Rights and Good Governance (CHRGG and Commissioner Elasto Hilarious Mugwadi who is the Chairperson of the Zimbabwe Human Rights Commission.

Unfortunately, the Honourable Commissioner Nyanduga could not make it to the meeting. He sent through an apology, leaving Commissioner Mugwadi as the only presenter for the session.

[55] Mr Tebogo Moipolai is the Executive Secretary of the Law Society of Botswana and is based in Gaborone, Botswana.

In opening his presentation, commissioner Mugwadi noted that he felt compelled to give an outline of the relationship between the work of the regional National Human Rights Institutions (NHRIs) and the SADC Tribunal. In the process, he however asked himself:

> *"How do I do this when the latter is currently morphing and practically emasculated?*

He noted however, that in fact he was persuaded to settle for an analytical assessment proceeding from an appreciation of the mandates or responsibilities of NHRIs in relation to the general purpose, jurisdiction and competence of the Tribunal in its original form and future configuration adopted by the SADC Summit on 18 August 2014 at Victoria Falls, Zimbabwe. He also noted that he would suggest how best NHRIs could assist in restoring the Tribunal's original jurisdiction.

He outlined that it is now a matter of common cause that NHRIs as human rights watchdogs, derive their responsibilities from the Paris Principles which are the international human rights best practices developed from various international human rights instruments commencing with the Universal Declaration of Human Rights (UDHR) of 1948.

He shared that the Paris Principles bestow a broad role on NHRIs with two major responsibilities, which are the promotion of human rights and the protection of these rights.

He briefly explained these two and expressed that;

a. <u>Human rights promotion</u> entails creating a national human rights culture where tolerance, equality and mutual respect thrive. Of course the general mandates of NHRIs are enshrined in respective national constitutions and enabling statutes, he noted.

b. <u>Human rights protection</u> basically means helping to identify and investigate human rights abuses, to bring those responsible for human rights violations to justice and to provide some remedy and redress for victims. NHRIs should always have a legally defined mandate to discharge these functions and to issue views, recommendations or even seek remedies before the courts. Under normal circumstances, this responsibility could link up with related competences of the Tribunal

which could by necessary implication serve as the additional judicial organ of SADC NHRIs.

Having given the above synopsis of the Paris Principles and what they entail, he then noted that there are a number of cross-cutting responsibilities and functions flowing from these two central roles of promotion and protection of human rights and these include but are not limited to:-

i. Advising the Government and Parliament and other authorities by giving "opinions, recommendations, proposals and reports;"

ii. Cooperating with national stakeholders, civil society, other countries' NHRIs and intergovernmental regional bodies such as ECOWAS and SADC to the extent of their involvement in human rights; cooperating with the international human rights system, for instance by presenting independent reports and documentation to human rights treaty bodies, special procedures mandate holders and to the Human Rights Council and its processes, to wit, the Universal Periodic Review (UPR).

iii. Protecting and promoting the rights of specific groups that include the vulnerable by virtue of their gender, age, disability, sexual orientation, migrant or minority status. It is often said that these rights are controversial and NHRIs are frequently the only ones that can speak out in defence of those who have no voice.

iv. Linking human rights to development initiatives through human rights based approaches and especially through promotion of economic, social and cultural rights.

v. NHRIs are also frequently given the additional responsibility of supporting or managing peace building and transitional justice issues in conflict and post-conflict situations.

vi. Finally according to the Paris Principles, NHRIs have the emerging and growing role in working with and monitoring business,

recognizing the crucial and relevant role of the private sector in national, regional and multinational contexts.

He then invited the participants to allow him to examine the SADC Tribunal's jurisdictional competences or rather its *de facto* limited role as he called it.

As with the other previous presentations, Commissioner Mugwadi gave a brief background of the birth of the SADC Tribunal. In so doing he noted that the Tribunal was established in 1992 as an institution of SADC through the Treaty establishing the Southern African Development Community (SADC) and was launched in November 2005. In terms of Article 4 of the Treaty, SADC and its Member States are obliged to act in accordance with the principles of human rights, democracy and the rule of law. This was the basis of the SADC Tribunal's interpretation of its own role, he said.

He noted that, at inception, the scope of the Tribunal's jurisdiction was broad and included but was not limited to:-

i. The powers to hear disputes between States and between natural or legal persons and States.

ii. Exclusive jurisdiction over all disputes between the States and the Community; and

iii. Exclusive jurisdiction over all disputes between natural or legal persons and the Community [56]

Commissioner Mugwadi indicated that, it is true that the Tribunal provided a vital forum for SADC nationals and juristic persons to seek legal remedies for violations of their rights or of the laws of SADC in compliance with Article 4 of the Treaty.

In the period of actual existence from 2005 to 2012, the Tribunal had jurisdiction over disputes between SADC Member States as well as on disputes between legal and natural persons and Member States. In order however, for a person to bring a case before the court, all internal remedies of the Member State had to be exhausted.

[56] Articles 15-20 of the SADC Protocol on the SADC Tribunal

He highlighted that from 2005 to 2012, no state but twelve individuals had approached the court. The Tribunal's first verdict at the end of 2008 was already a landmark case. Zimbabwe had enforced a compulsory land acquisition and redistribution policy in the early 2000s. In the *Mike Campbell (Pvt) Ltd and Ors v. Republic of Zimbabwe case*, the Tribunal ruled that the government's seizure of land owned by white farmers was indirect or *de facto* discrimination and that the plaintiffs were entitled to compensation. The Government of Zimbabwe, however, contented this was a political issue between her and Britain.

On 17 August 2010, a month after a similar ruling in the *Louis Karel Fick and Ors v. Republic of Zimbabwe case,* the SADC Summit of Heads of State and Government held in Windhoek, Namibia, which is the city of the Tribunal, suspended the Tribunal and ordered a "review of the role, responsibilities and terms of reference of the SADC Tribunal"[57]. Following this, the Tribunal's role was reduced to jurisdiction over disputes between SADC Member States as its powers were clipped and complaints by citizens against their governments made impossible. To the best of his recollection and knowledge, "this was the first time globally that an international instrument for individual complaints against human rights violations had been abolished."

He then turned to examine the events that followed the suspension of the Tribunal and noted that, on 18 August 2014 in Victoria Falls, Zimbabwe, the SADC Summit adopted the new Protocol on the SADC Tribunal whose major difference with the previous one and one which should interest NHRIs is provided for in Article 33 which reads:

> *"The Tribunal shall have jurisdiction on the interpretation of the SADC Treaty and Protocols relating to disputes between Member States."*

He noted that the effect of the above provision is to eliminate a previous competence over natural and legal persons to approach the Tribunal. The Protocol is not yet in force as only 9 out of the 15 Member States represented signed the protocol.

Article 53 of the Protocol provides that:

[57] Communique of the 2010 SADC Summit

> *"The Tribunal shall come into force 30 days after ratification by 2/3 of the Member States"*

In addition, Article 52 provides that;

> *"Only a Member State that has signed the Protocol can ratify it."*

He then pointed out that he understood that none of the signatories had yet ratified the Protocol, which he perceived would probably delay its operationalization.

As at the time of this presentation, he highlighted that six States had not yet signed were Angola, Botswana, Madagascar, Mauritius, Seychelles and Swaziland.

He noted that according to Veritas, a Zimbabwean legal think tank on Parliamentary affairs and statutory monitoring, the concerns of the unsigning members were presumably centered on the need for SADC to finalize consequential amendments to the SADC Treaty itself before allowing the Protocol to come into operation. This would have been in accordance with the 2013 SADC Summit's instruction in Malawi to the Committee of Ministers of Justice/ Attorneys-General to negotiate a new Protocol on the Tribunal and in addition, identify provisions of the SADC Treaty and other protocols and legal instruments requiring consequential amendments.[58]

In other words the procrastinating States may just have decided to avoid undue haste which might lead to legal mistakes similar to those that prompted Zimbabwe to reject the Tribunal's decisions against it and its successful campaign to persuade SADC Heads of State and Government first to stop the Tribunal functioning and then to emasculate it.

[58] Veritas Bill Watch 42/2014 dated 10 November 2014

Commissioner Mugwadi noted that the think-tank further argued that the concerns of the six States may be indicative of fundamental reservations about transforming the Tribunal into what a learned South African legal commentator has termed "a travesty", now that it has such reduced jurisdiction.

The narrowing of the SADC jurisdiction means that persons and organisations denied justice in their national courts will have no regional court to appeal to, as was the original intention when the SADC Tribunal was set up. If these reasons are mere assumptions, they could be exploited to convince Member States to revert to the original position of the Tribunal.

He noted that after the suspension of the Tribunal, some of the aggrieved parties decided to take the matter forward to yet another level. Commissioner Mugwadi noted that in December 2011 following the SADC leaders' suspension of the operations of the SADC Tribunal, Zimbabwean farmers, Luke Tembani and Ben Freeth took action at the continental level. They invoked the African Charter on Human and People's Rights by challenging the legality of the suspension of the Tribunal in an application to the African Commission on Human and People's Rights. The argument by Tembani and Freeth in their complaint to the African Commission was that the SADC States, in abruptly suspending the Tribunal, had infringed not only the SADC Treaty, but also Articles 7 & 26 of the African Charter on Human and People's Rights guaranteeing access to courts and had of course infringed principles of international law.

The complaint requested the Commission to do two separate things:

- Firstly, to refer the case on their behalf to the African Court on Human and People's Rights as Zimbabwe had not yet deposited the Article 34 (6) declaration allowing its citizens direct access to the African Court. However the Commission could refer a case to the Court on behalf of an individual or organization in such a situation.

- Secondly, for the Commission itself to declare that the actions of the SADC Summit on the Tribunal had infringed the SADC Treaty, the African Charter and international law and that the SADC Summit should accordingly reinstate the Tribunal and SADC Member State should enforce the decisions handed down by the Tribunal.

The Commission rejected the applicant's first request to refer the case to the African Court because in the Commission's view, *"it did not meet the*

requirements for referral as provided for in the Commission's Rules of Procedure."

After serious consideration of the second request the Commission rejected the application on 1st March 2014. The ground for rejection was that the Articles of the African Charter relied upon by the applicants did not guarantee access to regional courts such as the SADC Tribunal, but apply only to access to national courts.

The Commission's rejection of the application was greeted with disappointment by those who believed that the rule of law including access to justice should apply not only at national level but also at regional and international levels.

The Veritas think-tank has criticized the Commission's decision as an example of 'absurd literalism', an out-of-date and now discredited approach to the interpretation of international human rights instruments such as the African Charter. More recent and progressive thinking supported by decisions of international courts and authorities on international law is that such instruments should be construed purposively, with due regard to changes in circumstances and the evolution of new institutions and always aiming at enhancing rights, not restricting them.

In addition, there is also no indication anywhere in the Commission's ruling of approval or endorsement of the dismantling of the SADC Tribunal. Commissioner Mugwadi noted that it remained his personal hope and view that, notwithstanding the Commission's seeming rebuff, work should be escalated or should continue to ensure an effective legal remedy at both regional and continental levels for aggrieved individuals who have been denied the right of access to courts in their own countries or regions.

He noted that the new Protocol provides for repeal of the original Protocol effective on the date of operation of the new Protocol. This means *de jure* the original Protocol continues in force and the SADC Tribunal continues to exist by virtue of the 1992 SADC Treaty. But, of course, it remains a phantom court without judges and is unlikely to become operational soon.

He noted that he is aware that on the eve of the Victoria Falls SADC Summit on 18 August 2014, the SADC Lawyers Association had called for the launching of court cases in individual SADC Member States seeking to prevent their

governments from accepting the new Protocol. He noted that the Tanganyika Law Society had already litigated in the High Court seeking to stop the Tanzanian government from participating in any decision to adopt a new Protocol on the SADC Tribunal. Their argument was that this would be contrary to the Tanzanian Constitution. Commissioner Mugwadi further noted that on his part the Tanzania Attorney-General implored the court to dismiss the action as untenable. The generality of the SADC legal fraternity (including ex-judges of the Tribunal) appear agreeable that the dismantling and reassembling of the Tribunal by successive SADC Summits, has been in breach of the rule of law and view it as a denial of access to justice at the regional level.

Commissioner Mugwadi noted that the next crucial question was therefore, what then can SADC NHRI's as human rights watchdogs do to ensure the Tribunal does not completely relinquish its original competences over complaints of human rights violations by individual SADC nationals at the behest of Member States? He noted that a comparative study is always essential in this kind of discourse. He indicated that the African Union has recognized eight Regional Economic Communities (RECs) as official representatives of regional associations of African States. Although there are actually more regional cooperation frameworks, only the following have been recognized by a decision of the AU's assembly of Heads of States and Government:-

i. Arab Maghreb Union (AMU)
ii. Common Market for Eastern and Southern Africa (COMESA)
iii. Community of Sahel- Saharan States (CEN-SAD)
iv. East African Community (EAC)
v. Economic Community of Central African States (ECCAS)
vi. Economic Community of West African States (ECOWAS)
vii. Inter-Governmental Authority for Development (IGAD)
viii. Southern African Development Community (SADC)

Several African countries are members of several RECs at the same time and therefore there is a possibility of overlap and conflict of competences. RECs such as ECOWAS and SADC are instrumental in promoting regional integration in Africa and therefore complementing the efforts of the AU.

Hitherto, three out of the eight RECs dispose of systems in promotion and protection of human rights. These are ECOWAS, EAC, and SADC which have

such regional courts of justice that are expressly or implicitly vested with jurisdiction to pronounce on human rights violations, namely,

a. Court of Justice of the Economic Community of West African States (ECOWAS).
b. East African Court of Justice (EAC).
c. Tribunal of the Southern African Development Community (SADC) which is on the verge of relinquishing this responsibility completely.

Citizens of ECOWAS can file complaints against human rights violations by state actors at the regional Court of Justice whose seat is Abuja, Nigeria, having existed since 1991 although in practice set up in 2001. Its rules are in accordance with the African Charter on Human and People's Rights and its decisions are legally binding on Member States. In fact, the Court has had competence to rule on human rights through an individual complaint procedure since 2005. Particularly noteworthy is the fact that local remedies need not be exhausted before a case is brought to the ECOWAS Court of justice. This means, every victim of a human rights violation can directly approach the Court even if the case is still subject of a national proceeding.

In a historic ruling in 2008, the ECOWAS Court of Justice in a case of slavery convicted the State of Niger of violating the human rights of one of its citizens. While the Court found that Niger was not itself responsible for the discrimination – the plaintiff having been subjected to it by a non-state actor, namely, her own master – the country was found in violation of its international obligations to protect Mrs Hadijatou Mani from slavery under international as well as national law because of its tolerance, passivity, inaction and abstention with regard to the practice. Niger had to pay reparations in the amount of 10 million CFA francs (more than US$20000).

Commissioner Mugwadi noted that this is an example of an effective regional Court.

On the East African Court of Justice, Commissioner Mugwadi noted that the Court had jurisdiction over the interpretation and application of the East African Treaty of 1999. He noted that the Protocol to extend its jurisdiction to human rights cases has not yet been concluded.

Its human rights jurisdiction will however be based on the African Charter on Human and People's Rights. Though it lacks a human rights mandate with the clarity of the ECOWAS Court, the East African Court of Justice has very

progressive human rights judgments to its credit. Notwithstanding the absence of the operationalization of explicit human rights jurisdiction of the Court, it has been courageous enough to ensure that basic rights of individuals under the Treaty are respected.

The Court's temporary seat is in Arusha, Tanzania and reference to it may be by legal and natural persons in any of the Member States, by EAC Member States and Secretary General of the EAC.

In addition to the African regional system for the protection of human rights, there exist the Inter-American, the European and the Association of Southeast Asian Nations (ASEAN) Inter- Governmental Commission on Human Rights regional systems.

First of all, the Inter-American System for the protection of human rights is responsible for monitoring and ensuring implementation of human rights guarantees in the 35 independent countries of the Americas that are members of the Organisation of American States (OAS).

It is composed of two entities: a Commission and a Court. Both bodies can decide individual complaints concerning alleged human rights violations and may issue emergency protective measures when an individual or the subject of a complaint is in immediate risk of irreparable harm in addition to their other competences. Those who can submit complaints ("petitions") are individuals, groups of individuals, and NGOs recognized in any OAS Member State. The Inter-American Court of Human Rights is the judicial arm of the Inter-American Human Rights system.

Also, The European System on Human Rights is grounded on the European Court of Human Rights which has jurisdiction to decide complaints ("applications") against all 47 Council of Europe Member States. Individuals, groups of individuals, NGOs and States may submit applications concerning alleged violations of the European Convention on Human Rights. The European Court may issue emergency protective measures ("interim measures") when the applicant faces a real risk of serious irreparable harm.

Lastly, In 2009, the Association of Southeast Asian Nations (ASEAN) created a regional human rights body called the ASEAN Inter-Governmental Commission on Human Rights which also is seized with handling human rights complaints from individuals as well as other groups.

Armed with the background knowledge of the jurisdictions and operational competences of the ECOWAS and EAC Courts of Justice, the Inter-American and European Systems, the SADC NHRI's can take the bold step as national human rights watchdogs to approach SADC or lobby respective Member States to reinstate the Tribunal's original jurisdiction allowing individual access to the Court before the new Protocol is operationalized. In his view, any such approaches should be circumspect considering the following:

a. The reasons leading to the withdrawal of the original jurisdiction. The land issue is still unfinished business in Namibia, South Africa, Mozambique, Tanzania and Zimbabwe. It raises highly emotive political questions.

b. NHRIs although independent are creations of Member States and therefore paper tigers in most instances and can only make cautious recommendations and avoid confrontation in as much as the Tribunal was immobilized, an NHRI can be disbanded overnight.

c. He believes the best way forward would be for the SADC NHRIs forming themselves first into a regional association and then approaching the Community with one strong voice. Of course national advisory proposals through Parliament can still proceed undeterred and at anytime. This should remain their advocacy function and responsibility.

d. Since the Paris Principles require NHRIs to maintain ties with Civil Society, joint collaborative efforts between the two in lobbying individual Member States and the Community would also probably be productive.

The human rights terrain within the SADC Community could tremendously be enhanced if the Tribunal retains jurisdiction on individual human rights violations by Member States. Not only will it compliment the AU and UN efforts in ensuring respect, promotion, protection and enforcement of individual human rights, but will also serve as a phenomenal deterrent on rampant state violations of human rights, disrespect for the principles of democracy and the rule of law and the accompanying impunity.

7.2.Discussion.

This presentation presented some interesting issues and sparked quite an active debate among the participants.

The most contentious issue was the labeling of the National Human Rights Institutions as *paper tigers*. Some of the participants, particularly from the human rights institutions insisted that they were not paper tigers and were able to deal with human rights issues effectively and without fear or favour despite the threats that they faced from their governments. The fact that some of the NHRIs reported directly to Parliament and not to the Executive was seen as a buffer to protect their independence. There was an admission though that some do report to political heads, being ministers who in turn submit their reports to Parliament. It was noted that at times the minister may choose not to present the report thereby rendering it useless and pointless in the first place to have had it.

The integrity and the role of the national human rights institutions was defended by some of the participants who also likened it to the Public Protector in the Republic of South Africa whose recommendations had recently been held to be binding by the Supreme Court of that Country.

8.SESSIONS SIX AND SEVEN.

8.1 Session Six and Seven: Focusing on the development of Key messages, engagement strategies and activities for the reopening of the SADC Tribunal with its Original Mandate.

Session 6 and 7 were combined and chaired by Mr. Peter Wendoh, the Project Advisor of the KAS. The main aim under session 6 was to conduct group discussions focusing on the development of key messages, engagement strategies and activities for the re-opening of the SADC Tribunal with its original mandate while session 7 was for the feedback from the group work and discussions.

For the purposes of this report, the two sessions have been combined.

Following the labeling of NHRIs as paper tigers by Commissioner Mugwadi, Commissioner Phumelele Thwala of Swaziland suggested that before crafting key messaged and strategies, the groups should undertake a Strength, Weaknesses, Opportunities and Threats (SWOT) analysis of the NHRIs in the region. This was important in order to determined whether or not the NHRIs would be in a position to implement the agreed strategies once the participants got back to their respective countries.

8.2 SWOT Analysis Results

From the group discussions, a number of common areas were identified as both strengths and weaknesses of the various national human rights institutions. **The strengths were identified as follows**:

- It was agreed by the participants from various groups that one of the fundamental strengths of most of the national human rights institutions is that they derive their existence and validity from the supreme laws of their countries, their Constitutions.
- As such, since these institutions are in most jurisdictions creatures of the constitutions, the office bearers of the human rights institutions, the commissioners enjoy security of tenure, thereby strengthening their ability to carry out their mandate.
- The NHRIs enjoy special linkages with other regional bodies that deal with issues of human rights
- NHRIs do make recommendations regarding new legislation and play advisory role to governments, a function that could be used to address the SADC Tribunal issue; and
- Lastly they are mostly independent and have access to regional bodies.

The Weaknesses were identified as follows:

- All NHRIs are funded by government and in some instances have no control over their budget. This may be used to frustrate their operations if the government withholds resources.
- They make recommendations that are often ignored and it is often difficult if not impossible to enforce the recommendations as they do not have the effect similar to that of court orders as an example.

8.3 Group Discussion on SWOT Analysis Results

From the discussion of the above strengths and weaknesses, it was noted that, it was important for the National Human Rights Institutions to take action against human rights violations and specifically to fight for the revival of a SADC Tribunal which is accessible to all citizens of SADC. It was further noted that, being Government institutions, NHRIs had an advantage to engage with governments on this matter and even include the issue in their annual reports as a way of keeping it alive and on the agenda.

It was emphasised once again that lack of awareness of the Tribunal amongst citizens and other stakeholders remains a major challenge and that all stakeholders must be brought on board in the awareness campaign.

9. ACTION PLAN

After the two days of robust engagement and discussions, the sessions were wrapped up with the adoption of the action plan and key strategies to be employed by the NHRIs. These were that;

- National Human Rights Commissions should include in their annual reports the need to have an accessible SADC Tribunal and not just an inter- state organ.
- National Human Rights Commissions should take action and lobby for the creation of a strong and independent Tribunal with their respective governments
- National Human Rights Commissions should make recommendations to their respective governments about having an all inclusive and accessible tribunal.
- The Commissions should engage with prominent personalities to influence change in respect of the tribunal at both the national level.
- NHRIs must engage and collaborate with other civil society organisations at the national level to collectively lobby for the reinstatement of the SADC Tribunal with its original mandate
- The SADCLA must provide a position paper that NHRIs can use in their advocacy efforts
- SADC national NHRIs must form a regional forum that will make it easier for them to engage with regional issues and structures.

LIST of PARTICIPANTS

Nbr	Name	Name of organisation	Country
1	Adv Eileen Rakow	The Office of the Ombudsman	Namibia
2	Ms Binta Hazel Tobedza	SADC Lawyers Association	Botswana
3	Commissioner Amilcar Andela	Mozambique National Human Rights Commission (CNDH)	Mozambique
4	Commissioner Custodio Duma	Mozambique National Human Rights Commission (CNDH)	Mozambique
5	Commissioner Elasto H. Mugwadi	Zimbabwe Human Rights Commission (ZHRC)	Zimbabwe
6	Mr Kitso Phiri	Ditshwanelo- Botswana Centre for Human Rights	Botswana
7	Dr Arne Wulff	Konrad Adenauer Stiftung	Nairobi
8	Dr Martin Nsibirwa	South African Human Rights Commission	South Africa
9	Dr Teodosio Uate	SADC Secretariat	Botswana
10	Felicitas Mukuanadi	GIZ Botswana	Botswana
11	Dr Ghebremeskel Adane	GIZ Botswana	Botswana
12	Hon. Justice Isaac Lenaola	East African Court of Justice	Tanzania
13	Judge Oagile Dingake	Judge of the Residual Special Court of Sierra Leone and Professor of Public Law	Botswana
14	Justice Charles Mkandawire	Lilongwe High Court	Malawi
15	Commissioner Justin Dzonzi	Malawi Human Rights Commission	Malawi
16	Mr Lawrence Lecha	Law Society of Botswana	Botswana
17	Ms Lungile Nompumelelo Magagula - Magongo	Swaziland Human Rights Commission	Swaziland
18	Ms Makanatsa Makonese	SADC Lawyers Association	South Africa
19	Mr Charles Rutayuga Rwechungura	Tanganyika Law Society	Tanzania
20	Mr Erick Mukutiri	Zimbabwe Human Rights Commission (ZHRC)	Zimbabwe
21	Mr Gibson Mabulu	Law Society of Botswana	Botswana
22	Mr Mwiba Mwenda	Zambia Human Rights Commission	Zimbabwe
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28	Ms Tebo More	Law Society of Botswana	Botswana
29	Commissioner Phumelele Thwala	Swaziland Human Rights Commission	Swaziland
30	Mr Peter Wendoh	Konrad Adenauer Stiftung	Nairobi
31	Prof Magnus Killander	Centre for Human Rights, Faculty of Law, University of Pretoria,	South Africa
32	Ms Prudence Mabena	SADC Lawyers Association	South Africa
33	Mr Joseph Balosang Akoonyatse	Law Society of Botswana/ SADCLA	Botswana
34	Mr Abie Dithlake	SADC-CNGO	Botswana
35	Mr K.N. Monthle	Law Society of Botswana Vice Chairman	Botswana