



VOLUME 26 (2022)

DOI: <http://dx.doi.org/10.17159/2077-4907/2022/idd.v26.33>

ISSN: 2077-4907
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Rising from its ruins? The Southern African Development Community (SADC) Tribunal

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ABSTRACT

The Tribunal of the Southern African Development Community (SADC) was established to ensure adherence to and the proper interpretation of the provisions of the SADC Treaty and its subsidiary instruments, and to adjudicate upon such disputes as might be referred to it. However, since its establishment, it has had a troubled history. After the rulings it made against the Government of Zimbabwe in the landmark Campbell land seizures case, the Tribunal's operations were unceremoniously suspended. This was followed by a process to revise its mandate, one that ultimately condemned it to paralysis and ruin. The new 2014 Protocol on the Tribunal, meant to revise the mandate of the Tribunal to confine it to hearing disputes involving states only, has been criticised as an attempt to undermine the rule of law and human rights in the region. Since the adoption of this 2014

Protocol by the SADC Summit, stakeholders have mobilised regionally to resist its ratification by member states. In particular, lawyers in SADC countries are embarking on legal petitions to reverse the Protocol and promote the revival of the Tribunal in terms of its old mandate. So far, there have been victories in these cases in two influential SADC member states, South Africa and Tanzania. However, it remains important to assess the significance of these developments. As such, the article raises the question: Is the Tribunal rising from its ruins?

Keywords: SADC Tribunal; rule of law; regional integration

1 INTRODUCTION: SADC IN CONTEXT

The Southern African Development Community (SADC) started as a grouping of frontline states whose objective was the political liberation of Southern Africa. SADC was preceded by the Southern African Development Coordination Conference (SADCC), formed in Lusaka, Zambia on 1 April 1980 with the adoption of the Lusaka Declaration (Southern Africa: Towards Economic Liberation). The formation of SADCC was the culmination of a long consultation process by the leaders of the then only majority-ruled countries of Southern Africa, namely Angola, Botswana, Lesotho, Mozambique, Swaziland, Tanzania, Zambia and Zimbabwe. On 17 August 1992, at their Summit in Windhoek, Namibia, the heads of state and government signed the SADC Treaty and Declaration that transformed the SADCC into SADC. The organisation's objective shifted to include economic integration following the independence of the rest of the Southern African countries.¹

SADC now consists of 16 countries with a total population of approximately 345 million people, just slightly more than half of that of the European Union.² Three countries, the Democratic Republic of Congo (DRC), South Africa and Tanzania, account for almost two-thirds of the total population, while the six smallest members (Seychelles,

¹ Key developments in the formation of the SADC are the following. In the 1970s, Angola, Mozambique, Tanzania, Botswana and Zambia formed a grouping called the Frontline States to fight apartheid; in May 1979 in Gaborone, Botswana, the Foreign Ministers of the Frontline States called on the ministers responsible for economic development to meet and consider an economic development initiative for the region; in July 1979 in Arusha, Tanzania, the Ministers of Economic Development drafted a declaration paving the way for the Southern African Development Coordinating Committee; on 1 April 1980 in Lusaka, Zambia, the Lusaka Declaration, entitled "Southern Africa: Towards Economic Liberation", was adopted by the founding members – Angola, Botswana, Zambia, Tanzania, Zimbabwe, Malawi, Namibia, Mozambique, Swaziland and Lesotho – thus paving the way for the establishment of the SADCC; on 17 August 1992 in Windhoek, Namibia, the Heads of State of SADCC members signed a declaration and treaty establishing SADC, which shifted focus from the coordination of developmental projects to a more complex task of integrating the economies of member states; on 29 August 1994 in Gaborone, Botswana, South Africa acceded to the SADC Treaty, which accession was ratified in September 1994 whereupon South Africa became a member; on 9 March 2001 in Windhoek, Namibia, an extraordinary summit approved recommendations to restructure SADC to give effect to the change in focus of the new demands of regional integration of SADC (the Community) and to efficiently and effectively realise the new objectives. See SADC "SADC website" available at <http://www.sadc.int/about-sadc/overview/history-and-treaty/> (accessed 26 January 2021).

² That is the population as of 2018. See SADC website available at <https://www.sadc.int/about-sadc/overview/sadc-facts-figures/> (accessed 26 January 2021).

Swaziland, Mauritius, Botswana, Namibia and Lesotho) make up only about 3 per cent of the population. A sizeable number of SADC countries have small populations; as such, a major reason for integration is the belief that there is strength in numbers and unity, and that this strength can speed up development and enhance security.³

On the economic front, SADC struggles to shake off the bonds of poverty and underdevelopment. The gross domestic product (GDP) of the entire SADC region was USD 721 billion in 2018. To this, services contribute 59.4 per cent, industry 20.3 per cent, and agriculture 20.2 per cent.⁴ However, South Africa dominates the group, accounting for about three-quarters of SADC's GDP.⁵ Agriculture is the backbone of the SADC regional economy in that about 70 per cent of the SADC population depends on agriculture for food, income and employment. SADC countries are rich in natural resources, including precious and base metals, industrial minerals and precious stones.⁶ It is imperative for SADC to actualise its economic potential; to achieve this, conditions conducive to trade and investment, including the protection of human rights, must be created and sustained. It is untenable for SADC to pride itself on vast natural resources whilst almost half of its population languishes in extreme poverty.⁷

SADC recognises the sovereignty of its member states, but also acknowledges the need to promote co-operation among them to address the challenges of an increasingly complex regional and global environment. The main objectives of SADC, spelt out in article 5 of the SADC Treaty, are to promote sustainable and equitable economic growth and socio-economic development that will alleviate, and ultimately eradicate, poverty; to enhance the quality of life of the people of Southern Africa and support the socially disadvantaged through regional integration; to promote common political values through institutions which are democratic, legitimate and effective; to consolidate, defend and maintain democracy, peace, security and stability; to promote sustainable development on the basis of collective self-reliance and the interdependence of member states; achieve complementarity between national and regional strategies and programmes; maximise productive employment and utilisation of the region's resources; achieve sustainable utilisation of natural resources and effective protection of the environment; strengthen and consolidate long-standing historical, social and

³ Chingono M & Nakana S "The challenges of regional integration in Southern Africa" (2009) 3 *African Journal of Political Science and International Relations* 396 at 397.

⁴ See SADC "SADC statistics" available at <https://www.sadc.int/about-sadc/overview/sadc-facts-figures/> (accessed 26 January 2021).

⁵ This dominance is not always a pleasure. As the saying goes, if her neighbours "do not eat, then she won't sleep".

⁶ Chingono M & Nakana S "The challenges of regional integration in Southern Africa" (2009) 3 *African Journal of Political Science and International Relations* at 398.

⁷ In southern Africa, the proportion of people living in extreme poverty (defined as those living on less than US 1.90 per day) is expected to drop over the next 23 years. However, the number of people living in extreme poverty is expected to rocket from 88 million today to nearly 130 million over the same period. See Institute for Security Studies "Extreme poverty set to rise across Southern Africa" available at <https://issafrica.org/iss-today/extreme-poverty-set-to-rise-across-southern-africa> (accessed 26 January 2021).

cultural links between the people of the region; combat HIV/AIDS and other deadly and communicable diseases; ensure that poverty eradication is addressed in all SADC activities and programmes; and mainstream gender issues in the process of community-building.⁸

The SADC member states agree that underdevelopment, exploitation, deprivation and poverty can be overcome only through economic co-operation and integration. The objectives of SADC are sought to be achieved by harmonising the political and socio-economic policies and plans of its member states; encouraging the people of the region and their institutions to take initiatives to develop economic, social and cultural ties across the region, and to participate fully in the implementation of the programmes and projects of SADC; creating appropriate institutions and mechanisms for the mobilisation of requisite resources for the implementation of programmes and operations of SADC and its institutions; developing policies aimed at the progressive elimination of obstacles to the free movement of capital and labour, goods and services, and of the people of the region generally; promoting the development of human resources; promoting the development, transfer and mastery of technology; improving economic management and performance through regional co-operation; promoting the coordination and harmonisation of the international relations of its member states; securing international understanding, co-operation and support, and mobilising the inflow of public and private resources into the region; and developing such other activities as member states may decide upon in furtherance of the objectives of the SADC Treaty.⁹

To achieve its objectives and implement its programmes, SADC has established several institutions. Based on the experience of other regions, these institutions can foster integration and development if they are capacitated and supported with adequate resources and driven by political will. At the turn of the millennium, SADC restructured itself, creating more institutions and development plans.¹⁰ The SADC Treaty now provides for eight institutions: the Summit of Heads of State or Government; the Organ on Politics, Defence and Security Co-operation; the Council of Ministers; the Integrated Committee of Ministers; the Standing Committee of Officials; the Secretariat; the Tribunal; and the SADC National Committees. The Summit is empowered to create other institutions if necessary.¹¹ These institutions play a critical role in the realisation of SADC's objectives. There can be no meaningful integration without strong institutions that drive the process. In particular, it is suggested that, in a regional context, supranational courts can be drivers for integration.

⁸ Article 5(1) of the Treaty of the Southern African Development Community, 1992 (as amended), (hereafter "SADC Treaty") available at http://www.sadc.int/files/9113/5292/9434/SADC_Treaty.pdf (accessed 26 January 2021).

⁹ Article 5(2) of SADC Treaty.

¹⁰ SADC changed from the SADCC into an entity with a focus on deeper regional integration. See SADC website available at <https://www.sadc.int/pages/history-and-treaty> (accessed 26 January 2022).

¹¹ Article 9 of SADC Treaty.

Against this background, the article discusses the Tribunal as an institution key to regional integration. The discussion looks at its troubled history from its establishment and suspension to its reinstatement with a circumscribed jurisdiction, and considers whether there is still hope for its revival, and, if so, what steps could be taken to realise that hope.

2 THE SADC TRIBUNAL

The SADC Tribunal was meant to be an integral part of the SADC Treaty.¹² It was constituted to ensure adherence to, and proper interpretation of, the Treaty's provisions and its subsidiary instruments, and to adjudicate upon such disputes as might be referred to it.¹³ The SADC Tribunal was established in 1992 by article 9 of the SADC Treaty,¹⁴ and was meant to become "the" regional judicial institution within SADC. But since then, its operations shifted in an unforeseen direction.

Following the seizure of land owned by white commercial farmers by the Zimbabwean government, as instigated by the then ruling ZANU-PF and its leader, Robert Mugabe, the Zimbabwean parliament was pushed into passing a constitutional amendment¹⁵ to allow the government to seize or expropriate farmland without compensation and to bar courts from adjudicating over legal challenges filed by dispossessed and aggrieved farmers. On 11 October 2007, Mike Campbell (Pvt) Ltd, a Zimbabwean-registered company, together with other Zimbabwean white farmers, brought their case before the SADC Tribunal to challenge human rights violations caused by the expropriation of agricultural land in Zimbabwe by that country's government.¹⁶

The case before the Tribunal was that the constitutional amendments were contrary to Zimbabwe's obligations under SADC statutes and that the Zimbabwean courts had failed to adjudicate on the matter. On 13 December 2007, the SADC Tribunal ruled that

¹² Article 16(2) of SADC Treaty.

¹³ Article 16 (1) of SADC Treaty.

¹⁴ Article 9 of SADC Treaty.

¹⁵ Zimbabwean Constitutional Amendment Act 17 of 2005.

¹⁶ For more information, see Ruppel OC "The case of Mike Campbell and the paralysation of the SADC Tribunal" in Laryea ET, Madolo N & Sucker F (eds) *International economic law voices of Africa* (2012) 165–183; Ruppel OC "SADC land issues before the SADC Tribunal: A case for human rights?" in Chigara B (ed) *Southern Africa Development Community land issues: A new, sustainable land relations policy* (2012) 89–120; Ruppel OC "Mike Campbell verstorben: Und das SADC Tribunal?" *Allgemeine Zeitung* (20 April 2011) available at https://www.az.com.na/nachrichten/mike-campbell-verstorben-und-das-sadc-tribunal_ (accessed 12 August 2022); Ruppel OC "Regional Economic Communities and human rights in East and Southern Africa" in Bösl A & Diescho J (eds) *Human rights in Africa* (2009) 275–319; Ruppel OC "The Southern African Development Community (SADC) and its Tribunal: Reflexions on Regional Economic Communities' potential impact on human rights protection" (2009) 2 *Verfassung und Recht in Übersee* at 173–186; Ruppel OC "The SADC Tribunal, regional integration and human rights: Major challenges, legal dimensions and some comparative aspects from the European legal order" (2009) 2 *Recht in Afrika* 213 213–238; and Ruppel OC & Bangamwabo FX "The mandate of the SADC Tribunal and its role for regional integration" in Bösl A et al. (eds) *yearbook for regional integration* (2008) 179–221.

Campbell should remain on his farm until it had resolved the dispute in the main case.¹⁷ However, the order was not respected in Zimbabwe; in fact, there was a spike in state-sanctioned brutality, harassment and intimidation against white commercial farmers. This prompted the applicants to make an urgent application to the Tribunal, seeking a declaration to the effect that the respondent state was in breach and contempt of the Tribunal's orders. Consequently, in terms of article 32(5) of the Protocol, the Tribunal decided to report the matter to the SADC Summit for it to take appropriate action.¹⁸

On 28 November 2008, the SADC Tribunal, in its final decision, ruled in favour of Campbell and 78 other white commercial farmers.¹⁹ In its decision, the Tribunal held that Zimbabwe was in breach of its obligations under articles 4(c) and 6(2) of the SADC Treaty and that the applicants had been denied access to the courts in Zimbabwe;²⁰ the applicants had been discriminated against on the ground of race;²¹ and fair compensation had to be paid to the applicants for their land compulsorily acquired by the Republic of Zimbabwe.²²

Despite this decision and the order to protect the applicants' possession, occupation and ownership of land and pay compensation to the evicted, the Zimbabwean government ridiculed the Tribunal and its decision.²³ The Zimbabwean government had at this point decided to abandon its appearance in the court processes by, in essence, instructing its legal representative to inform the Tribunal that he had no instructions from the government.²⁴ The government also embarked on an offensive to undermine the Tribunal on the grounds that it had no jurisdiction and was wrongly constituted. The merits of these arguments were considered and found to be mere politicking.²⁵ On 23 February 2009, after the Tribunal's decision, President Mugabe said:

¹⁷ See the Interim Order in *Mike Campbell (Pvt) Ltd and Others v The Republic of Zimbabwe* SADC (T) (13 December 2007). This interim relief was also applied for by and granted to other applicants/interveners on 28 March 2008.

¹⁸ Dube M & Midgley R "Land reform in Zimbabwe: Context, process, legal and constitutional issues and implications for the SADC region" in Bösl A et al. (eds) *Monitoring regional integration in Southern Africa yearbook* Volume 8 (2008) 303 at 305–308.

¹⁹ *Mike Campbell (Pvt) Ltd and Others v The Republic of Zimbabwe* SADC (T) Case No. 2/2007.

²⁰ See *Campbell* (2007).

²¹ The issue of racial discrimination was decided by a majority judgement (four to one). Judge OB Tshosa, in his dissenting opinion, concluded that "Amendment 17 does not discriminate against the applicants on the basis of race and therefore does not violate the respondent obligation under Article 6(2) of the Treaty". He argued that "the target of Amendment 17 is agricultural land and not people of a particular racial group and that – although few in number – not only white Zimbabweans have been affected by the amendment". See *Campbell* (2007).

²² Dube & Midgley (2008) at 305–308.

²³ See Chanaka C "Mugabe says Zimbabwe land seizures will continue" available at <https://www.reuters.com/article/us-zimbabwe-crisis-mugabe/-says-zimbabwe-land-seizures-will-continue-idUSTRE51R0VS20090228?sp=true> (accessed 17 April 2020).

²⁴ Sasa M "Zim pulls out of SADC Tribunal" *Herald* (2 September 2009).

²⁵ See, among others, Phooko MR "No longer in suspense: Clarifying the human rights jurisdiction of SADC Tribunal" (2015) 18 *Potchefstroom Electronic Law Journal* 531 at 531–568; Nathan L "The disbanding of

There is no going back on the land reforms ... Some farmers went to the SADC Tribunal in Namibia but that's nonsense, absolute nonsense, no one will follow that ... We have courts here in this country that can determine the rights of people. Our land issues are not subject to the SADC Tribunal.²⁶

3 HIGH EXPECTATIONS – LOW RESULTS

The establishment of SADC as an all-encompassing regional grouping of countries reflects the aspirations of countries that initially saw themselves merely as partners against imperialism and foreign domination. The foundation upon which SADC is built is thus a key factor enabling cooperation among member states, yet it is also a source of impunity and lack of adherence to any rules. That is, there is a lack of appetite for creating and being bound by commitments under the regional set-up. The establishment of the Tribunal, although it provided hope for democracy and human rights, was under threat from the undemocratic environment in which SADC has always operated. There is a will to provide the aesthetics of a unified and politically strong region, but there is no political will to embrace regionalism to the extent that it might entail relinquishing some national authority to the regional grouping. It has been remarked that most African countries join such groupings as a way of being seen as good Africans.

However, this should not divert attention from the point that the establishment of SADC and its institutions signalled the intention to move towards a more democratic and rules-based regional community. The expectation that the Tribunal could then be an important driver of integration, by enforcing adherence to agreed rules and norms, should not be overlooked. Unfortunately, while the Tribunal's work began promisingly, the end results were poor.²⁷ In fact, over the past years, not a single SADC head of state has been on record as pressing Zimbabwe for compliance with the Tribunal's ruling.²⁸ What is equally apparent is that Zimbabwe received support from other heads of state.²⁹

the SADC Tribunal: A cautionary tale" (2013) 35 *Human Rights Quarterly* 870 at 870–892; Sarkin J "A critique of the decision of the African Commission on Human and Peoples' Rights permitting the demolition of the SADC Tribunal: Politics versus economics and human rights" (2016) 24 *African Journal of International and Comparative Law* 215 at 215–241.

²⁶ See Meckler S "A human rights monster that devoured no one: The far-reaching impact of dismantling the SADC Tribunal" (2016) 48 *NYU Journal of International Law & Politics* 1007 at 1007–1038. See also Chanaka C "Mugabe says Zimbabwe land seizures will continue" *Reuters* available at <https://www.reuters.com/article/us-zimbabwe-crisis-mugabe/mugabe-says-zimbabwe-land-seizures-will-continue-idUSTRE51R0VS20090228?sp=true> (accessed 17 April 2020).

²⁷ See Meckler (2016) at 1012–1014, discussing the short life of the tribunal.

²⁸ See Meckler (2016) at 1020, detailing views from various leaders on the tribunal. Lone voices such as those of the late Archbishop Desmond Tutu were largely ignored. See "SADC summit: Beheading the monster" *Economist* (22 August 2012) available at <https://www.economist.com/baobab/2012/08/22/beheading-the-monster> (accessed 16 January 2022).

²⁹ "SADC summit: Beheading the monster" (2012) available at <http://www.economist.com/blogs/baobab/2012/08/sadc-summit> (accessed 2 September 2019).

In the wake of the SADC Tribunal's decisions on Zimbabwe, there was spontaneous backtracking by SADC leaders, with some contesting that the Tribunal had any mandate. Some were blunt in this regard. The former Tanzanian President, Jakaya Kikwete, said that they had unwittingly created "a monster".³⁰ This is an indication that supranational instruments and approaches are not easily tolerated or supported in SADC. In fact, SADC leaders questioned the mandate of the Tribunal, which once had jurisdiction over disputes between states as well as between natural or legal persons and states, plus exclusive jurisdiction in disputes between organs of the Community, or between Community personnel and the Community.³¹ It had jurisdiction over all disputes and all applications referred to it on the interpretation and application of the Treaty; the interpretation, application or validity of the protocols; all subsidiary instruments adopted within the framework of SADC and acts of the SADC institutions; as well as over all matters provided for in any other agreements that member states might have concluded among themselves or within the Community.³²

Since then, the composition, powers, functions, procedures and other related matters governing the Tribunal have been prescribed by a new Protocol to the Tribunal.³³ The original attempt to create and operationalise a fully-fledged Tribunal with broad jurisdiction and overriding decisions seemingly made SADC leaders realise that they might have made a mistake in creating such a Tribunal. In the aftermath of the SADC Tribunal's far-reaching decisions in the few cases that were brought before it, SADC leaders saw fit to reconstitute the Tribunal under a new Protocol.

While the strong resistance in SADC may have been alarming, the reality is that this backlash against supranational judicial organs is not an isolated incident. A few other examples, such as the backlash against the courts of the East African Community (EAC) and Economic Community of West African States (ECOWAS), assist in clarifying the point. One such example is the experience of the Court of ECOWAS, where the Gambia sought to restrict the Court's power to review human rights complaints. This came after the Court ruled against Zambia in a case involving journalists from the Gambia.³⁴ Although the Gambia's agenda was successfully resisted by other ECOWAS member states, the attempt by the Gambia is an example of state reaction to unfavourable regional courts' decisions.

Similarly, in East Africa, the EAC Court of Justice has jurisdiction in all matters relating to the application and interpretation of the EAC Treaty under which it was created. The Court plays an advisory and counselling role to member states on issues relating to the

³⁰ *Ibid.*

³¹ Article 15 of the Protocol on the Tribunal and Rules Thereof.

³² Article 14 of the Protocol on the Tribunal and Rules Thereof.

³³ Final Communiqué of the 32nd Summit of SADC Heads of State and Government Maputo, Mozambique, 18 August 2012, point 24. See also Scholtz W "Review of the role, functions and terms of reference of the SADC Tribunal" (2011) 1 *SADC Law Journal* 197 at 197–201 for a discussion on the suspension of the Tribunal.

³⁴ See ECOWAS Court, *Manneh v The Gambia*, ECW/CCJ/JUD/03/08, 5 June 2008; ECOWAS Court, *Saidykhav. The Gambia*, ECW/CCJ/RUL/05/09, 30 June 2009.

EAC Treaty's laws, rules and procedures.³⁵ The Court ruled against Kenya, which resulted in attempts by Kenya to eliminate the EAC Court of Justice and remove some of its judges.³⁶ Although Kenya did not succeed, it still exerted a great deal of pressure on the Court, to the extent that member states agreed to restructure the Court in a manner that significantly affected its future operations.

Nevertheless, a comparison of these two regional courts and SADC shows that the different factors prevailing in these regional communities determine, if not the propensity to fight against regional courts, but the degree to which such propensity may find traction among member states and other stakeholders.³⁷

It must be mentioned, however, that there is still hope for other regional groupings such as the Common Market for Eastern and Southern Africa (COMESA) and the Organization for the Harmonization of Business Law in Africa (OHADA), which have not been affected by this backlash as yet. COMESA created its own Court of Justice with an advisory and interpretive role on all issues relating to the Treaty and its provisions and the mandate to serve as a dispute settlement mechanism.³⁸ It has jurisdiction to hear referrals from member states and from the Secretary-General of COMESA as well as from natural and legal persons challenging the decisions of member states.³⁹ With regard to OHADA, it is a system of corporate law and implementing institutions which was adopted by 17 West and Central African nations in 1993. It has been appreciated that:

[t]he attractiveness of the OHADA system results widely from the confidence to a supranational court, away from ... incompetence, corruption, political pressure, and peddling. Thus, the creation of a supranational court helps to promote the judicial security.⁴⁰ The Common Court of Justice and Arbitration was formed with two key objectives in mind: the unification of the jurisprudence of business law and the interpretation of the Uniform Acts. Disputes concerning the application of the Uniform Acts are first submitted to the national courts and then to the CCJA which is the final court of appeal under the OHADA Treaty.⁴¹

³⁵ Article 28(2) of the Treaty Establishing the East African Community, 1999 (as amended). See also Idris MB "Harmonization of business laws in Africa: An insight into the laws, issues, problems and prospects" in Dickerson CM (ed) *Unified business laws for Africa: Common law perspective on OHADA* 2nd ed (2012) 7 at 24.

³⁶ See EACJ, *Anyang Nyong'o v Attorney General of Kenya*, Reference No. 1 of 2006, 27 November 2006.

³⁷ See Karen JA, James TG & Laurence RH "Backlash against international courts in West, East and Southern Africa: Causes and consequences" 2016 (27) 2 *European Journal of International Law* 293.

³⁸ See article 19 of the Treaty establishing the Common Market for Eastern and Southern Africa.

³⁹ Articles 24–26 of the Treaty establishing the Common Market for Eastern and Southern Africa.

⁴⁰ See Gilles C "The legal integration in all its aspects: OHADA and SADC", cited in A Mouloul *Understanding the Organization for the Harmonization of Business Laws in Africa (OHADA)* 2nd ed (2009) at 38 available at <https://www.ohada.com/uploads/actualite/1403/Comprendre-l-Ohada-en.pdf> (accessed 22 January 2022).

⁴¹ See article 20 of the Treaty on Harmonisation of Business Law in Africa (OHADA). Execution and enforcement shall be ensured by the contracting states on their respective territories.

The right to an appeal can be exercised by a party on a matter falling within OHADA law after domestic appeal processes.⁴²

On paper at least, these two courts have retained individual access despite manoeuvres to limit the powers of regional courts in Africa.

4 PHASING OUT THE SADC TRIBUNAL

In August 2010, “[t]he SADC committee of justice ministers and attorney generals was tasked to examine the role and functions of the Windhoek-based Tribunal, and also the implications of a member state ignoring its rulings”.⁴³ The Tribunal was temporarily suspended, as the Summit instructed that the SADC Tribunal should not hear new cases until the role, functions and terms of reference of the Tribunal had been reviewed.⁴⁴ A consultancy firm was appointed to review the operations of the SADC Tribunal.⁴⁵

The study addressed,⁴⁶ inter alia, the role and functioning of the Tribunal, its jurisdiction, the interface with national laws in SADC, the mandate of the existing appeals chamber of the Tribunal, the recognition and enforcement of the Tribunal’s decisions, the qualifications and the process of nomination and appointment of the SADC Tribunal Judges, the legal status of the SADC Tribunal Protocol, and the overall role and functioning of the Tribunal, focusing in particular on practical aspects of its effectiveness.

What is important to note is that this independent review and its recommendations were discussed extensively by stakeholders before being amended and unanimously approved by SADC senior law officials at their meeting held in April 2011 in Swakopmund, Namibia.⁴⁷ Shortly thereafter, however, SADC ministers of justice and attorneys-general began to question the review. First, the Namibian Minister of Justice, Pendukeni Iivula-Ithana, stated that the decision on the future of the SADC Tribunal remained the decision of the SADC community: “[It] is us, the people of SADC, who can own our own instruments as they address our identified concerns and are compatible with our national legal systems.” She added:

⁴² See article 14 of the Treaty on Harmonisation of Business Law in Africa (OHADA).

⁴³ Zvayi C “Southern African Development Community Tribunal suspended” *Herald* (17 August 2010) available at <https://bit.ly/3va4idH> (accessed 20 January 2022).

⁴⁴ See Ndlovu PN “*Campbell v Republic of Zimbabwe: A moment of truth for the SADC Tribunal*” (2011) 1 *SADC Law Journal* 63 at 63–79.

⁴⁵ Nathan L “The disbanding of the SADC Tribunal: A cautionary tale” (2013) 35 *Human Rights Quarterly* 870 at 878.

⁴⁶ For a summary of the scope of the study, see Scholtz W “Review of the role, functions and terms of reference of the SADC Tribunal” (2011) *SADC Law Journal* at 197–201.

⁴⁷ Meckler S “A human rights monster that devoured no one: The far-reaching impact of dismantling the SADC Tribunal” (2016) 48 *N.Y.U. J. Int’l L. & Pol* at 1020.

This Tribunal is ours and we have received the advice contained in the final report of the consultant, ours is to take out of it what we deem appropriate and suggest to the Presidents and Heads of States for their decision.⁴⁸

In theory, there is nothing wrong with the comment that SADC instruments are for SADC people and that the opinion of the consultants on the SADC Tribunal was not binding on SADC. However, viewed in context, it is apparent that these comments paved the way for pre-determined decisions that were incompatible with both the procedures provided for under SADC instruments and the opinion which SADC leaders themselves had voluntarily sought from experts.

After completing its work, the Committee of Ministers of Justice and Attorneys General submitted its report for consideration by the Summit. By this stage, the Committee had practically ignored the independent opinion.⁴⁹ It is not surprising that subsequent to this report, the official communique⁵⁰ noted as follows:

6. Summit received and considered the Report of the Committee of Ministers of Justice and Attorneys General on the review of the Role, Responsibilities and Terms of Reference of the SADC Tribunal in accordance with Summit Decision 20 of August 2010 taken in Windhoek, Namibia.

7. Summit decided as follows:

- mandated the Ministers of Justice/Attorneys General to initiate the process aimed at amending the relevant SADC legal instruments and submit a progress report at the Summit in August 2011 and the final report to Summit in August 2012;
- not to reappoint members of the Tribunal whose term of office expired on August 31, 2010; and
- not to replace members of the Tribunal whose term of office will expire on October 31, 2011.

8. Summit further reiterated the moratorium on receiving any new cases or hearings of any cases by the Tribunal until the SADC Protocol on the Tribunal has been reviewed and approved.

With this decision, the SADC Summit again reneged on its duty to support the Tribunal in its judgement on the *Campbell* case: it decided not to take action against Zimbabwe's non-compliance but rather to defer consideration of the matter by questioning the legitimacy of its own legal framework. As the media in Zimbabwe noted at the time:

⁴⁸ Van den Bosch S "Southern Africa: Afeared of its own Tribunal" available at <https://www.globalissues.org/news/2011/05/16/9664> (accessed 26 June 2022).

⁴⁹ See Meckler (2016) at 1020.

⁵⁰ Communiqué of the Extraordinary Summit of Heads of State and Government of the Southern African Development Community, Windhoek, Republic of Namibia of 20 May 2011.

Heads of State from the Southern African Development Community (SADC) have unlawfully sabotaged the SADC Tribunal and undermined the right of citizens to access justice [...] by violating regional laws and acting unconstitutionally [...]. SADC laws require that the Tribunal be comprised of no fewer than ten judges but the leaders have violated these laws by failing to renew the terms of those judges eligible for reappointment or to appoint new judges to fill any vacancies so that the Tribunal no longer has enough judges to hear new cases.⁵¹

In his speech, “On the silence of lawyers”, presented at the Conference of the Society of Law Teachers in Stellenbosch on 17 January 2011, Advocate Jeremy Gauntlett stated the following, which was perhaps in anticipation of the above Summit decision:

What has now happened is that the government of Zimbabwe has resorted, not unexpectedly, to extra-legal means. It did so [...] by enlisting the support of other SADC members for an effective suspension of the Tribunal while various spurious questions concerning its jurisdiction and the extent of its powers are being investigated. The terms of office of the first appointed judges are being allowed to expire. In more ways than one, the lights have been turned off. Of all this, there has been far too little scrutiny, let alone the protest to which I believe proper scrutiny should give rise. It is patently, I believe, in violation of the Treaty and Protocol.⁵²

5 THE NEW 2014 PROTOCOL ON THE SADC TRIBUNAL

At the 32nd Session of the Summit of the Heads of State and Government of SADC, held in Maputo on 17 and 18 August 2012, it was concluded that a new Protocol on the Tribunal should be negotiated and that its mandate be confined to interpretation of the SADC Treaty and Protocols relating to disputes between member states. Finally, two years later, at the 34th SADC Summit, held in August 2014 at Victoria Falls, Zimbabwe adopted and signed a new Draft Protocol on the SADC Tribunal, thereby opening it up for ratification by member states.⁵³

Although the review process of the Protocol on the Tribunal took much longer than expected, there does not seem to have been much technical work done in drafting a new protocol distinct from the old one. Given that the terms of reference for the review had already been set by the Summit in 2012, one would have thought that the review would be completed more speedily. It has to be recalled that the Summit directed that the new Protocol should confine the Tribunal’s jurisdiction to disputes between states. What this means in practice is that natural and juristic persons will not have *locus standi* when the Tribunal finally starts operating again.

⁵¹ “SADC leaders unlawfully undermine Regional Tribunal, say legal groups” available at http://www.archive.kubatana.net/html/archive/opin/101111sangos1.asp?sector=LEGAL&year=2010&range_start=1 (accessed 18 August 2022).

⁵² The speech is available at <https://www.politicsweb.co.za/party/the-silence-of-the-lawyers> (accessed 18 August 2022).

⁵³ See Final Communiqué of the 34th Summit of SADC Heads of State and Government, Victoria Falls, Zimbabwe, 18 August 2014, points 18 and 23(i).

It must be mentioned that this approach is not isolated. The African Court on Human and Peoples' rights has held that disputes referred by non-state actors cannot be entertained without a state declaration to that effect. In *Michelot Yogogombaye*, the Court held "that direct access to the Court by an individual is subject to the deposit by the Respondent State of a declaration authorising such a case to be brought before the Court".⁵⁴ In fact, article 34(6) of the Protocol on the African Court specifically provides that "[a]t the time of the ratification of this Protocol or any time thereafter, the State shall make a declaration accepting the competence of the Court to receive cases under article 5(3) of this Protocol". The Court shall not receive any petition under article 5(3) involving a State Party which has not made such a declaration.⁵⁵ This reinforces continent-wide acceptance that individual access to supranational courts is not a right – or, to put the matter more directly, that it is simply not acceptable.

Jurisdiction under the new SADC Protocol is, therefore, the substantive difference between the old and the new system. Article 33 of the new Protocol states that "[t]he Tribunal shall have jurisdiction on the interpretation of the SADC Treaty and Protocols relating to disputes between Member States", whilst article 34 goes on to spell out the advisory role of the Tribunal "on such matters as the Summit or Council may refer to it". The sum total of the new role of the Tribunal is that it can only hear disputes between SADC member states and give non-binding advice when called upon to do so by the Council of Ministers of the SADC Summit.

The practical implication of the new Protocol is that SADC citizens who, during the short lifespan of the disbanded SADC Tribunal, had referred to it all the cases it heard, will be excluded from seeking justice through it in the future. Whether this move is progressive or retrogressive can best be answered by looking at the fundamental principles that underpin SADC.⁵⁶ Article 4 of the SADC Treaty states that SADC and its member states shall act in accordance with the principles of "sovereign equality of all Member States"; "solidarity, peace and security; human rights, democracy and the rule of law"; "equity,

⁵⁴ *Michelot Yogogombaye v The Republic of Senegal*, Application No. 001/2008 at para 34. See also *Falana v African Union*, Application No. 001/2011, where the Court dealt with the question of whether the African Union could be sued as a representatives of African Union member states.

⁵⁵ Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights.

⁵⁶ After all, tribunals established only for interstate disputes are not a new phenomenon. Other international organisations such as the WTO use such a system as well. In this case, states bring their disputes for adjudication in the event of a conflict. Although this system has proved to be relatively effective in the WTO, it remains to be seen if this will be so in SADC. The fact that not a single case was referred by a SADC member state to the Tribunal under the old protocol, which equally provided for jurisdiction for interstate disputes, should not be seen as a clean bill for disputes in SADC. What is true, however, and quite commendable, is that SADC managed to resolve legal challenges without involving the Tribunal in the past. The Tribunal's advisory role remains, and so does the question as to what its purpose will be under the new Protocol, seeing that SADC member states appear to prefer diplomatic approaches to dispute settlement. For a similar view, see Erasmus G "What future now for the SADC Tribunal? A plea for a constructive response to regional needs" (2012) available at <https://www.tralac.org/discussions/article/5281-what-future-now-for-the-sadc-tribunal-a-plea-for-a-constructive-response-to-regional-needs.html> (accessed 18 August 2022).

balance and mutual benefit”; and “peaceful settlement of disputes”. These principles build on SADC’s objectives in regard to economic development, poverty alleviation, and peace. A key element of this is citizen participation in SADC’s programmes and processes, because SADC is also meant to serve the common needs of its citizens. The decision to exclude citizens from judicial processes should thus be measured against such fundamental principles as human rights, democracy, the rule of law, and the peaceful settlement of disputes. The process that “reviewed” the Tribunal was not driven by the same spirit that informs the preamble of the SADC Treaty, where emphasis is placed on “the need to involve the people of the region centrally in the process of development and integration, particularly through the guarantee of democratic rights, observance of human rights and the rule of law”.⁵⁷

The protection of human rights is a cornerstone of modern democratic society and the basis for its fertile development. Protection of human rights cannot be guaranteed if there is no observance of the rule of law, and the rule of law cannot be assured without access to justice. It is clear that it is not the state authorities that yearn for justice but the citizens of SADC. The decision to outmanoeuvre its own citizens by denying them access to regional justice shows that SADC still has to wake up to the importance that citizen participation has in the process of regional development. For now, it may be concluded that, without citizen participation, the goal of regional integration cannot be easily achieved. The new Protocol has succeeded in removing the last impediment to an elitist regional body from which the ordinary SADC citizen is excluded. This can be seen as a victory for the Zimbabwean government, and at the same time as “a violation of judicial independence, the separation of powers doctrine, and the rights of access to justice and effective remedies for SADC citizens and residents [...]”.⁵⁸

Perhaps, with hindsight, SADC heads of state will realise that the impression that they are simply a club of “dictatorial old boys” stems from nothing else but their conduct, for it is often said, “[w]hat dictators and authoritarians fear most is their people”.⁵⁹ In the same vein, SADC citizens should realise that the new rules of the Tribunal are a violation of their right to access justice, which needs protection. As long as citizens do not take steps to hold their leaders accountable, the prospect of development will remain a dream. As has been noted:

[p]erhaps the most puzzling aspect about the relative decline of Africa during the 1970s and 1980s and dramatic decline of a number of states ... is the lack of anger on the part of the populace to an environment where the elite prospered

⁵⁷ Ruppel OC & Bangamwabo FX “The SADC Tribunal: A legal analysis of its mandate and role in regional integration” in Bösl A et al. (eds) *Monitoring regional integration in Southern Africa yearbook Volume 8* Stellenbosch: TRALAC (2008) at 35.

⁵⁸ See Resolution of SADC Lawyers, Judges and Rule of Law Advocates adopted at the Second Regional Consultative Conference on the Review of the SADC Tribunal, Johannesburg, South Africa, held on 28 July 2011, cited in Ruppel OC “The case of Mike Campbell and the paralysation of the SADC Tribunal” in Laryea ET, Madolo N & Sucker F (eds) *International economic law voices of Africa* (2012) at 179.

⁵⁹ Dobson WJ *The dictator’s learning curve: Tyranny and democracy in the modern world* New York: Vintage Digital (2012) at 9.

and the bulk fell behind. Such apathy, including those who have voted with their feet, suggests that countries get leaders they deserve⁶⁰

It is not surprising that there seems to be a concerted effort to ensure that the new Protocol on the Tribunal is not accepted as it is. In this light, the resolutions of the Round Table discussion on the Restoration of the SADC Tribunal, held at the Centre for Human Rights, Faculty of Law, University of Pretoria, should be commended as significant steps towards holding SADC leaders accountable.⁶¹ The Round Table discussion, among other things, resolved that:

[a] coalition for the Restoration of the SADC Tribunal, comprising of all SADC countries, should be formed, to bring together various stakeholders and institutions to work towards the common objective. [That t]he coalition should lodge a campaign to identify politicians to argue against the ratification of the new Protocol at the domestic level of each SADC member states and support them through legal arguments; [and that s]trong civil society coalitions ... be built to raise awareness among SADC citizens about the need for individual access.

There is great need in SADC for more citizens to take the initiative and participate in programmes that determine how they are governed by their leaders, especially in matters involving the protection of fundamental rights and access to justice, as was the case with the SADC Tribunal.

6 WHAT REMAINS OF SADC COMMUNITY LAW?

The fear of loss of state autonomy, a lack of vision, and the unwillingness to compromise are obstacles that prompted SADC to decide against strengthening SADC citizens' rights in the regional community in future. The initial acceptance of a legal instrument such as the SADC Treaty involved transferring a certain amount of decision-making authority away from states and to the regional community. This is exactly why "sovereign nations" should agree to such a treaty, as they need to realise that the benefits of cooperative action will be greater than the circumstances that exist otherwise.⁶² When the 2014 SADC Tribunal Protocol was adopted by the SADC Summit, a number of heads of state signed it pending national procedures for ratification. South Africa and Tanzania's Presidents were amongst those who signed the Protocol. These two states are specifically worth mentioning because of the legal challenges that followed.

⁶⁰ Mills G *Why states recover* London: Hurst (2014) at 170.

⁶¹ The Centre for Human Rights, Faculty of Law, University of Pretoria, in collaboration with the Konrad Adenauer Stiftung's Rule of Law Programme for Sub-Saharan Africa, held a two-day round table to discuss the restoration of the SADC Tribunal. See Report on the Round Table Discussion on the Restoration of the SADC Tribunal held at Centre for Human Rights, Faculty of Law, University of Pretoria 28–29 August 2014 available at <http://www.kas.de/rspssa/en/publications/38707/> (accessed 25 August 2019).

⁶² Ruppel OC "The case of Mike Campbell and the paralysation of the SADC Tribunal" in Laryea ET, Madolo N & Sucker F (eds) *International economic law voices of Africa* (2012) at 165–183.

In South Africa, the Law Society of South Africa and six other applicants, who were landowners in Zimbabwe, launched an application in the Gauteng Division of the High Court against the President and relevant Ministers for the President's signing of this new Protocol. The Law Society and others argued that the President's negotiation and signing of the 2014 Protocol that sought to strip the Tribunal of its jurisdiction over disputes of individuals against member states was unconstitutional, unlawful and irrational.⁶³ The applicants sought an order declaring and essentially directing the President to withdraw his signature from the Protocol. The High Court granted this order.

In line with constitutional requirements that an order of constitutional invalidity has to be confirmed by the Constitutional Court, the High Court decision was brought before the Constitutional Court, which made its decision in 2018. The Constitutional Court confirmed the order of constitutional invalidity made by the High Court. In ordering the President to withdraw his signature from the 2014 Protocol, the Court held as follows:

[80] In signing the Protocol, the President was effectively issuing a very serious threat to all citizens that their right of access to justice through the Tribunal was going to be taken away. Sadly, that individual right of access was immediately frozen when the provisions of article 18 of the Vienna Convention were activated by the President's signature. Whether he realised the profundity of his actions or not, he was effectively renouncing some of the foundational values of our democracy. He effectively disregarded "the rights of all people in our country". [85] He was in reality announcing to SADC and the world at large that a critical aspect of what defines our constitutional democracy will no longer be respected, protected, promoted or fulfilled.

[81] Through his actions, we made common cause with other Member States in the region to deprive South Africans and citizens from other SADC countries of access to justice, even in circumstances where domestic courts lack the jurisdiction to entertain human rights and rule of law-related individual disputes.⁶⁴

Ironically, the President then was Jacob Zuma. Perhaps with hindsight he may now, as a citizen without the benefit of state power, acknowledge that the decision to deny South Africans citizens' access to the SADC Tribunal was indeed not in the best interests of the rule of law and democracy. After his 2021 incarceration, it was reported that he was seeking to approach the African Court of Human and Peoples' Rights for redress. This Court would not have jurisdiction to hear his matter. It is the SADC Tribunal that he helped to paralyse that would have been the most effective judicial forum to adjudicate his matter had individual access not been withdrawn.⁶⁵ Would he make the same

⁶³ *Law Society of South Africa v President of the Republic of South Africa* [2018] 2 All SA 806 at para 72.

⁶⁴ *Law Society of South Africa and Others v President of The Republic of South Africa and Others* [2018] ZACC at 51.

⁶⁵ See Madisa K "Zuma goes continental after ConCourt refuses to scrap prison sentence" available at <https://www.timeslive.co.za/politics/2021-09-18-zuma-goes-continental-after-concourt-refuses-to-scrap-prison-sentence/> (accessed 10 January 2022).

decision now, having seen how important individual access to the SADC Tribunal could be for South African citizens?

The South African courts have therefore set the scene for a renewed conversation on the Tribunal. Equally important is a similar case decided upon in Tanzania. In *Tanganyika Law Society v Ministry of Foreign Affairs and International Cooperation of the United Republic of Tanzania and the Attorney General of the United Republic of Tanzania*, the Tanzanian High Court found that the suspension of the Tribunal and the failure to appoint Tribunal judges ran contrary to the clear provisions of the SADC Treaty. It was also “inimical to the Rule of Law as a foundational principle inherent to the legitimacy of the (SADC) community, and as expressly entrenched in the Treaty”. The Tanzanian challenge was brought by the Tanganyika Law Society and followed a decision by the SADC Lawyers’ Association that its member bars across the region should challenge the legitimacy of their respective government’s assent to the disbanding of the Tribunal.

The thrust of these decisions is that the SADC Tribunal was disbanded illegally and against the tenets of the rule of law and democracy. There is no doubt that South Africa and Tanzania are major members of the SADC regional bloc, with influence over key decisions. In particular, the step taken by the South African president to withdraw his signature of the new Protocol might offer some assurance that this leading nation will be able to play its role in the revival of the Tribunal. Thus, the case is a significant propellant for the key political and diplomatic work necessary to return the Tribunal to normality, albeit that only South Africa and Tanzania have made judicial decisions on the matter at this stage. The significant role that South Africa can play in the regional context is the main reason why this decision is so important.

7 CONCLUSION: RISING FROM THE RUINS?

For advocates of the Tribunal and opponents of its disbandment, the court decisions highlighted above are a welcome development. However, the practical implications of this Constitutional Court judgement for the revival of the SADC Tribunal remain unclear. Such court decisions provide new impetus for the revival of the SADC Tribunal in its original form. For those who have been at the forefront of this struggle, the decisions do more than validate their concerns – indeed, it also comes as a relief to know that well-respected courts such as the Constitutional Court of South Africa have handed down such a strong judgement, one which essentially directs the South African government to pursue a citizen-centred approach towards the establishment of the Tribunal.

These decisions have put in focus the important role of the Tribunal in pursuance of regionalism and common goals. The Tribunal’s role as the focal point for developing a common jurisprudence for SADC laws will continue to be undermined as long as SADC does not have the opportunity to enunciate and apply its laws. This applies even more in the absence of SADC member states litigating against each other. Without some measure of assurance that the laws of the region are going to be applied and respected, foreign investment, which the region relies on for economic development and poverty alleviation, will not be effected sufficiently. There will be no winners in such a game.

The Tribunal is a key institution for the attainment of one of SADC's key objectives, which is the harmonisation of policies. Harmonisation aims to reduce or eliminate the differences between national legal systems by inducing these systems to adopt common principles of law. In terms of regional integration, conformity of law is one central instrument for reducing normative barriers within the community.⁶⁶ The SADC Tribunal serves as a major institution that can give impetus and guidance for a common understanding of community law.⁶⁷ Yet the revival of the Tribunal depends on a collective effort by SADC citizens and on how much they are willing to stand up for the observance of rules-based regional integration.⁶⁸ Such a process will require significantly more political devotion to shared political, social, economic, and legal values in SADC. It is therefore to be hoped that, in view of the new national court challenges in the different SADC member states, among other efforts, the SADC Tribunal is now rising from the ruins.⁶⁹

8 RECOMMENDATIONS

Whatever the value of these court decisions, there is little doubt that they are positive steps towards the resurrection of the Tribunal. A lot still needs to be done by all concerned stakeholders to push for the re-establishment of the Tribunal and access to justice for citizens. On the back of its Constitutional Court judgement, South Africa can make a contribution to raising the SADC Tribunal from the ruins. The country is a superpower in SADC, and its voice is important in putting in motion the procedural steps that are necessary for addressing the current state of the Tribunal in keeping with the Constitutional Court's decision. It has been suggested that a coalition for the restoration of the SADC Tribunal, comprising all SADC countries, should be formed to bring together stakeholders and institutions to work towards the common objective. Furthermore, the coalition should launch a campaign to identify politicians to argue against the ratification of the new Protocol at the domestic level of each SADC member states and support them through legal arguments.⁷⁰ These local efforts may ultimately create a regional consensus.

There is no doubt that academics have been at the forefront of providing insightful knowledge about the effects and the consequences of the disbanding of the Tribunal. To this end, it remains crucial that knowledge be shared on how the revival can take place. Academics could organise and dedicate special academic forums for galvanising debates

⁶⁶ Ruppel & Bangamwabo (2008) at 29.

⁶⁷ Ruppel & Bangamwabo (2008) at 30.

⁶⁸ For a discussion of whether the SADC system is rule-based, see Erasmus G "Is the SADC trade regime a rules-based system?" (2011) 1 *SADC Law Journal* 17 at 17–34. The Preamble to the SADC Treaty has an interesting statement on how SADC states are related. The member states recognise that "in an increasingly interdependent world, mutual understanding, good neighbourliness, and meaningful co-operation among the countries of the Region are indispensable to the realisation of these ideals".

⁶⁹ See also Naldi GN & Magliveras KD "The new SADC Tribunal: Or the emasculation of an international tribunal" (2016) 63 *Netherlands International Law Review* 133 at 133–159.

⁷⁰ See Report on the Round Table Discussion on the Restoration of the SADC Tribunal held at Centre for Human Rights, Faculty of Law, University of Pretoria 28–29 August 2014 available at <http://www.kas.de/rspssa/en/publications/38707/> (accessed 25 August 2019).

to inspire new ideas around the structure, role and function of the Tribunal within the context of regionalism. The steps taken so far by other initiatives suggest that there is an important role for non-governmental organisations through civil society court action and civic education. Protest action that voices concerns about the current paralysis of the Tribunal may be an important way to attract the attention of the key political actors. After all, protest action is the language that politicians understand best.

SADC depends on aid and sponsorship for many of its programmes. This funding comes from business and other development partners. These partners must be encouraged to demand the observance of human rights and promotion of the rule of law, which includes providing for individual access to the Tribunal. In fact, their own endeavours and development goals are better served in an environment where access to justice and the rule of law flourish. There is a great need in SADC for more citizens to take the initiative and participate in programmes that determine how they are governed by their leaders, especially in matters involving the protection of fundamental rights and access to justice, as has been the case with the SADC Tribunal. Pressure must be exerted on South Africa to apply diplomatic pressure on SADC states to revive the old Tribunal. Similar cases must be brought before the more cooperative SADC states until a broad consensus is reached.

In the wider context, every citizen of SADC can play a role. The current state of the Tribunal affects citizens in different and various ways, and the impact on citizens varies from one person to another. However, there can be no doubt that organised labour, individuals, civic society, professionals and business all stand to benefit from the observance of the rule of law and the protection of fundamental human rights in SADC. Therefore, within their domains, and in conjunction with others, all these stakeholders could take a stand and apply themselves to the re-establishment of the Tribunal with a broad mandate for citizen access.

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