



Konrad
Adenauer
Stiftung



Centre for
Human Rights
UNIVERSITY OF PRETORIA

**A ROUNDTABLE WITH STAKEHOLDERS, IN THE LIGHT OF THE EXPERIENCE
OF THE EAST AFRICAN AND ECOWAS COURTS OF JUSTICE**

28 and 29 AUGUST 2014

Venue: Law 1-48

Ground floor, Faculty of Law building, main campus, University of Pretoria

THURSDAY 29 AUGUST 2014

Recap of Day 1

Welcome and Opening session

The workshop was opened by the Director of the Centre for Human Rights Prof Frans Viljoen who introduced the Dean of the Faculty of Law, University of Pretoria, Prof Andrea Boraine. Prof Boraine welcomed the workshop participants. He underscored the need for a judicial organ in a regional organisation like SADC, especially since the rule of law and good governance can only be guaranteed where there is an effective judicial organ. He expressed the hope that the workshop would come up with strategies that would address the challenges currently facing SADC with regards to the absence of a regional court.

The workshop was then addressed by Dr Arne Wulff of the Konrad Adenauer Stiftung (KAS), the co-facilitators of the workshop. Dr Wulff presented the view of the KAS on the link between the Tribunal and the rule of law. Dr Wulff questioned the attitude of the Republic of South Africa on the whole issue surrounding the suspension of the SADC Tribunal, especially in light

of its progressive domestic constitutionalism. He encouraged the workshop participants to remain seized with the issue until a solution is found.

1st thematic presentation- The current state of affairs: where are we and how did we get there?

Justice Ariranga Pillay, former President of the disbanded SADC Tribunal gave a presentation that covered the jurisdiction of the SADC Tribunal under the ‘old’ Protocol; the human rights provisions in the SADC Treaty and the background to the suspension and disbanding/sacking/dissolution of the SADC Tribunal. He pointed out that this was linked to the Tribunal’s progressive human rights jurisprudence especially as arising from the Campbell case and related matters. He also indicated that there could also be a link between the Tribunal’s decisions in the labour matters involving senior SADC employees and SADC and the SADC Parliamentary Forum and the attitude of the other institutions of SADC towards the Tribunal; and that these decisions could have contribute to the Tribunal’s eventual suspension. Justice Pillay concluded by observing that ultimately it was the SADC citizen, both natural and legal, who would be unconvinced by the limited jurisdiction as envisaged in the recently adopted protocol.

Next to present was Justice Mkandawire, the Registrar of the SADC Tribunal.¹ He indicated he continued to be regarded as the Registrar of the SADC Tribunal even after its suspension. He also indicated that he had firsthand information on the developments post suspension of the SADC Tribunal including the negotiation of the new protocol.

Justice Mkandawire advised the workshop that during its active life, the Tribunal received a total of 30 cases, one of them after the suspension of the Tribunal.² Of the 30 cases, the Tribunal was able to finalise 24 cases and the remaining six are still pending. One of the cases (filed after the suspension) was actually a challenge to the suspension of the Tribunal.

¹ According to Justice Mkandawire, there were three employees of the Tribunal remaining, the Registrar, the Assistant Registrar and the Librarian. Most of the employees left because of the uncertainty of the future of the Tribunal. All the three remaining employees will cease to be employees of SADC on Monday 1st September 2014 and will return to their home states.

² The judges had directed the Registrar to continue receiving cases since they viewed the suspension of the Tribunal as illegal.

Justice Mkandawire indicated that to his knowledge, the negotiation and drafting of the new protocol did not involve stakeholders in clear violation of article 23 of the SADC Treaty. He also questioned the legal status of the new protocol (the new protocol will come into force after ratification by state parties to the Protocol) in light of the SADC Treaty provision which indicates that the Tribunal protocol is an integral part of the Treaty, and by extension of reason, subject to the same adoption and amendment procedures as the SADC Treaty itself. He also decried the lack of saving provisions and said this created a lot of uncertainty regarding pending cases, among other things. He also advised that there was work in progress towards the establishment of an administrative tribunal with jurisdiction over labour matters between SADC and its employees. Justice Mkandawire indicated that from the look of things, the envisaged administrative tribunal is likely to be similar to such tribunals as the three UN administrative tribunals (in Nairobi, Geneva and New York) and that of the African Development Bank. Justice Mkandawire indicated that owing to the suspension of the SADC Tribunal, the SADC employees had no dispute resolution forum to take their employment related disputes to and some of them had to approach the Botswana courts, which fortunately have so far been declining to recognise SADC's international immunity, since SADC has not provided an alternative forum for resolution of disputes between it and its employees.

Justice Mkandawire indicated that on the issue of the pending cases, the SADC Summit has directed the ministers of justice to propose alternative ways of dealing with such cases and report at the next meeting of the Summit in 2015. However, indications are that the initial view that the former judges of the Tribunal would hear the pending matters has effectively been rejected.

By way of conclusion Justice Mkandawire indicated that the new protocol would likely establish a white elephant. This is because from experience, member states, now the only ones with access to the Tribunal on contentious matters, are not likely to take each other to the Tribunal because they ordinarily settle their differences diplomatically. He indicated that since protocols such as the ones on trade, investment and gender & development have the individual as their subject, the new tribunal would be meaningless as long as it does not allow individual access. According to

Justice Mkandawire, the adoption of the new protocol was a dark chapter in SADC, particularly in the legal history of SADC.

From the discussion that followed, one point was dominant: While the actions of the Summit were clearly illegal, the resolution of the matter should lie in the political domain, since there is no legal forum to drag the Summit to, at least within SADC.

2nd thematic presentation- The East Africa Court of Justice experience

The first panelist of the second thematic presentation, chaired by Dr Wulff, was Justice H Nsekela, former Judge President of the EAC Court. Justice Nsekela started by pointing out that cases brought by individuals have contributed considerably to the case law of the EAC Court. He went on to discuss the history behind the interpretation by the EAC Court of article 30 of the EAC Treaty in a case concerning the nomination by Kenya of the members of the East Africa Parliamentary Committee. He ended up by warning the audience to beware of saying that the SADC Protocol will take a long time before entering into action, pointing out that in Tanzania it only took 14 days.

The second panelist was Prof. John Eudes Ruhangisa, Registrar of the East African Court of Justice. He started by pointing out the very important role played by regional courts in the integration process. If any regional integration is to succeed there has to be a strong and independent institution to settle the disputes that may arise out of that relationship. The role being played by the EACJ in the integration as a regional court cannot be overemphasized.

He then moved on to discussing various cases on the jurisdiction of the EAC Court. Under EAC Treaty the EACJ's human rights and appellate jurisdictions have been postponed to the unknown future and pegged on the conclusion of a protocol to that effect. Crafty legal mind resorted to approaching the Court via Article 6 that acknowledges respect for human rights as one of the fundamental principles of the Community.

In *Sitenda Sebalu Vs Secretary General of EAC and Others* the Court held that the delay to extend the jurisdiction of the EACJ contravened the principles of good governance as stipulated in Article 6 of the Treaty.

The first case filed in the Court related to human rights was *James Katabazi and 21 Others*: (intervention of armed security agents of Uganda to prevent execution of a lawful court order thereby violating the principle of the rule of law and consequently the Treaty). The Court concluded that while it would not assume jurisdiction to adjudicate human rights disputes, it would not abdicate from exercising its jurisdiction of interpretation under Article 27(1) merely because the reference includes allegations of human rights violations

The Court's independence and impartiality in *Anyang'Nyong'o* Court ruling met with the hostile reaction from top leadership of the Community at the 8th Summit. The EAC Heads of State directed

- ▶ “that the procedure for the removal of Judges from office provided in the Treaty be reviewed with a view to including all possible reasons for removal other than those provided in the Treaty.” and that “a special Summit be convened very soon to consider and to pronounce itself on the proposed amendments of the Treaty in this regard.”

Within 14 days the Treaty was amended. The above interventions by the Summit seriously put at risk the security of tenure for EACJ Judges. However, this reaction did not deter the Judges from acting impartially and independently as it transpired in the subsequent decisions of the Court. Two Divisions of the Court were created. A two months limitation period within which a legal or natural person may institute a reference to the Court was introduced.

Prof Ruhangisa was at pains to point out that the Court has **so far** proved to be impartial and independent no matter the consequences. East African leaders must be willing and prepared to invest in institutions that will make people develop with dignity-EALA and EACJ. There has been resistance from the Partner States in relation to the Court dealing with matters related to issues of human rights but the Court has not abdicated its duty of interpreting the Treaty especially on issues related to the Treaty and mostly the Fundamental Principles of the Community which include promotion and protection of human rights. Despite the many challenges the Court has faced the Court has stood steadfast while playing its role in the integration process. Although there has not been non-compliance with the Courts decisions on issues of human rights, there is need to give the Court or the Community mechanisms to

implement its decisions because if a Partner State chose not to comply with the Court decision then there would be no way of making/forcing them comply with the decision.

3rd thematic presentation- The Economic Community of West African States Court of Justice experience

The third session was chaired by Adv Mushwana from the SAHRC. The panelist was Mr Y Danmadami, Senior Recorder at the ECOWAS Court. Mr Danamdami went through the history behind granting individual access at the ECOWAS Court. He pointed out that from the commencement of the activities of the Court in 2001 till January 2005, only 2 cases were filed by individuals (which was subsequently ruled out), and not cases were filed by states. It was therefore realized that only if individual access was granted, would the court become more effective. The Supplementary Protocol of 2005 granted five mandates to the Court, and nowadays the majority of cases before the Court refer to human rights abuse cases filed by individuals.

Following a question from the audience, a comparison was drawn between the SADC Tribunal and the ECOWAS Court of Justice. One aspect pointed out was the division of labour in the ECOWAS where a decision would go through three or four stages before coming to the attention of the heads of states.

4th thematic presentation- Constructing an argument for the restoration of individual access before the SADC Tribunal

The last session of the day was chaired by Prof Erika de Wet and centred on the construction of an argument for the restoration of individual access before the SADC Tribunal. The first panelist was Adv. Frank Pelsler who emphasised the embedded nature of human rights in the SADC. He advanced the argument that if human rights are implicit into the SADC system, then enforcement is implicit. He also argued that the Protocol has to be read expansively, rather than narrowly. The ouster of jurisdiction can never be implied and thus the contention that if individual access cannot be read in the word of the Protocol, thus it does not exist, is wrong.

Prof Laurie Nathan was the second panellist. He gave three reasons for the disbandment of the SADC Tribunal. First, the democratic demise in the region explains the demise of the Tribunal. Secondly, while many harboured the illusion that SADC member states were ceding sovereignty to regional institutions, the SADC member states have been clear that this was not the case. This is explained by the history of many member states and the lack of political trust within the region. The last reason concerned the hierarchy of values. The primed values of SADC member states are anti-imperialism and solidarity. Member states close rank under pressure from criticism. In fact, he pointed out that the current struggle is not for individual access or for the revival of the Tribunal, but for the respect of the rule of law. This makes it a much more difficult and political struggle. He ended by proposing that the current fight be fought together with human rights advocates and citizens through political parties or trade union. If this cannot be done, states will prevail in their power.

The last panellist was Mr Nyathi Nkuli who started by pointing out the implications of the new protocol: the removal of individual access and a restriction on the sources of law. He advocated for a complete reform of the institution of the SADC: the Summit is the only decision-maker with all other institutions doing their bidding. He pointed out that member states do not value judicial thinking but seem to think that they can interpret treaties themselves.

The audience was then able to interact with the Panel. Various arguments were put forward. For Prof Viljoen, one advocacy action should be that two-third of the member states do not ratify the Protocol. In the meantime, an interim has to be organised with judges being appointed. Dr Wuff advanced the argument that as more regional courts are allowing international access, can the SADC be said not to be fulfilling international standards. He was followed in his comment by Adv Pelsler who questioned the legality of the sacking of the judges. Prof Viljoen also questioned whether an argument could be made about the procedure of the amendment which was not inclusive. The last proposition came from Assoc Prof Magnus Killander who argued that since the African Court can refer to any other human rights instrument, it could also hear violations of the SADC Treaty.

Friday 29 August

Recap of day 2

1st thematic presentation-Strategies to restore individual access before the SADC Tribunal

Day 2 of the conference started with a brief recap of the previous day. This was immediately followed by the first session of the day chaired by Ms Emilia Siwanga, from the SADC Lawyers Association. The aim of this session was to find out strategies to restore individual access before the SADC Tribunal. Mr Lloyd Kuveya from the International Commission of Jurists went through the different strategies his organisation in association with other NGOs has gone through to save the SADC Tribunal. Constructive engagement, evidence-based dialogues with the Attorney-General or Ministers of Justice of the SADC Member States and the filing for an advisory opinion before the African Court had all failed. He therefore proposed new strategies. He advised for a new litigation before the African Court but with a different NGO and with a different set of facts, arguing first that the ousting of the SADC Tribunal jurisdiction is a violation of access to court and secondly that the process of the amendment violates the SADC Treaty. He encouraged SADCLA to pursue the case before domestic courts, including in Zimbabwe, with the argument that the removal of the right to individual access to the court violates the constitution. He argued for the lobbying of the newly strengthened Pan-African Parliament so as to persuade countries which have not yet ratified not to do so. He then proposed to raise awareness among the critical mass such as trade unions and university students. Finally, he proposed naming and shaming as a means to bear pressure on states.

The chairperson of the meeting clarified that while they were keen on pursuing the domestic route, the law society of Angola remains unconvinced. The second panellist was Dr Mwiza Nkhata from the University of Malawi. He advised that in view of the enormity and complexity of the problem, we all needed to become crafty, finding out innovative legal solutions. Methods used must appeal to both the legal and political sides of the matter. He agreed that a broad-based movement is necessary to bring about the necessary pressure: lawyers alone cannot succeed. He advised to isolate the states with a more amenable position but warned against an over-reliance on foreign experience. The power dynamics within the SADC being unique, one needs to pay attention to them. He advised that the movement would be more persuasive if the movement is

located within the values of the SADC, found inside the SADC Treaty. He recommended appealing to duty bearers by focusing on the importance of human rights and values. In his conclusion, he pointed out that access to a regional court is nothing new, but only builds on the domestic protection. It is therefore apparent that the problem is a deeply structural one in the SADC.

The last panellist was Prof Gilles Cistac from Eduardo Mondlane University who pointed out to the need for a realistic approach. One recommendation was working on future protocols by inserting the right to individual access.

Prof de Wet from the University of Pretoria discussed some of the previous recommendations. She pointed out that under international law there is no right to access to an international court; even at the domestic level, this right is not absolute. There might be a trend at international law to widen access to justice, but this remained a voluntary decision of states. She continued by pointing out that while the SADC Treaty caters for the creation of the Tribunal, there is nothing on who has *locus standi*. She pointed out that an argument for individual access in case of protocols which explicitly provide so would have a stronger chance than an argument of general admission. She supported the idea of asking the African Court for an advisory opinion.

Judge Pillay discussed how the decision to remove individual access was a retrogressive one as it was unreasonable. He asked why there was a need for a legal text if states could do as they wish. Dr Wuff from KAS agreed that there was no claim under international law but pointed out that an NGO could not only work on a legal basis. Prof Nathan argued that the focus on individual access is misplaced. This should rather be seen in the broader context of human rights and rule of law. He saw the project of increasing consciousness at the domestic level as an immensely worthwhile thing to do. Justice Mkandawire asked organisers to bring all the different bodies who work on that issue together.

A discussion followed MR Kuveya's question as to whether there could be an argument that a vested right had been removed. According to Adv. Pelsler, the cause of action could lay not in international law, but in the Constitution.

Prof Viljoen also proposed the creation of a Coalition for the Restoration of the SADC Tribunal. Prof Cistac proposed a campaign targeting politicians, who would then at the time of the

ratification of the Protocol in domestic parliaments stand and argue against it. He observed that the nomination of activist judges on the Tribunal could change the situation, as the experience in the East Africa region has shown. Adv Pelsler argued for a change in the perception of the Tribunal. Tribunal cannot overrule domestic decisions or sections of the Constitution. Rather, the Tribunal is important so that our own people judge us instead of foreigners and this should encourage political will for the Tribunal. Among the final contributions was Prof L Nathan who proposed as a possible line of argument that South Africa having signed the SADC Treaty has now acted illegally by agreeing with the Summit.

Adoption of statement and Press conference

After the tea break, the participants discussed the drafting of the statement, thereby leading to the adoption of a common statement. This was followed by a Press Conference, where the judges answered questions by the press.