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Promoting access to justice in Africa: Key points for advocacy on the Southern African Development Community Tribunal



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EXECUTIVE SUMMARY

This policy paper provides insights to strengthen advocacy for the restoration of the Southern African Development Community Tribunal (SADC Tribunal) in its original form. The focus on the SADC Tribunal is as a result of the acknowledgement that sub-regional integration needs strong institutions including independent and impartial judicial bodies that function effectively without political interference. Given the significant role of such independent judicial bodies, the paper reflects on advocacy for the restoration of the SADC Tribunal, the only sub-regional court which allowed citizens from SADC countries to bring cases before the court. The paper notes that the SADC Tribunal was suspended due to a political decision taken by the heads of states and governments of countries that are members to the Southern Africa Development Community (SADC). It then argues that the suspension of the SADC Tribunal created a huge gap for citizens to access justice in the SADC region. To address this gap, the paper reflects on advocacy efforts that are being made with view to bring back the SADC Tribunal in its original form. It makes recommendations to improve advocacy efforts. The conclusion reiterates the need to employ advocacy based on principles enshrined in the SADC Treaty itself as part of efforts to encourage SADC leaders to restore the SADC Tribunal as it was originally conceived.

INTRODUCTION

The quest for a sub-regional court to administer justice remains a pressing concern for the populations living in Southern African countries. This thought is supported by recurrent appeals made by human rights groups requesting heads of states and governments of countries in Southern Africa which are parties to the Southern African Development Community (SADC) to improve access to justice in the SADC region. Emphasis is placed on the numerous requests made for SADC leaders to lift the suspension imposed on the SADC Tribunal – the only sub-regional court that individuals could use to obtain redress when their rights were violated in their respective countries. This policy brief contributes by depicting selected principles enshrined in the SADC Treaty that can be used to improve advocacy towards the restoration of the SADC Tribunal. Following this brief introduction, Section 2 sets out the historical context and the reasons leading to the suspension of the SADC Tribunal. Section 3 looks at the gaps resulting from the suspension of the SADC Tribunal and Section 4 explores key points to strengthen advocacy to bring back the SADC Tribunal in its original form. A call is made for the need to restore the mandate of the SADC Tribunal to receive complaints brought by individuals. The conclusions sum up the paper by reflecting on some of the main findings and it makes recommendations to improve access to justice in the SADC region.

HISTORICAL CONTEXT OF THE SADC TRIBUNAL

In 2000, SADC adopted a Protocol on the SADC Tribunal. At that time, the SADC Tribunal

was conceived as an institution aimed to ensure access to justice.¹ Emphasis is placed on the role of the tribunal as an institution tasked to ensure adherence to and proper interpretation of the provisions of the SADC treaty and subsidiary instruments and adjudicate upon disputes referred to it.² We should be reminded that the SADC Treaty is the instrument that creates the regionally acclaimed SADC as an international organisation tasked with economic integration.³ There are many subsidiary instruments such as the SADC Protocol on Gender and others that complement the SADC Treaty. Although it was established in 2000, the SADC Tribunal only became operational on 18 November 2005 when the first judges of the court were sworn in.⁴ This coincided with what many have called the inauguration of the court. The operationalisation of the SADC Tribunal took longer than expected because the Protocol on the establishment of the SADC Tribunal did not receive enough ratifications for it to enter into force. To address the ratification gap heads of state and governments of SADC countries decided to integrate the tribunal into the SADC Treaty itself so that the SADC Tribunal became one of SADC's operational organs.⁵ When the court became operational it heightened the hopes of many people in the region, particularly those living in jurisdictions marred with a history of political interference in the court system. This was because a functioning SADC Tribunal raised expectations of fairness and access to justice for victims of violation of human rights in the jurisdictions concerned. Looking at the cases that the SADC Tribunal presided over since its inauguration in 2005, there were no questions about its independence and impartiality. In all instances, the

1 The tribunal was created in 1992 by a treaty, called the Protocol on the establishment of the SADC Tribunal.

2 The SADC Treaty was amended during SADC Heads of State and Government Summit held in Blantyre, Malawi on 14 August 2001. With the amendment, the lack of ratifications acting as an obstacle preventing the SADC Tribunal from operating was addressed.

3 See art to of the SADC Treaty as amended in 2015.

4 SADC Lawyers Association, 'SADC-LA stands in solidarity with the Law Society of South Africa (LSSA) on its court challenge against the SA Government for supporting the disbanding of the SADC Tribunal' <[www.lssa.org.za/upload/files/Press%20releases/SADCLA%20Solidarity%20Statement%20on%20LSSA%20%20SADC%20Tribunal%20Court%20Challenge%20\(00000002\).pdf](http://www.lssa.org.za/upload/files/Press%20releases/SADCLA%20Solidarity%20Statement%20on%20LSSA%20%20SADC%20Tribunal%20Court%20Challenge%20(00000002).pdf)> accessed 3 June 2019.

5 The incorporation of the SADC Tribunal as one of the main organs of the SADC Treaty was achieved through a formal amendment introduced in the original text of the SADC Treaty.

court acted boldly as demonstrated by its early decisions which were mainly based on principles and the law.⁶

Even though the SADC Tribunal was bold in administering justice it faced serious challenges discharging its work. Things became rocky in 2008 when the SADC Tribunal delivered a judgment against the Government of Zimbabwe. In the case of *Mike Campbell (Pvt) Ltd and others v Republic of Zimbabwe*⁷, Mr Campbell had approached the SADC Tribunal challenging expropriation of his land by Zimbabwean authorities without compensation. The SADC Tribunal made a ruling against Zimbabwe and ordered fair competition to be paid to Mr Campbell. The Government of Zimbabwe defied and refused to comply with the decision. Moreover, the Zimbabwean authorities led a political campaign against the SADC Tribunal. As part of the campaign the Zimbabwean authorities called their counterparts in the SADC region to limit the powers of the SADC Tribunal. The anti-SADC Tribunal campaign gain momentum leading to the de facto suspension of the tribunal in May 2011.⁸ On 17 August 2012, the Summit of SADC Heads of States and Government resolved that ‘a new Tribunal should be negotiated and that its mandate should be confined to interpretation of the SADC Treaty and Protocols relating to disputes between member states’.⁹ In August 2014, the SADC Summit amended the SADC Tribunal Protocol to allow access only to state parties. In other words, the 2014 amendments to the Protocol on the SADC Tribunal does not include a

mandate for the court to hear cases filed by individuals against states. This amendment was regard as a major turnaround from the original jurisdiction of the SADC Tribunal.¹⁰

GAPS FOLLOWING THE SUSPENSION OF THE SADC TRIBUNAL AND ADVOCACY ACTIONS

Many subsidiary instruments ratified by SADC member states, including the SADC Protocol on Gender, the SADC Protocol on Finance and the SADC Protocol on Corruption, retain the suspended SADC Tribunal as the primary court responsible for dispute resolution.¹¹ These subsidiary instruments are binding, they have force of law and allow individuals to use the suspended SADC Tribunal to institute complaints against violation of their rights. It is ironic that knowing this fact, SADC member states decided to suspend the SADC Tribunal leaving a huge vacuum for justice where violations of rights contained under SADC subsidiary instruments occur.¹² As mentioned in the introductory part of this policy paper, several efforts are being made to address the gap. To be precise, litigation and advocacy are being used to encourage SADC to restore the suspended SADC Tribunal in its original form. Mainly, these efforts aim to ensure that the SADC Tribunal is given the mandate to receive human rights complaints brought by individuals. Insofar as litigation is concerned, the two executive decisions, namely, the suspen-

6 Suzgo Lungu and Aquinaldo Mandlate, ‘Op-Ed: Access to justice in Africa – The fight for an effective SADC Tribunal’ (Daily Maverick, 12 February 2018) <www.dailymaverick.co.za/article/2018-02-12-op-ed-access-to-justice-in-africa-the-fight-for-an-effective-sadc-tribunal/#.WoUpnINuaM> accessed 3 June 2019.

7 *Mike Campbell (Pvt) Ltd and Others v Republic of Zimbabwe* (2/2007) [2008] SADCT 2 (28 November 2008).

8 The May 2011 Summit of SADC Heads of State and Government held in Victoria Falls, Zimbabwe suspended the SADC Tribunal.

9 Carmel Rickard, ‘Bring back the SADC Tribunal, says Judge’ (African Lii, 23 August 2018) <<https://africanlii.org/article/20180823/bring-back-sadc-tribunal-says-judge>> accessed 3 June 2019.

10 Under the 2014 SADC Tribunal Protocol the tribunal is solely left with powers to address disputes brought by SADC member states against each other. See generally Frans Viljoen, ‘Understanding and overcoming challenges in accessing the African Court on Human and Peoples’ Rights’ (2018) 67 ICLQ 1.

11 Suzgo Lungu and Aquinaldo Mandlate, ‘Op-Ed: Access to justice in Africa – The fight for an effective SADC Tribunal’ (Daily Maverick, 12 February 2018) <www.dailymaverick.co.za/article/2018-02-12-op-ed-access-to-justice-in-africa-the-fight-for-an-effective-sadc-tribunal/#.WoUpnINuaM> accessed 3 June 2019.

12 For instance, South Africa ratified both instruments highlighted above before 2014, when the decisions to suspend the tribunal and adopt a new protocol on the tribunal were taken, respectively.

sion of the tribunal in 2011 and the amendment of the SADC Tribunal Protocol in 2014, were subject to separate lawsuits in Mozambique¹³, South Africa¹⁴ and Tanzania, respectively. The three cases were instituted following a resolution of the SADC Lawyers Association (SADC LA) Council which called its members to use litigation in their respective countries to push for the restoration of the SADC Tribunal in its original form.¹⁵ To date, only the case brought before the High Court of Pretoria (South Africa) was finalised.¹⁶

Moreover, a network of civil society organisations established the Coalition for an Effective SADC Tribunal (the SADC Tribunal Coalition),¹⁷ which plays an important role advocating for the SADC Tribunal. Since its inception the SADC Tribunal Coalition has held several meetings and lobbied governments at various levels calling for the restoration of the SADC Tribunal in its original form. It has also mobilised communities, delivered statements and shared key advocacy messages speaking to the need for an effective regional court. The campaign under the SADC Tribunal Coalition has been slow with huge difficulties in obtaining funds needed to support its work. There has also been lack of sufficient efforts to use SADC standards themselves in advocating for the tribunal. While these two aspects are equally important, this policy paper only looks at the latter in proposing recommendations aimed to strengthen the work of the SADC Tribunal Coalition.

KEY POINTS ON STRENGTHENING ADVOCACY FOR THE SADC TRIBUNAL

Article 4 of the SADC Treaty enlists five principles governing the actions of SADC member states, including (i) principle of sovereign equality of all member states, (ii) principle of solidarity peace and security, (iii) principle of human rights, democracy and the rule of law, (iv) principle of equity, balance and mutual benefit, and (v) principle of peaceful settlement of disputes. Admittedly, the principle of human rights is in the heart of each of the other four key principles grounded in Article 4. To this end, it can be argued that all five principles listed in Article 4 of the SADC Treaty can be utilised to justify the call for a strengthened SADC Tribunal as a pillar for access to justice and particularly as an instrument of justice meant for the protection of human rights. What follows is a discussion on the importance of drawing links between these principles and advocacy calling for the restitution of the SADC Tribunal as an independent institution responsible for delivering justice.

Principle of sovereign equality of member states

Analysis

The principle of sovereign equality translates the notion of supreme authority over something. In this regard, all SADC members states have supreme authority over their respective jurisdic-

13 *Ordem dos Advogados de Moçambique v. Republica de Moçambique*, Recurso de Apelação No. 26/2016 decidido pelo Acórdão No. 74/2016-P (Acórdão do Tribunal Administrativo de Moçambique).

14 *Law Society of South Africa and Others v President of the Republic of South Africa and Others* (CCT67/18) [2018] ZACC 51; 2019 (3) BCLR 329 (CC); 2019 (3) SA 30 (CC) (11 December 2018).

15 The decision to challenge the suspension of the SADC Tribunal was taken by the SADC LA, which is the regional umbrella body for Law Societies in Southern Africa. The resolution by SADC LA Council is binding to all Law Societies in SADC. However, to this date, only three Law Societies, namely the South African Law Society, the Law Society of Tanzania and the Mozambican Bar Association, instituted cases in their respective jurisdictions. See more details at SADC LA (n 4).

16 The case was *Law Society of South Africa (LSSA) and others v the President of South Africa*. The applicants requested the court to determine that the President of South Africa's action in participating in the decision that led to the suspension of the SADC Tribunal in 2011 was unconstitutional. Moreover, the court was asked to determine that the President acted unconstitutionally when he signed the 2014 Protocol, which removed the powers of the SADC Tribunal to receive complaints brought by individuals, without consultations. The court delivered a decision stating that the President of South Africa acted unconstitutionally by participating in the decision that led to the weakening of the SADC Tribunal.

17 The coalition comprises more than 24 international regional and local civil society organisations.

tions. A cursory look at the SADC Treaty shows that the incorporation of this principle in the SADC Treaty itself was not a mistake or defect by design. Instead, the incorporation of this principle goes along with the thinking of the drafters of the SADC Treaty who envisioned the SADC as an inter-governmental institution as opposed to a supra-national body. The former comprises government as independent actors who come together to cooperate over agreed goals. Differently, stakeholders in supra-national institutions are governments that relinquish part of their authority to decide over specific matters agreed commonly in favour of the supra-national institution itself. This explains clearly that governments forming part of intergovernmental bodies always have the supreme authority to decide all aspects of common interest regardless of the decision of other participating stakeholders. However, in supra-regional institutional settings the decision over common interest is left to the institution which is attributed powers the mandate to make decisions of specific matters. Given the conceptualisation of the SADC as an intergovernmental body the following recommendations would help any advocacy efforts seeking to restore the SADC Tribunal.

Recommendations

- Advocacy needs to target SADC political bodies whose membership comprises representation of SADC member states; and
- Given sovereignty of member states, advocacy should target each SADC member state separately in their respective jurisdictions alongside advocacy at the heart of the organisation.

Principle of solidarity, peace and security

Analysis

This principle translates the idea that SADC member states should come together and support each other on matters concerning these states separately or collectively. The principle under examination also entrenches a component of peace and security. There is a wide pool of research showing that it is difficult to achieve peace and security where injustices prevail. It

means that the messages around the advocacy for the restitution of the SADC Tribunal need to include a dimension of peace and security and accommodate the fact that member states tend to act in support of each other.

Recommendations

- Advocacy should identify, select and use examples of SADC member states where the suspended SADC Tribunal played a meaningful role to bring peace and security. The experiences of these countries can be used to stimulate other SADC countries facing challenges to appreciate the importance of the SADC Tribunal in resolving dispute and promoting a peaceful environment; and
- Advocacy should target SADC member states who are not acting in solidarity with the people of countries in the region who are denied access to justice in their respective countries. Such countries should be exposed for their lack of action and for not complying to their commitments under the SADC Treaty.

Principle of human rights, democracy and the rule of law

Analysis

This principle commits all SADC member states to abide to human rights and to use human rights standards to gauge the action of their peers in the region. Due to this principle, when a state party to the SADC fails to act according to human rights standards other SADC member states should rise the flag and ask the state defaulting to respect human rights. Several measures can be taken to bring a defaulting state to correct its action or omission tramping against human rights. For instance, the SADC can apply sanctions including the suspension of SADC membership and or barring leaders of a defaulting state from attending meetings of the organisation. The notion of the rule of law is also enshrined in the principle under analysis. The concept of the rule of law underscores the fact that SADC member states and their leaders must respect codes of conducts and norms that bind them. This means that as a serious organisation the SADC should not support leaders of SADC member states who fail to subscribe to

rules and procedures accepted by the organisation (and by implication those that govern their respective countries).

Recommendations

- Advocacy should take stock of states that violate the rule of law including states that fail to allow their citizens to access justice in their respective courts; and
- Advocacy shall also use domestic legislation including constitutional norms that call for the establishment of courts to administer justice where human rights were violated. It may be useful to draw a comprehensive list of provisions entrenched in domestic laws and constitutions in force in SADC member states to show that these instruments promote access to justice at domestic, regional and international levels, alike.

Principle of equity, balance and mutual benefit

Analysis

The principle of equity, balance and mutual benefit matches well with the objectives of SADC¹⁸ as an organisation tasked with the promotion of regional economic integration.¹⁹ Regional economic growth implies fair distribution of opportunities (including raw materials and market space).²⁰ Effective integration also calls for independent and impartial institution capable to resolve conflicts deriving from sub-regional economic integration. The nature of conflicts may vary depending on the aspects at stake (some may be social, other purely economic and they may be mixed conflicts involving social and economic elements at the same time) thus justifying the establishment of judicial institutions with human rights mandates to resolve disputes with a human rights nature.²¹

Recommendations

- Civil society organisations need to advocate for the restitution of the SADC Tribunal as an institution capable of settling human rights disputes motivated by economic integration.

Principle of peaceful settlement of disputes

Analysis

The principle of peaceful settlement of disputes relates to relationships established among SADC member states themselves. The need to nurture peace in the SADC region translates the correspondent need for peaceful dispute settlement mechanism among member states. This helps to reduce confrontations and violation of human rights when disputes between states erupt. The search for peace and justice and the need to ensure access to justice for the people of SADC can be achieved through regional courts that resolve inter-state disputes. This helps to reduce chances for employing violent tools known to perpetuate injustice and human rights violations.

Recommendations

- Build an advocacy strategy that calls for the use of the SADC Tribunal as a mechanism of peaceful settlement of disputes in line with the principles prescribed by the SADC Treaty.

5. CONCLUSIONS

This policy paper shows a clear gap in ensuring access to justice for citizens living in countries in Southern Africa. The paper argued that the absence of a sub-regional court with powers to receive complaints brought by individuals alleging violations of their human rights presents a major setback. It reflected on advocacy to restore the SADC Tribunal in its original form.

18 The objectives of SADC are listed in art 5 of the SADC Treaty.

19 Such regional integration should contribute towards fair economic opportunities for the people in countries in the SADC region.

20 Aquinaldo Mandlate and Tinashe Kondo, 'Towards (Sub) Regional Integration: An appraisal of select aspects of immigrations and investment laws in two SADC countries' (paper presented at the 19th SADC Lawyers Association (SADC LA) General Assembly Meeting and Conference, Maputo, 2018).

21 Admittedly, all sorts of disputes including human rights disputes are bound to occur under regional economic settings.

This includes a mandate of the tribunal to receive such human rights complaints brought by SADC citizens. A set of key recommendations were made for civil society groups to use the principles enshrined in the SADC Treaty as part of the advocacy messages needed to persuade SADC member states to bring back the SADC Tribunal in its original form of conception.

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