CHALLENGES TO POLITICAL AND ECONOMIC INTEGRATION IN AFRICA: A SOCIO-LEGAL PERSPECTIVE

Thesis submitted for the degree *Doctor of Laws* at the Mafikeng Campus of the North-West University

by

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Thesis submitted in fulfilment of the requirements for the degree of *Doctor of Laws* in the School of Postgraduate Studies and Research, Faculty of Law, Mafikeng Campus of the North-West University.

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DECLARATION BY CANDIDATE

I, Ilyayambwa Mwanawina, declare that this thesis entitled: "Challenges to Political and Economic Integration in Africa: A Socio-Legal Perspective" for the degree of Doctor of Laws (LLD) in the North West University hereby submitted, has not previously been submitted by me for a degree at this or any other University, that it is my own work in design and execution and that all materials contained herein have been duly acknowledged.

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Ilyayambwa Mwanawina

November 2013

DECLARATION BY PROMOTER

I, Professor Melvin L. M. Mbao, hereby declare that this thesis entitled" Challenges to Political and Economic Integration in Africa: A Socio-Legal Perspective" by Ilyayambwa Mwanawina for the degree of Doctor of Laws (LLD) in the Department of Public Law and Legal Philosophy, be accepted for examination.

Prof. M. L. M. Mbao

November 2013

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DEDICATION

During the tenure of this research, I have had to indulge in African literature at depths I had not gone before. I had to understand the origins of the continent in order to appreciate its destiny. By walking this path of knowledge, my narrow understanding of African emancipation has been exposed to the men and women who are the epitome of unwavering commitment to the advancement of African people. They played their part. I dedicate this research to their gracious efforts.

LIST OF ABBREVIATIONS

ADB	African Development Bank.
AEC	African Economic Community.
AIDS	Acquired Immune Deficiency Syndrome.
AMU	Arab Maghreb Union.
AU	African Union.
CEMAC	Economic and Monetary Community of Central Africa.
CEN-SAD	Community of Sahel-Saharan States.
CEPGL	Economic Community of Great Lake Countries.
COMESA	Common Market of Eastern and Southern Africa.
CPCM	Conseil Permanent Consultatif du Maghreb.
EAC	East African Community.
ECA	Economic Commission for Africa.
ECCAS	Economic Community of Central African States.
ECHR	European Court of Human Rights.
ECOSOCC	Economic, Social and Cultural Council.
ECOWAS	Economic Community of West African States.
EEC	European Economic Community.
EESC	European Economic and Social Committee.
EPA	Economic Partnership Agreements.
EU	European Union.
FTA	Free Trade Area.
GDP	Gross Domestic Product.

HIV	Human Immune Virus.
IGAD	Inter-Governmental Authority for Development.
IOC	Indian Ocean Commission.
LPA	Lagos Plan of Action.
MRU	Manor River Union.
NEPAD	New Partnership for Africa's Development.
NMOG	Neutral Military Observer Group.
OAU	Organisation of African Unity.
OSBP	One Stop Border Posts.
REC	Regional Economic Community.
SACU	South African Customs Union.
SADC	Southern Africa Development Community.
SADCBRIG	SADC Brigade.
SADCC	Southern African Development Coordination Conference.
TFTA	Tripartite Free Trade Area.
TRALAC	Trade Law Centre.
UNCTAD	United Nations Conference on Trade and Development.
UNECA	United Nations Economic Commission for Africa.
WAEMU	West African Economic and Monetary Union.

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1963	Charter of the Organisation of African Unity.
1965	Merger Treaty.
1980	Lagos Plan of Action.
1983	Treaty Establishing the Economic Community of Central African States.
1989	Treaty Establishing the Arab Maghreb Union.
1991	Treaty establishing the African Economic Community.
1992	Treaty of the Southern African Development Community.
1993	Treaty Establishing a Common Market for Eastern and Southern Africa.
1993	Treaty of the Economic Community of West African States.
1996	Agreement Establishing the Inter-Governmental Authority on Development.
1999	Treaty Establishing the East African Community.
2000	Constitutive Act of the African Union.
2001	SADC Treaty as amended.
2005	Treaty of Lisbon.

2010	Consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union.

PROTOCOLS, PRINCIPLES AND DECLARATIONS

Protocols

1980	Additional Protocol to the OAU General Convention on Privileges and immunities.
2001	Protocol to the Treaty Establishing the African Economic Community Relating to the Pan-African Parliament.
2002	Protocol Relating to the Establishment of the Peace and Security Council of the African Union.
2003	Protocol of the Court of Justice of the African Union.
2003	Protocol on Amendments to the Constitutive Act of the African Union.
2004	Protocol to the OAU Convention on the Prevention and Combating of Terrorism.
2008	Protocol on the Statute of the African Court of Justice and Human Rights.
2009	Protocol on the African Investment Bank.

Principles

2005	SADC Principles and Guidelines Governing Democratic Elections.

Conventions

1950	European Convention on Human Rights.
1965	General Convention on the Privileges and Immunities of the Organization of African Unity.
1967	Phyto-Sanitary Convention for Africa.
1968	African Convention on the Conservation of Nature and Natural Resources.
1969	OAU Convention Governing the Specific Aspects of Refugee Problems in Africa.
1969	American Convention on Human Rights.
1969	Vienna Convention on the Law of Treaties.
1977	Convention for the Elimination of Mercenarism in Africa.
1985	Convention for the Establishment of the African Centre for Fertilizer Development.
1991	Bamako Convention on the Ban of the Import into Africa and the Control of Transboundary Movement and Management of Hazardous Wastes within Africa.

1999	OAU Convention on the Prevention and Combating of Terrorism.
2003	African Convention on the Conservation of Nature and Natural Resources (Revised Version).
2003	African Union Convention on Preventing and Combating Corruption.
2009	African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa.

Charters

1948	The United Nations Convention on the Prevention and Punishment of the Crime of Genocide.
1976	Cultural Charter for Africa.
1981	African Charter on Human and Peoples' Rights.
2003	Charter of Fundamental Social Rights in SADC.
2006	African Youth Charter.
2006	Charter for African Cultural Renaissance.
2009	African Charter on Statistics.
2011	African Charter on Values and Principles of Public Service and Administration.

Others

1969	African Civil Aviation Commission Constitution.

1972	European Communities Act.
1974	Constitution of the Association of African Trade Promotion Organizations.
1975	Inter-African Convention Establishing an African Technical Co-operation Programme.
1985	Agreement for the Establishment of the African Rehabilitation Institute.
1990	The Addis Ababa Declaration on the Political and Socio-Economic situation in Africa and the Fundamental changes taking place in the World.
1991	Treaty Establishing the African Economic Community
1993	Arusha Peace Agreement.
1994	African Maritime Transport Charter.
1995	The Cairo Agenda for Action.
1996	The African Nuclear-Weapon-Free Zone Treaty.
1999	Sirte Declaration.
2000	The Lome Declaration on the Framework regarding OAU's responses to unconstitutional change of government.
2000	The Lome Solemn Declaration on the Conference on the Security, Stability, Development and Cooperation in Africa.
2001	Judges' Remuneration and Conditions of Employment Act47.

2001	NEPAD Strategic Framework Document.
2002	The Durban Declaration on the principles governing democratic elections in Africa.
2007	Public Order and Security Amendment Act.
2009	Revised Constitution of the African Civil Aviation Commission.
2009	Statute of the African Union Commission on International Law.
2010	Revised African Maritime Transport Charter.
2012	Agreement for the Establishment of the African Risk Capacity (ARC) Agency.

ABSTRACT

This study is concerned with integration efforts on the African continent. This study sets out to investigate the politico-legal and economic impediments to regional and continental integration efforts in Africa. The documents, processes, and organs of the African Union, as the main continental organisation, are the focal point of this study. In order to achieve this, the study primarily adopted a qualitative approach since the literature involved in this work could not be reduced to a quantitative concept. The study ensured that the premises and the conclusions in this work conform to the principles of reliability and validity and in addition the elimination of bias in this was curtailed by validation and triangulation. This was achieved by the fact that the arguments in this work were not only based on qualitative arguments but, where possible, quantitative data was brought in to validate/ triangulate the qualitative arguments.

Evidently, the study would have been incomplete if it did not discuss and evaluate the many regional economic communities that have been established to further the objectives of the Treaty establishing the African Economic Community. One of the major premises that this study discovers is that there is a direct and demonstrable relationship between democracy and economic progress; genuine and sustainable development has to be fostered primarily by securing peace and stability on the African continent.

Some of the other key findings of the study include that;

a) the ultimate goal of the African Union is full political and economic integration leading to the United States of Africa;

b) overlapping memberships to a custom unions are highly detrimental to the state since it has to subscribe resources and political will to two or more different arrangements.

c) overlapping memberships cause confusion, inertia and most importantly legal uncertainty thereby stifling trade liberalisation efforts;

d) many African states still guard their sovereignty closely and that many perceive that yielding their sovereignty to a continental body is tantamount to losing their independence;

e) the African Union infrastructure still lacks supra-national and national institutions that are capable of implementing its values;

f) the African Union infrastructure does not contain an institutionalised mechanism for the promotion and management of Union affairs at national level;

g) the NEPAD initiatives, the APRM process and the functions of the Peace and Security Council play a positive role in African politico-legal and economic development. It has however been shown that these mechanisms are more reactive than preventative and as such intervene too late in the internal affairs of member states;

h) armed conflicts cause a reduction in the per-capita Gross Domestic Product growth rate of a nation experiencing a civil war/ conflicts.

i) the African Union has regressed from the original timelines of the African Economic Community. The highest regression being Phase 2 which involves the most critical element of strengthening of African regional integration arrangements and the harmonisation of policies concerned. A thirteen (13) year postponement is noted in this regard.

j) Africa's poor intra-trade performance is also attributed to the limited progress among African countries in fostering structural transformation. This structural transformation relates to the building of roads, bridges, railway lines and power grids;

In order for the African continent to re-position itself in an attempt to harness the benefits of regional integration, some of the recommendations that the study makes are that;

a) the African Union grant supra-national status to institutions of the Union for the equitable and speedy attainment of integration;
b) the Union and member states should as soon as possible create mechanisms with decision making powers to manage Union affairs at regional and national level;
c) the operationalization of the Pan African Parliament should be pursued with the utmost determination to bring the Parliament to full functionality as a Continental legislative body;
d) the operationalization of the African Court of Justice and Human Rights be completed as soon as possible in order to allow the body to function as a fully-fledged continental judiciary. This will ensure that the development of integration jurisprudence from an international law perspective is not delayed. The Court will also pursue the enforcement of Human rights norms and practices;
e) the Union should further lead the continent in the following sectors with clear and predictable deliverables;
    i) the establishment and upgrading of regional land, air, and other means of transportation and communication;

ii) the creation of a cross-border power and energy generation and distribution network;

iii) the establishment, advancement, and diversification of regional financial and commodity markets;

iv) the establishment of a regional higher education system by facilitating wider access through specialization in regional integration;

The study further acknowledges that these recommendations are not conclusive since the study of regional integration is still at its infancy and many other ideas on how to strengthen African regional integration still await discovery.

CHAPTER 1 INTRODUCTION

> Stretching through the mists, for a millennium, our common African history is replete with great feats of courage, demonstrated by the heroes and heroines and the heroic peoples, without whose loyal attachment to hope and the vision of a bright future for Africa, her people would long have perished.
>
> Thabo Mbeki[1]

1.1 Background to the Study

In pursuit of development and better living standards for the citizenry, the global village has become a jigsaw of alliances. Globalisation trends have led to the emergence of various integration agreements amongst countries and regions. It has been noted by *Christopher* that it is often advantageous for nations to co-ordinate their economic plans, in what is often referred to as regional integration since it brings with it the possibility of generating profits which would be impossible to attain if a nation remains isolated.[2]He submitted that regional integration has great potential as a means of peaceful development; it can also assist in lessening customs barriers in a continent like Africa whose history has led to the emergence of multiple political boundaries. Additionally, integration facilitates the movement of goods and services across national borders, especially for landlocked countries, the majority of whom are found on African soil, helping them benefit from the inverse relationship between the quantity produced and per-unit fixed costs or what is normally referred to as economies of scale.[3]

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1 Speech of the former President of South Africa, Thabo Mbeki, at the launch of the African Renaissance Institute, Pretoria, 11 October 1999.

2 Christopher, K., "Regional Integration: what does it mean and is it a panacea to Africa's economic problems?" 2009. ***Africa Growth Agenda***. p 12.

3 Christopher, K., *Ibid* note 2, p 12.

The African continent has not shied away from tapping into the benefits of regional integration. From an African perspective, regional integration was first identified as a strategy by African states for over-coming colonial rule, underdevelopment and dependency on western states.[4] The idea of an integrated Africa can be traced back to the Pan-Africanist Movement and to the clarion call made in 1961 by one of its fervent promoters, Kwame Nkrumah. His vision for a United Africa is well echoed in one of his speeches as follows:

> If we are to remain free, if we are to enjoy the full benefits of Africa's rich resources, we must unite to plan our total defence and the full expectation of our national and human means, in the full interest of all our people. To go it alone will limit our horizons; curtail our expectations and thereafter our liberty.[5]

Although Nkrumah's dream of forming a "United States of Africa" never came to completion, it nevertheless resulted in the formation of the Organization of African Unity (OAU) in May 1963.[6] During the debates that led to the birth of the Organization of African Unity, two schools of thought emerged on how such a body should be established. The first of them was the Casablanca Group, which was in favour of an accelerated programme of confederacy that would entail the creation of a central governmental authority to reverse the colonial legacy of artificial political boundaries.[7] The second school, the Monrovia group, advocated for a more gradual approach that would recognise the political boundaries inherited at independence as a starting point

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4 Nyirabu, M., "Appraising regional integration in Southern Africa: Feature. 2004." ***African Security Review***, Vol 13, Issue 1. p 21.

5 Nkrumah, K., ***Speak of Freedom—A Statement of African Ideology***, New York: Praeger Publishers, 1961.

6 Okumu, W., "The African Union: Pitfalls And Prospects for Uniting Africa," ***Journal of International Affairs***, Summer 2009, Vol. 62, No. 2. p 94.

7 African Union (AU), ***Audit Report of the African Union***, 2007.p 4.Available from www.pambazuka.org/actionalerts/images/uploads/AUDIT_REPORT.doc (Accessed 2013-10-24).

for the gradual construction of continental unity.[8]The model of the OAU was an attempt to amalgamate the two opposing views to integration, which involved a limited ceding of sovereignty. It was hoped that this would lead in the final analysis to a much deeper ceding of sovereignty. In the meantime, regional economic co-operation and integration arrangements and an array of institutional mechanisms were established to further the development of the continent.[9]

The OAU was officially established on 25 May 1963 in Addis Ababa, Ethiopia, on the signature of the OAU Charter by representatives of 32 governments.[10] A further 21 states joined gradually over the years, with South Africa becoming the 53rd member on 23 May 1994.[11] African leaders believed that in order to liberate the continent from colonialism and racism they had to be united under one umbrella organisation. The aims of the OAU were to;

a) promote the unity and solidarity of African States;
b) co-ordinate and intensify their co-operation and efforts to achieve a better life for the peoples of Africa;
c) defend their sovereignty, territorial integrity and independence; eradicate all forms of colonialism from Africa;
d) promote international co-operation, giving due regard to the Charter of the United Nations and the Universal Declaration of Human Rights; and

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8 AU Audit Report, *Ibid* note 7, p 4.
9 AU Audit Report, *Ibid* note 7, p 5.
10 Department of Foreign Affairs (DFA), "Organization of African Unity (OAU) / African Union (AU)," http://www.dfa.gov.za/foreign/Multilateral/africa/oau.htm (Accessed 2013-10-24).
11 DFA, *Ibid* note 10.

e) co-ordinate and harmonise members' political, diplomatic, economic, educational, cultural, health, welfare, scientific, technical and defence policies.[12]

During the first decade of its establishment, the OAU helped nurture solidarity among the newly independent states and preserve the ideals of inviolability of inherited borders and the sovereign equality of nations. It was also instrumental in leading the opposition against minority regimes in Southern Africa and against apartheid in South Africa.[13] It is however worth remarking that the OAU had never taken a decision to expel any of its members then, not even when Dr. Banda of Malawi chose to establish diplomatic and economic links with apartheid South Africa, in direct contravention of the organization's decisions in the 1970s.[14]

The ultimate outcome of the struggle against colonialism has been that today, apart from Western Sahara, every African territory is now independent and capable of governing its political and economic spheres. However, weighed down with financial debts and bureaucracy, and as a result of its policy of non-interference in the internal affairs of sovereign states, the OAU failed to prevent conflicts, stop genocides or challenge dictators.[15] For instance,in Liberia and Sierra Leone, the prolonged wars both contributed to, and were a reflection of a process of state collapse that had brewed for years. *Zartman* suggests that the collapse of a state is not a short-term phenomenon;

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12 Charter of the Organisation of African Unity, 1963. Art 2.

13 Legum, C., "The Organisation of African Unity-Success or Failure?" 1975 ***International Affairs*** Vol. 51, No. 2.p 212.

14 Legum, C., *Ibid* note 15, p 212.

15 Mesfin, D., "Why the African Union Needs a Human Rights Memorial". http://alembekagn.org/news-a-articles/articles/126-why-the-african-union-needs-a-human-rights-memorial. (Accessed 2013-10-24).

rather it is a "long-term degenerative disease" [16] which plagued the region under the watch of the OAU. Bent on becoming head of their respective states, neither Charles Taylor (Liberia) nor Foday Sankoh (Sierra Leone) had any moral or ideological incentive to compromise on a negotiated settlement that would give them anything less than total political control of their respective countries.

One may wonder how these irregular military forces managed to sustain themselves during the prolonged Liberia and Sierra Leone unrests. *Gershoni* has observed that in addition to the OAU limiting itself to a "negotiating platform", it also failed to marshal any form of regulation of arms flowing into Africa. During the Cold-War era, stock piles of arms and munitions essentially found their way into Africa, as the two superpowers (the United States of America and the Soviet Union) and their allies provided a steady supply of weapons, military technology and advisors to their respective Third World allies and proxies.[17] All parties had access to sources of arms and ammunition. No group had an advantage over the other in terms of strategy, force or power. The supply of arms made it impossible for each side to discontinue fighting.Just as the legitimate armies enjoyed a steady flow of arms, so also did the rebel forces enjoy twice as much.[18] This state of affairs rendered the OAU toothless, unable to proactively manage these conflicts in good time to prevent the unnecessary loss of life.

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16 See Zartman, W., ***Collapsed States: The Disintegration and Restoration of Legitimate Authority***, Lynne Rienner: London 1995.

17 Gershoni, Y., "War Without End and An End to A War: The Prolonged Wars in Liberia and Sierra Leone," 1997 ***African Studies Review***, Volume 40, Number 3. p 57.

18 Gershoni, Y., *Ibid* note 17, p 57.

The passiveness of the OAU was also revealed when Idi Amin rose to power after he overthrew the government of Milton Obote in Uganda in 1971. After much contestation and petitions by the legitimate government to the OAU, the OAU still allowed Idi Amin's government to sit in the OAU Council of Ministers in 1971.[19] Similarly, *Odinkalu* has recorded that during the times of the OAU, Africa had a long list of human rights abusers who were at best ignored and at worst embraced by the OAU, including Idi Amin, Emperor Bokassa in the Central African Republic, and Macias Nguema in Equatorial Guinea.[20]

Another conflict worth mentioning is the 1994 genocide in Rwanda. In the period, April to July of 1994, between five hundred thousand (500 000) and eight hundred thousand (800 000) people, including at least three-quarters (3/4) of the entire Tutsi population of Rwanda were systematically slaughtered.[21] These massacres occurred despite a widely ratified UN Genocide Convention condemning all acts of genocide as well as ample early warnings about the ethnic tension to the OAU as well as the international community. Upon analyzing the events that led to the genocide, analysts blame not only the UN and OAU, but also the entire international aid community, public and private, which for twenty years raised a deeply aid-dependent Rwandan regime that increasingly incited ethnic hatred and violence.[22] This "nurturing" of regimes is an OAU

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19 Kufuor, K.O., "The OAU and the Recognition of Governments in Africa: Analyzing Its Practice and Proposals for the Future." ***American University International Law Review*** 2002 Vol 17, No. 2 p 378-379.

20 Odinkalu, C.A.,"From Architecture to Geometry: The Relationship Between the African Commission on Human and Peoples' Rights and Organs of the African Union", ***Human Rights Quarterly*** 2013 Vol 35 No 4. p 862.

21 Murphy, C.N., "Global Governance: Poorly Done and Poorly Understood", ***International Affairs***, 2000 Vol. 76, No. 4, p 791.

22 Murphy, C.N., *Ibid* note 21, p 791.

syndrome that was rubber-stamped by its principles of non-intervention and respect for sovereignty entrenched within Article II of the Charter of the OAU.[23]

Serious and concerted efforts to attain progressive regional integration in Africa were initiated in the 1970s, climaxing with the establishment of the Lagos Plan of Action (LPA) signed in 1980 by the OAU member states. In sum, the Lagos Plan enjoined African countries to establish sub-regional economic groupings as a means for the eventual creation of the African Economic Community. The LPA identified three stages to realise this goal: trade liberalisation, the establishment of custom unions and the creation of a single economic community.[24]

The determination of the African continent to tap into the benefits of regional integration cannot only be seen in the then formation of the OAU, but also in the transmutation of the OAU into the African Union (AU). *Wapmuk* has pointed out that the OAU succeeded phenomenally in the area of liberation struggles, peaking with the liberation of South Africa in 1994 and the entrenchment of a constitutional democracy in the country. However, the OAU was not as fruitful in the areas of continental development, poverty eradication, ending numerous conflicts and human rights abuses as illustrated by the Rwandan genocide of 1994.[25]

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23 Charter of the OAU, *Ibid* note 12, Art II.

24 Nyirabu, M., *op-cit* note 4, p 22.

25 Wapmuk, S., "In Search of Greater Unity: African States and the Quest for an African Union Government". ***Journal of Alternative Perspectives in the Social Sciences*** (2009) Vol 1, No 3, 646.

The pursuit for regional integration is also evident in the fact that fourteen Regional Economic Communities (REC's) exist on the African continent, namely:

- Arab Maghreb Union (AMU),
- Community of Sahel-Saharan States (CEN-SAD),
- Economic and Monetary Community of Central Africa (CEMAC),
- Economic Community of Great Lake Countries (CEPGL),
- Common Market of Eastern and Southern Africa (COMESA),
- East African Community(EAC),
- Economic Community of Central African States (ECCAS),
- Economic Community of West African States (ECOWAS),
- Inter-Governmental Authority for Development (IGAD),
- Indian Ocean Commission (IOC),
- Manor River Union (MRU),
- Southern African Customs Union (SACU),
- Southern African Development Community (SADC), and
- West African Economic and Monetary Union (WAEMU).[26]

This commitment that has led to the establishment of multiple regional arrangements has been a double edged sword for the development of the continent. On one hand it can be argued that more integration arrangements improve trade relations on the continent and on the other hand it can be submitted that in fact they reduce continental

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[26] Salami, I., "Legal and Institutional Challenges of Economic Integration in Africa." 2011. ***European Law Journal***, Vol. 17, No. 5, September, p 667.

progress since there is a constant overlap of mandates. This view has been canvassed by various authors.[27]

Given that the status of the OAU was that of an organisation in the service of its sovereign member states, the strength of the OAU was largely dependent on the well-being of its constituent member states. *Yihdego* suggests that the massive energies required for the maintenance of domestic order tended to divert governments from their commitment to the incremental strengthening of the OAU.[28] This, compounded with other reasons, led to the transformation of the OAU into the African Union. The AU was established in 2001 with a view to addressing the inadequacies that challenged its predecessor.[29]

Okumu has opined that while cushioning Africa from the challenges of globalization, the AU is to promote, amongst its member states, values such as good governance, respect for the culture of human rights and peace to galvanize the continent's development and integration.[30] He has further noted in his work that although the AU borrowed the OAU's principles of sovereignty and non-interference in the internal affairs of member-states, it also adopted a radical principle of intervention in failed and failing

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27 See Jensen, H.G. and Sandrey, R., 2011. "The Tripartite Free Trade Agreement: A Computer Analysis of the Impacts", p 40. Stellenbosch: ***TRALAC***, Mtshali, S.N. 2011. Regional integration in Southern and Eastern Africa: Challenges to the Regional Economic Communities. Stellenbosch: ***TRALAC***, Jensen, H.G. and Sandrey, R., 2011. The Tripartite Free Trade Agreement: A Computer Analysis of the Impacts, p 6. Stellenbosch: ***TRALAC***
And Mandrup T., "South Africa and the SADC stand-by force." 2009. ***Scientia Militaria: South African Journal of Military Studies***, Vol 37, Issue 2. p 4.

28 AU Audit, *op-cit* note 7, p 5.

29 Yihdego, Z., "The African Union: Founding Principles, Frameworks and Prospects." 2011 ***European Law Journal***, Vol. 17, No. 5. p 569.

30 See Constitutive Act of the AU 2000, Art 3. See also Okumu, W., *op-cit* note 6, p 93.

states on request.[31]This is the most striking feature of the AU Constitution that differentiates it from the OAU. The position in the Charter of the OAU was that:

> The Member States, in pursuit of the purposes stated in Article II solemnly affirm and declare their adherence to the following principles:
> 1. The sovereign equality of all Member States.
> 2. Non-interference in the internal affairs of States.[32]

The above provisions are indicative of the value that member states placed on the ability to run the internal affairs of their countries free of external interference. The current position with regards to intervention in the Constitutive Act of the AU is engraved in the principles that the AU and its bodies abide by. It provides for:

> The right of the Union to intervene in a Member State pursuant to a decision of the Assembly in respect of grave circumstances, namely: war crimes, genocide and crimes against humanity as well as a serious threat to legitimate order to restore peace and stability to the Member State of the Union upon the recommendation of the Peace and Security Council;[33]

This is a departure from the previous passive position. It will however, be argued in this work that the new position is still insufficient for the integration agenda. The Constitutive Act of the AU still lacks supra-national and national institutions that are capable (and willing) of implementing its values.[34]

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31 Constitutive Act of the AU, *Ibid*, Art 3. See also Okumu, W., *op-cit* note 6, p 95.
32 Charter of the OAU, *Ibid* note 12, Art 3.
33 Protocol on Amendments to the Constitutive Act of the African Union, 2003. Art 4(h).
34 Yihdego, Z., *op-cit* note 29, p 569.

1.2 Problem Statement

The thrust of this work is to ascertain the challenges as well as to seek solutions to the factors circumventing the attainment of successful economic and political continental integration in Africa. In order to fully comprehend what the problem under investigation is, we should first begin by understanding what regional integration entails.

Within the realm of inter-state co-operation, the words "integration", "co-operation" and "regionalism" are sometimes used interchangeably to refer to regional integration. There is however a vast difference between regional co-operation and regional integration. *Soomer* submits that integration refers to the unification of nation states into a larger whole.[35]Regional integration can be described as a dynamic process that entails a country's willingness to share or unify into a larger whole. The degree to which it shares and what it shares determines the level of integration.[36]

Regional co-operation, on the other hand, is a lighter form among several other benefits of inter-state relations. Countries may co-operate for a joint development project or disaster prevention initiative. They may also co-operate for facilitating the exchange of information and best practices in areas including finance, technology or environmental issues. In regional co-operation, they retain full control of their domestic affairs and if needed, may opt-out of the arrangement with relative ease. Except for narrow issues calling for joint development, co-operation signals the lowest level of multilateral commitment. It may be most effective for addressing many common causes that require

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35 Soomer, J., "Building Strong Economies Depends on You and Me", 2003. Available from http://www.eccb-centralbank.org/PDF/newspaper3.pdf. (Accessed 2013-10-24).

36 Soomer, J., *Ibid*.

regular exchanges and consultations, but no supra-national body to make decisions. "Sub-regional common goods" would typically be the subject of some form of joint development and management scheme (e.g. River Basin Initiatives) or specific sub-regional initiatives (e.g. HIV, Malaria, Conflict Prevention and Resolution). This is also the case for issues related to governance, knowledge transfers and best practice sharing, etc.[37]

Regionalism is defined as a political process characterized by economic policy cooperation and coordination among countries.[38] Regionalism has been driven mostly by the establishment and spread of Preferential Trading Arrangements (PTAs).[39] These arrangements furnish states with preferential access to members' markets. It is submitted that for regionalism to succeed, geographic proximity and the relationship between economic flows and policy choices should be taken into account.[40]

In casu, "integration", "co-operation" and "regionalism" have slight differences in how they are defined, however they all aim at improving political and economic relations amongst member states involved in such relations.

The AU, as it stands, has clearly signalled its intentions. Its aim is not only to promote inter-state relations but to integrate the African continent. In 2005, the AU Assembly reaffirmed 'that the ultimate goal of the African Union is full political and economic

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37 See Kritzinger-van Niekerk, L.,"Regional Integration: Concepts, Advantages, Disadvantages and Lessons of Experience", Available from http://www.sarpn.org.za/documents/d0001249/P1416-RI-concepts_May2005.pdf (Accessed 2011-05-20).

38 Mansfield, E.D. and Milner, V.,"The New Wave of Regionalism", ***International Organization*** 1999 Vol 53 No 3, p 589–627.

39 Mansfield, E.D.,*Ibid*, p 626-7.

40 Mansfield, E.D.,*Ibid*, p 626-7.

integration leading to the United States of Africa.[41] This affirmation is further underscored by the AU's decision on the Union Government[42] in which the AU directed that financial resources be made available for the attainment of an African Union Government.

In a study "Towards the United States of Africa", that was commissioned and adopted by the AU, it was pointed out that continental integration should be one[43] of the strategic areas which the African governments should focus on.[44] The study supported the view that:

> There is a growing recognition among African countries of the need to provide the African Union with stronger continental machinery in order to work on agreed strategic areas of focus yet to be identified. To that end, the Assembly of the AU set up two *ad hoc* committees of Heads of State and Government which concluded that the "necessity for eventual Union Government is not in doubt". The Union Government must be a "Union of the African people and not merely a Union of states and governments". It must have "identifiable goals" and be based on a set of clearly identifiable shared values and commonality of interest...and on the principle of strict adherence.[45]

The problem begins here: the need for stronger continental machinery that will be able to rally the African governments behind one goal; towards integration based on shared values, commonality of interest and strict adherence are some of the factors that

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41 See Au Decision on the report of the Committee of Seven Heads of State and Government chaired by the President of the Republic of Uganda on the proposals of the Great Socialist People's Libyan Arab Jamahiriya, Assembly/AU/Dec.90 (V) S3.

42 See also AU, Assembly/AU/ Dec.123 (VII).

43 Other strategic areas included: education, training, skills development, science and technology; energy; environment; external relations; food, agriculture and water resources; gender and youth; governance and human rights; health; industry and mineral resources; finance; peace and security; social affairs and solidarity; sport and culture; trade and customs union; and infrastructure, information technology and biotechnology

44 Wapmuk, S., *op-cit* note 25, p 660.

45 AU Audit, *op-cit* note 7, p 4.

necessitated the metamorphosis of the OAU into the AU. Despite the numerous policies, guidelines and protocols aimed at the promotion of good governance, elimination of corruption and establishment of electoral guidelines, the implementation of these instruments does not seem to have an impact on the internal activities of member states.

The 1969 Vienna Convention on the Law of Treaties codified and progressively developed the international law relating to treaties, namely customary and other rules governing the conclusion, implementation, interpretation, and termination of international agreements. The internationally recognised principle of *pacta sunt servanda* applies to inter-state relations of AU member states. The principle reflects that every treaty in force is binding upon the parties to it and must be performed by them in good faith.[46] This principle implies that a party to the treaty cannot invoke provisions of its domestic law as justification for a failure to perform a treaty obligation.[47] However despite the existence of such norms, the AU and its REC's experience slow ratification of protocols and the reluctant implementation of agreed plans by member states. It has been observed by *SOTU*, an African advocacy group, that by August 2012, only two countries, Kenya and Mauritius, had ratified the African Charter on the values and principles of Public Service and Administration (2011) and only fourteen (14) countries had ratified the Charter for Democracy, Elections and Governance. At this current rate, the advocacy group calculates that the universal ratification of African Union treaties will

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46 Vienna Convention on the Law of Treaties, 1969. Art 26.

47 Biwater Gauff (Tanzania) Limited v United Republic of Tanzania, Case No. ARB/05/22 before the International Centre for Settlement of Investment Disputes; The implicit confidence that should exist in any legal relation is based on the good faith with which the parties must act when entering into the legal relation, and which is imposed as a generally accepted rule or standard. Asserting the contrary would imply supposing that the commitment was assumed to be breached, which is an assertion obviously contrary to the maxim pacta sunt servanda, unanimously accepted in legal systems.

not be completed before 2053, one hundred years after the formation of the AU's predecessor the OAU.[48] Due to low political commitment and/or perceived or real losses and sacrifices involved, a number of countries have been reluctant to fully implement integration programmes on a timely basis.[49]

Despite the numerous policies, guidelines and protocols aimed at the promotion of good governance, elimination of corruption and establishment of electoral guidelines, the implementation of these instruments does not seem to have an impact on the internal activities of member states. The AU has since its inception also struggled to rise above the politics of its member states and take its place as a leading institution of continental integration towards a union government as envisaged by its founders. The AU as it stands has also failed to muster the correct stature or machinery to drive the continental integration process forward. Against this background, the problem to be investigated therefore becomes twofold:

a) What has led to mixed results of continental integration efforts in Africa in particular within the context of the African Union?
b) What are the components of successful regional integration that the AU is supposed to work towards?

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48 State of the Union (SOTU), "Time to translate promises of shared values to action!", Available from http://www.sotu-africa.org/?blog=state-of-the-union-press-release-time-to-translate-promises-of-shared-values-to-action. (Accessed 2013-10-24).

49 Maruping, M., "Challenges for Regional Integration in Sub-Saharan Africa: Macroeconomic Convergence and Monetary Coordination", 2005. Available from http://www.fondad.org/uploaded/Africa%20in%20the%20World%20Economy/Fondad-AfricaWorld-Chapter11.pdf (Accessed 2011-11-16).

Therefore, this study undertook to extrapolate and understand the challenges facing regional integration from an AU perspective.

1.3 Aims and Objectives of the Study

1.3.1 General Aims

The idea to establish a stronger political union with functional decision-making arrangements for the continent is as old as the OAU itself. In May 1963, despite the reasons advanced by some notable delegates for a stronger political and economic Union, independent African Heads of State and Government established a more pragmatic international organisation, the OAU, which served as a framework for loose association among African states.[50] The same characteristics followed the AU. In order for the AU to successfully integrate the continent at both political and economic levels, a firm understanding of the challenges that it faces should be undertaken.

This study therefore seeks to comprehend the legal-politico and economic challenges circumventing continental integration efforts in Africa. This question deserves much attention as there is a huge *lacuna* on how politico-economic integration may be attained in Africa. A performance audit of the AU reveals that the Constitutive Act does not specify what phases are essential to accelerate the political and economic integration of Africa.[51] Neither does it provide clear and sufficient guidance as to the powers and functions of the various organs, institutions and key players, nor the

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50 Yihdego, Z., *op-cit* note 29, p 568. See also generally Nkrumah, K., *Ibid* note 5.
51 AU Audit, *op-cit* note 7, p 20

relations among them. Also, it does not contain an institutionalised mechanism for the promotion and management of Union affairs at national level.[52]

The AU itself has further acknowledged that "there are many challenges to the achievement of a union government or a United States of Africa at this time. It is (the AU) presently structurally weak as a framework for building full 'political and economic integration leading to the united states of Africa."[53] This study seeks to ascertain and discuss these structural challenges as well as to seek solutions to the challenges hampering the attainment of successful economic and political continental integration in Africa by drawing, as well, on important lessons from other continents and similar arrangements.

1.3.2 Specific Aims

Specific aims of this study were;

a) to critically evaluate the state of African integration efforts at the end of the first decade of existence of the AU;
b) to critically evaluate the politico-legal challenges that are preventing the attainment of integration objectives;
c) to investigate the economic challenges to integration initiatives of the African Union and its Regional Economic Communities; and

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52 AU Audit, *op-cit* note 7, p 20.
53 Wapmuk, S., *op-cit* note 25, p 664.

d) to benchmark African Integration efforts with other integration initiatives from other parts of the global village.

1.4 Basic Hypothesis

The thrust of this work was to ascertain the challenges as well as to seek solutions to the factors circumventing the attainment of successful economic and political continental integration in Africa.

It was hypothesized that the inability of the African Union to strictly implement and enforce democratic norms within its member states has a negative effect on the realization of sustainable political and economic integration. In a nutshell, this work assumes peace and stability are a pre-requisite to political and economic development. Therefore when the AU and its member states fail at their peace and stability mandate on the continent, the attainment of development through integration become ineffectual.

1.5 Rationale and justification of the study

It is submitted that Africa as a continent has to find solutions to its own problems. One promising avenue to deal with poverty, human rights abuses, corruption and economic mismanagement in Africa is to remove the focus by member states from narrow domestic interests to broader continental objectives. If Africa is to unite and focus on dealing with its challenges collectively, then the member states stand a better chance of achieving their developmental goals. There would be a stronger political force to ensure that member states adhere to universal and regional human rights norms as agreed

upon at continental level. There would be many benefits in the economic sense as intra-African trade would be boosted by various initiatives driven and implemented by a supra-national body; this would also help Africa to take its rightful place in the global economy as at the moment economic development and programmes in Africa are fragmented.

Recent literature relating to regional integration constantly stresses the importance of politico-economic continental integration. *Bonchuk* theorised in his work that in order to reap the rewards of regional integration, there was a serious need to revise the scholarship and policy formation with regard to African boundaries and regional economic integration.[54]His work is further be buttressed by *Christopher's* observations that the case for economic integration remained cardinal in order to reverse the marginalisation of the continent and to integrate Africa into the international economy.[55] In this respect, great attention must be given to creating the conditions necessary for attracting foreign direct investment and encouraging the international competitiveness of local enterprises. In addition, significant progress has to be made in deepening democratic governance across the continent, in promoting sound economic policies, and in improving the overall business environment.[56]

It is submitted that in order for the continent to be competitive in the global market, international trade cannot be pursued or negotiated individually amongst states as there are more powerful and united trading blocs such as the European Union (EU), the

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54 Michael, B.O.,"Panafricanism, African Boundariesand Regional Integration". ***Canadian Social Science***2012 Vol 8 No 4, p 237.

55 Christopher K., *op-cit* note 2, p 14.

56 Christopher K., *op-cit* note 2, p 14.

United States of America (USA) and the Association of Southeast Asian Nations (ASEAN).[57] It would therefore be futile for individual African states to attempt to compete against such trading partners. What is required are united efforts at a continental level if we are to succeed.

Olowu has remarked that while it is remarkable that there has have been voluminous discussions about the contemporary pan- Africanism, one might surmise that the socio-political dimensions of Africa's development have not received equal attention and investigation.[58]The critical significance of political will towards the efficacy of the emerging regional integration agenda cannot however be over-emphasised. The concerted efforts aimed at integration in Africa must move beyond rhetoric and assume deeper potential in concrete terms. Thus, if integration is to be meaningful and successful, it becomes appropriate to consider the dynamics that would ensure that end.[59] The dynamics that would make regional integration meaningful and productive are the components that form the central theme of this study. Through investigating the challenges that hamper continental integration in Africa and seeking solutions thereto, this study explicates such dynamics that are beneficial to the continent's future development. Inclusive of these dynamics are transport, infrastructure, telecommunications, customs policies etc.

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57 Note however that the USA is a federal government approach to integration.

58 Olowu. D., "Regional Integration, Development, and the African Union Agenda: Challenges, Gaps and Opportunities." 2003 ***IOWA Journal of Transnational and Comparative Problems***, Vol 13 p 219.

59 Olowu, D., *Ibid* note 58, p 219.

The study articulates a new line of thought to be pioneered in the field of regional integration and state relations as both institutions (the AU and its member states) are dependent on the success of the each other and as such the relationship needs to be explored further to understand how it can be tweaked and managed from a legal perspective. Stakeholders to regional integration will not only benefit from this work but will appreciate the ideas that will fill the *lacunae on* African regional integration efforts.

This study is projected to benefit diplomats, architects of public policy, law students, legal scholars especially those in the field of public international law as well as international economic law, non-governmental organisations, governments, regional and continental bodies etc.

1.6 Research Methods and Data Collection

The study examines areas within the legal framework of the African Union and its institutions that may be enhanced so as to enable the AU to be more effective and efficient in attaining its continental integration objectives.

In order to achieve this, the study adopts a qualitative approach instead of a quantitative method. *Coutin* remarked that "quantitative research is designed to test hypotheses," however qualitative research often attempts to answer a question rather than to test a hypothesis. Instead of devising "test conditions," qualitative researchers examine on-going social processes, study records or artefacts that shape or are produced by these

processes."[60] Qualitative research is a process of examination that focuses on revealing the significance and interpretations of social phenomena. Qualitative research is significant to undertake objectives that cannot be completed through alternative methods, that is, questions not responsive to measurement.[61]It is submitted that similar to *Coutin's* observations, the study of regional integration cannot be conducted through a series of quantitative measurements but rather involves a study of literature. The contrast between qualitative and quantitative methods is well summarised by *Marvasti* in the following table.

Table 1: Comparison of Quantitative and Qualitative Methods

Research Activity	Quantitative	Qualitative
Selection of participants	Random Sampling	Theoretical or purposive sampling
Data analysis	Pre-coded surveys or other formulaic techniques Statistical analysis aimed at highlighting universal cause and effect relationships	Direct fluid, observational techniques Analysis focused on context-specific meanings and social practices
The role of conceptual framework	Separates theory from methods	Views theory and methods as inseparable

Source: Marvasti, B., ***Qualitative Research in Sociology An Introduction***. SAGE Publications: London2004, p 12.

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60 Coutin, B.S., "Qualitative Research in Law and Social Sciences", University of California. p 1. Available from http://www.wjh.harvard.edu/nsfqual/Coutin%20Paper.pdf.(Accessed 2013-02-11).

61 Bourgeault, L., "Critical Issues In The Funding Of Qualitative Research", ***Journal of Ethnographic and Qualitative Research*** 2012, Vol. 7, 1. p 1-7.

It is submitted that the arguments, data and or evidence envisaged in this work cannot be quantified by measurement or scale and therefore they cannot be reduced to figures. The following methods of reasoning, well attributed to qualitative research methods are more applicable to this work.

a) Deductive reasoning – to derive a conclusion from given axioms (knowledge) and facts (observations).
b) Inductive reasoning – to derive a general rule (axiom) from background knowledge and observations.
c) Abductive reasoning – to derive a premise from a known axiom (theory) and some observation.

These methods of reasoning were used when perusing primary sources such as treaties, case law and official documents of the AU as well as those of other kindred organisations. The study further relies on secondary sources in the form of scholarly articles and books, journals, newspaper articles, and conference papers.

It is further important when undertaking qualitative research that the arguments produced, the premises and the conclusions in this work conform to the principles of reliability and validity. *Golafshani*, in his observations summarised reliability and validity as:

> ...referring to a research that is credible; while the credibility of a qualitative research depends on the ability and effort of the researcher. Although reliability and validity are treated separately in quantitative studies, these terms are not viewed separately in

> qualitative research. Instead, terminology that encompasses both, such as credibility, transferability, and trustworthiness is used.[62]

Further, the elimination of bias in this research was curtailed by validation and triangulation. This was achieved by the fact that the arguments in this work were not only based on qualitative arguments but were possible quantitative data was brought in to validate/ triangulate the qualitative arguments.

It is submitted that this work focused on material that is documented by well-established sources and organisations such as the United Nations, the African Union, the Economic Community of West African States, the New Partnership for Africa's Development, the Southern African Development Community, EU etc. Since this work is pioneering a new line of thought, most of the work to be critiqued and discussed will not be available in textbooks but rather in journals. This is because much of the study related to regional integration has so far been done from the economic perspective.[63]

The study also relies on modern research techniques based on the internet. This is because electronic research databases enable researchers to have access to a multitude of electronic journals and published material that will enrich the validity and reliability of this work.

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62 Golafshani, N., "Understanding Reliability and Validity in Qualitative Research". 2003 ***The Qualitative Report*** Vol 8 No. 4. p 600.

63 Estrada, R. and Arturo, M., "The Global Dimension of the Regional Integration Model (GDRI-Model)", 2013 ***Modern Economy*** Vol 4, p 346.

Once more, to ensure that the work is reliable, only peer-reviewed journal material or data from journals with a credible track record was used in this thesis. It is then important to have all this information triangulated; that is, having certain facts or opinions verified or cross checked by another source. This occurred throughout the course of the work on sections that are pivotal to the arguments raised by this work.

1.7 Literature Review

Since regional integration involves the coming together of sovereign member states, it is instructive to clarify the role that sovereignty plays in such arrangements. Sovereignty in the relations between States signifies independence.[64] This independence is in regard to a portion of the globe or a certain defined geographical area and grants the sovereign the right to exercise therein, to the exclusion of any other State, the functions of a State.[65]In the realm of International Law, much work has been done aimed at criticising and identifying the challenges facing regional or continental integration. The element of national sovereignty emerged as a common denominator identified by most authors.[66]

To begin with, sovereignty allows the sovereign, which at most times are the governments and their agencies, to take decisions on behalf of the country and its

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64 See Island of Palmas case: *United States v. Netherlands*: Hague Court Reports 2d 83 (1932), (Perm. Ct. Arb. 1928), 2 U.N. Rep. Intl. Arb.Awards 829

65 See Island of Palmas case: *United States v. Netherlands*: Hague Court Reports 2d 83 (1932), (Perm. Ct. Arb. 1928), 2 U.N. Rep. Intl. Arb.Awards 829. See also Dugard, J., ***International Law a South African Perspective***, JUTA 2006. p 126.

66 See for instance Soomer, J., *op-cit* note 35, p 553-57, Nzweni O., "Africa's Regional Integration: A Reflection on Grand Theory," 2011 ***Journal of Public Administration***: *Special Issue* 1, Vol 46. p 896. Ngandwe P.J, "Regional Cooperation and Integration: The African Perspective," Paper presented at Tilburg University, Winter School 12th January 2011. Isaksen, J. and Tjønneland, E., "Assessing the Restructuring of SADC - Positions, Policies and Progress." 2001*Chr. Michelsen Institute*, Report Vol6.

people. These decisions most of the time are always concerned about self-preservation of the state and the best interests of the governed. The government through its representatives is empowered to join various regional integration arrangements and participate in global discussions. This empowerment sometimes brings along some unintended consequences that are actually detrimental to the welfare of the state, for instance, a member state to the SADC can, through the exercise of its sovereign right also become a member of COMESA.[67]

On face value, it can be argued that being a member of more integration arrangements improves trade relations on the continent, and on the other hand, it can be submitted that in fact they reduce continental progress since there is a constant overlap of mandates. Scholars such as *Salami*[68] and *Nzweni*[69] have cautioned against such duplication of memberships as it is detrimental to the progress of the continent. It is submitted that their views are correct. Overlapping memberships to a customs union is highly detrimental to the state since it has to subscribe resources and political will to two different arrangements, both of which are already lacking amongst AU member states. Further, it complicates negotiations and strategy within the African trading schemes. In the Chapters to follow, this work indicates how other integration arrangements have managed to overcome this challenge and proposes solutions for the African experience. *Wapmuk*, in his work, concludes that many African states still guard their sovereignty jealously and that many perceive that yielding their sovereignty to a continental body is

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67 Zambia belongs to both SADC and COMESA. Under the SADC Protocol on Trade, Zambia is to extend duty-free treatment to South African products. However, because of its COMESA membership, Zambia is to implement a common external tariff in line with the COMESA Customs Union, which excludes South Africa. In essence, Zambia has agreed to simultaneously promote free trade with South Africa and maintain COMESA tariffs against that same country.

68 Salami, I., *op-cit* note 26, p 667.

69 Nzweni O., *op-cit* note 66, p 896.

tantamount to losing their independence.[70] The same is recorded by *Mbeki* that in comparison to other continents, African self-rule has only just begun and this recent accession of African rulers has led to a perception among African elites that sovereignty is a valuable economic tool that enables them to enrich themselves. It is this perception that leads many not to have allegiance to their own countries since self-enrichment undermines the state's ability to deliver effective social services.[71]

It is submitted that this perception is plausible only as an emotional argument grounded on the fact that most African states had to undergo protracted wars in order to obtain their political independence from their colonial masters and as such they are not yet willing to share the political "power" they fought hard for. It is however unfortunate that the same patriotic perception is blinding them to the opportunities and benefits of stronger economic and political ties. It is therefore incumbent on the current international law scholars to properly conceptualise a functional integration framework taking into account the existing legal norm surrounding the laws of inter-state relations. It will be argued that this usage of sovereignty as observed by *Mbeki* may be remedied through the establishment of institutions with a supra-national reach.

The AU has already promulgated norms and minimum core obligations which member states have voluntarily agreed to abide by. The challenge is that without supra-national organs, the member states are left to monitor and enforce the domestication of such norms by themselves. It is up to the governments of member states to decide if they

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70 Wapmuk, S., *op-cit* note 25, p 666.

71 Mbeki, M., Architects of Poverty: Why Africa's Capitalism needs Changing. Pan Macmillan South Africa2009. p 138.

wish to abide by such obligations and when confronted for non-compliance, African states are quick to invoke the sovereignty defence.

The African Union has in the past embarked on self-assessment initiatives in an attempt to improve its efficacy. One such initiative was the setting up of the Independent High Level Panel of the Audit of the African Union[72] by the Assembly of the Heads of State and Government. The Audit Report noted that if political integration was to be attained, then "the ceding of sovereignty would be inevitable".[73]Similarly, *Okumu*, in his work, has observed that the AU's subscription to the principle of territorial integrity and respect for the sanctity and inviolability of colonial-era boundaries contradicts the objective of "political and socio-economic integration of the continent.[74]He has also observed that the Constitutive Act of the AU does not specify what steps need to be taken to accelerate the political and economic integration of Africa as evidenced in the report of the High Level Panel of the Audit of the African Union.[75]

It is submitted that *Okumu's* observations are an indication that a pre-requisite to political integration is that AU member states must come to a clear understanding of how far the notion of state sovereignty can be used as a defence against continental interests. Clear legal guidelines would have to be promulgated to ensure that whilst member states retain a measure of the ability to determine their domestic affairs; such retention will not be absolute. At the moment, the AU and its members have not come to terms on how to manage such a notion within the context of continental integration.

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72 See generally AU Audit, *Ibid* note 7.
73 Okumu, W., *op-cit* note 6, p 95.
74 Okumu, W., *op-cit* note 6, p 95.
75 Okumu, W., *op-cit* note 6, p 95.

This has resulted in the AU functioning in a self-defeating manner since at one front it advocates for political-legal integration and at the other front, it asserts the inviolability of colonial-era boundaries.

Yihdego postulates that the African Union was established in 2001 with a view to addressing the pitfalls that challenged its predecessor, the OAU, and that the continent has not yet built supra-national and national institutions that are capable (and willing) of implementing its values.[76] It is submitted that these observations are correct in that the AU institutions rely on the voluntary co-operation of member states for the execution of its duties. If a member state is unwilling to allow AU institutions room to operate, the integration agenda is brought to a halt. In principle, this could be avoided by clearly defining the position of the AU as having supra-national characteristics or at least according certain organs of the AU supra-national decision-making powers so as to prevent it from being swayed around by domestic interests that hamper the attainment of continental objectives.

From the observations of *Okumu* and *Yihdego*, one is then provoked to ask whether it was necessary to transform from the OAU to the AU, to keep on promulgating treaties, protocols, decisions and declarations, without addressing the fundamental question of whom and how will such a body or institution enforce institutional objectives in the midst of member states who constantly seek refuge behind their national sovereignty.

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[76] Yihdego, Z., *op-cit* note 29, p 569.

Ngandwe is of the opinion that the notion of state sovereignty is often used to window-dress internal misdeeds and to bar neighbours from intervening on matters of appalling human rights violations that ultimately undermine the efforts of regional integration, peace and security.[77] Instructive in this regard, is the example of the human rights violations in Zimbabwe and the inertia by SADC member states to deal with those violations within the SADC accords.[78]This work will go beyond the observations of *Ngandwe*, *Okumu* and *Yihdego* and propose solutions to this quagmire.

Having discussed the complexities of national sovereignty, the questions that have for a long time occupied international law debates include, when is it legally permissible for a body such as the African Union to intervene in the internal affairs of its member states? Does the African Union have the right to intervene when the fiscal direction that a country is taking will eventually plunge the country into economic collapse and eventually civil unrest or should the AU only intervene once there is complete fallout as a result of matters that have evolved under its watch? Authors such as *Farmer*[79] and *Kuwali*[80] maintain that the current AU intervention mechanisms are sufficiently preventative. *Farmer* applauds Article 4(h) of the AU Constitutive Act which allows the AU to intervene in the internal affairs of member states when there are gross human rights violations. He posits that unlike the OAU, the AU adopted the notion that sovereignty is not a privilege that all states deserve, but rather it is a responsibility and

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77 Ngandwe P.J, *op-cit* note 66.
78 Ngandwe P.J, *op-cit* note 66.
79 Farmer, J.L., "Sovereignty and the African Union".2012 ***Journal of Pan African Studies***, Vol.4, No.10, p 99.
80 Kuwali, D,."The end of humanitarian intervention: Evaluation of the African Union's right of intervention". ***African Journal on Conflict Resolution***, 2009, p 41.

when a government fails to meet these responsibilities, its right to sovereignty is lost.[81] He further submits that Article 4(h) sends a strong signal to member states that they risk losing their sovereignty to the regional body in the event of poor governance and gross failure to protect civilian life.[82]

Kuwali in his work also applauds the ingenuity of the same Article. He opines that although intervention has traditionally been opposed by African States and regarded as imperialism, under the AU Act, AU member states have themselves accepted sovereignty not as a shield but as a responsibility where the AU has the right to intervene to save lives from egregious crimes.[83] He, in a forceful manner, applauds the current status of AU mechanisms. It should be borne in mind that the Charter of the OAU prescribed that member states adhere to the principle of, amongst others, peaceful settlement of disputes by negotiation, mediation, conciliation or arbitration. Despite this principle, the loss of life and the springing up of wars and conflicts was most prevalent during the times of the OAU, therefore, we cannot at first instance embrace optimism as a result of bare mechanisms that are entrenched in the AU Constitutive Act. The views of *Farmer* and *Kuwali,* do not seem to accommodate the fact that the AU intervention mechanisms are more reactive than preventative. The Constitutive Act of the AU under Article 4 allows the AU to intervene in a Member State

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81 Farmer, J.L., *op-cit* note 79, p 99.

82 See also Addo, B.K., Seizing sovereignty in Africa. BBC News (30 June, 2004). Available from http://news.bbc.co.uk/2/hi/africa/3850123.stm. (Accessed 2012-06-03).

83 Kuwali, D., *op-cit* note 80, p 41-42.

pursuant to a decision of the Assembly in respect of grave circumstances, namely war crimes, genocide and crimes against humanity.[84]

Corinne et al have correctly recorded that "the fact that intervention will require a decision by the Union's Assembly of Heads of State and Government arguably raises the risk of inaction".[85] It is argued in this work that the AU and its organs have to take proactive steps to guide the economic policies and trade relations of its member states with a view to preventing poverty, under-development and ultimately civil unrest.

This work further contends with relevant examples, dealing with how the current AU intervention mechanisms have failed to prevent the chaos in Libya, human rights abuses in Zimbabwe, the North and South Sudan Conflict, the Madagascan political impasse and the current South Sudanese civil conflict. This work further shows how keeping close economic and political ties across the continent through regional integration will help the AU in its politico-economic conflict prevention role.

Regional integration is a fundamental part of Africa's development strategy and has underpinned most pan-African development policies for the past 50 years.[86] The African continent has since the formation of the OAU gave birth to the Lagos Plan of Action and

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84 Protocol on Amendments to the Constitutive Act of The African Union, Article 4(h)... the right of the Union to intervene in a Member State pursuant to a decision of the Assembly in respect of grave circumstances, namely: war crimes, genocide and crimes against humanity as well as a serious threat to legitimate order to restore peace and stability to the Member State of the Union upon the recommendation of the Peace and Security Council.

85 Corinne, A., *et al*, "The New African Union and Its Constitutive Act", 2002 ***The American Journal of International Law***, Vol. 96, No. 2 p 373.

86 Gibb, R., "Regional Integration and Africa's Development Trajectory: meta-theories, expectations and reality". 2009 ***Third World Quarterly***, Vol. 30, No. 4, p 701.

the African Economic Community (AEC).[87] The AEC embodies operational plan aimed at the integration of African economies in order to increase the economic self-reliance of the continent and promote an endogenous and self-sustained development.[88]

The Economic Commission for Africa (ECA) and the New Partnership for Africa's Development (NEPAD) have been the vanguards of good governance debate, repeatedly pointing out the significance of good governance and stressing the interrelationship between good governance and sustained economic development.[89] These debates have further been affirmed by *Breytenbach* in a study that evidenced successfully that countries with a better democratic environment tend to have a higher development index.[90]*Page* also conducted a similar study and came to the same conclusion.[91] In a nutshell their studies affirmed that economic growth, good governance, political stability and strong institutions are the immutable prerequisites for effective regional integration; therefore, it is possible to argue that the AU needs to build a strong continental body if the visions in the various treaty documents are to be translated into action. In this work, a deeper discussion of the relationship between democracy, development and integration is undertaken with the intention to illustrate why the AU needs strengthening in order to address teething continental challenges as a means to economic progress.

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87 See Lagos Plan of Action, 1980-2000. Available from http://www.uneca.org/itca/ariportal/docs/lagos_plan.pdf.(Accessed 2013-02-21).See also Nyirabu M., *op-cit* note 4, p 22.

88 Treaty of the African Economic Community 1991,Art 4.

89 See United Nations Economic Commission for Africa (UNECA), African Development Forum. Available http://www.uneca.org/adfiv/documents/workshop_reports/ADF_IV_Recommendations_South_Africa.htm. (Accessed 2013-02-21).

90 See Breytenbach, W., "Democracy in the SADC region - a comparative overview: essay". 2002. ***African Security Review***, Vol 11, Issue 4. p 97.

91 See generally Page, S., Regionalism among Developing Countries. Basingstoke: Macmillan 2000.

African efforts to overcome its economic challenges have of course not yielded support from everyone. These attempts at integration have been scoffed at from time to time since they have not really produced the desired result of placing Africa as a recognisable entity on the global trading arena. For instance, *Herbst* in his paper argued that:

> Why go through the effort to try to have a relatively small number of extraordinarily poor people trade with each other when the world economy is larger, more populous, and growing faster?[92]

His submission refutes the idea that economic development can be attained by encouraging intra-African trade since African economies are both fragmented and too small to be able to compete globally. *Foote* also came to a parallel conclusion in his work which used an array of statistical models to determine whether the current integration, free and preferential trade agreements have had a positive impact on the levels of intra-African trade.[93] His work concluded that:

> With the exception of the Arab Maghreb Union (AMU), all integration agreements show statistically significant negative effects. These results differ from the effect of other integration agreements around the world. The ineffectiveness of the regional economic communities, and specifically those designated as pillars, have serious implications for the African Economic Community.[94]

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93 See Foote, T., Economic Integration in Africa. Effectiveness of Regional Agreements. University of Notre Dame, 2009.Available from http://economics.nd.edu/assets/24013/economicintegrationinafricaeffectivenessofregionalagreement.pdf.(Accessed 2013-02-21).

94 Foote, T., *Ibid* note 93, p 24.

It is submitted that the observations by *Foote* are correct. Intra-African trade has been very slow. *Herbst's* submission, however, fails to take into account that there are many factors beyond poverty and the size of African economies that have a negative impact on intra-African trade. For instance, *Kwaramba* asserts in his work that the challenge that faces many African countries in relation to trade facilitation is the need to develop requisite capacities needed to implement modern techniques of doing trade.[95] He referred to the lengthy border processes and the lack of technology driven systems and process.[96]This work therefore, shows how factors such as severe structural inadequacies in transport, services, banking, labour skills, corruption and cumbersome custom checks all contribute to the stagnation of trade within the continent. It is also argued in this work how integration will help overcome these challenges.

In a study by *Tesfayohanness* and *Besada*[97] aimed at identifying the push and pull factors for establishing the foundations of economic integration in Africa with a critical focus on the countries around the horn of Africa, it is highlighted that in order to improve regional infrastructural, institutional and political capabilities towards integration, state parties should focus on;

a) the creation of a cross-border power and energy generation and distribution network; the establishment and upgrading of regional land, air, and other means of transportation and communication;

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95 Kwaramba, M., "Evaluation of Chirundu One Stop Border Post- Opportunities and Challenges", ***Trade and Development Studies Centre***. 2010. Available from www.tradescentre.org.zw. (Accessed 2013-02-23).

96 Kwaramba, M., *Ibid* note 95.

97 Tesfayohanness, M. and Besada, H., "Economic Integration as a Contribution to Sustainable Development in the Horn of Africa". 2009 ***The Journal of African Policy Studies*** Vol. 15 No. 1, p 31-56.

b) the establishment, advancement, and diversification of regional financial and commodity markets; the establishment of a regional higher education system by facilitating wider access through specialization; and

c) the promotion of student exchanges and partnerships in research and development.[98]

In another work, by *Hammouda* et al[99] which investigated why regional integration does not improve income growth and investment in Africa, despite the common goal of more open and freer trade as postulated by the AU and its regional sub-groupings, the findings show that the slow accumulation of factors of production (land, labour, capital and entrepreneurship) as well as failure of the regional sub-groupings on the continent in improving intra-regional trade, intra-regional investment and labour mobility.[100] This work will pave the way for the realization of factors identified by *Tesfayohanness* and *Besadaa*s as well as promoting a deeper understanding of the role that factors of production play in regional integration.

The principle of *pacta sunt servanda* and the application, in good faith, of binding treaties continue to be a crucial concern over the relationship between international law and national law within the African Union. A pivotal reminder of the interplay between domestic interests and international law is the 1923 *Wimbledon* case[101] between the *United Kingdom, France, Italy and Japan v. Germany* before the Permanent Court of

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98 Tesfayohanness, M. and Besada, H., *Ibid* note 97, p 31-56.

99 Hammouda, H.B, *et al* "Why Doesn't Regional Integration Improve Income Convergence in Africa?", 2009 ***African Development Review***,. p 291–330.

100 Hammouda, *Ibid* note 99, p 314.

101 1923 P.C.I.J. (ser. A) No. 1 (Aug. 17).

International Justice. In resolving the dispute which arose from Germany wishing to exercise its sovereign rights in contravention of a Treaty it had signed, the Court opined that:

> The Court declines to see in the conclusion of any treaty by which a State undertakes to perform or refrain from performing a particular act an abandonment of its sovereignty. No doubt any Convention creating an obligation of this kind places a restriction upon the exercise of the sovereign rights of the State, in the sense that it requires them to be exercised in a certain way.[102]

In summary, the case clarified that entering into an international agreement is an exercise of sovereign authority and once concluded, states have to respect and fulfil the obligations that arise from such agreements.

With the above in mind, the following questions may then arise when one reflects on African integration discourse:

a) Do AU member states fully implement the decisions, resolutions and regional norms within their domestic jurisdictions?
b) Are there sufficient monitoring and enforcement mechanisms available to the AU to ensure that member states carry out the obligations that arise from being an AU member state?

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[102] at para 35.

The AU has promulgated various protocols and declarations aimed at facilitating the movement of goods and services on the continent.[103] It is envisaged that through the implementation of these protocols, member states would enjoy a steady rise in intra-African trade which will eventually have a positive impact on African economies. The reality is that there are no supra-national AU institutions to monitor and enforce the decisions of the continental organisation. Often in international law, there is usually much contestation between the obligations that a state voluntarily binds itself to and the internal state machinery. The obligations at international level would require certain reforms to be effected by the state; however, this can be stalled by much resistance or inertia by internal state institutions. This resistance might be influenced by differences in political ideologies, lack of capacity or a mere lack of political will. This work illustrates, with concrete examples, how member states continue to evade their obligations with few or no reactions from the AU.

In addition to the lack of monitoring and enforcement of decisions, another aspect that should be corrected in order to make a success of integration is the restructuring of the decision-making processes within the AU. The 2007 AU Audit Report indicated that there were numerous internal challenges within the AU; however, the AU Commission disagreed with some important aspects of the Audit Panel's analyses and recommendations.[104] A document recording such dissent was disseminated to the Ambassadors and Foreign Ministers and thus encouraged a negative reaction to the

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[103] See for instance Constitution of the Association of African Trade Promotion Organizations, 1974, Treaty Establishing the African Economic Community, 1991, Inter-African Convention Establishing An African Technical Co-Operation Programme, 1975, Protocol On The African Investment Bank, 2009.

[104] Bujr, A., "The African Union Audit Report: A brief note". 14 Feb 2008. Available from http://www.africafiles.org/article.asp?ID=17233.(Accessed 2012-06-06).

Audit Report.[105] This was a reaction to the Panel's overall finding with regard to the Commission that it is characterized by internal institutional incoherence and disarray, with a dysfunctional working and managerial culture at all levels.[106] It is submitted that such organisational incoherence eventually affects the attainment of continental objectives. This work indicates how other regional integration regimes have managed to overcome the challenges related to monitoring and enforcement of regional decisions with a view to proposing a mechanism for the African Union.

1.8 Limitations of the Study

The core focus of the study was the African Union and its regional integration efforts; however, the study attempted to draw a comparative analysis with the European Union and other similar institutions/organisations where necessary.

The African Union has a plethora of guiding documents, protocols, charters, memoranda of understanding etc. These documents will form the core focus of this study. The application of well-established principles of international law to these documents will be carried out in order to improve the efficacy of the AU infrastructure.

1.9 Ethical Considerations

The research was conducted in adherence to the following policies of the North West University:

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[105] Bujr, A., *Ibid* note 104.
[106] Bujr, A., *Ibid* note 104.

- The Policy on Plagiarism and other forms of Academic Dishonesty and Misconduct.

  The policy recognises that dishonest academic conduct constitutes serious misconduct, whether it occurs orally, by conduct or in writing, during examinations or in the context of other forms of assessment such as assignments, theses, as well as in reports and publications.[107]

- The Faculty of Law's Charter of Ethical and Professional Conduct.

  The Charter encourages, amongst others, the values of integrity, accountability, discipline and accountability in the execution of all work related to the Faculty of Law including research.

- Regulations as enacted by the NWU Research Ethics Committee.[108]

  The study was conducted with adherence to the following principles; non-malfeasance, beneficence, autonomy, justice. Important ethical guidelines that were taken into consideration include informed consent, confidentiality, anonymity appropriate referral, discontinuance and non-deception. The author

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107 NWU Policy on Plagiarism and other forms of Academic Dishonesty and Misconduct. Available from http://www.nwu.ac.za.(Accessed 2012-06-03).

108 See Rules of the Research Ethics Committee. Available from http://www.nwu.ac.za/webfm_send/24743.(Accessed 2012-06-03).

has further ensured that work that is not of his original doings is well acknowledged.

1.10 Scope of the study

Chapter one is the introductory Chapter to this work, a contextualisation of AU and the problem to be investigated, the research objectives, literature review, rationale and justification of the study, the methodological approach that was utilised by the author and an outline of the thesis structure.

Chapter two deals with the historical context of the AU, reflecting back on the formation of the OAU and highlighting the debates that led to its transformation into the AU. This Chapter gives insight into the origins of political and economic organisation on the Africa continent.

Chapter three focuses on the economic aspects of African continental integration. It does this by giving a synopsis of the sub-integration groupings that exist on the African continent under the auspices of the African Union. These sub-groups are sometimes referred to as regional economic groupings, though their roles are not limited to economic integration only. The Chapter also discusses the economic aspects of integration on the continent and suggest ways of improving them.

Chapter four focuses on the politico-legal aspects of integration. This Chapter blends both theory and processes of the African Union and argues for the effectiveness of the current political integration architecture of the African Union. It does so by identifying

key aspects of political integration and argues them against the current *status quo* of the Union. The chapter also provides qualitative and quantitative evidence on the linkage between political stability, integration and development.

Chapter five is a culmination of its preceding Chapters. It focuses on the right to development debates whether the founding documents of the African Union, by professing to achieve integration and ultimately the development of the continent give rise to the "right to development" and to what extent this right can be claimed by the African people. It argues that the political and economic objectives of the African Union are all designed to advance the development of its member states and as such with the assistance of case law, the right to development is coined.

Chapter six carries out broad conclusions to this study and makes recommendations on how to strengthen the AU and the pursuit for continental integration.

CHAPTER 2 AFRICA'S VOYAGE FROM THE OAU TO THE AU: A REFLECTION ON PAST AND PRESENT EFFORTS

2.1 Introduction

The previous Chapter discussed the problem statement, justified why this study is necessary and contextualised the approach chosen to undertake this study. This Chapter examines the OAU in a historical context, reflecting back on the historical events that necessitated its formation and further articulates the antecedents that led to its transformation into the AU. This Chapter also examines the organic structures of the OAU/AU and how they relate to one another with specific reference to their roles as drivers of the integration agenda.

2.2 Geography, Demographics and Resources

The African continent is located between 9.1021° N, 18.2812° E,[109] with a land mass of 30,221,532 square kilometres accounting for 12.7% of the planet's land masses.[110]Africa is the planet's second largest continent and the second most-populous continent after Asia with a human population estimated at 1.3 billion.[111] It includes fifty four (54) individual states, and Western Sahara, a member state of the African Union whose statehood is disputed by Morocco. It is also worth noting that South Sudan is the

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109 Data obtained from "Maps of the World". Available from http://www.mapsofworld.com/lat_long/africa.html.(Accessed 2013-02-21).

110 See "World Atlas". Available from http://www.worldatlas.com/webimage/countrys/aflandst.htm (Accessed 2013-02-21).

111 as above.

continent's newest state after internal civil conflicts led to the secession of South Sudan from North Sudan.[112] The continent is further blessed with an abundance of natural resources ranging from oil to precious metals such as gold, diamond, copper, iron ore, cobalt, uranium, bauxite, and silver, coupled with many natural geographical formations including mighty rivers and nature reserves that continue to attract a steady supply of tourism.

The resources of the continent are well summed up in the NEPAD framework document which spells out the following components:

a) A rich complex of mineral, oil and gas deposits, the flora and fauna, and the wide unspoiled natural habitat, which provide the basis for mining, agriculture, tourism and industrial development.
b) An ecological lung provided by the continents' rainforests and the minimal presence of emissions and effluents that are harmful to the environment a global public good that benefits all humankind.
c) The paleontological and archaeological sites containing evidence of the origins of the earth, life and the human race, and the natural habitats containing a wide variety of flora and fauna, unique animal species and the open uninhabited spaces that are a feature of the continent.

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[112] See generally Vidmar, J., "South Sudan and the International Legal Framework Governing the Emergence and Delimitation of New States". 2012 ***Texas International Law Journal*** Volume 47, Issue 3.

d) The richness of Africa's culture and its contribution to the variety of the cultures of the global community.[113]

On the face of it, it appears these natural advantages should have made for a self-sustaining continent, however the opposite is the case. The resources and opportunities for wealth creation have been the focal point of many African setbacks as articulated hereinafter.

The Berlin Conference of 1884-1885 was premised on enabling the colonisers to benefit from Africa's labour and natural resources ultimately leading to the 'balkanisation' of the continent.[114] Beyond colonialism, African leaders failed to seize the opportunity to build a self-sustaining continental system but rather engaged in various wars and genocides in an attempt to seize and accumulate wealth and power. For instance; the Sierra Leone conflict was propelled financially by the exchange of precious metals mainly diamonds for weapon consignments.[115] This continued over years despite international condemnation of the gross human rights abuses and mounting death tolls.[116] It may be argued that the slow intervention of the then OAU to clamp down on the proliferation of weapons was an indication of the weak institutional powers bestowed upon the OAU. Another example would be the conflicts in the Democratic Republic of the Congo which

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113 NEPAD, "Strategic Framework Document", p 3. Available from http://www.nepad.org/system/files/framework_0.pdf. (Accessed 2013-10-24).

114 See Basset, T.J., "Cartography and Empire Building in Nineteenth-Century West Africa". 1994 ***Geographical Review***, Vol. 84, No. 3, p 316-335. Griffith, I., "The Scramble for Africa: Inherited Political Boundaries". 1986 ***The Geographical Journal***, Vol. 152, No. 2, p 204-216

115 See Wilson, S.A., "Company–Community Conflicts Over Diamond Resources in Kono District, Sierra Leone".2013 ***Society and Natural Resources***, Vol. 26 Issue 3, p 254-269 and Fall, S., "Picturing Blood Diamonds".2011***Critical Arts: A South-North Journal of Cultural and Media Studies***, Vol. 25 Issue 3, p 441-466.

116 Wilson, S.A., "Company–Community Conflicts Over Diamond Resources in Kono District, Sierra Leone".2013 ***Society and Natural Resources***, Vol. 26 Issue 3, p 254-269

were fuelled by political and economic marginalisation based on ethnicity.[117] More recently the secession of South Sudan from Sudan has seen a new contestation over oil, disputes which have severely diverted development efforts in the region.[118]

2.3 The Founding Debates of Pan Africanism

In an attempt to correctly contextualise the foundations of the OAU, it beckons that an understanding of Pan Africanist thought should be acquired since integration arrangements in Africa were initially a political reaction to colonisation. Having discussed in the previous Chapter that countries often opt to join integration arrangements for various reasons, including political and economic gain, it therefore became logical for African colonies at the time to seek a political solution against colonisation through integration.

Pan Africanism can be described as the set of ideals that underpinned and continue to underpin politico-economic African dialogue.[119] These ideals have evolved from pro-independence conversations to modern day continental aspirations of the African people. *Adi* and *Sherwood* have observed that Pan Africanism is 'the belief in some form of unity or of common purpose among the peoples of Africa and the African

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117 See Mukalazi, G.G., "The Republic of Congo: situation report". 2006 ***Conflict Trends***, Issue 4, p 34-35 and Ahere, J., "The Democratic Republic of the Congo: fact file". 2012***Conflict Trends***, Issue 3, p 30-31.

118 See Africa Research Bulletin: Political, Social and Cultural Series; Aug2012, Vol. 49 Issue 7, p 19336-19337 and Africa Research Bulletin: Political, Social and Cultural Series; Apr 2012, Vol. 49 Issue 3, p 19189-19190.

119 Eze, M. O. (2013). Pan Africanism: A Brief Intellectual History. *History Compass*, *11*(9), 663-674. See also McLaren, J. (2013). Expanding the Channels of the African Diaspora. *Research in African Literatures*, *44*(1), 179-187.

Diaspora'.[120]*Fierce* aptly captured two dimensions of Pan Africanism as a *movement* and an *ideal.* In his work he observes that:

> The movement refers to an organized set of activities designed to relieve Black people (especially, but not exclusively Africans) from various kinds of exploitation and oppression on the path to *bonafide* black nationalism: social, political, and economic. The idea is the extent to which, if any, an African kinship or brotherhood consciousness exists among African Americans, irrespective of the steps taken.[121]

Though the above passage makes reference to African Americans, it is argued that these ideas were not only borne in the minds of African Americans who had left the continent as slaves or those who eventually studied overseas. The ideals were also rooted in the consciousness of ordinary Africans who at the time toiled under colonialism. Some of the most prominent promoters of African unity were President Kwame Nkrumah of Ghana, Jomo Kenyata of Kenya, Patrice Lumumba of the Congo, Julius Nyerere of Tanzania and Emperor Haile Selassie of Ethiopia who all believed African solidarity would bring an end to colonialism and racism.[122]

It should be noted that Pan Africanist ideals of unity and independence of African states transcended all forms of "national boundaries" and political tactics aimed at suppressing African uprising against colonialism. This common ideal that existed amongst African leaders in the period 1930-1970's allowed them to form a strong bond across the continent, united by a common notion against colonial occupation. The tone of such

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120 Murithi, T.,"Institutionalising Pan-Africanism Transforming African Union values and principles into policy and practice" 2007 ***Institute for Security Studies*** Paper 143, p 1-12.

121 Fierce, M., ***The Pan-African Idea in the United States, 1900–1919: African-American Interest in Africa and Interaction with West Africa***. New York: Garland Publishing, Inc.1993. p 35-40.

122 Fierce, M., *Ibid* note 121, p 78.

ideals would later evolve to focus on how to well manage a self-governing continent against the backdrop of colonialism and achieve development after most of the African states gained independence in the period 1957-1963. It was during this period of change that the founding principles of the OAU would emerge amongst the Pan Africanist dialogues.

2.3.1 The Birth of the OAU

In the 1960s, emerging African leaders such as Kwame Nkrumah, Jomo Kenyatta, Sekou Toure, Haile Selassie and Julius Nyerere, who were influenced by American and Caribbean civil right activists amongst others, WEB DuBois, Sylvester Williams and George Padmore, conceived the idea of a United Africa.

It was important for this first group of Pan Africanists to have some sort of organised sharing of ideas. In the period 1919-1945, the Pan Africanists held five congresses which to a lesser or greater extent paved the way for African self-rule. In February 1919, the first Pan-African Congress, organized by *Du Bois* and *Ida Gibbs Hunt* beseeched the Versailles Peace Conference held in Paris at that time to attempt and secure self-African rule. Among their demands were that Africa be granted home rule and Africans should take part in governing their countries as fast as their development permitted until at some specified time in the future.[123]In 1921, the Second Pan-African Congress met in

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[123] Mboukou, A., "The Pan African Movement, 1900-1945: A Study in Leadership Conflicts Among the Disciples of Pan Africanism". 1983***Journal of Black Studies***, Vol. 13, No. 3 p 275-288.

several sessions in London, Paris and Brussels.[124] The central theme of the conference was best summed up by an extract from *Du Bois's* "Manifesto to the League of Nations":

> England, with all her Pax Britannic, her courts of justice, established commerce, and a certain apparent recognition of Native laws and customs, has nevertheless systematically fostered ignorance among the Natives, has enslaved them, and is still enslaving them, has usually declined even to try to train black and brown men in real self-government, to recognise civilised black folk as civilised, or to grant to coloured colonies those rights of self-government which it freely gives to white men.[125]

From *Du Bois's* statement, it is evident that there was a great need amongst colonial powers to at least recognise persons of African origin as human beings, capable of governing themselves in a "civilised" manner. In 1923, the third Pan-African Congress was held in London and in Lisbon. Once again, the Conference reiterated the demand for self-rule and development on the continent that will benefit the original inhabitants of the continent. It also petitioned for the abolition of "lynch mob" policing in the United States of America. These same sentiments would be echoed in the fourth 1927 Pan-African congress held in New York.[126]

The fifth Pan-African Congress was held in Manchester, United Kingdom, on the 15–21October 1945. This conference is identified with the passing of resolutions that sought to criminalise racial discrimination and denouncing colonial imperialism as well as capitalism of all forms on the African continent. It is from this conference that Kwame

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124 Sherwood, M., "Pan-African Conferences, 1900-1953: What Did 'Pan-Africanism' Mean?" 2012 ***The Journal of Pan African Studies***, Vol.4, No.10, p 107-110.

125 See "London Manifesto of the 2nd Pan African Congress", 1921 at 752 Available from http://college.cengage.com/history/primary_sources/world/london_manifesto.htm. (Accessed 2013-02-21).

126 Sherwood, M., *op-cit* note 124, p 109-111.

Nkrumah, Jomo Kenyatta and other Pan Africanists found it fit to establish the Pan-African Federation in 1946 with the aim of demanding self-determination and secure the equality of African civil rights.[127]

The Pan-African movement gained momentum when Ghana (under Nkrumah) became the first black African country to gain its self rule, and as an independent state it was tasked with organising the All Africa Conference in Accra in 1959.[128] It is recorded that Nkrumah then began a tireless campaign to spread his philosophy about unity amongst states that had just gained their independence after Ghana. He also attempted to establish Unions such as the Ghana-Guinea Union, and the Ghana-Guinea-Mali Union. In 1963, he and leaders of other independent African states convened a summit in Addis Ababa to unite and establish a common Pan-African organization, the Organisation of African Unity.[129]

2.3.2 Different approaches to the establishment of the Africa Union

The 1963 Addis Ababa summit was the culmination of all resistance against colonialism. Though all African leaders agreed to the establishment of the OAU and the eradication of colonialism, the summit was divided on the manner in which the organisation would relate to the newly formed independent states. The OAU was thus a compromise between the aspirations of three blocs which had emerged during its establishment. These three blocs were;

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127 Sherwood, M., *op-cit* note 124, p 109-111.
128 Sherwood, M., *op-cit* note 124, p 109-111.
129 See MONGABAY, "Relations and History of the OAU". Available from http://www.mongabay.com/history/ghana/ghanathe_organization_of_african_unity_and_the_rest_of_africa.html. (Accessed 2013-02-21).

a) the Casablanca group;

b) the Brazzaville group; and

c) the Monrovia group.

The Casablanca group[130] identified as carrying Kwame Nkrumah's integralist position took a more radical approach to unity. They favoured socialistic planned economies for members and viewed strident anti-colonialism as a unifying force. The group envisioned the formation of a supra-national government and parliament. This ideal to the formation of a continental structure is what *Rossi* would label the "federalist" approach to integration. He observes that it presupposes the coming together of diverse entities in order to create a central unit, to which they relinquish their sovereignty, thus leading to the creation of a supra-national entity.[131] Nkrumah had argued that a federation of African states or a Union Government for Africa would be the most effective vehicle for Africa's economic, social and political emancipation.[132]

The Brazzaville group mainly consisted of former French colonies.[133] This cluster stood for a gradualist approach to the concept of African unity, starting with regional economic and cultural co-operation. The third group, identified as the Monrovia group[134] was more moderate, placing more emphasis on economic cooperation and less on politics and

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130 The Casablanca Group consisted of Ghana, Mali, Guinea, the United Arab Republic, and the Algerian Provisional Government.

131 Wapmuk, S., *op-cit* note 25, p 647-648.

132 Wapmuk, S., *op-cit* note 25, p 646.

133 Central African Republic, Cameroon, Ivory Coast, People's Republic of Congo, Dahomey, Mauritania, Gabon, Upper Volta (the present-day Burkina Faso) , Senegal, Niger, Chad and Madagascar.

134 Nigeria, Sierra Leone, Liberia, Togo, Ivory Coast, Cameroon, Senegal, Dahomey, Malagasy Republic, Chad, Upper Volta, Niger, People's Republic of Congo, Gabon, Central African Republic, Ethiopia, Somalia, and Tunisia.

ideology. This group also took a regional approach to problem-solving but a hands-off approach to members' internal affairs and problems. *Rossi* would label this the "functionalist" approach as it supported the view of gradual incrementalism[135] in the manner in which a continental body would intervene in the internal matters of member states. Despite the push by some notable delegates for a stronger Union, independent African heads of state wished for a more pragmatic international Organisation which served as a framework for a loose association among African states.[136] The views of the Monrovia Group were supported by the majority of countries in the Summit. Most member states at the time contemplated that the goal of the establishment of the OAU should be an extremely flexible associative structure that would not compromise the sovereignty of the states and regional organizations that already existed[137] and as such the OAU Charter would contain, amongst others, the following principles:

a) Article 3(1) the sovereign equality of all Member States.
b) Article 3(2) non-interference in the internal affairs of States.
c) Article 3(3) respect for the sovereignty and territorial integrity of each State and for its inalienable right to independent existence.[138]

Member states undertook to thoroughly observe the principles enumerated in Article III of the Charter.[139] The Constitutive Act of the AU ushered 37 years after the 1963 Charter also contained similar blueprints to the provisions mentioned above. For instance:

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135 Wapmuk, S., *op-cit* note 25, p 648.
136 Yihdego, Z., *op-cit* note 29, p 568.
137 Rossi, G., "The OAU: Results of a Decade". 1974 ***International Journal of Politics***, Vol. 4, No. 4, p 15-34.
138 OAU Charter, *op-cit* note 12.
139 OAU Charter, *op-cit* note 12, Art IV.

a) Article 4(a) sovereign equality and interdependence among Member States of the Union.
b) Article 4(b) respect of borders existing on achievement of independence.
c) Article 4(g) non-interference by any Member State in the internal affairs of another.[140]

It can be reasonably deduced from the above comparison that there has not been much evolution in the principles guiding the continental body. Despite the change in language, the undertones and interpretations remain the same. Both the 1963 OAU Charter and the new 2000 Constitutive Act place a substantial amount of emphasis on respect for sovereignty and non-interference in the internal affairs of member states. This then does confirm *Wapmuk* and *Mbekis'* views that African states still guard their sovereignty closely especially since it was gained after long violent struggles and that many perceive that sharing their sovereignty with other member states through a continental body is tantamount to losing their independence.[141]

2.4 The fundamental character of the Charter of the OAU

Article II of the 1963 Charter provided that the OAU was created for the following purposes;

a) promote the unity and solidarity of the African States;
b) coordinate and intensify their cooperation and efforts to achieve a better life for the peoples of Africa;

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[140] See Constitutive Act of the AU, Ibid note 30.
[141] See Wapmuk, S., *op-cit* note 25, p 666 and Mbeki, M., *op-cit* note 68, p 138.

c) defend their sovereignty, their territorial integrity and independence;

d) eradicate all forms of colonialism from Africa; and

e) promote international cooperation, having due regard to the Charter of the United Nations and the Universal Declaration of Human Rights.[142]

The organisation was also to be the body from which member states would coordinate and harmonize their policies in areas such as;

a) political and diplomatic cooperation;

b) economic cooperation, including transport and communications;

c) educational and cultural cooperation;

d) health, sanitation and nutritional cooperation;

e) scientific and technical cooperation; and

f) co-operation for defence and security.[143]

In order to operationalize the above mentioned purposes, the OAU was driven by a very simple hierarchy of institutions. These were;

a) the Assembly of Heads of State and Government;

b) the Council of Ministers;

c) the General Secretariat; and

d) the Commission of Mediation, Conciliation and Arbitration.[144]

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142 OAU Charter, *op-cit* note 12, Art II 1(a)-(e).
143 OAU Charter, *op-cit* note 12, Art II(2)(a)-(f).
144 OAU Charter, *op-cit* note 12, Art VII (1)-(4).

2.4.1 Assembly of Heads of State and Government

The Assembly was the supreme organ of the OAU. It discussed matters of common concern to Africa with a view to coordinating and harmonizing the general policy of the OAU. The Charter also gave the Assembly the power to review the structure, functions and acts of all the organs and agencies within the OAU.[145] The Assembly was required to meet at least once in a year or at the request of a member state after two thirds of the member states approve of such a request.[146] Resolutions of the OAU were passed by two thirds majority unless the question before the house was that of a procedure which required a simple majority.[147]

2.4.2 Council of Ministers

The Council of Ministers, consisted of Foreign Ministers as designated by member states and was accountable to the Assembly, entrusted with the implementation of decisions of the Assembly.[148] As it was with the Assembly, resolutions were determined by simple majority[149] whereas a two thirds majority was required for a quorum.[150]

2.4.3 General Secretariat

The Secretary General was appointed by the Assembly and was tasked with directing the affairs of the Secretariat.[151] The Charter envisioned a Secretariat that was

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145 OAU Charter, *op-cit* note 12, Art VIII.
146 OAU Charter, *op-cit* note 12, Art XI.
147 OAU Charter, *op-cit* note 12, Art x.
148 OAU Charter, *op-cit* note 12, Art XII and Art XIII.
149 OAU Charter, *op-cit* note 12, Art XIV.
150 OAU Charter, *op-cit* note 12, Art XIV (3).
151 OAU Charter, *op-cit* note 12, Art XVI.

independent of the interest of member states and insisted that it be responsible to OAU alone. It also required member states to respect the character of the Secretary General.[152]

The limited and restrictive nature in which the role of the Secretariat was inscribed by the Charter under Art XVIII contributed to the inability of the OAU to achieve its goals. The Charter concentrated too much power in the Assembly as the supreme organ to the extent that the Secretary General was limited to administrative functions and the implementation of the wishes of the Assembly only. This created a monopoly of power within the OAU. This view is also echoed by *Meyers* when he submitted that:

> The OAU's founders were determined not to establish a strong secretariat whose head might try to control the organization, influence policy making, or diminish the prestige of the African Heads of State.[153]

It is submitted that the independence of a Secretariat in any organisation is critical to its success. A Secretariat should be able to implement policy directives and drive member states towards the attainment of specific milestones without depending on the Assembly to issue out directives. This will then ensure that the all-powerful Heads of State remain accountable to the Secretariat to transform decisions into programmes.

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152 OAU Charter, *op-cit* note 12, Art XVIII (1)-(2).

153 Meyers, D., "The OAU's Administrative Secretary General". 1976 ***International Organization***, Vol 30, p 510.

2.4.4 Other Organs of the OAU

Besides the three main bodies discussed above, the OAU had the following Commissions:

a) Commission on Mediation, Conciliation and Arbitration.

b) Economic and Social Commission.

c) Educational, Scientific, Cultural and Health Commission.

d) Defence Commission.[154]

The Charter also permitted the OAU to establish other commissions as it deemed necessary.[155]

2.5 Appraisals and Criticisms of the OAU

Wapmuk has observed that the OAU was successful liberating the continent from colonialism.[156]He also observed in the same work that the OAU was not as successful in the areas of economic development, poverty eradication, ending numerous conflicts and human rights abuses as illustrated by the Rwandan genocide of 1994.[157]

2.5.1 African Emancipation

Article 3(6) of the OAU Charter required member states of the OAU to be absolutely dedicated to the total emancipation of the African territories which were still dependent

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154 OAU Charter, *op-cit* note 12, Art XIX –XX.
155 OAU Charter, *op-cit* note 12, Art XX.
156 Wapmuk, S., *op-cit* note 25, p 646.
157 Wapmuk, S., *op-cit* note 25, p 646.

or under colonial rule. The OAU was founded, primarily to lead the process of African decolonization and development, as well as to combat apartheid, a system of racial segregation peculiar to the Republic of South Africa, and it did accomplish much toward these goals.

The OAU created the Liberation Committee in 1963, which sought to end colonial occupation through various means, including providing assistance to liberation movements on the African Continent. This support was at times extended in the form of military assistance to the Liberation movements. The Liberation Committee's mandate was ultimately terminated in June 1994 at the 13th Ordinary Session of the OAU, this termination after South Africa's first democratic elections in April 1994.[158]

There were also non-violent campaigns aimed at eradicating colonialism in Africa, in particular racist and minority regimes in the Portuguese colonies of Angola, Mozambique Guinea the regimes of South Africa and Rhodesia. For instance, the 1967 Lusaka Manifesto, authored by Presidents Kaunda and Nyerere embodied Africa's commitment to the achievement of majority rule in Southern Africa 'by every means possible' preferably by peaceful negotiations but, if necessary, through a violent struggle. It offered to discourage all violence provided the white-ruled regimes agreed to talk meaningfully about ways of achieving majority rule peacefully.[159]

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158 See AU Resolution on Dissolution of the OAU Liberation Committee, AHG/Res.228 (XXX). Available from http://www.peaceau.org/uploads/ahg-res-228-xxx-e.pdf.(Accessed 2013-06-22).

159 Legum, C., *op-cit* note 13, p 215.

2.5.2 Mediation of border disputes and conflicts

The political boundaries of Africa owe their exceptional characteristics to the fact that the continent was partitioned by Europeans who at the time had limited knowledge of the people and the continent thus paid no regard to their interests. *Griffiths* calculated that these boundaries began to emerge 30 years after the Berlin conference.[160] Since these boundaries were erected without consultation or regard to the original inhabitants of the continent, the OAU was faced with an initial mammoth task of settling border disputes between the newly emerged independent states.

The Algerian-Moroccan border conflict of 1963 delivered to the OAU the first test of its machinery and processes for peacekeeping and for the peaceful settlement of disputes. Morocco considered the border established by colonialists artificial. During the Algerian War of Independence (1954-1962), the Provisional Government of the Algerian Republic agreed in July 1961 to address the frontier question after the liberation struggle. Morocco fought a brief war with Algeria in October 1963, over the possession of certain frontier regions, and hoped that military pressure would induce Algeria into conceding.[161] Mediation by the OAU produced a cease-fire in early November 1963.[162]

Another border conflict which the OAU was instrumental in diffusing was between Kenya, Somalia and Ethiopia in the period 1965 to 1967. The Western Somalia Liberation Front, acting in close collaboration with the Somali government, called for

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160 Griffiths, I., "The Scramble for Africa: Inherited Political Boundaries", 1986 ***The Geographical Journal***, Vol. 152, No. 2, p 204.

161 Touval, S., "Africa's Frontiers: Reactions to a Colonial Legacy", 1966 ***International Affairs*** Vol. 42, No. 4, p. 641-654

162 Heggoy, A., "Colonial Origins of the Algerian - Moroccan Border Conflict of October 1963." 1970 ***African Studies Review*** 13, No. 1, p 17 – 2.

self-determination for Somalis in Kenya and Ethiopia.[163] During the dispute Somalia emphasized the importance of self-determination for the Somali populations in the disputed region, while Ethiopia warned of the danger of attempting to revise Africa's borders despite that fact that they were not drawn by Africans. It was through the diplomatic efforts of the OAU led by President Kenneth Kaunda that immediate danger was averted and the President of Kenya and the Prime Minister of Somalia signed a memorandum of understanding to end the tensions between their two countries.[164]

Other instances where the OAU had played an active role in peace initiatives are as follows:

a) In collaboration with the countries of the region, the OAU was instrumental in facilitating the Arusha Peace Agreement of 1993 which was one of the principal instruments in the Rwandan peace process. The OAU also deployed a Neutral Military Observer Group (NMOG) to monitor the implementation of the resultant ceasefire. NMOG was ultimately incorporated into the UN Mission in Rwanda that was formed in 1994.[165]

b) In October 1993, the OAU intervened in Burundi to restore political democracy as well as to stop the violence which erupted after leading members of the first democratically elected government of Burundi, led by Melchior Ndadaye, were

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163 Chege, M., "Conflict in the Hum of Africa, in Africa: Perspectives On Peace and Development" p 87-100 (Emmanuel Hansen ed.,1987).

164 See generally Munya, P., "The Organization of African Unity and Its Role in Regional Conflict Resolution and Dispute Settlement: A Critical Evaluation", 1999 ***Third World Law Journal***. p 537.Also available from http://lawdigitalcommons.bc.edu/twlj/vol19/iss2/1.(Accessed 2013-02-21).

165 See Institute for Security Studies (ISS), "The Arusha Peace Agreement", Available from http://www.iss.org.za/Pubs/Monographs/No21/Nhara.html. (Accessed 2012-02-21).

assassinated by Tutsi army officers on 21 October 1993. The OAU was engaged from the beginning in sustaining and promoting a peaceful resolution of the conflict. It established an Observer Mission in Burundi (OMIB), comprising both civilian and military components.[166]

c) During the Liberian Civil War, the role of the OAU was critical in the mobilisation of international political, financial and material support for the initiative of the Economic Community of West African States (ECOWAS). The OAU promoted the evolution of a regional consensus behind the ECOWAS Military Observer Group (ECOMOG), and contributed to the Abuja Peace Accord and the process that culminated in the successful elections held in that country during mid-1997.[167]

d) The OAU was appointed, jointly with the UN, a Special Envoy of the Secretary General for the Great Lakes and was involved in the negotiations which brought an end to the Congo/Zaire crisis.[168]

Despite the above mentioned positive track record, the OAU has been severely criticised for its inaction and lack of quick decisive action in some of the conflicts that occurred on the African continent. *Zartman* has correctly argued in his work that "the collapse of a state is not a short-term phenomenon. Rather it is a "long-term

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166 Tieku,T., "Lessons learned from mediation by an African regional Organization". Paper presented at the BISA Africa and International Studies Working Group seminar on Peace, Conflict and Intervention at University of Birmingham, April 7, 2011.

167 ISS, *op-cit* note 165.

168 ISS, *op-cit* note 165.

degenerative disease"[169] and as such a case can be made against the OAU that some of the conflicts that resulted in the loss of human life on the African continent could have been prevented had the OAU acted upon the glaring signs, evident in the various conflicts in Rwanda, Burundi, Liberia, and Sierra Leone.

One such conflict, the Rwandan genocide was a stark example of how crippled the OAU was in terms of its ability to intervene in the internal affairs of its member states. Prior to the genocide, African heads of state agreed at the 28th annual summit of the OAU in Dakar, Senegal in June 1992, to establish a mechanism for preventing, managing and resolving conflicts. Militarily, that mechanism was supposed to rely on an African peacekeeping force, and financially on an African Peace Fund, however the fund was never established as a result of the financial weakness of the OAU members, and the decision to establish the African Peacekeeping Force was declined at the OAU Annual Summit in Cairo, June 1993.[170]

Murphy as recorded that in the period beginning from April ending July of I994, between 500,000 and 800 000 people were methodically slaughtered during the Rwandan conflict. The warning signs were well displayed to the international community and to African leaders prior to the commencement of the conflict; nevertheless the OAU had to adhere to its principle of non-intervention and respect for territorial sovereignty.[171] In addition to this legal hurdle entrenched in its treaty, the OAU did not have the financial and military flexibility as a result of the 1993 Cairo Summit decision not to proceed with

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169 See generally Zartman, *op-cit* note 16, p 13.
170 Gershoni, Y., *op-cit* note 17, p 65.
171 Murphy, C.N., *op-cit* note 21, p 791.

establishing a peace fund and force that would be able to be called upon whenever military intervention was required.

It is submitted that some of the African conflicts were characterized by prolonged and unnecessary loss of life because the militia and guerilla movements were seemingly well-armed than the peace keeping forces. Apart from the inability of the OAU to establish a peace fund, it was also unable to monitor and prohibit increased illegal arms transfers to Africa. Regimes such as those under the rule of Charles Taylor continually traded away their countries' natural resources such as timber and diamonds in exchange for the import of arms into Liberia and infrastructure that was used to transport weapons to Sierra Leone during the Sierra Leone Civil War in the 1990's.[172]

Today, in the wake the wake of 2013 civil conflict in Mali and the Democratic Republic of Congo, the AU is considering to establish the African Capacity for Immediate Response to Crises (ACIRC).[173] It is submitted that this is a duplication to the African Standby Force (ASF) and it merely duplicates both efforts and resources which could have been channelled elsewhere.[174]

Another factor which exposed the weakness of the OAU was its inability to promote good economic governance and growth within Africa. Africa's external debt situation as at 2004, three (3) years after the OAU's transformation to the AU, was reported to be

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172 Physicians for Human Rights, "War-Related Sexual Violence in Sierra Leone: A Population-Based Assessment," June 2002, p. 2.Report available from https://s3.amazonaws.com/PHR_Reports/sierra-leone-sexual-violence-2002.pdf.(Accessed 2013-02-21).

173 See ISS, http://www.issafrica.org/iss-today/new-super-combat-brigade-creation-of-an-african-elite(Accessed 2013-10-24).

174 ISS, *op-cit* note 165.

standing at US$ 330 billion, equivalent of fifty per cent (50%) of the continent's Gross Domestic Product (GDP).[175] At its 37th Anniversary in May 2000, the then OAU Secretary General Salim Ahmed Salim noted with disappointment that:

> African nations, particularly from the Sub-Saharan region - occupy the bottom rung on virtually any table measuring human or economic development. They are among the poorest in the world, contain the unhealthiest people with the shortest life spans, suffer the most conflicts, the least educated people, the worst communications, the most environmental destruction...[176]

In a nutshell after thirty seven years since the establishment of the OAU which purported amongst others to lead to the economic growth of Africa, the African continent was still ranked the "poorest" and "least educated".

An additional criticism that can be directed around the activities of the OAU was that it was an organisation for the elite. Scholars such as *Corinne* have argued that the manner in which the OAU was established and run was totally detached from the people it actually purported to govern. It is argued that public information on the work of the OAU was relatively scanty and few Africans scholars followed the work of the organization.[177]

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175 Wapmuk, S., *op-cit* note 25, p 654.

176 Independent Online (IOL), "OAU's anniversary marked by scourges". Available from http://www.iol.co.za/news/africa/oau-s-anniversary-marked-by-scourges1.38729?ot=inmsa.ArticlePrintPageLayout.ot. (Accessed 2013-02-21).

177 Corinne, A *et al*, *op-cit* note 85, p 365.

2.6 The metamorphosis from the OAU to the AU

The clarion call from which the early Pan-Africanists had established the OAU slowly became debatable as the African continent had become completely emancipated from the stronghold of colonialism.

After some time the priorities of the OAU started to change, from fighting colonial regimes to managing internal conflicts and also pursuing economic advancement. Human rights became a more important concern and also in 1981the African Charter on Human and Peoples' Rights was adopted.[178] With the end of the Cold War, the OAU had to re-evaluate its purpose in relation to African development. African leaders recognized that ever-present conflicts on the African continent had upset African development, one of the sentiments that led to the establishment of the 1993 OAU Mechanism for Conflict Prevention, Management and Resolution. With the new mechanism, it was believed that intervention in what were formerly considered as internal conflicts would become possible, however the crafters of the document still stressed on non-intervention resulting in the mechanism's lack of effectiveness.[179] This view is also canvassed by scholars such as *Muyangwa* and *Vogt*.[180]

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178 See African Charter on Human and Peoples' Rights, 1981. Available from http://www.humanrights.se/wp-content/uploads/2012/01/African-Charter-on-Human-and-Peoples-Rights.pdf.(Accessed 2013-02-21).

179 Vale, P., and Maseko, S., "South Africa and the ,African renaissance." ***International affairs*** 1998 Vol 74 No 2. p 271-287.

180 Muyangwa, M. and Vogt, M., "An Assessment of the OAU Mechanism for Conflict Prevention, Management and Resolution", 1993-2000, Available from http://www.ipacademy.org/Publications/Reports/Africa/PublRepoAfriAssessPrint.htm#part2. (Accessed 2013-10-24).

In a pilot to expedite the procedure of economic and political integration in the continent, the OAU in 1999 convened at the Sirte Extraordinary Session in which the Heads of State deliberated broadly on the methods of strengthening the OAU and also to make it more effective to be able to keep pace with the political, economic and social developments going on within and beyond the continent.[181] The Summit resolved amongst others to;

a) establish an African Union, in conformity with the ultimate objectives of the Charter of the OAU and the provisions of the Treaty establishing the African Economic Community;
b) accelerate the process of implementing the Treaty establishing the African Economic Community;
c) shorten the implementation periods of the Abuja Treaty;
d) ensure the speedy establishment of all the institutions provided for in the Abuja Treaty; such as the African Central Bank, the African Monetary Union, the African Court of Justice and in particular, the Pan-African Parliament;
e) strengthening and consolidating the RECs as the pillars for achieving the objectives of the African Economic Community and realising the envisaged Union; and
f) mandate the Council of Ministers to prepare the legal text of the Union.

The Lome Summit held in 2000 adopted the Constitutive Act of the African Union, which specified the objectives, principles, and organs of the AU. The following Lusaka Summit

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[181] Institut Africain de la Gouvernance, "Sirte Declaration", Available from http://www.iag-agi.org/bdf/docs/sirte_declaration.pdf. (Accessed 2013-10-28).

in 2001 drew the road map for the implementation of the AU and in particular stressed that the OAU Secretary General should consult the Regional Economic Communities (RECs), with a view to having them involved in the formulation and also implementation of all forth-coming programmes of the Union. The Durban Summit in 2002 launched the AU and convened the First Assembly of Heads of States of the African Union.[182] In his address as the Chairperson of the AU, President Thabo Mbeki, emphasised that:

> ...the first task is to achieve unity, solidarity, cohesion, cooperation among peoples of Africa and African states. We must build all the institutions necessary to deepen political, economic and social integration of the African continent. We must deepen the culture of collective action in Africa and in our relations with the rest of the world...[183]

The above statement re-iterates the objective of the AU which amongst others includes deepening political, economic and social integration within the continent. It also confirms the notion that there is a need for strong institutions that will drive the integration agenda forward to be established within the organisation.

2.7 The functioning of the AU

The Constitutive Act is the principal founding document of the African Union. It states the African Union strives to;

a) achievement of greater unity and solidarity between the African countries and the peoples of Africa;

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182 See AU, "Durban Summit Documents" Available from http://www.au2002.gov.za/docs/dbnsummit/. (Accessed 2013-02-21).

183 See AU "Launch of the African Union, 9 July 2002: Address by the chairperson of the AU, President Thabo Mbeki" Available from http://www.au2002.gov.za/docs/speeches/mbek097a.htm. (Accessed 2013-02-21).

b) defend the sovereignty, territorial integrity and independence of its Member States;

c) accelerate the political and socio-economic integration of the continent;

d) promote and defend African common positions on issues of interest to the continent and its peoples;

e) encourage international cooperation, taking due account of the Charter of the United Nations and the Universal Declaration of Human Rights;

f) promote peace, security, and stability on the continent;

g) promote democratic principles and institutions, popular participation and good governance;

h) promote and protect human and peoples' rights in accordance with the African Charter on Human and Peoples' Rights and other relevant human rights instruments;

i) ensure the effective participation of women in decision-making, particularly in the political, economic and socio-cultural areas;[184]

j) establish the necessary conditions which enable the continent to play its rightful role in the global economy and in international negotiations;

k) promote sustainable development at the economic, social and cultural levels as well as the integration of African economies;

l) promote co-operation in all fields of human activity to raise the living standards of African peoples;

m) coordinate and harmonize the policies between the existing and future Regional Economic Communities for the gradual attainment of the objectives of the Union;

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[184] AU Protocol on Amendments to the Constitutive Act of the African Union, *op-cit* note 33.

n) advance the development of the continent by promoting research in all fields, in particular in science and technology;

o) work with relevant international partners in the eradication of preventable diseases and the promotion of good health on the continent.[185]

p) develop and promote common policies on trade, defence and foreign relations to ensure the defence of the Continent and the strengthening of its negotiating positions;[186] and

q) invite and encourage the full participation of the African Diaspora as an important part of our Continent, in the building of the African Union.[187]

Of most interest to this research is Article 3(c), (j) (l) and (m) which requires the Union to accelerate politico-socio-economic integration, the promotion of sustainable development and the coordination of the regional economic communities.

The Act under Article 4 articulates the AU's principles as follows;

a) sovereign equality and interdependence among Member States of the Union;

b) respect of borders existing on achievement of independence;

c) participation of the African peoples in the activities of the Union;

d) establishment of a common defence policy for the African Continent;

e) peaceful resolution of conflicts among Member States of the Union through such appropriate means as may be decided upon by the Assembly;

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185 Constitutive Act of the AU, *Ibid* note 30, Art 3(a)-(n).
186 AU Protocol on Amendments to the Constitutive Act of the African Union, *op-cit* note 33.
187 AU Protocol on Amendments to the Constitutive Act of the African Union, *op-cit* note 33.

f) prohibition of the use of force or threat to use force among Member States of the Union;

g) non-interference by any Member State in the internal affairs of another;

h) the right of the Union to intervene in a Member State pursuant to a decision of the Assembly in respect of grave circumstances, namely: war crimes, genocide and crimes against humanity as well as a serious threat to legitimate order to restore peace and stability to the Member State of the Union upon the recommendation of the Peace and Security Council;[188]

i) peaceful co-existence of Member States and their right to live in peace and security;

j) the right of Member States to request intervention from the Union in order to restore peace and security;

k) promotion of self-reliance within the framework of the Union;

l) promotion of gender equality;

m) respect for democratic principles, human rights, the rule of law and good governance;

n) promotion of social justice to ensure balanced economic development;

o) respect for the sanctity of human life, condemnation and rejection of impunity and political assassination, acts of terrorism and subversive activities;

p) condemnation and rejection of unconstitutional changes of governments.[189]

q) restraint by any Member State from entering into any treaty or alliance that is incompatible with the principles and objectives of the Union; and [190]

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188 AU Protocol on Amendments to the Constitutive Act of the African Union, *op-cit* note 33.
189 Constitutive Act of the AU, *op-cit* note 30, Art 4(a)-(p).
190 AU Protocol on Amendments to the Constitutive Act of the African Union, *op-cit* note 33.

r) prohibition of any Member State from allowing the use of its territory as a base for subversion against another Member State.[191]

The Act specifies that the AU Assembly may establish other organs for the performance of its activities,[192]It however enshrines the following organs as the principal governing institutions of the AU;

a) the Assembly of the Union
b) the Executive Council.
c) the Pan-African Parliament;
d) the Court of Justice;
e) the Commission;
f) the Peace and Security Council;[193]
g) the Permanent Representatives Committee;
h) the Specialized Technical Committee;
i) the Economic, Social and Cultural Council; and
j) the Financial Institutions.[194]

These bodies will now be discussed *seriatim*.

2.7.1 The Assembly of the Union

The Assembly is the supreme organ of the Union composed of Heads of States and Governments or their duly accredited representatives. It meets once in a year in an

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191 AU Protocol on Amendments to the Constitutive Act of the African Union, *op-cit* note 33.
192 Constitutive Act of the AU, *op-cit* note 30, Art 5(2).
193 See note 153.
194 Constitutive Act of the AU, *op-cit* note 30, Art 5(1).

ordinary session, and it can meet in extraordinary session at the request of any member state that has to be approved by a two-third majority of the member states. The Assembly is chaired by a Head of State or Government, from among the member states who is elected at the beginning of each ordinary session. The chairperson remains in the position for a renewable period of one year. During this term the Chairperson is assisted by a bureau chosen by the Assembly on the basis of equitable geographical representation.[195]

The AU Assembly has been endowed with enormous executive powers. It can approve or disapprove sanctions directed against member states as articulated in Article 23 of the Constitutive Act, appoint or terminate the terms of judicial officers, determine policies, consider requests for membership,[196] etc. It will be argued in the Chapter to follow that such concentration of power goes against the rule of law and contravenes the same principles that the AU wished to inculcate such as democracy and accountability. This work will also indicate that such designs in the AU infrastructure also contribute to the stagnation of the integration agenda since the policy direction of the body is solely dependent on one organ.

2.7.2 The Executive Council

The Executive Council is accountable to the Assembly; and is composed of Ministers of Foreign Affairs who meet twice a year in an ordinary session. Member states may

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195 Constitutive Act of the AU, *op-cit* note 30, Art 6(1)-(7).
196 Constitutive Act of the AU, *op-cit* note 30, Art 9.

designate other ministers or authorities in place of the ministers of the foreign affairs.[197]The Rules of Procedure of the Executive Council provide that the Council shall;

a) prepare the sessions of the Assembly;
b) determine the issues to be submitted to the Assembly for decision;
c) coordinate and harmonize the policies, activities and initiatives of the Union in areas of common interest to Member States;
d) monitor the implementation of the policies, decisions and Agreements adopted by the Assembly;
e) elect the Commissioners to be appointed by the Assembly;
f) elect members of the African Commission on Human and Peoples' Rights and the African Committee of Experts on the Rights and Welfare of the Child and submit to the Assembly for appointment;
g) take appropriate action on issues referred to it by the Assembly;
h) examine the Programme and Budget of the Union and submit them to the Assembly for consideration;
i) promote cooperation and coordination with the Regional Economic Communities, the African Development Bank (ADB), other African Institutions and the United Nations Economic Commission for Africa (UNECA);
j) determine policies for cooperation between the Union and Africa's partners and ensure that all activities and initiatives regarding Africa are in line with the objectives of the Union;
k) decide on the dates and venues of its sessions on the basis of criteria adopted by the Assembly;

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[197] AU Protocol on Amendments to the Constitutive Act of the African Union, *op-cit* note 33.

l) elect its Chairperson and the other office bearers;

m) receive, consider and make recommendations on reports and recommendations from other Organs of the Union that do not report directly to the Assembly;

n) set up such ad-hoc committees and working groups as it may deem necessary;

o) consider the reports, decisions, projects and programmes of the Committees;

p) approve the Rules of the Committees, oversee, monitor and direct their activities;

q) consider the Staff Rules and Regulations and the Financial Rules and Regulations of the Commission and submit them to the Assembly for adoption;

r) approve the agreements for hosting the Headquarters, other Organs and Offices of the Union;

s) consider the structures, functions and Statutes of the Commission and make recommendations thereon to the Assembly;

t) determine the conditions of service including salaries, allowances and pensions of the Staff of the Union; and

u) ensure the promotion of gender equality in all programmes of the Union.

With regards to the Executive Council, it is important to note the distinction between regulations, directives and recommendations of the AU. The rules of procedure stipulate that regulations are binding and applicable in all member states and national laws shall, where appropriate, be aligned accordingly. Directives may be addressed to any or all member states, to undertakings or to individuals. They bind member states to the objectives to be achieved while leaving national authorities with the power to determine the form and the means to be used for their implementation. However,

recommendations, declarations, resolutions, opinions etc, are not binding and are intended to guide and harmonise the viewpoints of member states.[198]

Subsection two (2) of Rule 34 further provides that the non-compliance with regulations and directives will only attract sanctions in terms of Article 23 of the Constitutive Act after the AU assembly has approved of such.

2.7.3 The Pan-African Parliament

The Pan-African Parliament is one of the organs of the African Union as envisaged in Article 5(1) (c) of the Constitutive Act. The Pan-African Parliament was formally inaugurated in 2004.[199]It attempts to secure the full participation of African peoples in the development and economic integration of the continent by providing a platform for civil society participation.[200] The importance of having a legislative and oversight body especially in organisations at a continental scale cannot be over emphasised, however the manner in which the Pan-African Parliament has been established leaves much to be desired. It is envisaged that it represents the ordinary people of the continent however citizens do not have a say in who sits in the Parliament; this is a severe blow to the democratic ideals that the AU professes to embrace. It is also worth noting that in contrast to the European Union, in the European Parliament, citizens are directly

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198 AU Rules of Procedure of the Executive Council, Rule 34. Available from http://www.africa-union.org/rule_prot/exec-council.pdf.(Accessed 2013-02-21).

199 AU, "Inaugural and the First Session of the Pan-African Parliament", Available from http://www.africa-union.org/root/au/organs/Pan-African_parliament_en.htm.(Accessed 2013-02-21).

200 Constitutive Act of the AU, *op-cit* note 30, Art 17.

represented at Union level and[201] political parties contribute to forming European political awareness.[202]

The Pan African Parliament seems to have no authority within the AU; it merely serves as a shadow organisation whose opinions can be set aside by the Assembly. This has also been affirmed by its speaker, *Bethel Nnaemeka Amadi* of Nigeria when he, ahead of the January 2013 AU Summit opined that; "We are advisory but no-one seeks our advice; we are consultative but no-one consults us."[203]

In addition, *Karuuombe* has correctly argued that the Pan-African Parliament should also be analysed in the context of the general executive-parliamentary relationships on the continent. The Forum which is supposed to be a continental parliamentary body was established without any legislative powers.[204] It merely serves as a consultative body, whose advice can be opted out of if the AU Assembly prefers to. In the chapters to follow, we illustrate how the framework of the Pan-African Parliament was framed in such a manner as to render it weak. It will also illustrate the negative impact, in terms of lack of monitoring and enforcement of the integration agenda that the continent is being subjected to.

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201 Treaty establishing the EU, Art 10(2).

202 Treaty establishing the EU, Art 10(4).

203 Business Day, "Pan-African Parliament hopes its toothless days are about to end" Available from http://www.bdlive.co.za/world/africa/2013/01/25/pan-african-parliament-hopes-its-toothless-days-are-about-to-end. (Accessed 2013-02-21).

204 Karuuombe, B.,"The Role of Parliament in Regional Integration – The Missing Link." p 17.TRALAC. Available from http://www.tralac.org/cause_data/images/1694/MRI2008Chapter9Karuuombe.pdf(Accessed 2011-07-30).

2.7.4 The Court of Justice

As per Articles 5(1) and 18 of the Constitutive Act, the Court of Justice of the African Union was established as a principal judicial organ of the Union. While the Protocol of the Court of Justice was still awaiting to receive the requisite number of signatures, member states decided to merge it with the African Court on Human and Peoples' Rights, and to that end, adopted the relevant Protocol on 1 June 2008 on recommendation of the Executive Council.[205]

Despite this adoption the Court remains inoperative until it receives the requisite number of ratifications. The AU database reflects that only five (5) of fifteen (15) ratifications have been entered.[206] In a nutshell, the OAU/AU has failed since its inception to establish a strong permanent continental judicial organ that would pronounce not only on human rights or governance matters, but also on matters relating to trade, economic governance and the fulfilment of integration objectives. The impact of this void on the continent is succinctly canvassed for in the chapters to follow.

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[205] See Decision on the Merger of the African Court on Human And Peoples' Rights and the Court Of Justice of the African Union - ASSEMBLY/AU/5 (V).

[206] List of Countries which have Signed, Ratified/Acceded to the Protocol on the Statute of the African Court of Justice and Human Rights. Available from http://www.au.int/en/sites/default/files/Protocol%20on%20Statute%20of%20the%20African%20Court%20of%20Justice%20and%20HR.pdf (Accessed 2013-02-21).

2.7.5 The Commission

The Commission is the Secretariat of the African Union,[207] and as such, has numerous functions. The Statute of the Commission of the AU enumerates the following list of functions that the Commission is mandated to;

a) represent the Union and defend its interests under the guidance of and as mandated by the Assembly and the Executive Council;
b) initiate proposals for consideration by other organs;
c) implement the decisions taken by other organs;
d) organise and manage the meetings of the Union;
e) act as the custodian of the Constitutive Act, its protocols, the treaties, legal instruments, decisions adopted by the Union and those inherited from the OAU;
f) establish, on the basis of approved programmes, such operational units as it may deem necessary;
g) coordinate and monitor the implementation of the decisions of the other organs of the Union in close collaboration with the PRC and report regularly to the Executive Council;
h) assist Member States in implementing the Union programmes and policies, including, CSSDCA and NEPAD;
i) work out draft common positions of the Union and coordinate the actions of Member States in international negotiations;
j) prepare the Union's Programme and Budget for approval by the policy organs;

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[207] Constitutive Act of the AU, *op-cit* note 30,Art 20.

k) manage the budgetary and financial resources including collecting the approved revenue from various sources, establishing fiduciary, reserve and special Funds with the appropriate approvals, and accepting donations and grants that are compatible with the objectives and principles of the Union;

l) manage the assets and liabilities of the Union according to laid down regulations and procedures;

m) prepare strategic plans and studies for the consideration of the Executive Council;

n) take action in the domains of responsibility as may be delegated by the Assembly and the Executive Council. The domains shall include the following:

   i. control of pandemics;

   ii. disaster management;

   iii. international crime and terrorism;

   iv. environmental management;

   v. negotiations relating to external trade;

   vi. negotiations relating to external debt;

   vii. population, migration, refugees and displaced persons;

   viii. food security;

   ix. socio-economic integration; and

   x. all other areas in which a common position has been established.

o) mobilize resources and devise appropriate strategies for self-financing, income generating activities and investment for the Union;

p) promote integration and socio-economic development;

q) strengthen cooperation and co-ordination of activities between Member

r) States in fields of common interest;

s) ensure the promotion of peace, democracy, security and stability;

t) provide operational support to the Peace and Security Council;

u) elaborate, promote, coordinate and harmonise the programmes and policies of the Union with those of the RECs;

v) prepare and submit an annual report on the activities of the Union to the Assembly, the Executive Council and the Parliament;

w) prepare the Staff Rules and Regulations for approval by the Assembly;

x) implement the decisions of the Assembly regarding the opening and closing down of sections, administrative or technical offices;

y) follow up and ensure the application of the Rules of Procedure and Statutes of the organs of the Union;

z) negotiate, in consultation with the PRC, with the host countries, the Host Agreements of the Union and those of its administrative or technical offices;

aa) build capacity for scientific research and development for enhancing socio-economic development in the Member States;

bb) strive for the promotion and popularization of the objectives of the Union;

cc) collect and disseminate information on the Union and set up and maintain a reliable database;

dd) ensure the mainstreaming of gender in all programmes and activities of the Union;

ee) undertake research on building the Union and on the integration process;

ff) develop capacity, infrastructure and maintenance of intra-continental information and communication technology; and

gg)prepare and submit to the Executive Council for approval, administrative regulations, standing orders and Rules and Regulations for the management of the affairs of the Union and keeping proper books of accounts.[208]

2.7.6 The Permanent Representatives Committee

This body is charged with the responsibility of preparing the work of the Executive Council and acting upon the instructions of the Executive Council.[209]

2.7.7 The Specialized Technical Committees

Article 14 of the Constitutive Act of the African Union legally establishes the Specialized Technical Committees as an organ of the African Union. The Specialized Technical Committees are made accountable to the Executive Council of the AU. The constitutive Act establishes seven Specialized Technical committees composed of Ministers or senior officials responsible for sectors falling within their respective areas of competence. The Assembly may, however, establish other committees as it deems appropriate.[210] These current committees as stipulated in the Constitutive Act are:

a) The Committee on Rural Economy and Agricultural Matters,

b) The Committee on Monetary and Financial Affairs,

c) The Committee on Trade, Customs and Immigration Matters,

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208 Statute of the Commission of the AU, 2002. Art 3. Available from http://www.au2002.gov.za/docs/summit_council/statutes.pdf.(Accessed 2013-02-21).

209 Constitutive Act of the AU, *op-cit* note 30, Art 21.

210 Constitutive Act of the AU, *op-cit* note 30, Art 14.

d) The Committee on Industry, Science and Technology, Energy, Natural Resources and Environment,
e) The Committee on Transport, Communications and Tourism,
f) The Committee on Health, Labor and Social Affairs, and
g) The Committee on Education, Culture and Human Resources.

The Committees are responsible for the following functions within their area of competence, namely to;

a) prepare projects and programmes of the Union and submit them to the Executive Council;
b) ensure the supervision, follow-up and the evaluation of the implementation of decisions taken by the organs of the Union;
c) ensure the coordination and harmonization of projects and programmes of the Union;
d) submit to the Executive Council either on its own initiative or at the request of the Executive Council, reports and recommendations on the implementation of the provisions of the Act; and
e) carry out any other functions assigned to it for the purpose of ensuring the implementation of the provisions of the Act.[211]

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[211] Constitutive Act of the AU, *op-cit* note 30, Art 15.

2.7.8 The Economic, Social and Cultural Council

The Economic, Social and Cultural Council (ECOSOCC) of the AU is established under Article 22 of the Constitutive Act. The Statute of the ECOSOCC, adopted by the Heads of State and Government at the third Ordinary Session of the Assembly in 2004 defines it as an advisory organ of the African Union composed of different African social groups, professional groups, non-governmental organizations, and cultural organizations. ECOSOCC's structure includes a General Assembly, a Standing Committee, Sectoral Cluster Communities and a Credentials Committee.[212]

Under Article 2 of its statute, the ECOSOCC is required to;

a) promote continuous dialogue between all segments of the African people on issues concerning Africa and its future;
b) forge strong partnerships between governments and all segments of the civil society, in particular women, the youth, children, the Diaspora, organized labour, the private sector and professional groups;
c) promote the participation of African civil society in the implementation of the policies and programmes of the Union.
d) support policies and programmes that will promote peace, security and stability in Africa, and foster development and integration of the continent;
e) promote and defend a culture of good governance, democratic principles and institutions, popular participation, human rights and freedoms as well as social justice;

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[212] Statutes of the Economic, Social and Cultural Council of the African Union, Art 22.Available from http://pages.au.int/sites/default/files/ECOSOCC%20STATUTES-English.pdf.(Accessed 2013-02-21).

f) promote, advocate and defend a culture of gender equality;

g) promote and strengthen the institutional, human and operational capacities of the African civil society;

Haastrup, in his work, compared the ECOSOCC with the EU's European Economic and Social Committee (EESC). He observed that both fora include a 'civil society' in the governance process of the regional organisations and they both have been motivated by the UN's Economic and Social Council.[213] Despite the existence of this body, the AU has remained an organisation for the elite. The process that civil society is subjected to in order to participate in the activities of the ECOSOCC have been labelled "extremely bureaucratic" and as such the ECOSOCC has failed to bridge the gap between the AU and the ordinary people. This bridge is necessary to give "traction" to the politico-economic activities of the AU.[214]

2.7.9 The Financial Institutions

The Constitutive Act of the African Union determines that the Union shall have three financial institutions. These are:

a) The African Central Bank;

b) The African Monetary Fund, and

c) The African Investment Bank.[215]

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213 Haastrup, T., "EU as Mentor? Promoting Regionalism as External Relations Practice in EU–Africa Relations", 2013 ***Journal of European Integration***. p 1-16

214 See AU Monitor, "Revisiting ECOSOCC" Available from http://www.pambazuka.org/aumonitor/comments/445/. (Accessed 2013-02-21).

215 Constitutive Act of the AU, *op-cit* note 30, Art 19.

Interestingly, the above mentioned institutions have not yet been fully established and yet the role that they play in an integration scheme cannot be over emphasised.[216] It is submitted that this is one of the key areas that the AU should focus its efforts on if it is to succeed in the areas of economic development of Africa.

2.8 AU Membership

According to the Constitutive Act, any African state may notify the Chairman of the African Commission of its intention to accede to the Constitutive Act and to be admitted as a member of the Union.[217] The Chairperson of the Commission shall, upon receipt of such notification, transmit copies thereof to all Member States. Admission shall be decided by a simple majority of the Member States. The decision of each Member State shall be transmitted to the Chairman of the Commission who shall, upon receipt of the required number of votes, communicate the decision to the State concerned.[218] AU membership currently stands at fifty four (54) African states with South Sudan ushered in recently.[219] Unlike the EU, membership does not require an applicant state to meet certain standards or undertake reforms before it is accepted as a member. It is safe to infer that geographic qualification is sufficient for AU membership. It is instructing then to compare the AU's position with that of the Council of Europe.

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216 Brookings, Africa's Economic Morass—Will a Common Currency Help? http://www.brookings.edu/research/papers/2003/07/africa-masson

217 See Constitutive Act of the AU, *op-cit* note 30, Art 29.

218 as above.

219 See AU, "AU Welcomes South Sudan", Available from http://www.au.int/en/content/african-union-welcomes-south-sudan-54th-member-state-union. (Accessed 2013-10-24).

For over half a century, the European Union has continually improved its integration model while ushering in new members.[220]Today's EU, with 27 member states and a population of close to 500 million people, is a much safer, more prosperous, stronger and more influential continental arrangement than the original European Economic Community of 50 years ago, with its 6 members and population of less than 200 million, or any other regional arrangement on African soil.[221]The application from a country wishing to join is petitioned to the Council. The European Commission provides a formal opinion on the applicant country, and the Council decides whether to accept the application. Once the Council unanimously agrees on a negotiating mandate, negotiations may be formally opened between the candidate and all the member states. This is not automatic though.[222] The applicant country must satisfy the basic criteria before negotiations start. The so-called *Copenhagen criteria*, set out in December 1993 by the European Council in Copenhagen, require a candidate country to have:

a) stable institutions that guarantee democracy, the rule of law, human rights and respect for and protection of minorities;
b) a functioning market economy, as well as the ability to cope with the pressure of competition and the market forces at work inside the Union;
c) the ability to assume the obligations of membership, in particular adherence to the objectives of political, economic and monetary union.[223]

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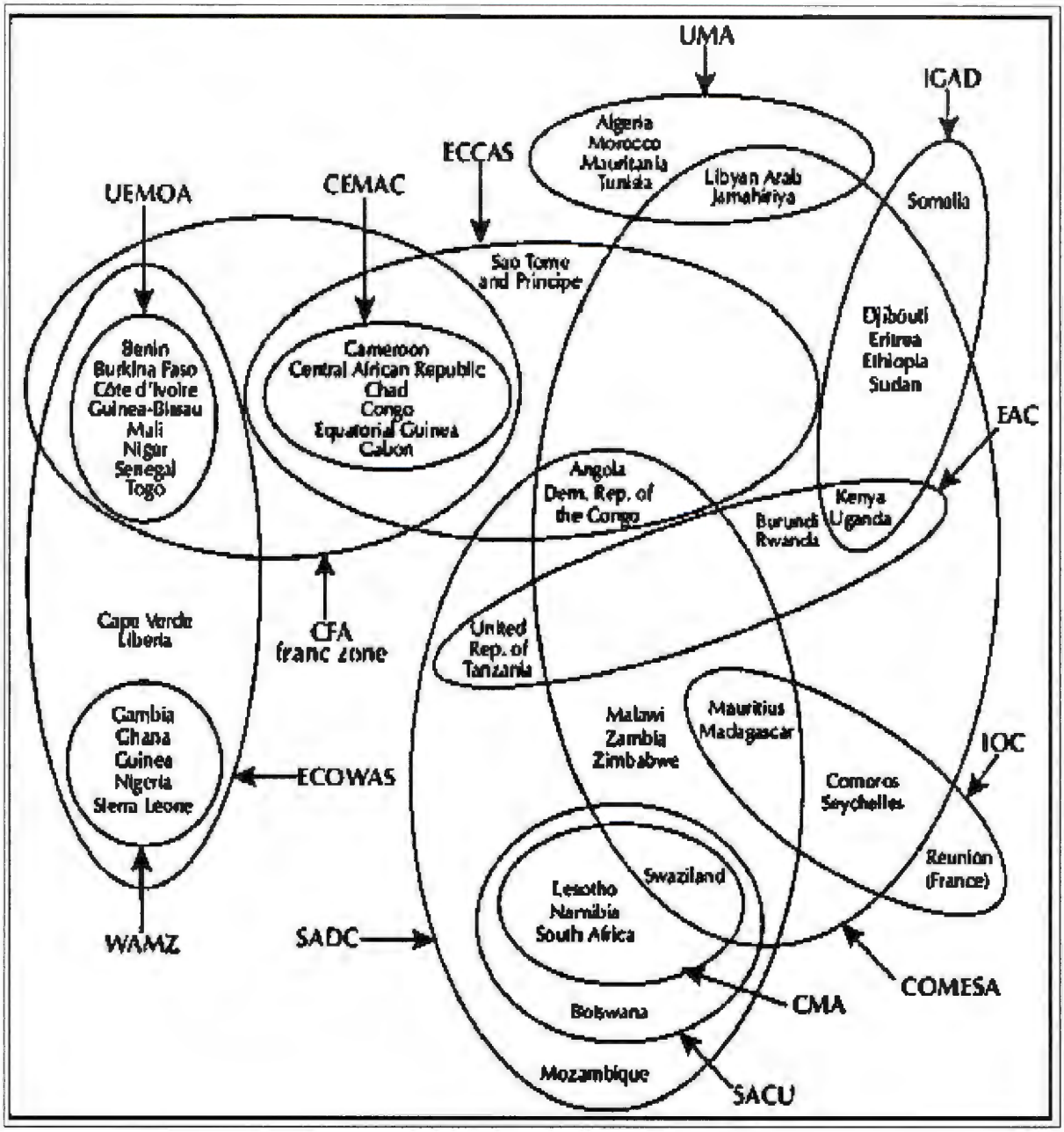
220 EU, "Understanding EU Enlargement", Available from http://ec.europa.eu/enlargement/pdf/publication/enl-understand_en.pdf. (Accessed 2013-10-24).
221 EU, *Ibid* note 220.
222 European Commission (EC), "Conditions for Enlargement." Available from **http://ec.europa.eu/enlargement/the-policy/conditions-for-enlargement/index_en.htm**. (Accessed 2011-08-07).
223 EC, *op-cit* note 220.

It is submitted that it would have been desirable for the membership requirements of the African Union to follow a criteria similar as the one discussed above. However it is impossible and impractical at the moment to terminate all of the Unions membership and begin a readmission process for all the fifty-four (54) member states.

The African Union recognizes eight regional economic communities. These are the Arab Maghreb Union (AMU), Community of Sahel-Saharan States (CEN-SAD), Common Market for Eastern and Southern Africa (COMESA), East African Community (EAC), Economic Community of West African States (ECOWAS), Economic Community of Central African States (ECCAS), Inter-Governmental Authority on Development (IGAD), and Southern African Development Community (SADC). Other groups not recognised by the AU but still in existence are the African Financial Community (CFA), Common Monetary Area (CMA), Economic and Monetary Community of Central Africa (CEMAC), Indian Ocean Commission (IOC), Southern African Customs Union (SACU), West African Economic and Monetary Union (UEMOA), and the West African Monetary Zone (WAMZ).

The figure (on the next page) illustrates not only the AU member states but the various sub-regional economic groupings that they belong to.

Figure 1: AU and sub-regional economic group Membership



Source: Tavares, R., and Tang, V., "Regional economic integration in Africa: impediments to progress?"2011 ***South African Journal of International Affairs*** Vol18 No 2, p 226.

2.9 The African Union and European Union architecture in comparative perspectives

In just half a century of its existence, the European Union (EU) has managed to maintain itself as an epitome of politico-economic integration on the global arena. It has delivered peace between its members and prosperity for its citizens. It has created a single European currency (the Euro) and a frontier free 'single market' where goods, people, services and capital move around freely. The EU has grown from six to fifteen countries and is preparing to embrace a dozen more. It has become a major trading power, a world leader in fields such as technology, commerce, environmental protection and its contributions to development aid,[224] aid which has found its way into the African region and; therefore, it makes economic and legal sense to understudy such a regional arrangement, in order to learn how it has become such a global force.

One may ask if it is justifiable to compare or even draw lessons from the European Union, and apply the lessons to the African Union. Obviously on the face of it, one regime was the colonial power and the other the colony and, as such, there might be emotive political reasons why not to continue with this argument any further. In addition, like all regions around the world, the European Union was not immune to the global financial crisis that led to a rise in unemployment, accumulation of debt and reduction in government budgets as observed by *Serricchio et al.*[225] It is argued that despite these, the experiences of Europe since the early 1950s with peacefully integrating sovereign

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[224] European Commission, "How the European Union works: A citizen's guide to the EU Institutions." 2003, p 3 Available from http://eeas.europa.eu/delegations/georgia/documents/virtual_library/08_euro_en.pdf(Accessed 2011-10-10).

[225] Serricchio, F *et al*,. "Euro-scepticism and the Global Financial Crisis", 2013 ***Journal of Common Market Studies***, p 51–56.

national states voluntarily, is by far the most significant and far-reaching among all such efforts. As such, it has attracted far more scholarly attention than any other regions.[226]*Michel* similarly observed that European integration forms a big part of international relations theory and has been studied at great lengths.[227]Additionally, in his support to the advancement or supremacy of the EU integration model, the former President of the European Commission, Romano Prodi, in his speech at the 2nd Conference of the European Community stated that;

> Political integration enables a region not only to manage its own economic integration but to speak and act single-mindedly on global issues. It also gives a greater say to small countries, whose voice would otherwise be drowned out in the global clamour. *Our European model of integration is the most developed in the world. Imperfect though it still is, it nevertheless works on a continental scale. Given the necessary institutional reforms it should continue to work well after enlargement, and I believe we can make a convincing case that it would also work globally.*[228]*(own emphasis)*

It stands to reason; therefore, that the European Union, is collectively the most likely organization to provide some lessons for those trans-national regions that are just beginning the complex process of integration.[229]

The need to compare the African Union with the European Union is further necessitated by the fact that the manner in which the organs of both inter-governmental organisations

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226 Schmitter, P.C., "Imagining the future of the Euro-polity with the help of new concepts." 1996 ***Governance in the European Union*** Vol 133, p 6.

227 Michel, S, "European Integration Theories and African Integration Realities", 2012 ***Leiden University***, p 9.

228 See EU, "European Commission - SPEECH/13/115" Available from http://europa.eu/rapid/press-release_SPEECH-00-115_en.htm. (Accessed 2013-10-24).

229 Schmitter, P.C, *op-cit* note 226, p 7.

function is similar. For instance, the following Table illustrates the organs of both organisations that play similar roles.

Table 2: Organs with similar roles in the AU and EU

African Union	European Union
Assembly of Heads of States and Governments	European Council
AU Commission	EU Commission
Pan-African Parliament	EU Parliament
Peace and Security Council	Political and Security Committee
Economic, Social and Cultural Council	European Economic and Social Committee

The above table illustrates organs that perform similar functions on both African and European arrangements. It is however worth noting that though they execute similar roles, the European experience appears to be more defined, for instance, the Pan African Parliament has not been granted its legislative powers, yet the European Parliament does legislate and perform other functions without any hindrances.[230]

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[230] See "Pan African Parliament", Available from http://www.pan-africanparliament.org/News.aspx?ID=889 (Accessed 2013-10-24).

The two principal treaties upon which the EU is based are the Treaty on European Union[231] and the Treaty on the Functioning of the European Union.[232] These main treaties are as a result of constant change within the European Union, to suit the ever-changing needs and challenges of the Community. The EU has transformed from the simple Treaty of Brussels whose basis was simple military defence;[233]to the Merger Treaty which brought the European Coal and Steel Community (ECSC), European Atomic Energy Community (Euratom) and the European Economic Community (EEC) into a single institutional structure and eventually leading to decades of negotiating to the Treaty of Lisbon[234] which came into force in 2009, giving the European Parliament more competence in legislative procedures at par with the European Council.

The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities.[235]These values are common to the member states in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail.[236] The Community aims at promoting economic, social and territorial cohesion and solidarity among member states as well as offering its citizens an area of freedom, security and justice without internal frontiers, in which the free

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231 Effective since 1993. Available from http://eurlex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2010:083:FULL:EN:PDF (Accessed 2011-10-03).

232 Effective since 1958. Available from http://eurlex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2010:083:FULL:EN:PDF (Accessed 2011-10-03).

233 See Brussels Treaty 1948. Available from http://www.coe.int/t/dgal/dit/ilcd/archives/selection/Brussels/default_en.asp

234 Available from http://eur-lex.europa.eu/JOHtml.do?uri=OJ:C:2007:306:SOM:EN:HTML (Accessed 2011-10-03).

235 See Article 1 and 2 of The Treaty on European Union, 1993.

236 The Treaty on European Union, Art 2.

movement of persons and goods is ensured in conjunction with appropriate measures with respect to external border controls, asylum, immigration and the prevention and combating of crime.[237] It is submitted that all these values are equally contained in the Constitutive Act of the African Union as discussed in this Chapter thus making both organisations very similar. Having laid this foundation, this work will make comparisons between the AU and the EU.

2.10 Summary

This Chapter has discussed the functioning of both the OAU and the AU. It has illustrated the political and emotive push factors that the Pan African fathers of the OAU relied upon towards the realisation of African emancipation from the strongholds of colonialism. It has illustrated how, through these Pan Africanist ideals, the foundations of African integration and unity were first laid. The Chapter has also discussed the appraisals, criticisms and inadequacies that the OAU had to contend with during its time and how these influenced the final architecture of the current African Union. It has illustrated the values and objectives that underpin the functioning of all organs of the Union and showed how the structure of the African Union is similar to the European Union. Having discussed how the organs of the current African integration flagship relate to one another, the following Chapter will then deliberate over the sub-integration arrangements that exist within Africa.

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[237] Treaty on the Functioning of the EU, *Ibid* note 232, Art 3.

CHAPTER 3 THE EMERGENCE OF AFRICAN ECONOMIC GROUPINGS

3.1 Introduction

This Chapter will traverse on the work of the previous one by giving a synopsis of the sub-integration groupings that exist on the African continent under the auspices of the African Union. These sub-groups are sometimes referred to as regional economic groupings, though their roles are not limited to economic integration only. The chapter also advances arguments to illustrate how the development of regional arrangements into state like entities creates conflict between the arrangements and their member states.

3.2 The Emergence of Regional Economic Groupings

The OAU, with the help of the Economic Commission for Africa, drafted the 1980 Lagos Plan of Action. The Plan was an acclamation by African leaders of the realisation that the growth and success of African economies solely depended on Africa's own efforts. This is evident from the Preamble to the Plan which states;

> ...the effect of unfulfilled promises of global development strategies has been more sharply felt in Africa than in the other continents of the world. Indeed, rather than result in an improvement in the economic situation of the continent, successive strategies have made it stagnate and become more susceptible than other regions to the economic and social crises suffered by the industrialised countries.[238]

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[238] LPA, *op-cit* note 87, p 4.

Perhaps one of the most scathing statements that made African leaders realize that the success of African development solely rests on African shoulders was the statement by the United States government when they made it clear to the other members of the drafting Committee of the Declaration on the Right to Development that "the Right to Development Declaration should not be used as a means of resuscitating New International Economic Order nor would the United States allow the Declaration to create any entitlement to a transfer of resources; aid was a matter of sovereign decision of donor countries and could not be subject to binding rules under the guise of advancing every human being's Right to Development".[239]

In addition to the above, the guidelines underpinning the realisation of the Lagos Plan as captured in the founding document were that;

a) Africa's huge resources had to be applied principally to meet the needs and purposes of its people;
b) Africa's almost total reliance on the export of raw materials had to change. Rather, Africa's development and growth had to be based on a combination of Africa's considerable natural resources, her entrepreneurial, managerial and technical resources and her markets (restructured and expanded), to serve her people. Africa, therefore, had to map out its own strategy for development and must vigorously pursue its implementation;

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[239] See 1986 UN Declaration on the Right to Development, Art 141/1281986. See also Stephen, M.,"Human Right to Development: Between Rhetoric and Reality", 2004, ***Havard Human Rights Journal*** Vol 17, p 143.

c) Africa had to cultivate the virtue of self-reliance. This is not to say that the continent should totally cut itself off from outside contributions. However, these outside contributions should only supplement our own effort: they should not be the mainstay of our development;

d) as a consequence of the need for increased self-reliance, Africa had to mobilise her entire human and material resources for her development;

e) each of Africa's states had to pursue all-embracing economic, social and cultural activities which will mobilise the strength of the country as a whole and ensure that both the efforts put into and the benefits derived from development were equitably shared;

f) efforts towards African economic integration had to be pursued with renewed determination in order to create a continent-wide framework for the much needed economic co-operation for development based on collective self-reliance.[240]

It was further provided for within the Plan that the Secretary General of the OAU was authorised to appoint, as quickly as possible, a Drafting Committee, at ministerial level, to prepare the draft of the treaty establishing the African Economic Community.[241] The Council of Ministers of the OAU in their *Resolution 464 on the Division of Africa into Five Regions* resolved to divide Africa into five regional areas[242] in anticipation of the AEC Treaty whose integration plan would be premised on six phases over 34 years[243] The subsequent Treaty establishing the African Economic Community was signed in

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240 See LPA, *op-cit* note 87.
241 See Treaty establishing the AEC, *Ibid* note 85.
242 CM/Res.464 (XXVI)
243 1994-2027.

1991.[244] The ultimate goal of the AEC was that Africa would be an economic union with a common currency, full mobility of factors of production and free trade among all African countries. In 2006 AU Banjul Summit resolved to recognize eight (8) Regional Economic Communities on the African continent.[245] These are:

a) The Southern African Development Community (SADC)
b) The Arab Maghreb Union (AMU)[246]
c) The Community of Sahel-Saharan States (CEN-SAD)
d) The Common Market for Eastern and Southern Africa (COMESA)
e) The East African Community (EAC)
f) The Economic Community of West African States (ECOWAS)
g) The Economic Community of Central African States (ECCAS) and
h) The Inter-Governmental Authority on Development (IGAD)

3.2.1 The Complexities of Multiple memberships

The 2006 Banjul decision to recognise the above mentioned regional economic communities *prima facie* appears to have been a step forward in the right direction for a continent that has a lot of fragmented states. Obviously, the economic reasoning was

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244 North Africa; West Africa ; South Africa; East Africa and Central Africa

245 Other groups not recognised by the AU but still in existence are the African Financial Community (CFA), Common Monetary Area (CMA), Economic and Monetary Community of Central Africa (CEMAC), Indian Ocean Commission (IOC), Southern African Customs Union (SACU), West African Economic and Monetary Union (UEMOA), and the West African Monetary Zone (WAMZ).

246 See Assembly of the African Union Seventh Ordinary Session, Available from http://www.au.int/en/content/banjul-1-2-july-2006-assembly-african-union-seventh-ordinary-session. (Accessed 2013-10-24).

that a combination of several small countries into a regional block would enable them negotiate more effectively with other trading blocs.[247]

There is also what is termed the "economies of scale argument".[248]In international economics, this entails the amount of savings on the cost per manufactured unit as it relates to the level of production.[249]The theory is that when entering into a regional integration agreement, countries would share the cost of agricultural research/ production, power generation, scientific research and other related activities necessary for the development of the region. This benefits smaller economies which do not have the capital or human resource base to embark on such projects on their own.

There is, however, a challenge that African integration schemes have failed to curb. The previous Chapter defined what regional integration entails at continental level. It canvassed for all the various processes and objectives that member states have to work towards in addition to paying attention to their own domestic affairs. This Chapter will in addition to the work illustrated by the previous one, articulate the obligations and objectives of multiple regional economic integration arrangements that exist on the continent. This then places a lot of administrative burden on member states that belong to such arrangements. This burden is not only a result of the financial contributions that the organisations require from member states to keep their processes running but also there is much effort that is required to ensure that the policies and targets that are

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247 Oyejide, A., "Policies for Regional Integration in Africa", ***The African Development Bank***, Economic Research Papers No 62, p 5

248 Oyejide, A., *Ibid* note 247, p 5.

249 Oyejide, A., *Ibid* note 247, p 5.

spelled out are actually realised within the domestic machinery. The following table illustrates African states with overlapping memberships.

Table 3: Overlapping Regional Membership in Africa

Country	AMU	SADC	EAC	COMESA	ECOWAS	CEN-SAD	IGAD	ECCAS
Algeria	X							
Angola		X						X
Benin					X	X		
Botswana		X						
Burkina Faso					X	X		
Burundi			X	X				
Cameroon								X
Central African Republic						X		X
Cape Verde								
Chad						X		X
Comoros				X		X		
Congo								X
Cote d'vore					X	X		
Djibouti				X		X	X	
DRC		X		X				X
Egypt				X		X		
Equatorial Guinea								X
Eretria				X		X	X	
Ethiopia							X	
Gabon					X			X
Gambia						X		
Ghana					X	X		
Guinea					X	X		
Guinea Bissau					X	X		
Kenya			X	X		X	X	
Lesotho		X						
Liberia						X		
Libya	X			X		X		
Madagascar		X		X				
Malawi		X		X				
Mali					X	X		
Mauritania	X							
Mauritius		X		X				
Morocco	X					X		
Mozambique		X						
Namibia		X						
Niger					X	X		

Nigeria					X	X		
Rwanda			X	X				
Sao Tome and Principe						X		X
Senegal					X	X		
Seychelles		X		X				
Sierra Leone					X	X		
Somalia						X	X	
South Africa		X						
Sudan				X		X	X	
Swaziland		X						
Tanzania		X	X					
Togo					X	X		
Tunisia	X					X		
Uganda			X	X			X	
Zambia		X		X				
Zimbabwe		X		X				

Source: AU, "African Regional Economic Communities", Available from www.au.int/en/recs. (Accessed 2013-10-31).

The above Table indicates that there is much support and enthusiasm from African governments for regional integration. They have appreciated the role that regional integration plays, as an important factor in their development strategies, and concluded that a very large number of regional integration arrangements, several of which have significant membership overlap.[250]

It is submitted that due to an overlap of memberships, the commitment of member states is spread thin and as such goals are not achieved in time and contributions to regional projects are strained. For instance, on 17 August 2007, the SADC declared its stand-by-force as being operational at a large parade in Lusaka, Zambia and on the same occasion signed a Memorandum of Understanding on the SADC Brigade

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[250] Hartzenberg, T., "The new SACU agreement: Implications for regional integration in Southern Africa." 2003 ***Monitoring Regional Integration in Southern Africa Yearbook*** 3, p 1.

(SADCBRIG).[251] Such an initiative would require both funding and a pledge of human resources from member states. *Mandrup* observed that Tanzania, Madagascar, the Indian Ocean Islands,[252] and the Democratic Republic of Congo (DRC) all took part in setting up the SADCBRIG. This was problematic in the sense that the situation created uncertainty about who was expected to contribute to which regional brigade.[253]It is also submitted that even if the member states were to resolve to fulfil their contributions to all the organisations that they belong to, it would overstretch their domestic resources that otherwise would have been channelled to other developmental initiatives.

3.2.2 Trade Liberalisation

Trade liberalization is loosely defined as a move towards freer trade through the reduction of tariffs and other barriers.[254] The rapid increase in the flows of goods and services across national borders is one of the aspects through which integration can be measured or quantified.[255]

To achieve trade liberalization, regions may apply a variety of strategies. The simplest, the free-trade zone, is an area in which domestic obstacles to trade are dismantled; this means that customs tariffs are not imposed on the products of any member country. A customs union takes things one step further. A common external tariff is established, stabilising the amount that products coming from the rest of the world have to pay to

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251 Mandrup T., *op-cit* note 27, p 4.
252 Pemba, Zanzibar, Rodriguez and Agalega Islands.
253 Mandrup T., *op-cit* note 27, p 4.
254 International Labour Organisation (ILO), "Trade liberalization and employment" Available from http://www.ilo.org/public/english/standards/relm/gb/docs/gb282/pdf/sdg-2.pdf. (Accessed 2013-10-24).
255 ILO, *Ibid* note 249.

enter the area. This implies that the member countries form a single entity in the arena of international trade. The third step, a common or single market, is a customs union to which the free mobility of productive factors between the member countries and a common trade policy are added. It contemplates the co-ordination of sectoral macro-economic policies among its members and requires the harmonization of national legislation. Fourth, an economic union joins centralized monetary institutions and common financial policies to the single market. It goes beyond simple coordination and harmonization among the member countries, and includes the establishment of unified supra-national agencies.[256]

The intention of the African Union as canvassed before in this work is to work towards both a political and economic union as evidenced by the engraving of institutions such as the African Central Bank, African Monetary Fund, and the African Investment Bank.[257] The following table gives an enhanced overview of these strategies.

Table 4: Features of regional integration

Type of arrangement	Free trade among members	Common commercial policy	Free factor mobility	Common monetary and fiscal policies	One government
Preferential trade area	No	No	No	No	No
Free trade area	Yes	No	No	No	No
Customs union	Yes	Yes	No	No	No

256 Malamud, A., "Overlapping Regionalism, No Integration: Conceptual Issues and the Latin American Experiences", ***RSCAS*** 2013/20, p 2.

257 Constitutive Act of the AU, *Ibid* note 30, Art 19.

Common market	Yes	Yes	Yes	No	No
Economic union	Yes	Yes	Yes	Yes	No
Political union	Yes	Yes	Yes	Yes	Yes

Source: UNECA, "Assessing Regional Integration in Africa (ARIA V): Towards an African Continental Free Trade Area", 2012 p 29.[258]

Africa, through the Treaty establishing the African Economic Community embraces the strategies outlined in the above Table. It details the following phases;

Table 5: Phases of the African Economic Community

Phase	Strategy
1 **Target year: 1999**	Strengthen existing RECs and create new RECs in regions where they do not exist.
2 **Target year: 2007**	Ensure consolidation within each REC, with a focus on liberalizing tariffs; removing non-tariff barriers (NTBs); harmonizing taxes; and strengthening sector integration regionally and continentally in trade, agriculture, money and finance, transport and communications, industrial development and energy.
3 **Target year: 2017**	Set up in each REC a free trade area (FTA) and customs union (with a common external tariff and a single customs territory).
4 **Target year: 2019**	Coordinate and harmonize tariff and non-tariff systems among the RECs with a view to establishing a continental customs union.
5 **Target year: 2023**	Set up an African common market.

[258] Available from http://www.uneca.org/publications/assessing-regional-integration-africa-v. (Accessed 2013-10-24).

6 **Target year: 2028**	Establish the AEC, including an African Monetary Union and Pan-African Parliament.

Source: Treaty Establishing the African Economic Community, 1991.

This Chapter amongst other topics discusses the regional arrangements that have been established on the Africa continent thereby signifying the attainment of Phase 1 of the Treaty Establishing the African Economic Community, enhancing the potential for mutually beneficial trade. However In 2010, the African Union Conference of Trade Ministers conceded to the fact that it has only been successful in working towards Phase1.[259] Phase 2 has not been successfully attained and it does not appear as if it will reach the goal within the prescribed time. Some of the factors that have led to the postponement of the economic objectives are that there have been limited steps taken to implement fully the commitments, tariff reductions, elimination of non-tariff barriers amongst regional arrangements and as such there is no free movement of goods and services throughout Africa. In addition, regional institutions contend with issues arising out of overlapping membership.[260] It is argued that the lack of a supra-national body to monitor and enforce the implementation of policies is a huge deficit that the African region faces and as a result commitments will continue to be postponed. The following Table indicates the duration that it will currently take to achieve the goals as set out in the Treaty of the African Economic Community.

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259 See AU, "Au Conference of Ministers of Trade 6th Ordinary Session" Available from http://ti.au.int/en/content/au-conference-ministers-trade-6th-ordinary-session-0. (Accessed 2013-10-24).

260 AU Conference, *Ibid* note 259.

Table 6: Proposed Revised Time Frames for the Abuja Treaty Six Stage Establishment of the African Economic Community

Phase	Goal	Original time frames	Revised time frames
1	Creation of regional blocs in regions where such do not yet exist	To be completed in 1999	Completed
2	Strengthening of intra-REC integration and inter-REC harmonisation	To be completed in 2007	To be completed in 2020
3	Establishing of a free trade area and customs union in each regional bloc, **and common markets by 2017 (added).**	To be completed in 2017	To be completed in 2015 for free trade and customs unions, and by 2017 for common markets
4	Establishing of a continent-wide customs union (and thus also a free trade area)	To be completed in 2019	To be completed in 2017
5	Establishing of a continent-wide African Common Market (ACM), **from the regional common markets (added)**	To be completed in 2023	To be completed in 2020
6	Establishing of a continent-wide economic and monetary union (and thus also a currency union) and Parliament	To be completed in 2028	To be completed in 2025
	End of all transition periods:	2034 at the latest	2030 at the latest

Source: 6th Ordinary Session of the AU Conference of Ministers of Trade.[261]

The above Table shows the regression from the timelines set by the Treaty, the highest regression being Phase 2 which involves the most critical element of strengthening of African regional integration arrangements and the harmonisation of policies concerned. A thirteen (13) year postponement is noted in this regard.

It is further submitted that despite the efforts invested towards the establishment of the various organisations that are discussed in this Chapter, intra-African trade remains one

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[261] AU Conference, *Ibid* note 259.

of the lowest globally. The United Nations Economic Commission for Africa assessed global trade and the following Table captures the results of the assessment.

Table 7: Percentage of Trade within Continents

Continent	Percentage (%)
Intra-European trade	72
Intra-Asian trade	52
Intra-North American trade	48
Intra-South and Central American trade	26
Intra-African trade	11

Source: UNECA, "Assessing Regional Integration in Africa (ARIA V): Towards an African Continental Free Trade Area", 2012 p 35.[262]

Apart from the presence of tariff barriers on the continent as observed by the African Union Conference of Trade Ministers, Africa's poor intra-trade performance is also attributed to the inadequate progress among African countries in fostering structural transformation.[263] *Limao* and *Venerables* state that labour movement, communication, capital, and entrepreneurship are largely dependent on infrastructure, which includes transport infrastructure, such as roads, railways, waterways and airways. Similarly, information and communication infrastructure improves the speed and volume of flow of information thereby reducing irregularities and delays in trade. Communication

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262 Available from http://www.uneca.org/publications/assessing-regional-integration-africa-v. (Accessed 2013-10-24).

263 UNECA, *op-cit* note 262.

infrastructure unravels new opportunities, and improves connectivity between demand and supply sides in trade and facilitates better links between contributors in the value chain of products.[264]

The evidence to support the fact that Africa's transportation links are still inadequate to support the grand vision of the continent is contained in a report by the UNECA that detailed the amount of time to export and import goods.

Table 8: Average export and import times (days)

Region	Export time(Days)	Import time (Days)
Latin America and Caribbean	17.8	19.6
Middle East and North Africa	19.7	23.6
East Asia and Pacific	21.9	23.0
Sub-Saharan Africa	31.5	37.1

Source: UNECA, "Assessing Regional Integration in Africa (ARIA V): Towards an African Continental Free Trade Area", 2012 p 33.[265]

The above Table shows that in relation to other regions, goods on African continent take the longest number of days to be imported or exported. It is submitted that in comparison to other regions of the world, bureaucracy and an absence of reliable transport links hamper African trade relations. African integration efforts should be backed up with complementary integration strengthening measures especially

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[264] Limao, N. and Venables, J., "Infrastructure, geographical disadvantages, transport costs and trade." 2001 ***Economic Review. World Bank***, Vol. 15, No. 3. Available from http://economics.ouls.ox.ac.uk/12078/1/INFRAS.pdf (Accessed 2011-11-16).

[265] Available from http://www.uneca.org/publications/assessing-regional-integration-africa-v. (Accessed 2013-10-24).

transportation networks. The region has begun making attempts such as One Stop Border Posts (OSBP) aimed at eliminating the duplication of the clearing process for commercial traffic.[266] The initiative has already been launched at the Chirundu border post between Zambia and Zimbabwe.[267]

Though the pilot project at Chirundu is a success that should be replicated all over Africa, a protest in 2013 by truck drivers highlighted an issue that cripples the effectiveness of such borders. Tuckers during the protest reported that despite the existence of streamlined processes and infrastructure the lack of skilled personnel to operate the systems resulted in queues extending over 5 km.[268]In a similar vein, *Kwaramba* has argued that the task that confronts many Africa countries is the desire to develop needed capacities to implement modern techniques to doing trade. Developing the necessary infrastructure in addition to human expertise are two of the most important problems Africa that Africa faces. Progress in these two areas is fundamental with regard to African development. One Stop Border Posts are not an exception to these challenges. Officers are mainly concerned with getting through the day with as little difficulty as possible, and not be concerned with how the other sections of the border are working and whether the traveler or the trucks are getting through the border quickly and efficiently.[269]

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266 Translog Africa, "The One Stop Border Post Concept" Available from http://www.translogafrica.com/page/border_posts_osbp. (Accessed 2013-10-24).

267 Translog Africa, *Ibid* note 266.

268 TRALAC, "Chirundu Challenges", Available from http://www.tralac.org/2013/09/25/challenges-at-chirundu-one-stop-border-post/. (Accessed 2013-10-24).

269 Kwaramba, M., *op-cit* note 95.

3.2.2.1 Trade Liberalisation in the EU

Unlike the African position where member states are free to decide on how they implement measures towards advancing economic integration within the domestic sphere, the European Union has six exclusive competences in areas such as trade policy, international agreements economic and monetary policy. In these areas, the EU makes legislation and decisions on its own. Nation states take no decisions and do not interfere with the competence for these matters given to the EU, for it has granted the Commission power to make decisions in these areas.[270]

The effect that this position would have on the integration efforts in Africa would be remarkable, for instance, if trade related aspects would be synchronised at regional level, the movement of goods and services would be more efficient and the bureaucracies that are currently in place would be avoided. For example the United Nations Development Programme report has noted that:

> In Denmark, it takes three documents and two signatures to complete the requirements for shipping cargo abroad. In Burundi, the same process requires 11 documents, 17 visits to several offices located in different areas and 29 signatures. Whereas a Danish exporter needs five days to complete the documentation process and prepare his or her container to sail, an exporter in Burundi needs an average of 67 days just to move goods from the factory to the ship.[271]

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270 These areas are the customs union, the economic and monetary policy, competition laws, international trade policy, the common fisheries policy and international agreements. For more information see http://ec.europa.eu/ireland/about_the_eu/competences/index_en.htm (Accessed 2011-11-16).

271 United Nations Development Programme, "Regional integration and Human development: A Pathway for Africa," p 18. Available from http://www.unesco.org/library/PDF/RegIntegAndHumanDev_Africa_web.pdf (accessed 2011-11-16).

The UNDP has further observed that where trade facilitation measures are implemented, integration improves. For example, the introduction of the United Nations Conference on Trade and Development (UNCTAD) Automated System for customs data helped to substantially cut processing times at the borders of 42 African countries, resulting in faster service and more traffic.[272]

3.2.3 Performance of the Regional Economic Communities

Though the6th Ordinary Session of the AU Conference of Ministers of Trade proposed to postpone the timelines for the achievement of full African economic integration, there is notable progress from some of the regional integration arrangements.

The Fifth BRICS Summit[273] on 27 March 2013 in Durban under the theme: "BRICS and Africa: Partnership for Development, Integration and Industrialisation" gave birth to two agreements. The BRICS Multilateral Infrastructure Co-Financing Agreement for Africa[274] paves the way for the establishment of co-financing arrangements for infrastructure projects across the African continent. The BRICS Multilateral Cooperation and Co-Financing Agreement for Sustainable Development[275] sets out to explore the establishment of bilateral agreements aimed at establishing cooperation and co-financing arrangements, specifically around sustainable development and green economy elements. These two agreements, in the event implemented correctly and

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272 United Nations Conference on Trade and Development, "Use of Customs Automation Systems" p 18-19. Available from http://r0.unctad.org/ttl/technical-notes/TN03_CustomsAutomationSystems.pdf. (Accessed 2013-10-24).

273 Brazil, Russia, India, China and South Africa.

274 BRICS. "Fifth BRICS Summit", Available from http://www.brics5.co.za/. (Accessed 2013-10-24).

275 BRICS, *op-cit* note 274.

supported with the requisite political backing can help the country overcome many of the infrastructural difficulties and expose African merchandise and services to a broader industry both inside and beyond the African continent.

The Heads of State and Government of the Common Market for Eastern and Southern Africa, the East African Community and the Southern African Development Community met on 12 June 2011 and adopted a developmental approach to a Tripartite Integration process that will be anchored on three pillars namely: market integration based on the Tripartite Free Trade Area (TFTA); infrastructure development to enhance connectivity and reduce costs of doing business as well as industrial development to address the productive capacity constraints.[276]It is submitted that in order to achieve what is envisaged in the tripartite alliance, the regions first need to facilitate a harmonization and co-ordination process amongst all its member states to eliminate trade barriers and bottlenecks in the way of successful integration.

Mtshali argues that this challenge will have to be addressed before southern and eastern African states can realize the grand goal of a TFTA. African leaders cannot expect that they will get it right with the TFTA when they have failed to get it right in the individual regional economic communities.[277]*Jensen* is also of the view that the necessary starting point for the envisaged TFTA is the full functioning of the three sub-

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276 COMESA, "Communiqué of Second COMESA-EAC-SADC Tripartite Summit". Available from http://about.comesa.int/attachments/435_110614_Communiqu%C3%A9%20of%20Second%20COMESA-EAC-SADC%20Tripartite%20Summit.pdf (accessed 2011-08-23).

277 Mtshali, S.N., *op-cit* note 27, p 16.

FTAs in the region[278] which will require member states to overcome the challenges crippling the development of their own regional economic communities first.

Intra-regionally, there has been more movement in particular within COMESA, SADC and EAC as well as ECOWAS. COMESA concluded the COMESA Regulation on Services in 2009 as well as Negotiating Guidelines for services negotiations. It has made a choice of priority sectors and is currently in the process of exchanging requests and offers on services liberalization. SADC member states have in principle concluded negotiations on a SADC Protocol on Trade in Services through which they aim to achieve substantial liberalization of trade in services by 2015.

In 2010, African countries agreed on a Minimum Integration Programme (MIP). The MIP comprises of activities, projects and programmes that the regional economic groupings have selected to accelerate and bring to completion as part of the regional and continental integration process. As a mechanism for convergence of the regional economic groupings, it focuses on a few priority areas of regional and continental concern, where RECs could strengthen their cooperation and benefit from best integration practices.[279] The following Table presents a summary of the MIP.

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278 Jensen, H.G. and Sandrey, R.,. "The Tripartite Free Trade Agreement: A Computer Analysis of the Impacts," p 6. 2011 ***Stellenbosch: TRALAC.***

279 UNECA, Assessing Regional Integration in Africa (ARIA V): Towards an African Continental Free Trade Area, 2012 pp 1. Available from http://www.uneca.org/publications/assessing-regional-integration-africa-v

Table 9: Summary of the MIP

Priority sectors	Sub-sectors	Objectives	Projects, activities and programmes
Trade	Tariff barriers	Gradual elimination of tariff barriers in all the RECs	• Speeding up the implementation of programmes for the elimination of tariff barriers in every REC.
	Non-tariff barriers (NTBs)	Elimination of NTBs (NTBs) in the RECs	• Establishment/operationalization of computerized systems in all the RECs in order to detect and eliminate all the non-tariff obstacles to trade.
	Rules of origin	Simplification and harmonization of the rules of origin	• Simplification and harmonization of rules of origin in all the RECs and among them.
	FTA	Signing of partnership agreements between RECs	• Signing of partnership agreements between the RECs; and; • Harmonization of programmes of the RECs.
	Customs	Gradual harmonization of the customs procedures and establishment of a customs union in every REC with a common external tariff	• Speeding up the establishment of Customs Unions in the RECs; • Addressing the problem of member states' membership of more than one REC by encouraging the creation of a cooperation framework between Communities with a view to eventually setting up Customs Unions among REC groupings.
Free movement of people,	Free movement of	Unlimited free movement of people	• Speeding up the effective drafting of regional protocols on the free movement of people, the rights of residence and establishment;

goods, **services and capital**	people	in the regions and limited free movement among them	• Exemption from visa requirement for Africans holding diplomatic and service passports; • Loosening of visa regulations for some categories of persons (business men and business women, researchers and academicians); • Institution of security instruments to improve cooperation in security matters and combat terrorism in each REC and among the regions.
	Free movement of goods	Free movement of goods in the regions	• Establishing mechanisms which facilitate the free movement of goods in the regions; • Harmonizing in the regions some instruments which promote the free movement of goods in the regions.
	Free movement of services and capital	Gradual free movement of services and capital in the regions	• Establishing in every REC a legal framework (protocol) for the free movement of services and capital.
Peace and **security**	All the sub-sectors	Conflict prevention and resolution and post conflict development in Africa	• Establishing and operationalizing an early warning system for conflicts and surveillance units for observation and monitoring; • Establishing and operationalizing an African standby force and regional brigades; • Implementing the African Union Border Programme; • Promotion of pre-emptive diplomacy in conflict resolution.
Infrastructure **and energy**	Transport/ Energy/ ICT	Development of infrastructure in Africa	• Speeding up the implementation of the NEPAD Plan of Action (Sub-Saharan Africa Transport Programme) • Ensuring effective participation of the RECs in the process of formulating the Programme for Infrastructure Development in Africa (PIDA); • Assisting the RECs in building their capacity to formulate and develop infrastructure projects.
Agriculture	All the sub-sectors	Speed up the implementation of the Comprehensive	• Harmonizing the various regional programmes on food security; • Establishing where it does not exist, an agricultural markets information management system; • Experience sharing among the

		Africa Agriculture Development Programme	RECs; • Implementing the Maputo Decision inviting member states to earmark 10 per cent of national budgets for agricultural development; • Establishing a special fund for agriculture in every REC
Industry	All the sub-sectors	Develop the industrial sector in Africa	• Developing a legal framework to promote industrial policies (protocol) in each REC; • Operationalizing in every REC of the Plan of Action for Industrial Development in Africa.
Investment	Investment policies	Establish a regional and continental platform to promote investment	• Establishing regional investment protocols, • Harmonizing the various protocols; • Formulating a continental investment code; and • Speed up establishment of the African Investment Bank
Science and technology	Education	Development of the educational system in Africa	• Encouraging the RECs and member states to implement the Plan of Action of the Second Decade of Education for Africa.
	Science and technology	Promote the use of science and technology to eliminate poverty in Africa	• Encouraging the RECs and member states to implement Africa's Science and Technology Consolidated Plan of Action.
Social affairs	Health	Increase access of Africans to primary health care	• Implementing the Africa Health Strategy (2007–2015).
	Gender	Promote the participation of women in economic development	• Establishing regional business women's associations.

Political affairs	Elections and promotion of democratic institutions	Promote democratic elections and changeover of political power	• Ratification and implementation of the African Charter on Democracy, Elections and Governance.
	Governance	Improve governance in the RECs	• Creating a Peer Review Mechanism in each REC; and Encouraging all member states to accede to the African Peer Review Mechanism process.
Statistics	Harmonization of statistics	Prepare instruments to facilitate harmonization of statistics in Africa	• Ratification of the African Charter on Statistics by member states; • Preparing continental guides for data collection; harmonization of measurement standards, etc.
Capacity building	All the sub-sectors	Build the capacities of the RECs, the AUC and member states	• Organizing training sessions in the various sub-sectors of the MIP for officials of the RECs, the AUC and member states; • Institutional capacity building for RECs and AUC; • Developing a programme aimed at experience and best practices sharing among RECs.
Fiscal policy	Inflation/interest rates/fiscal deficit	Harmonize fiscal policies at the level of each REC	• Supporting the harmonization of fiscal policies at the level of each REC.
Monetary policy	Payment systems/ macro-economic convergence/ banking sector	Intensify actions for establishment of the African Central Bank and the African Monetary Fund	• Speeding up establishment of the African Central Bank and the African Monetary Fund.
Financial market	Stock Exchange	Set up the Pan-African Stock	• Create an environment that is conducive to the promotion of national and regional financial markets.

development		Exchange	

Source: UNECA, "Minimum Integration Programme (MIP)", 2011.[280]

The above programs and efforts represent positive initiatives towards the attainment of deeper economic integration. These are, however, diluted by the challenges faced by other regions. For instance, there is limited or no progress towards formation of free trade areas and customs union in UMA, CEN-SAD and IGAD.[281]ECCAS was inactive for several years because of financial difficulties (non-payment of membership fees) and the conflict in the Great Lakes area. It planned to achieve free trade by 2007 but has not met this goal.[282]This also supports the argument in the Chapter to follow that where there is no political stability; economic progress and development are also still-born.

ECCAS, SADC, IGAD and CEN-SAD lag behind in terms of concrete actions to advance the free movement of persons. Barriers to the free movement of persons include non-standardised visa fees and procedures for immigration, cumbersome and duplicated immigration procedures in connection with application of work permits.[283] For instance, the SADC Protocol on the Facilitation of Free Movement of Persons which has been applauded as the most important Protocol, in fact, so much such that it is referred to as 'the mother' of all protocols. Surprisingly, this Protocol could not even receive half the signatures of SADC Heads of State and Government.[284]

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280 AU, "Minimum Integration Program (MIP)", Available from http://www1.uneca.org/Portals/ctrci/6th/MinimumIntegrationProgrammeEng.pdf(Accessed 2013-10-24).

281 AU MIP, *Ibid* note 280.

282 AU, *op-cit* note 259, p 11.

283 AU *op-cit note* 259, p 13.

284 Karuuombe, B., *op-cit* note 204, p 5.

It is submitted that in addition to the above, the African Union as a continent-wide arrangement does not have competition-related provisions in its Constitutive Act similar to the ones existing in the EU Treaty.[285]Therefore, it would be timely and appropriate to consider ways of introducing a supra-continental competition framework and harmonize the existing arrangements to be in line with the continental initiative. This would facilitate dealing with anti-competitive practices across the whole continent and also assist in addressing competition related provisions in trade agreements with extra-regional partners.[286]

3.3 The legal status of Africa's Regional Economic Communities

The Treaties of most of the Regional Economic Communities either contain an Article that establishes such a Union/ Community,[287] provides that such a Union/ Community

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285 Article 81 of the EC Treaty (ex Article 85) provides that The following shall be prohibited as incompatible with the common market: all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the common market, and in particular those which: (a) directly or indirectly fix purchase or selling prices or any other trading conditions; (b) limit or control production, markets, technical development, or investment; (c) share markets or sources of supply; (d) apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage; (e) make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts. Article 82 of the EC Treaty (ex Article 86) provides that Any abuse by one or more undertakings of a dominant position within the common market or in a substantial part of it shall be prohibited as incompatible with the common market insofar as it may affect trade between Member States. Such abuse may, in particular, consist in: (a) directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions; (b) limiting production, markets or technical development to the prejudice of consumers; (c) applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage; (d) making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

286 See AU, *op-cit* note 259, p 14.

287 See Art 1 of Treaty Establishing the Arab Maghreb Union (AMU, 1989/89). Art 2 of the Treaty Establishing the Economic Community of Central African States (ECCAS, 1983/85); Art 3 of the Treaty of the Southern African Development Community (SADC, 1992/93); Art 88 of the Treaty of the Economic Community of West African States (revised) (ECOWAS, 1993/93); Art 186 of the Treaty Establishing a Common Market for Eastern and Southern Africa (COMESA, 1993/94); Art 1A of the

shall be an international organisation with legal personality or with the capacity and power to enter into contract, acquire, own or dispose of movable or immovable property and to sue and be sued.[288]

It is submitted that these provisions endow the Communities with legal personality that is cardinal to the execution and achievement of their objectives. It further submitted that the situation in domestic law, where the exercise of public power is constrained by national legislation, so should the conduct of international organisations be governed by international treaties and obligations voluntarily entered into.[289] The legal status of international organisations was well captured in the International Court of Justice Advisory Opinion (Reparation case) of the 11 April 1949. The legal question before the Court was if in the event of an agent of the United Nations in the performance of his duties suffers injury in circumstances involving the responsibility of a State, does the United Nations, as an Organisation, have the capacity to bring an international claim against the responsible *de jure* or *de facto* government with a view to obtaining the reparation due in respect of the damage caused? The Court opined that:

> the Organization was intended to exercise and enjoy, and was in fact exercising and enjoying, functions and rights which could only be explained on the basis of the possession of a large measure of international personality and the capacity to operate upon an international plane ... Accordingly, the Court came to the conclusion that the Organization was an international person. That was not the same thing as saying that it was a State, which it certainly was not, or that its legal personality and rights and duties

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Agreement Establishing the Inter-Governmental Authority on Development (IGAD, 1996/96) and Art 138 of the Treaty Establishing the East African Community (EAC, 1999/2000).

288 SADC Treaty, *Ibid* note 287 Art 3(1).

289 Southern Africa Litigation Centre *et al,* "Implications of the Decision to Review the Role, Functions and Terms of Reference of the SADC Tribunal,"pg 11. Available from http://www.swradioafrica.com/Documents/SADC%20OPINION%20%20final%204%20Nov%202010.pdf (Accessed 2011-06-16).

> were the same as those of a State ... What it did mean is that it was a subject of international law and was capable of possessing international rights and duties, and that it had capacity to maintain its rights by bringing international claims.[290]

Originally, international was either part of customary international law or belonged to the general principles of law; today the rules governing international treaties which are concluded between states in written form are codified.[291] The Vienna Convention on the Law of Treaties[292] codifies several areas of contemporary international law. The principle of free consent as enshrined in Article 26 of the Convention extends to third parties to a treaty.[293] Equally important is the good faith principle on interpretation of treaties contained in Article 31(1)[294] as well as Article 62(2)(b)[295] on fundamental change circumstances. In *Reuter's* words, the *pacta sunt servanda* principle can be translated by the following formula: treaties "are what the authors wanted them to be and only what they wanted them to be and because they wanted them to be the way they are".[296] It further implies that a party to the treaty cannot invoke the provisions of its domestic law as justification for a failure to perform its treaty obligations. The *rebus sic stantibus* principle, takes cognisance of the fact that extraordinary circumstances can lead to the termination of a Treaty. These circumstances can consist of either a material breach of

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290 Reparation for Injuries Suffered in the service of the United Nations, Advisory Opinion: I.C. J. Reports 1949, p. 174.

291 The International Law Treaties, 1989 Available from http://www.public-international-law.net/ (Accessed 2011-05-25).

292 Vienna Convention, *op-cit* note 46.

293 A treaty does not create either obligations or rights for a third State without its consent.

294 A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

295 A fundamental change of circumstances may not be invoked as a ground for terminating or withdrawing from a treaty: (b) if the fundamental change is the result of a breach by the party invoking it either of an obligation under the treaty or of any other international obligation owed to any other party to the treaty.

296 The International Law of Treaties, *op-cit* note 287.

a given treaty by one of the States Parties,[297] of a permanent disappearance of an object indispensable for the execution of the treaty[298] or of a fundamental change of circumstances.[299] Finally the principle of *favor contractus* means that when confronted with a situation in which the contract may either be fulfilled or terminated, it is preferable to fulfil such a contract.

3.3.1 The conflict between regional and domestic interests

Having discussed the above, it is safe to infer that since a regional organisation or intergovernmental arrangement is granted legal personality under international law, these arrangements are slowly beginning to attain nation like features. This particular argument is based on the fact that this Chapter will discuss the various organs, their composition and the functions they perform in order to run the integration programs. From this, legal scholars will be able to infer that these organisations have executive, legislative and judicial organs. These submissions are canvassed more comprehensively in the next Chapter which focuses on the politico-legal features of integration.

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297 Art 60 (1) of the Vienna Convention provides that A material breach of a bilateral treaty by one of the parties entitles the other to invoke the breach as a ground for terminating the treaty or suspending its operation in whole or in part.

298 Art 61 (1) of the Vienna Convention provides that A party may invoke the impossibility of performing a treaty as a ground for terminating or withdrawing from it if the impossibility results from the permanent disappearance or destruction of an object indispensable for the execution of the treaty. If the impossibility is temporary, it may be invoked only as a ground for suspending the operation of the treaty.

299 Art 62 (1) (a) of the Vienna Convention provides that A fundamental change of circumstances which has occurred with regard to those existing at the time of the conclusion of a treaty, and which was not foreseen by the parties, may not be invoked as a ground for terminating or withdrawing from the treaty.

It is submitted that by endowing legal personality and creating common, permanent institutions capable of making decisions binding on all members, there is often a conflict between the regional / continental obligations of member states and their domestic interests or preferences. *Shaw* has noted that what often does happen is what is termed a conflict of obligations; that is, when the state within its own domestic sphere does not act in accordance with its obligations as laid down by international law. In such a case, the domestic position is unaffected and is not overruled by the contrary rule of international law but rather the state as it operates internationally has breached a rule of international law and the remedy will lie in the international field, whether by means of diplomatic or judicial action.[300]

It is submitted that this conflict creates potential uncertainty about which laws / norms should be followed, especially when national borders and sovereignty give way to cross border trade, communication and investment. It is a well-respected notion that economic activity requires predictable and transparent rules and as such, this problem has to be clarified.[301]

The starting point is to understand the monist-dualist theories. According to *Dugard*, monism has its roots in natural law theories which see all law as the product of reason.[302]It envisions international law as being automatically part of national legal systems.[303] The foundation of dualism is in legal positivism. It posits that international and national laws operate on separate legal planes: international law governs relations

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300 Shaw, M.N.,***International Law.*** New York: Cambridge University Press 2008. p 133.
301 Hartzenberg, T., *Ibid* note 250, p 14.
302 Dugard, J *op-cit* note 65, p 41-51.
303 Dugard, J *op-cit* note 65, p 41-51.

between states; and national law regulates relations between individuals and the state. Under dualism, international law can play no role in the national legal systems except in so far as it has been received or adopted by them.[304]African constitutions reflect the monist-dualist perspectives. There are other constitutional provisions that appear to merge aspects of both perspectives.[305]

It is submitted that the solution to these theories may lie in what *Shaw* describes as the doctrine of transformation.[306] The doctrine is based upon the perception of two quite distinct systems of law, operating separately, and maintains that before any rule or principle of international law can have effect within the domestic jurisdiction, it must be expressly and specifically "transformed" into municipal law by the use of appropriate constitutional machinery such as an Act of Parliament.[307] It is further submitted that this transformative approach would only be effective if the domestic as well as the regional and continental parliaments of the African region were proactive and willing to oversee the transformation of treaties into domestic commitments.[308]

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304 as above

305 See for instance Burundi Constitution, Art. 292. It provides that _treaties take effect only after having been duly ratified and subject to their application by the other party in the case of bilateral treaties and the fulfilment of the conditions for entry into force specified by them in the case of multilateral treaties'; Constitution of the Republic of Cape Verde, 1992, Art. 11 Cape Verde Constitution. It provides among others that _rules, principles of international law, validly approved and ratified internationally and internally, and in force, shall take precedence all laws and regulations below the constitutional level'. Constitution of the Federal Democratic Republic of Ethiopia, 1995, Art. 9(4) [Ethiopia Constitution]. It provides that _all international agreements ratified by Ethiopia are an integral part of the law of the land'. Constitution of the Republic of Gabon, 1991 Art. 114 [Gabon Constitution]. It simply provides that _treaties take effect only after having been ratified and published'. Namibia Constitution, Art. 144, which provides that _unless otherwise provided in this Constitution or Act of Parliament, the general rules of public international law and international agreements binding upon Namibia under this Constitution shall form part of the law of Namibia'.

306 Shaw, M.N., *op-cit* note 300, p 139.

307 Shaw, M.N., *op-cit* note 300, p 139.

308 The role of Parliaments is discussed in the next Chapter.

There have been instances in Africa where judiciaries have had to tackle the interplay between domestic and regional interests. In *Afolabi Oladjide v Nigeria*[309]in the ECOWAS Court of Justice, the applicant filed an application before the Court challenging the closure by Nigeria of its border with Benin Republic on 9 August 2003. He claimed he had suffered some losses due to the closure. Though the suit was struck out for lack of jurisdiction, the Court made a declaration relying on international law, that the closure of the border was a violation of the applicant's right to freedom of movement of his persons and goods, right of egress and ingress as guaranteed by the Treaty of the Economic Community of West African States and Article 12 of the African Charter on Human and Peoples' Rights signed and ratified by the Federal Republic of Nigeria in 1990.[310]

In *Peter Anyang' Nyongoand Others v The Attorney General of the Republic of Kenya and Others*,[311] the rules of the Kenya National Assembly[312] were set aside for being incompatible with the provisions of the Treaty establishing the East African Community.

More recently, in *Government of the Republic of Zimbabwe v Fick and Others,*[313]the South African Constitutional Court held that property of the Government of Zimbabwe could be attached in South Africa to give effect to awards granted by the SADC Tribunal. The Court relied on provisions of the SADC Treaty arguing that no member of the SADC could achieve impunity by raising state sovereignty against the international law obligations (*inter alia* to uphold the rule of law) each had accepted on accession to

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309 2004/ECW/CCJ/04 (ECOWAS Court of Justice, 2004)
310 at para 68.
311 EACJ Reference No. 1 of 2006.
312 Kenya Legislative Assembly Rules to Election of the East African Legislative Assembly, Adopted 2001.
313 2013 (5) SA 325 (CC).

the SADC Treaty.[314] In reflecting on South Africa's international law obligations, the Court also noted that:

> South Africa has essentially bound itself to do whatever is legally permissible to deal with any attempt by any Member State to undermine and subvert the authority of the Tribunal and its decisions as well as the obligations under the Amended Treaty. Added to this, are our own constitutional obligations to honour our international agreements and give practical expression to them.[315]

The above selected African judgments are all in favour of interpretation that is inclusive of international law. However this is not always the case, In *Attorney-General v Dow,*[316]the Court remarked as follows in the conclusion of the matter:

> It is, in my respectful view, a dangerous precedent to allow a court free reference to international declarations where no "doubt exists" (that is, where the Constitution sought to be interpreted unambiguously) for this would ultimately lead to an abandonment of sovereignty which would be wholly at variance with the entire purpose of the Constitution of Botswana.

In essence the position of international law obligations was severely relegated to below the Constitution of Botswana in this judgment.

In *Okunda v. Republic,*[317] the question of the supremacy of East African Community law over Kenyan law was in issue. Two persons were being prosecuted under the Official Secrets Act 1968 of the East African Community without the consent of the counsel for the Community. Under section 8(1) of the Act, such consent was necessary. The

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314 *Ibid*, para 52-60.
315 *Ibid*, para 59.
316 1994 (6) BCLR 1.
317 1970 East Africa Law Reports [EA] 453.

question was whether the Attorney-General of Kenya could institute that proceeding without such consent. Resolving this issue involved examining the relationship between the community law and section 26(8) of the Kenyan Constitution which provided that in the performance of his duty, the Attorney-General "shall not be subject to the direction or control of any person." Counsel for the community submitted that the conflict between the two provisions should be resolved in favour of community law. He argued that under the Treaty for East African Co-operation, the members undertook to take all steps within their power to pass legislation to give effect to the treaty, and to confer upon Acts of the community the force of law within their territory. Further, under Article 4 of the treaty, the members were enjoined "to make every effort to plan and direct their policies with a view to creating favourable conditions for the development of the Common Market and the achievement of the aims of the Community." In the view of applicant, by these provisions, member states agreed to "surrender part of their sovereignty."

The court found that nothing had been done by Kenya to breach these obligations and that the laws of the community were, under the Kenyan Constitution, part of the laws of Kenya and in the event of conflict, were void to the extent of their inconsistency with the Constitution; the Constitution being the supreme law of the land. Although an appeal from this decision was subsequently dismissed by the Court of Appeal for East Africa,[318] the court, recognising that the case raised an issue of "fundamental importance," held *obiter* that "the Kenyan Constitution is paramount and any law, whether it be of Kenya,

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[318] Okunda v. Republic 1970 EA 457, 9 I.L.M. 561.

of the Community or any other country which has been applied in Kenya, which is in conflict with the Constitution is void to the extent of the conflict."[319]

Another similar example is the defences raised by the Government of the Republic of Zimbabwe in reaction to the ruling in *Mike Campbell (PVT) Limited and Another v Republic of Zimbabwe,*[320]arguing that the Tribunal rulings do not supersede the country's laws. Zimbabwe refused to comply with the SADC Tribunal's rulings and challenged its legitimacy on the grounds of procedure and content. The government's lawyers even stopped attending tribunal hearings, deriding it as primordial institution without relevance to African nationalism. Zimbabwe has even declined to register the Tribunal's decision, saying it violates the country's Constitution.[321] It is submitted that the position adopted by the Zimbabwean government is in breach of its international law obligation to respect and abide by decisions issued by institutions it voluntary accepted jurisdiction of.

After discussing these cases, it is evident that the application of international law principles varies from country to country and might even depend on the interest at stake. The root of these sentiments to resisting international law may be founded in various doctrines. The International Court of Justice (ICJ) has observed that "between independent states, respect for territorial sovereignty is an essential foundation of international relations and state sovereignty as the fundamental principle on which the

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319 Okunda, *Ibid* note 318,at 460.

320 SADCT: 2/07

321 Southern African Land and Agrarian Reform Network, SADC Land Tribunal: "*Sovereignty, Independence and Pan Africanism".* Available from http://www.ctdt.co.zw/attachments/053_SALARN%20News%20-%20Issue%203.pdf. (Accessed 2013-10-24). See also SADCT: 2/07.

whole of international law rests.[322]The state's territorial borders are essential elements in defining the area of internal sovereignty. *Hugo Grotius* and *Emerich de Vatel* submitted that "every nation that governs itself, under what form so ever, without dependence on any foreign power, is a sovereign state".[323]*Fowler* and *Bunck* also submitted that in order to remain a sovereign entity, the state must sustain its independence from its peers in the international arena by demonstrating not only domestic political supremacy, but actual independence of outside authority in foreign affairs.[324]

An acute aspect of sovereignty is that it forms an elementary structure regarding governance which usually forges a new social relationship between citizens and the state. This basic structure of governance is expected to provide the objectives of peace, order, justice, and security within the state, with the sovereign state managing its national economy to achieve these objectives. As discussed by *Devetak* and *Higgotts*, sovereign states have the obligation to manage their economies in such a way as to promote the wealth and welfare of their subjects, ensuring liberty, security and prosperity of the subjects and ensuring that the specific social needs of their people are met.[325] Similarly, it has been argued in other pieces of philosophy that behaviour that increases welfare should be encouraged insofar as statute and common law permits. Behaviour that decreases welfare should, within the same limit be discouraged.[326]It is

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322 See ICJ Report 1986-1987. Available from http://www.icj-cij.org/court/en/reports/report_1986-1987.pdf.(Accessed 2012-06-05).

323 Mboya, T., "Conflict Between State Sovereignty and the Right of Intervention Under the Constitutive Act of the African Union". 2009 ***Africa Insight*** Vol 39 (2). p 79.

324 Mboya, T., *Ibid*.

325 Westway, J., "Globalization, Sovereignty and Social Unrest", 2012 ***Journal of Politics and Law*** Vol. 5, No. 2; p 133.

326 Roederer, C and Moellendorf, D., ***Jurisprudence***,Lansdowne 2004 at 201.

submitted that this obligation has become embedded in the psyche of the international community so the question becomes how do states accommodate international law in their domestic sphere?

In today's era of globalisation, interpretations relating to sovereignty are subject to change. The question as to what hierarchy treaty law should be afforded against domestic law may be answered in a comparative exercise. Under Article 3(e) of the AEC Treaty, member states are enjoined to observe the legal system of the community. To what extent is this observance required?

In international law, it is accepted that a state cannot plead a rule in its own municipal law as a defence to a claim based on international law.[327] In *Nold v. Commission*,[328] the European Court of Justice emphasized that measures incompatible with the fundamental rights recognised and protected by the constitutions of member states could not be upheld. It was also held that international treaties for the protection of human rights on which member states have collaborated, or of which they are signatories, could supply guidelines which should be followed within the framework of Community law.

In English law, the courts have received the basic doctrines of community law into English law and litigation.[329] They have adapted well to the new constitutional arrangements and to their role in them. They have been remarkably resilient and free of

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327 See the Vienna Convention, 1969.
328 1974 ECR 491, 407.
329 See generally Moser, P. and Katrine, S., ***The Legacy of Advocate General Jacobs at the European Court of Justice***, Edward Elgar Publishsing Limited, 2008. p 103.

dogmatism in accommodating the changes. The basic elements of community law, its supremacy, its doctrine of direct effect and proportionality and its principles of purposive interpretation are all well understood and frequently applied by the courts via the European Communities Act 1972 that links domestic law with European Community law.[330]

It is submitted that the European position on relations between community law and national law represent a more efficient solution to clashes between the sovereignty of member states and treaty law. The European Court of Justice has in the case of *NV Algemene Transporten Expeditie Onderneming van Gend en Loos v Nederlandse Administratis der Belastingen*[331] given the following interpretation:

> The Community constitutes a new legal order of international law for the benefit of which the states have limited their sovereign rights, albeit within limited fields and the subjects of which comprise not only member states but also their nationals. Independently of the legislation of member states, community law therefore not only imposes obligations on individuals but is also intended to confer upon them rights which become part of their legal heritage. These rights arise not only where they are expressly granted by the treaty, but also by reason of obligations which the treaty imposes in a clearly defined way upon individuals as well as upon the member states and upon the institutions of the community.

In the case of *Costa v ENEL*[332] it was contended that the Italian Courts were bound to apply Italian legislation subsequent in date to the entry into force of the EEC Treaty. The Court of Justice disagreed, it opined that:

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330 Moser, P. and Katrine, S., *Ibid* note 329, p 103.
331 1963 ECR 1 (Case 26/62).
332 1964 ECR 585.

> The integration into the laws of each member state of provisions which derive from the community and more generally the terms and spirit of the Treaty, make it impossible for the state as a corollary, to accord precedence to a unilateral and subsequent measure over a legal system accepted by them on a basis of reciprocity. The obligations undertaken under the treaty establishing the community would not be unconditional but merely contingent, if they could be called in question by subsequent legislative acts of the signatories.[333]

The doctrine of *pucta sunt servanda* is a doctrine which is well-known in federal systems where, in the event of a conflict, the law of the federal authority will usually have precedence over the law of the regional authorities.[334] The reason for this is very simple; it is to give order and certainty in a region that proposes to act as one. In *R v Secretary of State for Transport Ex p Factortame,* the court observed that:

> The full effectiveness of Community law would be impaired if a rule of national law could prevent a court seized of a dispute governed by Community law from granting interim relief in order to ensure the full effectiveness of the judicial decision to be given on the existence of rights claimed under Community law.[335]

Similarly, in the *Simmenthal* case,[336] the court argued that:

> Every national court must in a case within its jurisdiction, apply Community law in its entirety and protect rights which the latter confers on individuals and must accordingly set aside any provision of national law which may conflict with it, whether prior or subsequent to the Community rule.[337]

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333 1964 ECR 585 at 593 and 594.
334 at p 133-134.
335 (No.2) [1991] HL.
336 *Simmenthal* 1978 ECR 629.
337 *Simmenthal* 1978 ECR 629 AT 643B.

It is submitted that the principles of direct effect and supremacy of European Union law guide the implementation of European Court of Justice rulings and the legal framework within which it acts. These joint principles give the European Court of Justice a large amount of judicial power within member states. Supremacy allows the European Court of Justice to establish primacy for European laws while direct effect means that these laws then apply to people as well as to states making them more like domestic laws than international acts. In various European Union case law, the principle that an Act of Parliament that is incompatible with any requirement of European Community law can and must be declared invalid and ineffective to the extent of that incompatibility has been well established.[338]In the United States Court of Appeals, O'Connor, J in *Boos v Barry*[339] opined that as a general proposition, it is of course correct that the United States has a vital national interest in complying with international law.

It is submitted that, in the African region, the African Court of Justice has not been allowed to develop its own jurisprudence since it is still waiting to acquire the requisite number of ratifications[340]and as such the effect of international law norms has not been fully explored. It is further submitted that until a judicial body is vested with the power and jurisdiction to clarify legal interpretation on the African continent, economic activity and development will forever remain stifled by the uncertainty that African integration brings to the legal order.

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338 See Equal Opportunities Commission v Secretary of State 1994 HL, Internationale Handelsgesellschaft mbH v Einfuhr - und Vorratsstelle fur Getreide und Futtermittel Case 1970 ECR, Italy v Watson and Belmann 1976 ECJ, Marshall v Southampton Health Authority (No 1) 1986 ECJ, United Kingdom v Commission 1998 ECJ,Webb v EMO Air Cargo 1994 HL, Bossa v Nordstress Ltd [1998] EAT and Clean Car Autoservice v Wien 1998 ECJ.

339 485 U.S. 312.

340 Discussed more comprehensively in the next Chapter.

Having discussed the above various aspects of the regional economic communities' the Chapter below will now turn to elaborating the formation and functioning of each community *seriatim*.

3.3 The Southern African Development Community

The Southern African Development Community (SADC), formerly known as the Southern African Development Coordination Conference (SADCC), is an organization of the Southern African states initially formed to reduce economic dependence on South Africa (then an Apartheid state) and to harmonize and co-ordinate development in the region.[341]At their meeting in Windhoek in August 1992, the Heads of State and Government signed a Treaty transforming the "SADCC" from a Coordination Conference into SADC the Community, and re-defined the basis of co-operation among member states, from a loose association into a legally binding arrangement.

The vision and mission of SADC reach well beyond the harmonization of development within the region. It extends to fields that include political stability, peace building, the maintenance of security and justice as well as economic co-operation.[342] The attainment of these goals requires well-co-ordinated regional mechanisms; as such over the past decade member states have paid particular attention to the possibility of attaining these goals through regional integration. The broad strategies of the SADC as contained in the Treaty are to:

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341 See SADC Treaty, *op-cit* note 282. See "The SADC Framework for Integration," Available from http://www.sadc.int/index/browse/page/107 and "Profile: Southern African Development Community," available from http://www.africa-union.org/recs/sadcprofile.pdf (Accessed 2011-11-16).

342 SADC Treaty, *op-cit* note 287, Art 4-5.

a) harmonise political and socio-economic policies and plans of member states;
b) encourage 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;
c) create appropriate institutions and mechanisms for the mobilisation of requisite resources for the implementation of programmes and operations of SADC and its institutions;
d) develop policies aimed at the progressive elimination of obstacles to the free movement of capital and labour, goods and services, and of the peoples of the region generally, among member states;
e) promote the development, transfer and mastery of technology;
f) improve economic management and performance through regional co-operation;
g) promote the co-ordination and harmonisation of the international relations of member states; and
h) secure international understanding, co-operation and support, and mobilise the inflow of public and private resources into the region.[343]

The organisation recorded much progress since its establishment in the form of concluding and signing of protocols in areas where member states have committed themselves to co-operating, harmonizing and integrating strategies. Other protocols signed by member states include those on drug trafficking, the harmonization of energy policy, the integration of transport communications, education and training as well as

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[343] SADC Treaty, *op-cit* note 287.

policies to combat corruption and monitor (guide) elections within member states.[344] The Treaty under Article 6(1)[345] and 6(5)[346]imposes a positive legal obligation for national legal reforms so that national legal systems conform to the letter and spirit of the SADC Treaty. Article 6(1) and 6(5) read together further requires State Parties not to promulgate or act in a manner that will defeat the objectives of the organisation. The grey area is that; the Treaty does not expressly encapsulate a 'supremacy clause'. It is quite clear that from a principled perspective, SADC norms within the Community's area of competence constitute a higher law and where there is a conflict with a member state's national law, SADC law should take precedence as in the case of European Union law.

3.3.1 The functioning of the SADC

The key SADC institutions as provided for in the SADC Treaty are 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 SADC National Committees.[347] The SADC summit is the body responsible for the overall policy direction of the organisation.[348] The Summit is composed of Heads of States of member states to the organization. *Moyo*

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344 See 'SADC Protocols', Available from http://www.sadc.int/documents-publications/protocols/ (Accessed 2014-03-17).

345 Member States undertake to adopt adequate measures to promote the achievement of the objectives of SADC, and shall refrain from taking any measure likely to jeopardise the sustenance of its principles, the achievement of its objectives and the implementation of the provisions of this Treaty.

346 Member States shall co-operate with and assist institutions of SADC in the performance of their duties.

347 SADC Treaty, *Ibid* note 287, Art 9(1)(a)-(h).

348 SADC Treaty, *Ibid* note 287, Art10(2).

has argued that the SADC institutional structure, predominantly the enormous legislative and executive powers reposited in the Summit greatly reflect the desire by the political leadership to be in total control of the integration project and the reluctance to devolve any meaningful powers to other community institutions.[349] It is submitted that the current powers and functions vested upon the Summit do not engender a sense of separation of powers as too much oversight and control mechanisms are left to the discretion of the Summit. The concerns of such power concentration will be illustrated when discussing the suspension of the judicial organ of SADC. The Secretariat is the principal executive organ of SADC, responsible for strategic planning, co-ordination and management of SADC programmes. It is headed by an Executive Secretary and has its headquarters in Gaborone, Botswana.[350]

3.3.2 The SADC Tribunal

The SADC Tribunal is the judicial organ of the community with jurisdiction over contentious and non-contentious proceedings.[351] The Treaty explicitly provides for the Tribunal to be the institution mandated to ensure adherence to and the proper interpretation of the provisions of the SADC Treaty and subsidiary instruments and to adjudicate upon such disputes as may be referred to it.[352] A protocol expounding the

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349 Khulekani, M., "Towards a Supranational Order for Southern Africa: a Discussion of the Key Institutions of the Southern African Development Community (SADC)," ***University of Oslo***, 2008, p 26.

350 African Union, "SADC" http://www.africa-union.org/recs/sadcprofile.pdf (Accessed 2011-11-16).

351 Khulekani, M., *op-cit* note 349, p 37.

352 SADC Treaty, *op-cit* note 287, Art 16.

composition, powers, functions and procedures of the Tribunal was adopted by the Summit which also provided for the Court to have its seat in Windhoek, Namibia.[353]

The Protocol establishing the Tribunal provides that the Tribunal comprises of not less than ten (10) judges from nationals of member states who possess the qualifications for appointment to the highest judicial offices in their respective states and are jurists of recognised competence. The judges' terms and conditions of service, salaries and benefits are determined by the Council of Ministers.[354] Article 16(5) of the SADC Treaty provides that the decisions of the Tribunal are final and binding. In relation to matters relating to jurisdiction, the Protocol provides that the Tribunal has jurisdiction over disputes between member states, and between natural or legal persons and member states[355] and in addition, that no natural or legal person can bring an action against a member state unless he or she has exhausted all available remedies[356] or is unable to proceed under the domestic jurisdiction.[357] Finally, the Tribunal has exclusive jurisdiction in disputes between organs of the community or between community personnel and the community.[358]

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353 Protocol on Tribunal and Rules of Procedure Thereof, adopted on 7th August 2000.
354 Protocol on SADC Tribunal, *Ibid* note 353, Art 10.
355 Protocol on SADC Tribunal, *Ibid* note 353, Art 15.
356 In fact, all major human rights instruments do provide for the rule on the exhaustion of local remedies: e.g. Article 35(1) of the European Convention on Human Rights, 1950; Article 46 (1) of the American Convention on Human Rights, 1969; 56(5) of the African Charter on People's and Human Rights, 1981; and Articles 2 and 5(2)(b) of the Optional Protocol to the International Covenant on Civil and Political Rights, 1966. In regard to the Rome Statute of the International Criminal Court, the principle of exhaustion of domestic remedies is substituted by the complementarity principle as laid down in Article 17 (a) of the ICC Statute. This article makes it clear that the International Criminal Court will only accept a case where a state which has jurisdiction over it is unwilling or unable to genuinely carry out the investigation and/or prosecution.
357 Protocol on SADC Tribunal, *op-cit* note 353 Art15(2).
358 Protocol on SADC Tribunal, *op-cit* note 353 Art18-19.

3.3.2.1 The Suspension of the Tribunal

The SADC Treaty provides that member states shall act in accordance with the principles of human rights, democracy and the rule of law.[359] It is submitted that this provision also places an obligation upon the institutions of SADC to reciprocate such principles. *Raz* articulated that in order for the rule of law to flourish, it is required that the independence of the judiciary be guaranteed as well as courts having review powers over the implementation of the other principles.[360] The principle that a court of law should be independent and impartial is firmly embedded in all legal systems and in all major international human rights instruments.[361] In an expert opinion submitted to the European Court of Human Rights, it was observed that the principle of judicial independence is a general principle of law recognised by the international community and that the importance of judicial independence has been recognised by many international courts and human rights supervisory mechanisms.[362] The notion of judicial independence derives from the doctrine of the separation of powers, as advocated by *Montesquieu*, the French jurist and philosopher. In *L'Esprit des Lois* (1748), *Montesquieu* cautioned that:

> ...there is no liberty, if the judiciary power be not separate from the legislative and executive. Were it joined with the legislative, the life and liberty of the subjects would be exposed to arbitrary control; for the judge would be the legislator. Were it joined to the executive power, the judge might behave with violence and oppression.

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359 SADC Treaty, *op-cit* note 287, Art. 4(c)

360 See generally Raz, J., ***The Authority of Law, Essays on Law and Morality***, Oxford 1979, p. 208.

361 See e.g. Art. 14(1) of the International Covenant on Civil and Political Rights (ICCPR); Art.6(1) of the European Convention on Human Rights (ECHR); Art.8(1) of the American Convention of Human Rights (ACHR).

362 ECHR, Baltasar Garzón v Spain, Expert Opinion On International Legal Standards Regarding Judicial Independence, http://www.interights.org/userfiles/Annex_2_Judicial_Independence_filed.pdf ((Accessed 2013-10-24).).

Closely aligned to a situation in which a judicial body such as the SADC Tribunal has been established under the auspicies of an integration arrangement, Article 1.2 of the Burgh House Principles provides that:

> Where a court is established as an organ or under the auspices of an international organisation, the court and judges shall exercise their judicial functions free from interference from other organs or authorities of that organisation. This freedom shall apply both to the judicial process in pending cases, including the assignment of cases to particular judges, and to the operation of the court and its registry.[363]

Similarily, In the Canadian case of *R v Valente,*[364] the argument was made that the degree of control exercised by the provincial Attorney-General over the judges raised a reasonable apprehension that the judges would be biased in favour of the Crown. Judges were said to be subjected to the executive power by three factors; they had been appointed by the Attorney-General; the Attorney-General had the power to authorize leaves of absence and paid extra-judicial work; and judges' salaries were fixed by regulation, not by statute.[365] In the same vein, in *Lawyers of Human Rights v Swaziland,*[366] the African Commission on Human and Peoples' Rights ruled that the defendant was in breach of democratic provisions of the African Charter on Human and Peoples' Rights by entrusting all judicial powers to the Head of State with powers to remove judges, through Proclamation of 1973 of Swaziland. The main *raison d'être* of

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363 The "Burgh House Principles on the Independence of the International Judiciary", which were adopted by the ILA Study Group on the Practice and Procedure of International Courts and Tribunals, in association with the Project on International Courts and Tribunals, in 2004. While the Burgh House Principles are not binding, they set out useful general guidelines to contribute to the independence and impartiality of the international judiciary.

364 1985 2 S.C.R. 673.

365 1985 2 S.C.R. 673.

366 Lawyers of Human Rights v Swaziland 251/02.

the principle of separation of powers is to ensure that no organ of government becomes too powerful and abuses its power.[367]

Since its inception the SADC Tribunal has ruled on twenty cases that included disputes between citizens and their governments, as well as cases between companies and governments. The majority involved Zimbabwean citizens taking the Zimbabwe government to court. The last series of decisions involved rulings pertaining to the land reform disputes in the Republic of Zimbabwe. In *Mike Campbell (PVT) Limited and Another v Republic of Zimbabwe*, Mike Campbell (PVT) Limited, a Zimbabwean registered company, instituted a case with the Tribunal to challenge the acquisition of agricultural land in Zimbabwe by the Government of Zimbabwe on the basis of, amongst others, an argument that the expropriation of the land had infringed their property rights. The matter was also pending in the Supreme Court of Zimbabwe at the time. As a result, they sought an interim measure to interdict the Government of Zimbabwe from evicting Mike Campbell (PVT) Limited, *et al*, from the land in question pending the outcome of the Tribunal decision. The Tribunal ruled as follows:

> In the present application there is a *prima facie* right that is sought to be protected, which involves the right to peaceful occupation and use of the land; and there is anticipated or threatened interference with that right; and the applicants do not appear to have any alternative remedy thereby tilting the balance of convenience in their favour. Accordingly, the Tribunal grants the application pending the determination of the main case and orders that the Republic of Zimbabwe shall take no steps, or permit no steps to be taken, directly or indirectly, whether by its agents or by orders, to evict from or interfere with the peaceful residence on

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[367] Lawyers of Human Rights v Swaziland 251/02.

and beneficial use of the farm known as Mount Carmell of Railway 19.[368]

The decision was received as "absolute nonsense" by senior governemnt officials in Zimbabwe.[369] In April 2009, pro-Mugabe militants forcibly evicted Campbell.[370] The Tribunal would again find the Zimbabwean government in contempt of the first *Campbell* decision as well as being in breach of its obligations under the SADC Treaty.[371] At this point in time, relations between the Tribunal and Zimbabwe had reached a state of deterioration. Due to Zimbabwe's persistent refusal to adhere to the Tribunal's orders, the Tribunal referred Zimbabwe to the SADC Council of Ministers for appropriate action. In terms of the SADC Treaty, the Ministers should have recommended sanctions or suspension, but instead of suspending Zimbabwe as it had done in the case of Madagascar,[372] SADC apparently preferred to suspend the Tribunal, under the guise of a review process, at the request of the Zimbabwean government.[373] In August 2010, the Summit decided to limit the operations of the Tribunal, ostensibly to allow for time to consider this issue of a review. The review was eventually commissioned by SADC. The review was conducted by WTI Advisors Ltd, Geneva, an affiliate of the World Trade Institute and it recommended amongst others that:

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368 2/07 200] SADCT 1 (13 December 2007).

369 Chinaka, Mugabe Says Zimbabwe Land Seizures Will Continue, MAIL and GUARDIAN (S. Afr.), 28 February 2009, http://www.mg.co.za/article/2009-02-28-mugabe-says-zimbabwe-land-seizures-will-continue (last accessed on 14 August 2013).

370 Jan Raath, Anti-Mugabe farmer Mike Campbell who stood up to thugs loses his land, THE TIMES, 8 April 2009, http://www.thetimes.co.uk/tto/news/world/africa/article2594193.ece (last accessed on 14 August 2013).

371 Mike Campbell (Pvt) Ltd and Others v Republic of Zimbabwe SADC (T) 11/08.

372 Membership was suspended after a coup d'état in breach of SADC Principles.

373 Nicole Fritz, SADC Tribunal: Will regional leaders support it or sabotage it?, http://www.osisa.org/sites/default/files/sup_files/Sabotaging%20the%20SADC%20Tribunal.pdf (last accessed on 14 August 2013).

a) The SADC Tribunal had the legal authority to deal with individual human rights petitions.
b) SADC Community law is supreme to domestic laws and constitutions.
c) Decisions of the SADC Tribunal are binding and enforceable within the territories of all SADC member states.[374]

Despite these observations by the advisors, the SADC Extraordinary Summit of May 2011[375] would then decide that the Tribunal was not to hear any further cases henceforth, whether pending or otherwise, and members of the Tribunal were not to be reappointed or replaced until August 2012. This decision effectively rendered the Tribunal disfunctional. It is obvious that the SADC Summit was faced with recommendations that did not favour them and as such, opted to cripple the Tribunal. This in itself was a calculated move by the Summit that could have been avoided if the Tribunal enjoyed a measure of institutional independence.

The decision by the Summit is an indication of an absence of what is termed institutional independence, since the Tribunal itself can cease to exist as a result of a pronouncement made outside the scope of acceptable norms of separation of powers and judicial independence by the Summit. As it stands, the parties have approched the African Commission on Human and Peoples' Rights, contending that the decision to

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374 See The Zimbabwean, SADC law binding, 13 April 2011,http://www.thezimbabwean.co.uk/news/38881/sadc-law-binding.html (last accessed on 14 August 2013).

375 See SADC Lawyers Association, Statement by the SADC Lawyers Association following the decision of the SADC Extraordinary Summit to extend the suspension of the SADC Tribunal, 8 June 2011, http://www.swradioafrica.com/Documents/Statement%20on%20the%20continued%20suspension%20of%20the%20SADC%20Tribunal%5B1%5D.pdf (last accessed on 14 August 2013).

suspend the Tribunal violates the African Charter, the SADC Treaty and the International Covenant on Civil and Political Rights by;

a) infringing the right of access to court;
b) interfering with the independence, competence and institutional integrity of the SADC Tribunal;
c) terminating existing proceedings and vested remedies;
d) violating the rule of law; and
e) trespassing on the doctrine of separation of powers.[376]

The matter has been ruled admissible and is still to be be heard on its merits. According to *Dicey's* model of the rule of law, the rule of law is made up of three main principles: that the law is supreme and above the arbitrary exercise of power by government; the law must therefore give government any power that it exercises. Government can exercise no power without the law authorising it. For example: government can only arrest a person if there is a law that gives government the power to do so; Equality before the law; everyone, including the state, is bound by the same laws and subject to the jurisdiction of the same ordinary courts; and that fundamental protections are the result of the ordinary law of the land: Constitutional principles such as personal liberty and fundamental human rights were the product of the ordinary common law remedies created by the courts and not the product of the Constitution or the Bill of Rights.

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[376] Communication 409/12.

Therefore, even if there was no document called "the Constitution" (as in Britain) human rights protections are still found in the common law.[377]

In characterizing the rule of law doctrine, Plato wrote that:

> Where the law is subject to some other authority and has none of its own, the collapse of the state, is not far off; but if law is the master of the government and the government is its slave, then the situation is full of promise and men enjoy all the blessings that the gods shower on a state.[378]

Raz, in his works, defines the rule of law in an itemized outline of the concept, each item of which correlates to the law's co-ordinative function as follows:

a) All laws should be prospective, open and clear;
b) Laws should be relatively stable;
c) The making of particular laws should be guided by open, stable, clear and general rules;
d) The independence of the judiciary must be guaranteed;
e) The principles of natural justice must be observed;
f) The courts should have review powers over the implementation of the other principles;
g) The courts should be easily accessible; and
h) The discretion of crime preventing agencies should not be allowed to pervert the law.[379]

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377 Dicey, A.V., ***An Introduction to the Study of the Law of the Constitution***, 10th ed. London Stevens and Co. 1982.
378 Cooper, J *et al*, ***Complete Works by Plato***, page 1402, Hackett Publishing, 1997.
379 Raz, J., ***The Authority of Law, Essays on Law and Morality***, Oxford University Press, 1979.p 10-15.

The rule of law is the opposite of the rule of power/man. It stands for the supremacy of law over the supremacy of individual will. In *Affordable Medicines Trust and Others v Minister of Health and Another,* the Court opined that:

> Laws must be written in a clear and accessible manner. What is required is reasonable certainty and not perfect lucidity. The doctrine of vagueness does not require absolute certainty of laws. The law must indicate with reasonable certainty to those who are bound by it what is required of them so that they may regulate their conduct accordingly. The doctrine of vagueness must recognise the role of government to further legitimate social and economic objectives. And should not be used unduly to impede or prevent the furtherance of such objectives.[380]

At the very minimum, the rule of law incorporates the principle of legality. This requires that government's conduct must be "empowered" by a law. In *Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Council* it was interpreted to mean the following:

a) Government must act within the boundaries of what the law empowers it to do. The law is therefore an "empowering provision". Government cannot do anything act outside the empowering provision.

a) There are no extra (outside) legal powers that the government may exercise. Any power of the government must derive from some other law. This may either be from the constitution or from another source of law, such as the common law. If the law does not empower government to exercise some power, then the exercise of that power will be invalid.[381]

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[380] 2005 (6) BCLR 529 (CC) at para 108.
[381] 1998 (2) SA 374 (CC).

The Rule of Law includes the notion that no one is above the law. In *Lesapo v North West Agricultural Bank,*[382] the Court held that:

> The relevant section of the Act in question allowed the bank to bypass the courts and that using courts to resolve issues is very important in a constitutional democracy. A section of the North West Agricultural Bank Act 14 of 1981 (the Act) allowed the bank, without having to seek an order or judgment from a court, to require a messenger of court to sell the property of a debtor by public auction. This was a fundamental violation of the rule of law and placed state officials implementing these provisions above the law. It is important that the role of the courts as adjudicators of dispute be preserved. Ensuring that executive, public and private action can be tested in a court of law assists in maintaining a society that is governed by law.

In *Justice Alliance of South Africa and Others v President of Republic of South Africa and Others, Freedom Under Law v President of Republic of South Africa and Others,*[383] the Court declared Section 8(a) of the Judges' Remuneration and Conditions of Employment Act[384] in terms of which the President of the Republic of South Africa, Jacob Zuma requested the Chief Justice of South Africa, Justice Ngcobo, to continue performing active service as Chief Justice unconstitutional. The Court found that the section allowed the president to "usurp" the power of Parliament and held that Parliament alone had the power to extend a Constitutional Court judge's term of office. The Court went further to opine that:

> It was not merely a procedural matter. The temporary absence of a Chief Justice was something that had happened in the past and any deleterious effect could be overcome in time. Nothing prevented the incumbent Chief Justice from assisting his successor in overcoming these problems. The Chief Justice had

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382 2000 (1) SA 409 (CC).
383 2011 (5) SA 388 (CC).
384 Act 47 of 2001.

> no right to an extended term of office and could not have expected to hold tenure under an unlawful legislative provision and executive decision. To suspend invalidity would undermine the [rule of law] and independence of the judiciary.

The principles of the rule of law, the separation of powers and judicial independence, underscored by international law, are indispensable cornerstones of constitutional democracy.[385] These principles are also encapsulated in the Basic Principles on the Independence of the Judiciary,[386] and the Code of Minimum Standards of Judicial Independence.[387]

The transition from *SADCC* to *SADC* indicated that the SADC institutions, as outlined in the previous Chapter, would collectively amalgamate and form a regional government; therefore the SADC institutions have assumed the role of a government, the Summit representing the Executive, the Tribunal assuming the roles and functions of the Judiciary and the Council of Ministers as well as the SADC Parliamentary forum as the Legislature. The principles of the integration agenda as outlined in Article 4 (c) are aimed at achieving, *inter alia,* human rights, democracy and the *rule of law*.

It is submitted that the absence of the rule of law within the SADC arena has a negative impact on the attainment of socio-economic development. This research will illustrate in the chapters to follow that there is a relationship between development and the presence of democracy, peace and stability.

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385 at paragraph 40.

386 Adopted by the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders held at Milan from 26 August to 6 September 1985 and endorsed by General Assembly resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985.

387 Adopted in New Delhi, India, 1982.

3.3 The Arab Maghreb Union

The 1964 Conference of the Maghreb Economic Ministers in Tunis established the Conseil Permanent Consultatif du Maghreb (CPCM) between Algeria, Libya, Morocco, and Tunisia, to coordinate and harmonize the development plans of the four countries as well as inter regional trade and relations with the European Union. However, for a number of reasons, the plans were never realized. It was not until the late 1980s that new impetus began to bring the parties together again. The first Maghreb Summit of Heads of State, held at Zeralda (Algeria) in June 1988, resulted in a decision to set up the Maghreb High Commission and various specialized commissions.[388] On February 17, 1989 in Marrakech, the Treaty establishing the AMU was signed by the Heads of State of the five countries including Mauritania. The AMU is currently dormant, but attempts are under way to revive it.[389]

The Treaty establishing the AMU indicates that the Union aims at;

a) Strengthening the ties of brotherhood which link the member states and their peoples to one another;
b) Achieving progress and prosperity of their societies and defending their rights;
c) Contributing to the preservation of peace based on justice and equity;
d) Pursuing a common policy in different domains; and
e) Working gradually towards achieving free movement of persons and transfer of services, goods and capital among them.

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388 See United Nations Economic Commission for Africa (UNECA), "Arab Maghreb Union" Available from http://www.uneca.org/oria/pages/uma-arab-maghreb-union-0. (Accessed 2013-10-24).

389 See "Arab Maghreb Union", Available from http://www.maghrebarabe.org(Accessed 2013-10-24).

3.3.1 Functioning of the AMU

The supreme institutional organ that has the authority to make decisions is the Presidential Council consisting of Heads of State; its decisions require unanimity.[390] According to the Treaty, the Council was to meet twice a year, to take decisions concerning regional issues. A Council of Foreign Affairs Ministers is required to meet regularly to prepare for the sessions of the Presidential Council of Heads of State and to examine proposals formulated by subordinate committees and four specialized ministerial commissions.[391]

The Union has a General Secretariat composed of one representative for each Member State. The General Secretariat exercises its functions in the country presiding over the session of the Presidential Council under the supervision of the Chairperson of the session whose country shall cover the expenses involved.[392] A Consultative Council, consisting of 10 representatives from each Member State advises the Presidential Council of Heads of State. The treaty specifies that the Consultative Council shall hold ordinary sessions every year as well as extraordinary sessions at the request of the Presidential Council. The Consultative Council advises on all draft decisions handed over to it by the Presidential Council, as it may submit to the Presidential Council any recommendations it might consider likely to strengthen the action of the Union and achieve its goals.[393]

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390 Treaty Establishing the AMU, *op-cit* note 287, Art 5-7.
391 Treaty Establishing the AMU, *op-cit* note 287, Art 8.
392 Treaty Establishing the AMU, *op-cit* note 287, Art 11.
393 Treaty Establishing the AMU, *op-cit* note 287, Art 12.

The Union also has a Judicial Organ, composed of two judges for each State to be appointed by the State concerned for a six-year period, and renewed by half every three years. The organ shall specialize in examining conflicts related to the interpretation and implementation of the Treaty and the agreements concluded within the framework of the Union and submitted by the Presidential Council or any of the States parties to the conflict or as provided for by the Statutes of the Judicial Organ, the verdicts of which shall be binding and final.[394]

The treaty requires member states to observe that any aggression directed against one of the member states is considered as an aggression against the other member states. Member states pledge not to permit on their territory any activity or organization liable to threaten the security, the territorial integrity or the political system of any of them. They also pledge to abstain from joining any alliance or military or political bloc directed against the political independence or territorial integrity of the other member states. Member states are free to conclude any agreements between them or with other States or groups provided these agreements do not run counter to the provisions of the AMU Treaty.[395]

3.4 Community of Sahel-Saharan States

The Community of Sahel-Saharan States (CEN-SAD) is a framework for Integration and Complementarity. CEN-SAD was established on 4th February 1998 following the Conference of Leaders and Heads of State held in Tripoli. The General Secretariat is

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394 Treaty Establishing the AMU, *op-cit* note 287, Art 13.
395 Treaty Establishing the AMU, *op-cit* note 287, Art 14-17.

based in Tripoli and its operations entirely supported by Libya.[396] Its institutional organs include the Conference of the Heads of States and Government; the Executive Council; the General Secretariat; the Development Bank; and the Economic, Social and Cultural Council.[397]

The civil uprisings that occurred in Libya and other Arabic states have severely destabilized the operations of the Community. In fact, since the Libyan conflict in 2011, the Community held its first Conference only in February 2013.[398]

3.5 Common Market for Eastern and Southern Africa

Formed in 1994, COMESA is the successor to the Preferential Trade Area (PTA) for Eastern and Southern Africa established in 1981.[399] The establishment of COMESA was a fulfilment of the requirements of the PTA Treaty, which provided for the transformation of the PTA into a common market ten years after the entry into force of the PTA Treaty. The principles underpinning the activities of COMESA are as follows;

a) equality and inter-dependence of the Member States;

b) solidarity and collective self-reliance among the Member States;

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396 See Center for Strategy and Security in the Sahel Sahara, "Revitalizing the CEN SAD"Available from http://www.centre4s.org/en/index.php?view=articleandcatid=39%3Aarticleandid=96%3Arevitalizing-the-cen-sadandoption=com_content.(Accessed 2013-10-24).

397 See http://www.au.int/en/recs/censad. (Accessed 2013-10-24).

398 Zeidan in Chad for Sahel security summit http://www.libyaherald.com/2013/02/15/zeidan-in-chad-for-sahel-security-summit/#axzz2ITAOvSJU.(Accessed 2014-03-18)

399 The decision of the Authority of the Preferential Trade Area for Eastern and Southern African States taken at its Tenth Meeting held in Lusaka, Zambia from 30 - 31 January, 1992 resolved to transform the Preferential Trade Area for Eastern and Southern African States into a Common Market for Eastern and Southern Africa.

c) inter-State co-operation, harmonisation of policies and integration of programmes among the Member States;

d) non-aggression between the Member States;

e) recognition, promotion and protection of human and peoples' rights in accordance with the provisions of the African Charter on Human and Peoples' Rights;

f) accountability, economic justice and popular participation in development;

g) the recognition and observance of the rule of law;

h) the promotion and sustenance of a democratic system of governance in each Member State;

i) the maintenance of regional peace and stability through the promotion and strengthening of good neighbourliness; and

j) the peaceful settlement of disputes among the Member States, the active cooperation between neighbouring countries and the promotion of a peaceful environment as a pre-requisite for their economic development.

The treaty enjoins on member states to make every effort to plan and direct their development policies with a view to creating conditions favourable for the achievement of the aims of the Common Market and the implementation of the provisions of the Treaty and further requires them to abstain from any measures likely to jeopardize the achievement of the aims of the Common Market or the implementation of the provisions of the Treaty.[400]

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[400] Treaty of the COMESA, *op-cit* note 287, Art 55.

The obligation not to jeopardise the advancement of COMESA was argued well in the case of *Chloride Batteries Limited v Viscocity and Others*[401] before the High Court of Malawi. The Court had to adjudicate on a matter in which an order sought by the plaintiff was against the defendants to be restrained permanently from further dealing in Exide batteries. The plaintiff had entered into an agreement with Chloride CA, the proprietors of the said trade mark to distribute the batteries but later discovered that the defendants were also distributing and selling counterfeit batteries under the same trade mark. In their arguments, the plaintiff successfully contended that the acts of the defendant were in breach of Article 35 of the COMESA Treaty which required to members to refrain from acts that negates the objective of free and liberalised trade.[402]

The Treaty establishes that COMESA aims to;

a) attain sustainable growth and development of the Member States by promoting a more balanced and harmonious development of its production and marketing structures;
b) promote joint development in all fields of economic activity and the joint adoption of macro-economic policies and programmes to raise the standard of living of its peoples and to foster closer relations among its Member States;
c) co-operate in the creation of an enabling environment for foreign, cross border and domestic investment including the joint promotion of research and adaptation of science and technology for development;

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401 Civil Cause No 1896 of 2006.
402 Civil Cause, *Ibid* note 401.

d) co-operate in the promotion of peace, security and stability among the Member States in order to enhance economic development in the region;

e) co-operate in strengthening the relations between the Common Market and the rest of the world and the adoption of common positions in international fora; and

f) contribute towards the establishment, progress and the realisation of the objectives of the African Economic Community.[403]

3.5.1 Functioning of COMESA

Article 7 of the Treaty provides that COMESA shall be steered by the following organs:

a) the Authority;

b) the Council;

c) the Court of Justice;

d) the Committee of Governors of Central Banks;

e) the Intergovernmental Committee;

f) the Technical Committees;

g) the Secretariat; and

h) the Consultative Committee.

The Authority is the supreme policy organ of the Common Market and is responsible for the general policy and direction and control of the performance of the executive functions of the Common Market.[404] Article 8(3) provides that the directions and

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403 Treaty of the COMESA, *op-cit* note 287, Art 3.
404 Treaty of the COMESA, *op-cit* note 287, Art 8(2).

decisions of the Authority are binding on the Member States and on all other organs of the Common Market other than the Court in the exercise of its jurisdiction. The exclusion of the Court is an important aspect of judicial independence and will be later canvassed in detail in contrast to the developments in the Southern African Development Community.

The Council of Ministers consists of Ministers designated by each Member State. The Council executes the following;

a) monitor and keeps under constant review and ensures the proper functioning and development of the Common Market in accordance with the provisions of the Treaty;
b) makes recommendations to the Authority on matters of policy aimed at the efficient and harmonious functioning and development of the Common Market;
c) gives directions to all other subordinate organs of the Common Market other than the Court in the exercise of its jurisdiction;
d) makes regulations, issue directives, take decisions, make recommendations and give opinions in accordance with the provisions of this Treaty;
e) requests advisory opinions from the Court in accordance with the provisions of this Treaty;
f) considers and approves the budgets of the Secretariat and the Court; and
g) considers what measures should be taken by Member States in order to promote the attainment of the aims of the Common Market.[405]

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[405] Treaty of the COMESA, *op-cit* note 287, Art 9(2).

3.5.2 The Court of Justice of the COMESA

The COMESA Court of Justice is established under Article 7 of the Treaty and it is responsible for ensuring adherence to law through interpretation and application of COMESA Treaty Law.[406] The Court is composed of seven Judges who are appointed by the Authority.[407] The Court has jurisdiction over matters referred to it in the following instances;

a) when a Member State which considers that another Member State or the Council has failed to fulfil an obligation under the Treaty or has infringed a provision of the Treaty;[408]
b) where the Secretary-General considers that a Member State has failed to fulfil an obligation under the Treaty;[409]
c) any person who is resident in a Member State may refer for determination by the Court the legality of any act, regulation, directive, or decision of the Council or of a Member State on the grounds that such act, directive, decision or regulation is unlawful or an infringement of the provisions of the Treaty;[410] and
d) when disputes arise between the Common Market and its employees[411]

The Court further has jurisdiction to hear and determine any matter arising from an arbitration clause contained in a contract which confers such jurisdiction to which the

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406 Treaty of the COMESA, *op-cit* note 287, Art 19.
407 as above, See Art 20. Art 20(2) provides that the Judges of the Court shall be chosen from among persons of impartiality and independence who fulfill the conditions required for the holding of high judicial office in their respective countries of domicile or who are jurists of recognized competence.
408 Treaty of the COMESA, *op-cit* note 287, Art 24.
409 Treaty of the COMESA, *op-cit* note 287, Art 25.
410 Treaty of the COMESA, *op-cit* note 287, Art 26.
411 Treaty of the COMESA, *op-cit* note 287, Art 27.

Common Market or any of its institutions is a party and matters arising from a dispute between the Member States regarding the Treaty if the dispute is submitted to it under a special agreement between the Member States concerned.[412] Member states or parties before the Court are expected to take, without delay, the measures required to implement a judgment of the Court. The Court may further prescribe such sanctions as it shall consider necessary to be imposed against a party who defaults in implementing the decisions of the Court.[413]

3.6 The East African Community

The East African Community (EAC) is the regional inter-governmental organisation of the Republics of Burundi, Kenya, Rwanda, Uganda and the United Republic of Tanzania.[414] The headquarters of the EAC are located in Arusha, Tanzania.[415] The Treaty for the Establishment of the East African Community was signed on 30th November 1999 and entered into force on 7th July 2000, following its ratification by the three original partner states, Kenya, Uganda and Tanzania. The Republic of Burundi and the Republic of Rwanda acceded to this EAC Treaty on 18th June 2007 and became full members of the Community with effect from 1st July 2007.[416]

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412 Treaty Establishing the EAC, *op-cit* note 287, Art 28.
413 Treaty Establishing the EAC, *op-cit* note 287, Art 34.
414 Note that an earlier version of the EAC collapsed in 1977. The actual collapse of the old EAC was occasioned by different levels of economic development, which meant Kenya taking a lion's share of the EAC benefits, with the rest of the Partner States only importing from Kenya. See http://www.monitor.co.ug/OpEd/Letters/Why-the-first-EA-Community-collapsed-/-/806314/1653726/-/oipj5n/-/index.html
415 Treaty Establishing the EAC, *op-cit* note 287.
416 Treaty Establishing the EAC, *op-cit* note 287.

The fundamental principles that underpin the establishment and activities of the EAC are as follows;

a) mutual trust, political will and sovereign equality;
b) peaceful co-existence and good neighbourliness;
c) peaceful settlement of disputes;
d) good governance including adherence to the principles of democracy, the rule of law, accountability, transparency, social justice, equal opportunities, gender equality, as well as the recognition, promotion and protection of human and people's rights in accordance with the provisions of the African Charter on Human and Peoples' Rights;
e) equitable distribution of benefits;
f) co-operation for mutual benefit;
g) people-centred and market-driven co-operation;
h) the provision by the Partner States of an adequate and appropriate enabling environment, such as conducive policies and basic infrastructure;
i) the establishment of an export oriented economy for the Partner States in which there shall be free movement of goods, persons, labour, services, capital, information and technology;
j) the principle of subsidiarity with emphasis on multi-level participation and the involvement of a wide range of stake- holders in the process of integration;
k) the principle of variable geometry which allows for progression in cooperation among groups within the Community for wider integration schemes in various fields and at different speeds;

l) the equitable distribution of benefits accruing or to be derived from the operations of the Community and measures to address economic imbalances that may arise from such operations;

m) the principle of complementarity; and

n) the principle of asymmetry.[417]

In accordance with Article 5(3) of the Treaty, the EAC aims to ensure;

a) the attainment of sustainable growth and development of the Partner States by the promotion of a more balanced and harmonious development of the Partner States;

b) the strengthening and consolidation of co-operation in agreed fields that would lead to equitable economic development within the Partner States and which would in turn, raise the standard of living and improve the quality of life of their populations;

c) the promotion of sustainable utilisation of the natural resources of the Partner States and the taking of measures that would effectively protect the natural environment of the Partner States;

d) the strengthening and consolidation of the long standing political, economic, social, cultural and traditional ties and associations between the peoples of the Partner States so as to promote a people-centred mutual development of these ties and associations;

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[417] Treaty Establishing the EAC, *Ibid* note 287, Art 6.

e) the mainstreaming of gender in all its endeavours and the enhancement of the role of women in cultural, social, political, economic and technological development;

f) the promotion of peace, security, and stability within, and good neighbourliness among, the Partner States;

g) the enhancement and strengthening of partnerships with the private sector and civil society in order to achieve sustainable socio-economic and political development; and

h) the undertaking of such other activities calculated to further the objectives of the Community, as the Partner States may from time to time decide to undertake in common.[418]

Article 9 of the Treaty establishes the following organs as constitution the bedrock of the EAC architecture;

a) the Summit;

b) the Council;

c) the Co-ordination Committee;

d) the Sectoral Committees;

e) the East African Court of Justice;

f) the East African Legislative Assembly; and

g) the Secretariat.[419]

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[418] Treaty Establishing the EAC, *op-cit* note 287, Art 5(3).
[419] Treaty Establishing the EAC, *op-cit* note 287, Art 9(1)(a)-(h).

The Summit consists of the Heads of State or Government of the Partner States and is tasked with giving general directions as to the development and achievement of the objectives of the Community. The Summit also reviews the state of peace, security and good governance within the Community and the progress achieved towards the establishment of a Political Federation of the Partner States.[420]

The Council of the EAC consists of the Ministers responsible for regional cooperation of each Partner State Article 14 of the Treaty specifies that the Council shall;

a) make policy decisions for the efficient and harmonious functioning and development of the Community;
b) initiate and submit Bills to the Assembly;
c) subject to the Treaty, give directions to the Partner States and to all other organs and institutions of the Community other than the Summit, Court and the Assembly;
d) make regulations, issue directives, take decisions, make recommendations and give opinions in accordance with the provisions of the Treaty;
e) consider the budget of the Community;
f) consider measures that should be taken by Partner States in order to promote the attainment of the objectives of the Community;
g) make staff rules and regulations and financial rules and regulations of the Community;
h) submit annual progress reports to the Summit and prepare the agenda for the meetings of the Summit;

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[420] Treaty Establishing the EAC, *op-cit* note 287, Art 10-11.

i) establish from among its members, Sectoral Councils to deal with such matters that arise under the Treaty as the Council may delegate or assign to them and the decisions of such Sectoral Councils shall be deemed to be decisions of the Council;

j) establish the Sectoral Committees provided for under the Treaty;

k) implement the decisions and directives of the Summit as may be addressed to it;

l) endeavour to resolve matters that may be referred to it; and

m) exercise such other powers and perform such other functions as are vested in or request advisory opinions from the Court.[421]

The East African Legislative Assembly is currently composed of fifty two members,[422] with nine Elected Members from each of the five EAC Partner States and seven Ex-officio Members.[423] The assembly is responsible for;

a) liaising with the National Assemblies of the Partner States on matters relating to the Community;

b) debating and approving the budget of the Community;

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421 Treaty Establishing the EAC, *op-cit* note 287, Art 14(4).

422 See East African Legislative Assembly EALA, "Composition of the EALA" Available from http://www.eala.org/the-assembly/composition.html. (Accessed 2013-10-24).

423 Treaty Establishing the EAC, *Ibid* note 287, Art 50 (1) provides that The National Assembly of each Partner State shall elect, not from among its members, nine members of the Assembly, who shall represent as much as it is feasible, the various political parties represented in the National Assembly, shades of opinion, gender and other special interest groups in that Partner State, in accordance with such procedure as the National Assembly of each Partner state may determine. Art 50 (2)provides that A person shall be qualified to be elected a member of the Assembly by the National Assembly of a Partner State in accordance with paragraph 1 of this Article if such a person: (a) is a citizen of that Partner State; (b) is qualified to be elected a member of the National Assembly of that Partner State under its Constitution; (c) is not holding office as a Minister in that Partner State; (d) is not an officer in the service of the Community; and (e) has proven experience or interest in consolidating and furthering the aims and the objectives of the Community. See also Art 48.

c) considering the annual reports on the activities of the Community, annual audit reports of the Audit Commission and any other reports referred to it by the Council;

d) discussing all matters pertaining to the Community and making recommendations to the Council as it may deem necessary for the implementation of the Treaty;

e) establishing any committee or committees for such purposes as it deems necessary;

f) recommending to the Council the appointment of the Clerk and other officers of the Assembly; and

g) making its rules of procedure and those of its committees.[424]

3.6.1 The East African Court of Justice

Judges of the Court are appointed by the Summit from among persons recommended by the Partner States who are of proven integrity, impartiality and independence and who fulfil the conditions required in their own countries for the holding of such high judicial office, or who are jurists of recognised competence, in their respective Partner States.[425] The jurisdiction of the Court extends to the interpretation and application of the EAC Treaty.[426] The architecture of the Treaty also makes it possible for Partner States, the Secretary General, legal and natural persons and employees of the EAC to

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424 Treaty Establishing the EAC, *op-cit* note 287, Art 49(2)(a)-(g).
425 Treaty Establishing the EAC, *op-cit* note 287, Art 24(1).
426 Treaty Establishing the EAC, *op-cit* note 287,Art 23.

bring cases to the Court.[427] Similar to the text of the COMESA Court of Justice, member states are required to take, without delay, the measures required to implement a judgment of the Court.[428]

The EAC Court of Justice has been very instrumental in passing a judgement that settled that argument about the position of EAC Treaty law *vis-a-vis* domestic law. In *Peter Anyang' Nyongo and Others v The Attorney General of the Republic of Kenya and Others*,[429] it was held that the rules invoked by the Kenya National Assembly for purposes of electing members to the East African Legislative Assembly, which did not allow election directly by citizens or residents of Kenya or their elected representatives was null and void and further contrary to the provisions of the EAC Treaty which required that such elected members shall not be members of the Kenyan Legislature but shall represent as much as it is feasible, the various political parties represented in the National Assembly. In finding in favour of the Applicants, the Court emphasised that domestic law shall be subordinate to the EAC Treaty and that;

> ..while the Treaty upholds the principle of sovereign equality, it must be acknowledged that by the very nature of the objectives they set out to achieve, each Partner State is expected to cede

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427 See Treaty Establishing the EAC, *op-cit* note 287, Art 28-31. Also note that under Art 36(1) The Summit, the Council or a Partner State may request the Court to give an advisory opinion regarding a question of law arising from this Treaty which affects the Community, and the Partner State, the Secretary General or any other Partner State shall in the case of every such request have the right to be represented and take part in the proceedings.

428 Treaty Establishing the EAC, *op-cit* note 287, Art 38. See also Art 44 which provides that the execution of a judgment of the Court which imposes a pecuniary obligation on a person shall be governed by the rules of civil procedure in force in the Partner State in which execution is to take place. The order for execution shall be appended to the judgment of the Court which shall require only the verification of the authenticity of the judgment by the Registrar whereupon, the party in whose favor execution is to take place, may proceed to execute the judgment.

429 EACJ Reference No. 1 of 2006

some amount of sovereignty to the Community and its organs albeit in limited areas to enable them play their role.[430]

3.7 The Economic Community of West African States

The Economic Community of West African States (ECOWAS) is a regional group of fifteen countries, founded in 1975.[431] The idea for a West African community dates back to the late President William Tubman of Liberia, who made the call in 1964. An initial agreement was signed between Côte d'Ivoire, Guinea, Liberia and Sierra Leone in February 1965. Subsequently in April 1972, General Gowon of Nigeria and General Eyadema of Togo re-launched the idea, drew up proposals and toured 12 countries, soliciting their plan from July to August 1973. A meeting was then called at Lomé from 10-15 December 1973 to study a draft treaty. This was further examined at a meeting of experts and jurists in Accra in January 1974 and by a ministerial meeting in Monrovia in January 1975. Finally, 15 West African countries signed the treaty for an Economic Community of West African States (Treaty of Lagos) on 28 May 1975. The protocols launching ECOWAS were signed in Lomé, Togo on 5 November 1976.[432]

In July 1993, a revised ECOWAS Treaty designed to accelerate economic integration and to increase political co-operation, was signed.[433] Article 3 of the 1993 Treaty specifies the following objectives as cardinal to the activities of the ECOWAS;

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430 *Peter Anyang' Nyongo and Others v The Attorney General of the Republic of Kenya, op-cit* note 422, p 44.

431 ECOWAS, "Discover ECOWAS" Available from http://www.comm.ecowas.int/sec/index.php?id=about_aandlang=en.(Accessed 2013-10-24).

432 See http://www.comm.ecowas.int/sec/en/pps/ecowas.pps. (Accessed 2013-10-24).

433 Treaty of ECOWAS, *Ibid* note 287.

a) the harmonisation and co-ordination of national policies and the promotion of integration programmes, projects and activities, particularly in food, agriculture and natural resources, industry, transport and communications, energy, trade, money and finance, taxation, economic reform policies, human resources, education, information, culture, science, technology, services, health, tourism, legal matters;

b) the harmonisation and co-ordination of policies for the protection of the environment;

c) the promotion of the establishment of joint production enterprises;

d) the establishment of a common market through:

   i. the liberalisation of trade and the adoption of a common external tariff as well as the removal, between Member States, of obstacles to the free movement of persons, goods, service and capital, and to the right of residence and establishment;

   ii. the establishment of an economic union through the adoption of common policies in the economic, financial social and cultural sectors, and the creation of a monetary union;

   iii. the promotion of joint ventures by private sectors, enterprises and other economic operators, in particular through the adoption of a regional agreement on cross-border investments; and

   iv. the adoption of measures for the integration of the private sectors, particularly the creation of an enabling environment to promote small and medium scale enterprises;

e) the establishment of an enabling legal environment;

f) the harmonisation of national investment codes leading to the adoption of a single Community Investment Code;

g) the harmonisation of standards and measures;

h) the promotion of balanced development of the region, paying attention to the special problems of each Member State particularly those of landlocked and small island Member States;

i) the encouragement and strengthening of relations and the promotion of the flow of information particularly among rural populations, women and youth organisations and socio-professional organisations such as associations of the media, business men and women, workers, and trade unions;

j) the adoption of a Community population policy which takes into account the need for a balance between demographic factors and socio-economic development; and

k) the establishment of a fund for co-operation, compensation and development.[434]

The treaty subscribes to the following principles;

a) equality and inter-dependence of Member States;

b) solidarity and collective self-reliance;

c) inter-State co-operation, harmonisation of policies and integration of programmes;

d) non-aggression between Member States;

e) maintenance of regional peace, stability and security through the promotion and strengthening of good neighbourliness;

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[434] Treaty of ECOWAS, *Ibid* note 287, Art 3.

f) peaceful settlement of disputes among Member States, active Co-operation between neighbouring countries and promotion of a peaceful environment as a prerequisite for economic development;

g) recognition, promotion and protection of human and peoples' rights in accordance with the provisions of the African Charter on Human and Peoples' Rights;

h) accountability, economic and social justice and popular participation in development;

i) recognition and observance of the rules and principles of the Community;

j) promotion and consolidation of a democratic system of governance in each Member State as envisaged by the Declaration of Political Principles adopted in Abuja on 6 July, 1991; and

k) equitable and just distribution of the costs and benefits of economic co-operation and integration.[435]

The Treaty establishes the following organs of the Community;

a) the Authority of Heads of State and Government;

b) the Council of Ministers;

c) the Community Parliament;

d) the Economic and Social Council;

e) the Community Court of Justice;

f) the Executive Secretariat;

g) the Fund for Co-operation, Compensation and Development; and

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[435] Treaty of ECOWAS, *op-cit* note 287, Art 4.

h) the Specialised Technical Commissions.[436]

The functioning and architecture of the organs of the Community is very similar if not a replica of the organs of the EAC and thus will not be re-canvassed in this work.

3.8 The Economic Community of Central African States

At a summit meeting in December 1981, the leaders of the Central African Customs and Economic Union (UDEAC) agreed in principle to form a wider economic community of Central African states. The Economic Community of Central African States (ECCAS) was established on 18 October 1983 by the UDEAC members and the members of the Economic Community of the Great Lakes States (CEPGL) (ECCAS began functioning in 1985, but was inactive for several years because of financial difficulties relating to non-payment of membership fees. The conflict in the Great Lakes area as well as the war in the Democratic Republic of Congo was particularly divisive, as Rwanda and Angola fought on opposing sides. These conflicts also contributed immensely to the regression that the ECCAS suffered.

The Treaty establishing the ECAAS specifies that the Community aims towards;

a) the elimination between Member States of customs duties and any other charges having an equivalent effect levied on imports and exports;
b) the abolition between Member States of quantitative restrictions and other trade barriers;
c) the establishment and maintenance of an external common customs tariff;

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[436] Treaty of ECOWAS, *op-cit* note 287, Art 6.

d) the establishment of a trade policy vis-à-vis third States;

e) the progressive abolition between Member States of obstacles to the free movement of persons, goods, services and capital and to the right of establishment;

f) the harmonization of national policies in order to promote Community activities, particularly in industry, transport and communications, energy, agriculture, natural resources, trade, currency and finance, human resources, tourism, education, culture, science and technology;

g) the establishment of a Cooperation and Development Fund; and

h) the rapid development of States which are landlocked, semi-landlocked, island or part-island and/or belong to the category of the least advanced countries.[437]

Article 7 of the Treaty establishes the organs of the Community and once more, they are a replica of those of the ECOWAS and EAC with similar functions and competences.[438]

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437 Treaty of ECCAS, *op-cit* note 287, Art 4(2)(a)-(i). Art 4(1) also provides that It shall be the aim of the Community to promote and strengthen harmonious cooperation and balanced and self-sustained development in all fields of economic and social activity, particularly in the fields of industry, transport and communications, energy agriculture, natural resources, trade, customs, monetary and financial matters, human resources, tourism, education, further training, culture, science and technology and the movement of persons, in order to achieve collective self-reliance, raise the standard of living of its peoples, increase and maintain economic stability, foster close and peaceful relations between Member States and contribute to the progress and development of the African continent.

438 Agreement Est. the IGAD, *op-cit* note 287, Art 7 provides that the organs of the Community shall be; The Conference of Heads of State and Government; The Council of Ministers; The Court of Justice; The General Secretariat; The Consultative Commission.

3.9 The Inter-Governmental Authority on Development

The Intergovernmental Authority on Drought and Development (IGADD) was formed in 1986 with a very narrow mandate on issues of drought and desertification. In the 1990s, IGADD became the accepted vehicle for regional security and political dialogue. The IGADD Heads of State and Government met on 18 April 1995 at an Extraordinary Summit in Addis Ababa and resolved to revitalize it into a fully-fledged regional political, economic, development, trade and security entity similar to SADC and ECOWAS. It was envisaged that the new IGADD would form the northern sector of COMESA with SADC representing the southern sector. One of the principal motivations for the revitalization of IGADD was the existence of many organizational and structural problems that made the implementation of its goals and principles ineffective. On 21 March 1996, the Heads of State and Government at the Second Extraordinary Summit in Nairobi approved and adopted an Agreement Establishing the Intergovernmental Authority on Development (IGAD).[439]

The Member States of IGAD are committed to the following principles:

a) the sovereign equality of all Member States;
b) non-interference in the internal affairs of Member States;
c) the peaceful settlement of inter- and intra-State conflicts through dialogue;
d) maintenance of regional peace, stability and security;
e) mutual and equitable sharing of benefits accruing from cooperation under the IGAD Agreement;

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[439] See Agreement Est. the IGAD, *op-cit* note 287.

f) recognition, promotion and protection of human and people's rights in accordance with the provisions of the African Charter on Human and People's Rights.[440]

The aims and objectives of IGAD as outlined in the Treaty indicate that the IGAD aims to;

a) promote joint development strategies and gradually harmonize macro-economic policies and programmes in the social, technological and scientific fields;
b) harmonize policies with regard to trade, customs, transport, communications, agriculture, and natural resources, and promote free movement of goods, services, and people and the establishment of residence;
c) create an enabling environment for foreign, cross-border and domestic trade and investment;
d) achieve regional food security and encourage and assist efforts of Member States to collectively combat drought and other natural and man-made disasters and their consequences;
e) initiate and promote programmes and projects for sustainable development of natural resources and environment protection;
f) develop and improve a coordinated and complementary infrastructure, particularly in the areas of transport and energy;
g) promote peace and stability in the sub-region and create mechanisms within the sub-region for the prevention, management and resolution of inter and intra-State conflicts through dialogue;

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[440] Agreement Est. the IGAD, *op-cit* note 287, Art 6.

h) mobilize resources for the implementation of emergency, short-term, medium-term and long-term programmes within the framework of sub-regional cooperation;

i) promote and realize the objectives of the Common Market for Eastern and Southern Africa (COMESA) and the African Economic Community;

j) facilitate, promote and strengthen cooperation in research, development and application in the fields of science and technology.

k) develop such other activities as the Member States may decide in furtherance of the objectives of this Agreement

Article 8 of the Treaty establishes the organs of the Community and once more, they are a replica of those of the ECOWAS and EAC with similar functions and competences.[441]

3.10 Summary

This Chapter has defined the role that each regional organisation plays within its geographic area. It has shown how the founding documents of the organisation are all aimed at achieving similar objectives encompassing the political and economic integration of its member states. In addition to examining the economic aspects of African integration arrangements, it has also discussed pivotal judgments that have been issued by the judicial organs or domestic courts within member states and

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[441] Agreement Est. the IGAD, *Ibid* note 287., Art 8 provides that the organs of the Community shall be; An Assembly of Heads of State and Government; A Council of Ministers; A Committee of Ambassadors; and A Secretariat.

judgements which have an impact on the attainment of integration objectives. Having focused on sub-continental arrangements in this Chapter, the next Chapter will discuss political integration at continental level

CHAPTER 4 AFRICAN INTEGRATION: THE POLITICAL PERSPECTIVE

4.1 Introduction

The previous Chapter elucidated the regional arrangements that constitute Africa's grand plan towards political and economic integration. It did so by discussing and examining the economic groupings of Africa and unpacking the founding documents of each integration arrangement. This Chapter blends both theory and processes of the African Union and critiques the effectiveness of the current political integration architecture of the African Union. It achieves this through identifying key aspects of political integration and evaluating them against the stated objectives of the political integration.

4.2 Political Integration

The foundation laid down by this work thus far has illuminated certain key aspects on Africa's integration path. These aspects are the;

- creation of the OAU in 1963;
- adoption of the Lagos Plan of Action and the Final Act of Lagos in 1980;
- signing of the Abuja Treaty in 1991;
- signing of the Sirte Declaration of 1999 and the adoption of the Constitutive Act of 2000 and,
- launching of the NEPAD in 2001.

Each of these aspects has had an immense impact on the political and economic integration of the continent. Political integration relates to the manner in which decisions are executed and enforced. It is well intertwined with rules of public international law since the capacities and jurisdictions of international organisations are defined within this realm. Economic integration on the other hand is focused on trade related aspects of continental development. It involves debates that surround policy decisions by governments intended to reduce or remove barriers to the mutual exchange of goods, services, capital and people. The focus of this Chapter is on political integration.

It is without doubt that the success of the AU depends on the efficiency of the organs outlined in the previous Chapter as well as the due co-operation of its member states. It is further submitted that the pre-requisites for successful political integration in Africa cannot be contained in one conclusive document as different challenges and circumstances may require a different set of solutions and mechanisms. It is however acknowledged that the Minimum Integration Programme[442]as discussed in the previous Chapter serves as a bedrock for the arguments that will follow in this Chapter.

4.3 Political Aspects in the Minimum Integration Programme

In order to clearly articulate the characteristics of political integration in Africa, it is convenient to separate the sectors and sub-sectors which fall within the politico-legal class from the economic/trade class. The following table presents only the politico-legal sectors of the Minimum Integration Programme.

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[442] MIP, *op-cit* note 280.

Table 10: Politico-legal Sectors of the Minimum Integration Programme

Priority Sectors	Sub-sectors	Objectives	Projects, activities and programmes
Peace and Security	All the sub-sectors	Conflict prevention and resolution and post conflict development in Africa	• Establishing and operationalizing an early warning system for conflicts and surveillance units for observation and monitoring; • Establishing and operationalizing an African standby force and regional brigades; • Implementing the African Union Border Programme; and • Promotion of pre-emptive diplomacy in conflict resolution.
Political affairs	Elections and promotion of democratic institutions	Promote democratic elections and changeover of political power	• Ratification and implementation of the African Charter on Democracy, Elections and Governance (2007).
	Governance	Improve governance in the RECs	• Creating a Peer Review Mechanism in each REC; and encouraging all member states to accede to the African Peer Review Mechanism process.

Source: Adapted from UNECA, "Assessing Regional Integration in Africa (ARIA V): Towards an African Continental Free Trade Area," 2012 p 1.[443]

The MIP identifies two main priority sectors which this work classifies as politico-legal aspects required for effective integration. These are also the areas that the REC's of the AU must deliver in order to lay a strong foundation for successful integration. These are:

- Peace and security which both require conflict resolution and conflict prevention;
- Political affairs encompassing good governance and the promotion of democracy with the continent.

The priority sectors mentioned above alone are obviously insufficient to guarantee the success of the AU. In their work, *Estrada et al*,[444]identified the following internal variables that should be in place in order for integration efforts to be successful.

Table 11: Internal Variables for Regional political development

	Regional Political Development	
INTERNAL FACTORS	**International organization support**	International organizations can facilitate financial and technical support.
	Intra-regional institution number	The number of institutions can play an important role in the development of the regional integration process.
	Political regime	This sub-variable encourages the political stability of the region.

[443] Available from http://www.uneca.org/publications/assessing-regional-integration-africa-v.(Accessed 2013-07-07).

[444] Estrada, R. and Arturo, M., "The Global Dimension of the Regional Integration Model (GDRI-Model)", 2013 ***Modern Economy*** Vol 4, 351-354.

Legislative background	This can help to facilitate the regional legal framework for environmental and other issues.
Internal security	Adequate security measures for local and regional citizens
Human rights	The level of protection of human rights offered by each member in the same region.
Border problems	Border problems can hinder or stop the regional integration process.
Political stability	This is a basic condition in order to integrate all countries into the same region.
Public administration	Good public administration can facilitate management of the regional integration process.
Army size	Less expenditure on armed services can help to redirect resources towards social and public services.
Bureaucracy level	A complicated bureaucracy system can generate difficulties in the regional integration process.
Regional Social Development	Regional social development is generated by seven sub-variables: Literacy, Social Problems, Health and Medical programs, External Culture Influence, Food Security, Public Education, Low Cost Housing Projects.
Literacy	This sub-variable shows the human capital stock under regional level.
Food security	This prevents regional disasters and quick handling of emergencies.
Social problems	These can generate instability in one member country or at a regional level.
Health and medical programs	The social welfare orientation of the region is important.
External culture influence	Societal behaviour in order to become an individual or a collective society.

	Public education	Infrastructure for training and higher education at the regional level
	Low cost housing projects	Equitable distribution of income at regional level
	Regional Economic Development	Production, Consumption, Trade, Labour.

Source: Estrada, R. and Arturo, M.,"The Global Dimension of the Regional Integration Model (GDRI-Model)", 2013 ***Modern Economy*** Vol 4, 351-354.

Upon analysing the conditions identified by *Estrada,* it is evident that the elements as canvassed in the Minimum Integration Programme, peace and security, and political affairs are merely broken down further in Table 11 to include public administration, border problems, political regime, political stability, international organization support, human rights e.t.c. Table 11 also includes regional economic development as a pre-requisite to successful economic integration. This will be classified as an economic not political factor due to its dependency on production, consumption, trade, and labour.

The thrust of this work is to ascertain the challenges as well as to seek solutions to the factors circumventing the attainment of successful economic and political continental integration in Africa. In order to address this research question, the factors of successful integration as identified by the MIP and *Estrada* in Tables 10 and 11 respectively will be compressed for practical purposes and discussed under three headings; Political stability; Human rights; and Legislative framework.

4.4 Political stability

The simplest definition of a stable political system is one that survives through crises without internal warfare and civil unrests.[445] This definition is however narrow since the absence of unrest does not indicate and automatically translate into good governance. *Shepherd* has argued that there are a number of African states that are not headed by purely democratic regimes that nonetheless have remarkably stable political systems, for instance Eritrea shows absolutely no signs of internal unrest yet it is economically dilapidated, reliant on remittances and external assistance. The Gambia is tightly in the grip of President Jammeh, as it has been since 1994, and remains as impoverished as ever.[446]

In his attempt to determine the causal link between political stability and economic growth, *Paldam* identifies the following factors as constituting political stability:

a) Stability of government;

b) Internal law and order:

c) External stability; and

d) Stability of political system.[447]

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445 Encyclopædia Britannica Online, "Political System," Available from http://www.britannica.com/EBchecked/topic/467746/political-system.(Accessed 2013-10-24).

446 Shepherd, B., "Political Stability: Crucial for Growth?" Available from http://www.lse.ac.uk/IDEAS/publications/reports/pdf/SU004/shepherd.pdf(Accessed 2013-10-24).

447 Paldam, M., 1998. "Does economic growth lead to political stability". In: Borner, S., Paldam, M. Eds. The Political Dimension of Economic Growth. MacMillan, Houndsmills.

Table 12: Four aspects of political stability

Narrowly defined	Broadly defined
Stability of government **Does it rule for a full election period and have a majority?**	**Internal law and order** A sub-aspect is the level of industrial conflict.
Stability of political system **Do governments change legally according to a constitution?**	**External stability** Are the borders of the country contested or actively threatened?

Source: Paldam, M., 1998. "Does economic growth lead to political stability". In: Borner, S., Paldam, M. Eds. ***The Political Dimension of Economic Growth***. MacMillan, Houndsmills.

The above indicates that there is no single definition or aspect of political stability. All four factors as identified by *Paldam* as well as the observations of *Shepherd* are correct. It is submitted that in the context of this work, political stability refers to the presence of the rule of law with strong institutions guided by democratic principles which lead to an atmosphere with low corruption, human rights and a climate conducive for development at social, economic and political levels. It is further submitted that political stability is required at both domestic and international levels within Africa.

4.4.1 The AU and Political stability

Closely related to the political stability of the region, the Constitutive Act provides that the AU should:

a) establish the necessary conditions which enable the continent to play its rightful role in the global economy and in international negotiations;[448]

b) promote peace, security, and stability on the continent;[449] and

c) promote democratic principles and institutions, popular participation and good governance.[450]

The attempts by the OAU/AU to promote political stability may also be derived from the following key documents promulgated overtime.

Table 13: OAU/AU Initiatives towards political stability

AU Document/ Initiative	Purpose
The Addis Ababa Declaration of July 1990 on the Political and Socio-Economic situation in Africa and the Fundamental changes taking place in the World.[451]	In the declaration, the OAU noted that they were fully aware that in order to facilitate the process of socio-economic transformation and integration, it was necessary to promote popular participation of people in the processes of government and development. A permitting political environment which guarantees human rights and the observance of the rule of law, would ensure high standards of probity and accountability,

448 Constitutive Act of the AU, *op-cit* note 30, Art 3(i).
449 Constitutive Act of the AU, *op-cit* note 30, Art 3(f).
450 Constitutive Act of the AU, *op-cit* note 30, Art 3(g).
451 Declaration of the Assembly of Heads of State and Government of the Organization of African Unity on the Political and Socio-Economic Situation in Africa and the fundamental Change Taking Place in the World AHG/Decl.1.(XXVI).

	particularly on the part of those who hold public office.[452]
The Cairo 1995 Agenda for Action.	Adopted by the Council of Ministers of the Organization of African Unity at its seventeenth extraordinary session, held at Cairo from 25 to 28 March 1995, and endorsed by the Assembly of Heads of State and Government of the Organization of African Unity.[453] The crux of the document was about re-launching Africa's Economic and Social Development. The irony of the matter was that Egypt at that time was not a good model for good governance.
The 1999 Algiers Decision on unconstitutional change of Government.	In this decision, the OAU reiterated its condemnation of all types of unconstitutional change of Government as anachronistic and in contradiction of its commitment to the promotion of democratic principles and constitutional rule. It further called upon the United Nations during the Millennium Summit to join in the rejection of all types of unconstitutional changes anywhere in the world, and to take appropriate measures against their perpetrators.

452 at para 10.
453 Resolution AHG/Res.236 (XXXI) of 28 June 1995.

The Lome July 2000 Solemn Declaration on the Conference on the Security, Stability, Development and Cooperation in Africa.	The OAU noted that all the major decisions since its inception reflected the inter-linkage between peace, stability, development, integration and cooperation. It was further observed that instability in one country affects the stability of neighbouring countries and has serious implications for continental unity, peace and development.[454]
The Lome July 2000 Declaration on the Framework regarding OAU's responses to unconstitutional change of government[455]	This declaration outlined the processes to be followed by the OAU/AU and its member states in the event a member state is experiencing a coup d'état.
The Durban July 2002 Declaration on the principles governing democratic elections in Africa.[456]	In this document the OAU/AU decided to establish an administrative unit for election monitoring within the Office of the Commission responsible for Political Affairs to be responsible for coordinating and streamlining participation in election monitoring in collaboration with the competent authorities of the countries concerned.

454 See para 7 and principles 9 a-d.

455 Available from http://www.africa-union.org/Structure_of_the_Commission/Political%20Affairs/x/10HoGAssembly2000.pdf .(Accessed 2013-10-24).

456 Available from http://www.africa-union.org/Structure_of_the_Commission/Political%20Affairs/x/ELECTION%20MONITORING%20UNIT%20IN%20AFRICA.pdf. (Accessed 2013-10-24).

The AU Department of Political Affairs[457]	The Department of Political Affairs has remained the core department in the Organization of Africa Unity/African Union since its inception in 1963. It is believed that its core functions relating to Democratization, Governance, Human Rights and The rule of Law, if managed well and successfully implemented at the level of Member States, will prevent conflicts and promote sustainable peace and development on the continent.

In addition to the above initiatives, the institutions/ organs discussed in the previous Chapter also play a critical role in ensuring that member states adhere to good codes of governance.

4.4.2 Political stability, Development and Democracy

Having defined and discussed political stability, the question to be addressed remains as to whether there is a relationship between political stability and development since African integration is aimed at achieving amongst others, development on the continent.

Development was first succinctly defined in the 1990 United Nations Human Development Report. It was captured as follows:

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[457] Available from http://www.africa-union.org/Structure_of_the_Commission/depPOLITICAL%20AFFAIRS%20DIRECTORATE.htm. (Accessed 2013-10-24).

> Human development is a process of enlarging people's choices. In principle, these choices can be infinite and change over time. But at all levels of development, the three essential ones are for people to lead a long and healthy life, to acquire knowledge and to have access to resources needed for a decent standard of living. If these essential choices are not available, many other opportunities remain inaccessible.[458]

In their work, *Pritchett* and *Kenny* simply summarised development as constituting a better quality of life along the dimensions of education, health, freedom, consumption etc.[459]It is submitted that the AU, through their current Commissioner, *Nkosazana Dlamini-Zuma,* has expressed similar sentiments that development involves equitable wealth distribution, jobs and infrastructure.[460] The Commissioner also indicated that;

> It's important to understand that development is not a 'nice to have', it's essential for peace, for stability and for progress in the world...to me those are two sides of the same coin – if you don't develop your country, if people don't feel [there is] an equitable distribution of wealth, you are actually threatening peace.[461]

The correlation between development and stability as indicated in the above passage has also been observed by other authors. In his article, *Nyirabu* observes, that the pursuit of development will be futile if peace and stability are elusive in the region. He argues that African conflicts result in a terrible loss of human lives, population

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458 See UNDP, "Human Development Report 1990", p 10. Available from http://hdr.undp.org/en/media/hdr_1990_en_chap1.pdf. (Accessed 2013-10-24).

459 Lant, P., and Charles, K,. 2013. "Promoting Millennium Development Ideals:The Risks of Defining Development Down." ***CGD Working Paper*** 338. Washington, DC: Center for Global Development.http://www.cgdev.org/publication/promoting-millennium-development-ideals-risksdefining-development-down. (Accessed 2013-10-24).

460 Available from http://www.theguardian.com/global-development/2012/dec/03/african-union-development-peace-progress. (Accessed 2013-10-24).

461 Available from http://www.theguardian.com/global-development/2012/dec/03/african-union-development-peace-progress. (Accessed 2013-10-24).

dislocation, economic stagnation as well as environmental degradation.[462] *Copson* arrives at a similar conclusion in his work that aimed at calculating the costs of war on the African continent. He noted that:

> The costs of war for Africa's people, its cultures and societies, and its economies have been immense. Indeed, measured in terms of deaths, refugees and displaced persons, and lost economic opportunities, African war is one of the greatest calamities of our era. It is also a calamity in dimensions that are more difficult to measure, including the anguish and suffering of millions, and the destruction of traditional ways of life, perhaps forever ... What may be happening to traditional human societies and to wildlife in the war zones is largely a matter of speculation. And we have no way to gauge the psychic pain of the homeless, the orphans, and the destitute.[463]

In addition to the views articulated by *Nyirabu* and *Copson, Breytenbach*[464]carried out a study in which he measured relationship between democracy and the development index of Southern African countries. The following tables summarise the findings of his study.

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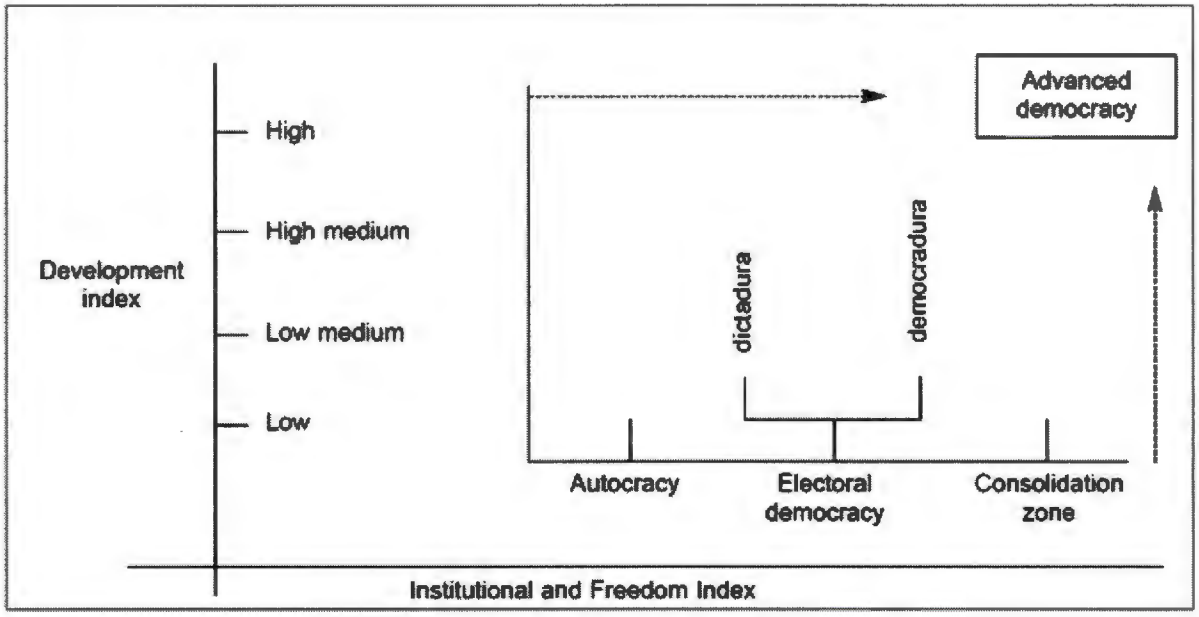
462 See Nyirabu M., *op-cit* note 4.
463 See Nyirabu M., *op-cit* note 4.
464 Breytenbach, W., Democracy in the SADC region - a comparative overview: essay. 2002. ***African Security Review***, Vol 11, Issue 4. p 97

Figure 2: Measuring democracy trends with Development



Source: Breytenbach, W., Democracy in the SADC region - a comparative overview: essay. 2002. ***African Security Review***, Vol 11, Issue 4. p 92.

Figure 3: Institutional and development indexes for SADC member states (2000)

Development Index (per capita; and HDI)				
	high	none	none	none
	high medium		1. Seychelles – –	2. Mauritius 3. South Africa 4. Botswana
	low medium	5. Swaziland – –	– 6. Namibia 7. Lesotho	– – –
	low	– – – 12. DRC – –	8. Zimbabwe 9. Zambia 10-11. Angola & Tanzania 13-14. Mozambique & Malawi	– – – – –
		Autocracy democracy	Electoral zone	Consolidation
		Institutional and Freedom Index (regular elections, political rights and civil liberties)		

Source: Breytenbach, W., Democracy in the SADC region - a comparative overview: essay. 2002. African Security Review, Vol 11, Issue 4. p 97

The above Tables revealed that development under democratic conditions is more likely to occur than under authoritarianism or any form of political instability. It recognises that there is a strong rapport between development and democracy; therefore, it would be futile to try and pursue development without addressing the political stability of a region.

In a similar study carried out by the Bertelsmann Foundation, processed data revealed a co-relation between good governance and economic development.[465] The Bertelsmann Stiftung's Transformation Index (BTI) analyses and evaluates the quality of democracy, a market economy and political management in 128 developing and transition countries. It measures successes and setbacks on the path toward a democracy based on the rule of law and a market economy buttressed by socio-political safeguards.[466] The following figures reflect the results of their 2008 database.

Figure 4: BTI Democracy Rating Sub-Categories

Country	Stateness	Political Participation	Rule of Law	Stability of Democratic Institutions	Political and Social Integration
South Africa	9.0	10.0	8.0	8.5	7.5
Botswana	9.0	9.0	8.3	8.5	7.5
Namibia	8.8	9.0	7.5	8.5	6.8
Kenya	7.5	8.0	6.0	7.0	6.5
Tanzania	8.3	7.3	6.3	7.0	5.5
Uganda	7.5	7.0	6.5	6.5	6.5
Zambia	8.3	7.0	6.0	7.0	5.8
Mozambique	8.3	7.5	4.8	7.0	5.3
Malawi	8.3	7.3	6.0	7.0	4.5
Burundi	7.3	7.0	5.0	5.0	4.8
Rwanda	7.8	3.3	3.0	2.0	2.3
Lesotho	NOT AVAILABLE				

Source: Bertelsmann Stiftung's Transformation Index (BTI), "Selected Country Reports 2008", 2008.[467]

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[465] Bertelsmann Stiftung's Transformation Index (BTI), "Country Reports 2008", 2008 Available from http://www.bti-project.org/index/. (Accessed 2013-10-24).

[466] BTI, *Ibid* note 465.

[467] BTI, *Ibid* note 465.

Figure 5: Selected Indicators 2008

Country	Status Index	Rank	Democracy	Rank		Market Economy	Rank		Management Index	Rank
South Africa	7.89	18	8.60	17	→	7.36	23	→	6.86	10
Botswana	7.94	19	8.45	20	→	7.43→	20	→	7.33	3
Namibia	7.32	27	8.10	21	→	6.54	44	→	5.86	34
Uganda	6.19	47	6.80	45	↑	5.57	60	→	5.75	42
Zambia	5.97	58	6.80	45	→	5.14	73	↓	5.80	38
Kenya	5.89	61	7.00	40	↑	4.79	87	→	5.03	61
Tanzania	5.84	62	6.85	42	→	4.82	84	→	5.84	35
Mozambique	5.56	67	6.55	53	→	4.57	91	↓	5.00	63
Malawi	5.35	74	6.60	51	→	4.11	99	↑	5.50	50
Burundi	4.78	83	5.80	69	↑	3.75	109	→	4.80	70
Rwanda	3.89	104	3.67	103	↓	4.11	99	↓	4.58	82
Lesotho	NOT AVAILABLE									

Source: Bertelsmann Stiftung's Transformation Index (BTI), "Selected Country Reports 2008", 2008.[468]

Interestingly, the above indicators show that countries with a higher score out of ten (10) in the first figure indicating that they have a higher democracy rating would have a higher ranking in terms of their market economy as well as good ranking away from the bottom list in the second figure. In a nutshell, the results also buttress the notion that good governance and economic growth complement each other.

The determination of the impact of each conflict on African soil cannot be determined in this work as it lies within economic and financial calculations that are beyond the scope of public international law. Despite this limitation, it is however possible with the benefit of modern technology to quantify the number of conflicts that have occurred on African

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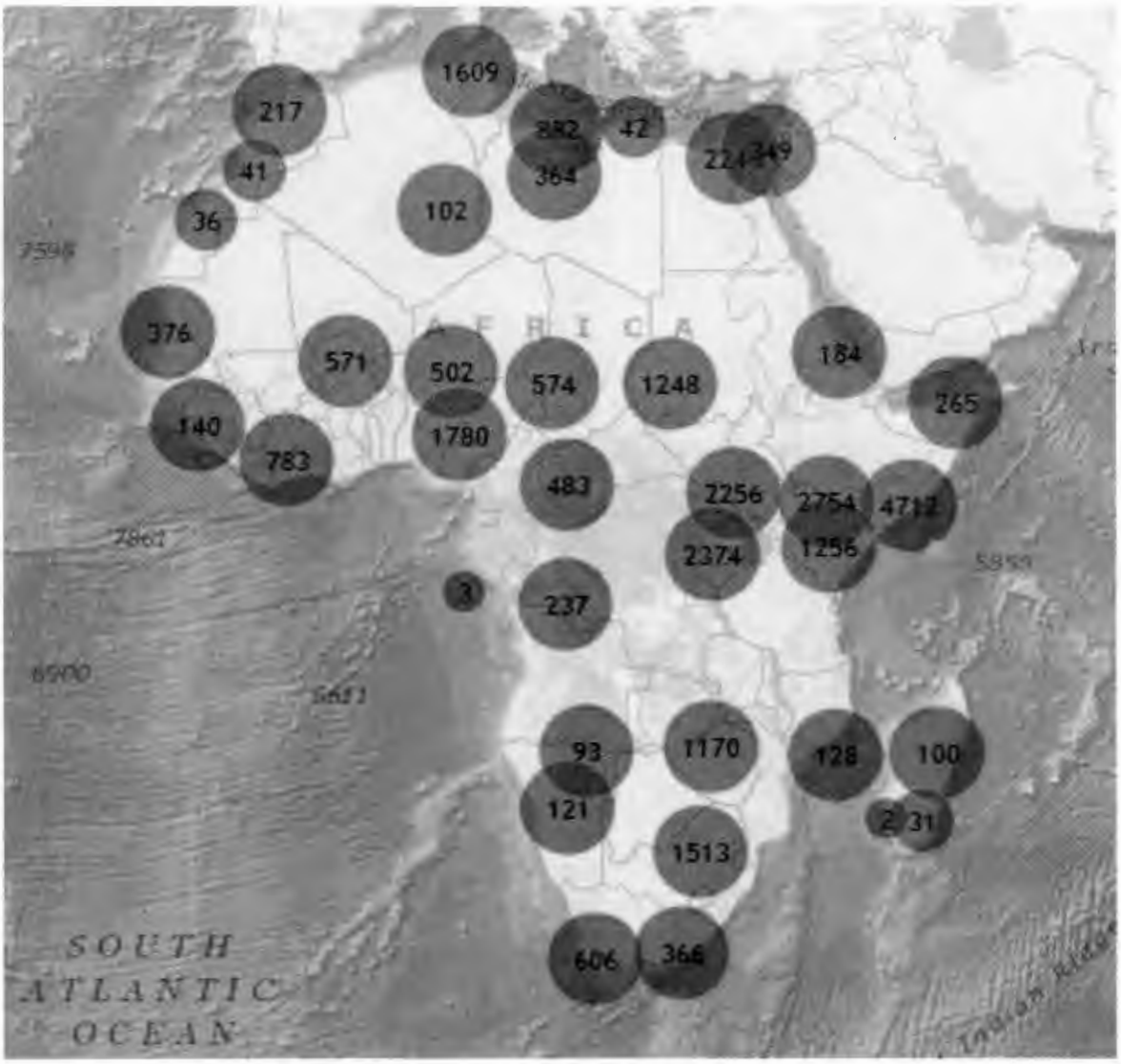
[468] BTI, *Ibid* note 465.

soil. The following figure illustrates the results produced by an online user interactive database programmed by the Strauss Centre for International Security and Law.[469]

See figure on next Page.

[469] See Strauss Centre for International Security and Law. CCAPS Mapping Tool. Available from http://ccaps.aiddata.org/. (Accessed 2013-10-01).

Figure 6: Map illustrating African conflicts beginning Jan 2010-Aug 2013



Source: Strauss Centre for International Security and Law. CCAPS Mapping Tool.Available from http://ccaps.aiddata.org/. (Accessed 2013-10-01).

The database recorded a total number of thirty thousand five hundred and fourty seven (30547) conflicts amounting to sixty thousand nine hundred and thirty nine (60939) fatalities/ deaths in the period between January 2010 to August 2013. A comprehensive list of the conflicts is annexed to this work in a Compact Disc - Read Only Memory (CD-ROM) labelled Annexure 1. The nature of conflicts recorded on this range is limited to unrests that have an impact on the security index of the continent. These range from

simple civil protests, violence towards civilians by either government forces or rebel groups, militia-government clashes in Sudan to Xenophobic attacks in South Africa. It is submitted that the very nature of such conflicts distract development efforts within Africa as member states would normally have to mobilise resources and efforts to neutralising such conflicts, resources which could have otherwise been directed towards developmental programmes.

It has been quantified by d'*Agostinoet al* that armed conflicts cause a reduction of nearly 4% point in the per-capita GDP growth rate of a nation experiencing a civil war. It is submitted that this percentage may even rise to higher levels depending on the magnitude and length of such a conflict as well as the stability of such a nation prior to the conflict.[470]

The observations by *Nyirabu*, *Copson,* and *Breytenbach* (above) then form a basis for the submission that the AU needs to establish effective mechanisms to proactively respond to the instability within the African continent. Obviously it would be a pipe dream to envisage a world in which there are no conflicts at all, this is not the proposal of this work but rather that there should be early warning and response mechanisms on the African continent to deal with conflicts that have the potential to lead to loss of human lives as well as disturbing the development trajectory of the continent.[471]

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[470] d'Agostino, G., Dunne, J.P., and Pieroni, L., "Military Expenditure, Endogeneity and Economic Growth". 2013 ***University Library of Munich***, p 21.

[471] The then UN Secretary General Kofi Anan observed that economic development, social justice, environmental protection, democratization, disarmament, and respect for human rights and the rule of law constitute the foundational values of Human Security, in its broadest sense it embraces far more than the absence of violent conflict. It encompasses human rights, good governance, access to education and health care and ensuring that each individual has opportunities and choices to fulfil his or her own potential. See United Nations Human Development Report 1994.

It is further submitted that a reduction in the number of conflicts has an array of benefits presented on different fronts. As already argued, there is a correlation between peace and development. Additionally the regional social development of the region which includes facets of health, education and food security becomes a priority in times of peace.[472]

4.4.2 The AU Peace and Security Council and NEPAD

The focus of this study is not to discredit the work, or unfairly criticise the African Union. The Union has made considerable progress towards improving the African political and economic climate evident in the establishment of the Peace and Security Council as well as in the adoption of the New Partnership for Africa's Development.

The African Union Assembly adopted the *Protocol Relating to the Establishment of the Peace and Security Council of the African Union* in 2002.[473] The Protocol provides that the Council is a standing decision-making organ for the prevention, management and resolution of conflicts. The Peace and Security Council is a collective security and early-

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472 The United Nations Human Development Report 1994 argued that "The components of human security are interdependent. When the security of people is endangered anywhere in the world, all nations are likely to get involved. Famine, disease, pollution, drug trafficking, terrorism, ethnic disputes and social disintegration are no longer isolated events, confined within national borders. Their consequences travel the globe. Human security is easier to ensure through early prevention than later intervention. It is less costly to meet these threats upstream than downstream. For example, the direct and indirect cost of HIV/AIDS (human immunodeficiency virus/acquired immune deficiency syndrome) was roughly $240 billion during the 1980s. Even a few billion dollars invested in primary health care and family planning education could have helped contain the spread of this deadly disease." See p 22-23.

473 Available from http://www.africa-union.org/root/au/organs/psc/Protocol_peace%20and%20security.pdf. (Accessed 2013-10-24).

warning arrangement to facilitate timely and efficient response to conflict and crisis situations in Africa.[474]

During the period 2003 to 2013, Africa has experienced thirteen (13) *coups d'état*.[475] Obviously these sorts of events are in violation of the Union's *Lomé Declaration* which condemns the following situations as unconstitutional change of governments;

a) military *coup d'etat* against a democratically elected Government;
b) intervention by mercenaries to replace a democratically elected Government;
c) replacement of democratically elected Governments by armed dissident groups and rebel movements; or
d) the refusal by an incumbent government to relinquish power to the winning party after free, fair and regular election.[476]

The Declaration further outlines steps that are to be taken by various AU organs in an attempt to restore political order. These steps range from using leaders to apply moral

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474 See Art 2(1). The objectives of the Council are outlined in Art 3 and outlines that the objectives for which the Peace and Security Council is established shall be to: a. promote peace, security and stability in Africa, in order to guarantee the protection and preservation of life and property, the well-being of the African people and their environment, as well as the creation of conditions conducive to sustainable development; b. anticipate and prevent conflicts. In circumstances where conflicts have occurred, the Peace and Security Council shall have the responsibility to undertake peace-making and peace building functions for the resolution of these conflicts; c. promote and implement peace-building and post-conflict reconstruction activities to consolidate peace and prevent the resurgence of violence; d. co-ordinate and harmonize continental efforts in the prevention and combating of international terrorism in all its aspects; e. develop a common defence policy for the Union, in accordance with article 4(d) of the Constitutive Act; f. promote and encourage democratic practices, good governance and the rule of law, protect human rights and fundamental freedoms, respect for the sanctity of human life and international humanitarian law, as part of efforts for preventing conflicts.

475 Hiroi, T. and Omori, S., "Causes and Triggers of Coups d'état: An Event History Analysis". 2013 ***Politics and Policy***, Vol 41 39–64.

476 Lome Declaration Available from http://www2.ohchr.org/english/law/compilation_democracy/lomedec.htm. (Accessed 2013-10-24).

pressure to the parties involved in the conflict to targeted sanctions.[477] Rightly so, the African Union has during the same period suspended nine (9) of its member states as a result of such unconstitutional changes of governments.[478] This reflects the willingness of the African Union to respond to conflicts on African soil.

NEPAD which was adopted at the 37th session of the Assembly of Heads of State and Government in July 2001 is another tool available to the Union. The NEPAD Heads of State and Government Implementation Committee (HSGIC) is a sub-committee of the AU Assembly.[479] This implies that the HSGIC reports directly to the AU Assembly. Amongst its primary objectives, NEPAD was instituted to help establish the conditions for sustainable development on the African continent by ensuring:

- peace and security;
- democracy and sound political, economic and corporate governance; and
- regional-cooperation and integration.[480]

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477 The declaration provides that (a) A period of up to six months should be given to the perpetrators of the unconstitutional change to restore constitutional order... (b) ... At the expiration of the six months suspension period, a range of limited and targeted sanctions against the regime that stubbornly refuses to restore constitutional order should be instituted, in addition to the suspension from participation in the OAU Policy Organs. This could include visa denials for the perpetrators of an unconstitutional change, restrictions of government-to government contacts, trade restrictions, etc. In implementing a sanctions regime, the OAU should enlist the cooperation of Member States Regional Groupings and the wider International/Donor Communities. Careful attention should be exercised to ensure that the ordinary citizens of the concerned country do not suffer disproportionately on account of the enforcement of sanctions.

478 These include Guinea, Madagascar, Eritrea, Côte d'Ivoire, Niger, Central African Republic (CAR), Côte d'Ivoire, Guinea, Guinea-Bissau, Mali, and Mauritania. See also Vines, A., "A decade of African Peace and Security Architecture". 2013 ***International Affairs***, p 89–109.

479 Assembly/AU/Dec.283(XIV)

480 Office of the Special Adviser on Africa (OSAA), "NEPAD" Available from http://www.un.org/africa/osaa/nepad.html. (Accessed 2013-10-24).

One of the most significant programmes introduced by NEPAD and endorsed by the AU in an attempt to attain the above mentioned objectives is the African Peer Review Mechanism (APRM). The Peer Review process involves periodic assessments of the policies and practices of participating countries to determine if progress is being made towards achieving the mutually agreed goals and compliance in the four focus areas as outlined in the Declaration on Democracy, Political, Economic and Corporate Governance.[481] The four focus areas on which the assessments would be made are;

- democracy and political governance,
- economic governance and management,
- corporate governance, and
- socio-economic development.[482]

For the purposes of this research, it is important to mention some of the Objectives, Standards, Criteria and Key Indicators for the APRM. These include;

a) prevention of intra and inter country conflicts,
b) constitutional democracy,
c) separation of powers,
d) acceleration of socio economic development,
e) ensuring affordable access to water, energy, finance etc especially to the rural poor, and

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481 AHG/235 (XXXVIII) 2002.
482 AU, *op-cit* note 483.

f) strengthening policies, delivery mechanisms and outputs in key social developmental areas (including education for all, combating HIV and AIDS and other communicable diseases).[483]

In *casu* the primary purpose of the APRM is to foster the adoption of policies, standards and practices that lead to political stability, high economic growth, sustainable development and accelerated sub-regional and continental economic integration through sharing of experiences and reinforcement of successful and best practice, including identifying deficiencies. Records show that on 21 January 2006, Sudan acceded to the APRM,[484] thereby signifying its willingness to be legally bound by the terms and decisions in relation to the APRM process.

In relation to this work, Sudan as a case study serves adequately on the basis that, although there are other conflicts that could have been utilized to illustrate the processes of AU, it is one conflict that has simmered for many years and reached its climax when Southern Sudan separated from the rest of Sudan Sudan.[485]

According to the APRM base document, APRM Organisation and Process, and the MOU on Technical Assessment and the Country Review Visit, there are four types of

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[483] See generally APRM, "Objectives, Standards, Criteria and Indicators for the African Peer Review Mechanism". Available from http://www1.uneca.org/Portals/aprm/Documents/book5.pdf. (Accessed 2013-10-24).

[484] AU, "Country Overview: SUDAN" Available from http://aprm-au.org/knowledge-network/sudan. (Accessed 2013-10-24).

[485] http://www.almanar.com.lb/english/adetails.php?fromval=2andcid=60andfrid=21andseccatid=60andeid=21236

reviews that a country should undergo once it accedes to the instrument. These instances are;

a) when a country officially accedes to the APRM process;
b) periodic reviews which are meant to be conducted every two-four years;
c) upon a special request by an APRM member state for the APR Secretariat to initiate an ad hoc review; and
d) at any moment when early warning signs suggest an impending political, economic or social crisis in an APRM member state.

It is however shown in this work that the APRM process has remained dormant and its early warning capabilities have not been utilised effectively. The following discussion is illustrative of this.

4.4.2.1 Critiquing the Role of NEPAD and the PSC: A Sudanese case study

The Republic of Sudan ratified the African Charter on Human and People's Rights on 18 February 1986.One may question whether the Republic of the Sudan has ever been found in violation of its international law obligations and whether such violations have been brought to the attention of the African Union prior to the political turmoil that led to the secession of the South from the North.[486]

Article 62 of the Charter requires member states to submit periodically a report on the legislative or other measures taken with a view to giving effect to the rights and freedoms captured in the Charter. Sudan has submitted reports since 1996, and in most

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[486] Available from http://www.unric.org/html/english/library/backgrounders/sudan_eng.pdf. (Accessed 2013-10-24).

if not all instances, the reports were found inadequate by the African Commission.[487] For instance in response to Sudan's third 2007 report, the African Commission observed, amongst others, that:

a) government-aligned militia (janjaweed), Darfur rebel groups, and tribal factions continued to commit serious abuses of human rights.[488]
b) there was lack of progress on issues such as North-South border demarcation and disagreements about North-South sharing of oil revenues threatened to erode the CPA as the SPLM (South Sudanese Sudan People's Liberation Movement) threatened a permanent withdrawal from the Government of National Unity.[489]
c) credible reports still indicated that serious human rights violations like indiscriminate bombing of villages and schools, extra-judicial and other unlawful killings by government forces and other government-aligned groups were still taking place.[490]
d) torture, beatings, rape, and other cruel, inhuman treatment or punishment by security forces still persisted.[491]
e) sexual violence against women in Darfur was still taking place.[492]

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487 See The Third Periodical Report of the Republic of the Sudan under Article 62 of the African Charter on Human and People's Rights May 2006.Available from http://www.achpr.org/files/sessions/43rd/state-reports/3rd-20032006/staterep3_sudan_2006_eng.pdf

488 The Third Periodical Report of the Republic of the Sudan (ACHPR 2003-2006) under Article 62 of the African Charter on Human and People's Rights May 2006.Available from http://www.achpr.org/files/sessions/43rd/state-reports/3rd-20032006/staterep3_sudan_2006_eng.pdf para 24.

489 ACHPR 2003-2006, *Ibid*note 488, para 26.

490 ACHPR 2003-2006, *Ibid*note 488, para 27.

491 ACHPR 2003-2006, *Ibid*note 488, para 29.

492 ACHPR 2003-2006, *Ibid*note 488, para 30.

In addition to these observations, the African Commission has in the decade leading to the secession made various judicial pronouncements on Sudan that were sufficient to call for serious intervention by the African Union under the auspices of Article 4(h). For instance, in *Sudan Human Rights Organisation and Centre on Housing Rights and Evictions (COHRE) v Sudan*,[493] the Complainants alleged gross, massive and systematic violations of human rights by the Republic of Sudan against the indigenous Black African tribes. The violations being committed included large-scale killings, the forced displacement of populations, the destruction of public facilities, properties and disruption of life through bombing by military fighter jets in densely populated areas. The Commission ruled in favour of the complainants and found Sudan in breach of various provisions of the African Charter. It further recommended amongst others, that:

a) the government undertake major reforms of its legislative and judicial framework in order to handle cases of serious and massive human rights violations;
b) the government rehabilitate economic and social infrastructure, such as education, health, water, and agricultural services, in the Darfur provinces; and
c) it establish a National Reconciliation Forum to address the long-term sources of conflict, equitable allocation of national resources to the various provinces, including affirmative action for Darfur.

In *Curtis Francis Doebbler v Sudan*,[494] the Commission was faced with human rights abuses that were somehow based on religious grounds sanctioned by Shari'a law. The complainants, students of the Nubia Association at Ahlia University, alleged that

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493 Communication 279/03-296/05.
494 *Curtis Francis Doebbler v Sudan* 236/00 2003.

security agents and policemen confronted them, beating some and arresting others. They were alleged to have violated 'public order', contrary to Article 152 of the Criminal Law of 1991, because they were not properly dressed or acting in a manner considered as immoral. Under Shari'a law, such offences were punishable by the administering of lashes, which the security forces went ahead to administer. The Commission observed that:

> There is no right for individuals, and particularly the government of a country to apply physical violence to individuals for offences...The law under which the victims in this communication were punished has been applied to other individuals. This continues despite the government being aware of its clear incompatibility with international human rights law.[495]

The Commission further requested Sudan to amend the Criminal Law and abolish the penalty of lashes. It is submitted that all of the above violations and reports against Sudan were investigated, heard or filed by organs functioning within the ambit of the AU. It is further submitted that AU protocols themselves require that such matters after being dealt with by an organ of the AU, be reported to the AU assembly. For instance, Rule 59 of the Rules of Procedure of the African Commission on Human and Peoples' Rights[496] enforcing the Commission to submit an activity report of its promotion, protection and other activities to each ordinary session of the Assembly. Rule 84 of the same presses on the Commission when there are serious or massive human rights violations, to bring the matter to the attention of the Assembly of Heads of State and Government of the African Union and the Peace and Security Council of the African Union.

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[495] at para 42 and 44.

[496] Available from http://www.achpr.org/instruments/rules-of-procedure-2010/. (Accessed 2013-10-24).

It is interesting to note that despite these judgments and findings by various organs of the AU, Sudan never complied with the recommendations. The *Curtis* judgment was delivered in 2003, however in 2012 the Sudanese public was still discontent with application of the Criminal and Shari'a law.[497] The *COHRE* judgment was delivered in 2005 and yet the government did not undertake to review its legislative and judicial framework as well as to ensure that there was equitable infrastructural development within the country.

After perusing through decisions of Assembly from 2005-2010, and having noticed the absence of an agenda item or decision requesting Sudan to implement resolutions of the AU Commission leads to the inescapable conclusion that Sudan is immune to comply with its regional or international law obligations. Shockingly, the AU Assembly on 1 July 2008 entrusted Sudan with the responsibility of strategic leadership for the implementation of the NEPAD programme by appointing it to the Heads of State and Government Orientation Committee (HSGOC).[498] The Assembly would then, in addition to its silence on the human rights abuses and political turmoil in Sudan, allow Khartoum to host the annual summit in early 2006 even though the AU's rules of procedure[499] explicitly require that the summit take place in a "conducive political atmosphere".[500] Was this an endorsement by the AU that the situation in Sudan was politically conducive or was this a way of the AU "wishing away" African problems? Another

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497 See http://thinkafricapress.com/sudan/violence-against-women-and-sudans-article-152 (Accessed 2013-10-24).

498 See Decision on the Report of Heads of State and Government Implementation Committee on NEPAD Doc. Assembly/Au/11 (Xi)

499 Rule 5 of the Rules of Procedure of the Assembly of the Union

500 See Assembly of the African Union Sixth Ordinary Session 23 – 24 January, 2006 Khartoum, SUDAN

astonishing move by the AU is when it noted; "with satisfaction, the progress made in the humanitarian and security situation in Darfur."[501]

It is submitted that this noting was incorrect and not in congruence with the reality within Sudan. Various human rights organisations have noted widespread human rights abuses in the same year the AU felt it was satisfied with the humanitarian and security situation in Sudan.[502] Today, in 2013, the human rights situation is still plagued by massive human rights violations. The President has been indicted by the ICC[503] but is yet to face Justice. Further compounding this situation is the 2013 AU resolution calling for cases against sitting leaders in the International Criminal Court (ICC) to be deferred until the leaders vacate office.[504]

Considering the argument raised above, one can conclude that the African Union through the NEPAD APRM process had enough time and process at their disposal to detect and help steer the failing governance system of Sudan and possibly avert the secession, since the conflicts in Sudan were all based on a failure to meet the criteria outlined in the Objectives, Standards, Criteria and Key Indicators for the APRM. Apart from the Preliminary APRM Mission undertaken from 30 September to 4 October 2012 aimed at ensuring a common understanding of the philosophy, rules and processes of

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501 Assembly/AU/Dec.268(XIV) Rev.1 p 3, at 14.

502 Available from http://www.hrw.org/news/2010/06/30/sudan-widespread-abuses-bode-ill-referendum. (Accessed 2013-10-24).

503 See ICC Darfur, Sudan. Available from http://www.icc-cpi.int/en_menus/icc/situations%20and%20cases/situations/situation%20icc%200205/Pages/situation%20icc-0205.aspx. Accessed 2014-03-17)

504 African Union says ICC should not prosecute sitting leaders http://www.theguardian.com/world/2013/oct/12/african-union-icc-kenyan-president(Accessed 2013-10-24).

the APRM,[505] there are no records, at least available publicly, of Sudan being subjected or subjecting itself to any APRM processes after it acceded to the mechanism in 2006.

It is argued that, for decades, there have always been early warning signs about the state of governance in Sudan. These warning signs should have prompted action from the African Union through the APRM to initiate a review on the grounds of impending political instability. However, no such review was initiated despite the fact that the APRM was a mechanism available to the AU in the event the governing processes of a member state would lead to politico-economic instability in that country. From the above discussion, it is evident that there has been no political will from AU member states to intervene using the APRM process.

In addition, there is the aspect of conflict prevention and management that the documents guiding the Peace and Security Council contain. It common cause that good governance is essential to conflict prevention. The abuse of power and transgression of human rights, bad governance and circumvention of democracy eventually lead to civil wars and in the case of Sudan, prolonged conflicts that led to the deaths of millions. It is however unfortunate that although policy-makers and academics are aware of these facts, no African country has been prepared to recommend the intervention by the AU on the grounds that a member state is undemocratic or in violation of various human rights norms.[506]

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505 http://www.afrimap.org/fr/newsarticle.php?id=3625 (Accessed 2013-10-24).

506 See also Cilliers, J. and Sturman, K., "Challenges Facing The Au's Peace And Security Council", 2004 ***African Security Review***, Vol 13 No 1, p 97-104.

4.5 Human rights

In defining human rights, the Office of the United Nations High Commissioner for Human Rights recorded that 'Human rights are rights inherent to all human beings, whatever our nationality, place of residence, sex, national or ethnic origin, colour, religion, language, or any other status.[507] These rights are afforded to all without discrimination.[508] They are universal legal guarantees protecting individuals and groups against actions and omissions that interfere with fundamental freedoms, entitlements and human dignity. They stem from cherished human values that are common to all cultures and civilizations.[509]

Universal human rights are often expressed and guaranteed by law, in the form of international agreements, customary international law, general principles and other sources of international law. International human rights law such as the AU's African Charter on Human and Peoples' Rights lays down obligations of governments to act in certain ways or to refrain from certain acts, in order to promote and protect human rights and fundamental freedoms of individuals or groups. It has been argued in this work that the OAU was very instrumental in the decolonisation of Africa and thus helped promote the right to self-determination and independence of the African people. The rights to self-determination and independence have become the cornerstone from which Africa

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507 OHCHR. "Human Rights Indicators", Available from http://www.ohchr.org/Documents/Publications/Human_rights_indicators_en.pdf .(Accessed 2013-10-24).

508 OHCHR, *Ibid* note 507.

509 OHCHR, *Ibid* note 507.

has been able to aspire to afford its citizenry a wider range of rights ranging from health[510] to development.[511]

In 1979, the Assembly of Heads of State and Government of the OAU requested the Secretary-General to:

> Organise as soon as possible, in an African capital, a restricted meeting of highly qualified experts to prepare a preliminary draft of an "African Charter on Human and Peoples' Rights" providing inter alia for the establishment of bodies to promote and protect human and peoples' rights.[512]

Subsequently, the OAU Assembly on 28 June 1981, at their meeting in Nairobi, Kenya, adopted the African Charter on Human and Peoples' Rights.[513] The Charter under Article 30 established the African Commission on Human and Peoples' Rights, a quasi-judicial body that reports to Assembly of Heads of State and Government, tasked with promoting and protecting human rights and rights throughout the African continent as well as interpreting the African Charter and considering individual complaints of violations of the Charter. It is submitted that the Charter is modelled on the design of the Universal Declaration on Human Rights. It is Africa's affirmation of the continent's adherence to the principles of human and peoples' rights and freedoms contained in the declarations, conventions and other instruments adopted by the United Nations, OAU, and the Movement of Non-Aligned Countries.[514]

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510 ACHPR 1981, Art 16.
511 ACHPR, *Ibid* note 510, Art 22.
512 AHG/Dec.115 (XVI) Rev. 1 1979.
513 UNM Human Rights Library, "History of the ACHPR" Available from http://www1.umn.edu/humanrts/instree/z1afchar.htm. (Accessed 2013-10-24).
514 See Preamble, ACHPR, *op-cit* note 510, 1981.

The African Charter consists of sixty eight articles (68), the first twenty-nine (29) of which provide the substantive rights. Twenty-three (23) of these, Article 2-24 guarantee the specific rights of individuals, groups and communities, while another three feature duties of the individual in Article 27-29. Two further articles cover other state duties in Article 25-26. The Table below summarises these rights.

Table 14: Summary of the African Charter on Human and Peoples Rights

Provision	Content
Article 2	non-discrimination
Article 3	equality before the law, and equal protection of the law
Article 4	right to life
Article 5	freedom from torture
Article 6	liberty and security of person
Article 7	right to fair trial
Article 8	freedom of religion
Article 9	right to receive, express, disseminate information,
Article 10	right of association
Article 11	freedom of assembly
Article 12	freedom of movement
Article 13	right to participate in government
Article 14	right to property
Article 15	right to health
Article 16	right to education
Article 18	State's obligation to protect and assist the family
Article 19	equality and self determination
Article 20	right to self-determination
Article 21	right to free disposal of wealth and natural resources
Article 22	right to economic, social and cultural development

Article 23	right to national and international security and peace
Article 24	right to a general satisfactory environment
Article 25	duty to promote human rights
Article 26	guarantee the independence of the judiciary
Article 27	duties of individual and valid grounds for limitations
Article 28	duty of respect and non-discrimination
Article 29	duties to community, nation and to promoting African values

Source: African Charter on Human and Peoples' Rights. Available from http://www.au.int/en/content/african-charter-human-and-peoples-rights.(Accessed 2013-10-24).

The Charter requires member states of the AU to recognize the rights, duties and freedoms enshrined in the document and to adopt legislative or other measures to give effect to them.[515] It also provides that every individual shall be entitled to the enjoyment of the rights and freedoms without distinction of any kind such as race, ethnic group, colour, sex, language, religion, political or any other opinion, national and social origin, fortune, birth or other status. In addition, Article 62 of the Charter requires Member states to submit periodically a report on the legislative or other measures taken with a view to giving effect to the rights and freedoms engraved in the Charter. *Nmehielle* has observed that the African Commission and the African Court on Human and Peoples' Rights are the main human rights organs of the region.[516]Additionally, the Assembly of Heads of State and Government of the African Union and the Pan-African Parliament are political organs of the institution with important powers that affect the human rights

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515 ACHPR, *op-cit* note 510, Art 1.

516 Nmehielle, V., ***The African human rights system: Its laws, practice and institutions***, Martinus Nijhoff Publishers, 2001 p 170-183; also Essien, U., "The African Commission on Human and Peoples' Rights: Eleven years after" 2000 ***Buffalo Human Rights Law Review*** Vol 6, p 93.

practice of the AU.[517] The African Peace and Security Council generally functions as a decision-making organ of the AU with important powers that have a bearing on human rights and democracy.[518]

The human rights arsenal of the African continent is not only limited to the African Charter. Article 66 of the African Charter provides that special protocols or agreements, if necessary, to supplement the provisions of the African Charter may be promulgated. The following Table summarises the purpose and status of other human rights instruments in Africa.

Table 15: Human Rights Legal Instruments and Ratification Status

Instrument	Adopted	Entry into force	Ratification status
African Charter on Democracy, Elections and Governance • **To promote adherence, by each State Party, to the universal values and principles of democracy and respect for human rights.** • **To promote and enhance adherence to the principle of the rule of law premised upon the respect for, and the supremacy of, the Constitution and constitutional order in the political arrangements of the**	25.10.2011	15.02.2012	21

[517] Nmehielle, V., *Ibid* note 516, p 93.
[518] Protocol Relating to the Establishment of the Peace and Security Council of the African Union, 2002.

State Parties.			
Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa • **To codify additional arrangements, obligations and rights to be afforded by member states to women**	07.11.2003	25.11.2005	28
Constitutive Act of the African Union • **Encourage international cooperation, taking due account of the Charter of the United Nations and the Universal Declaration of Human Rights.**[519] • **Promote and protect human and peoples' rights in accordance with the African Charter on Human and Peoples' Rights and other relevant human rights instruments.**[520] • **Promote respect for democratic principles, human rights, the rule of law and good governance.**[521]	11.07.2000	26.05.2001	53
Protocol to the African Charter on Human and Peoples' Rights on the Establishment of the African Court on	10.06.1998	25.01.2004	24

519 Art 3(e).
520 Art 3(h).
521 Art 4(m).

Human and Peoples' Rights • **Technical document that establishes procedures on how to bring the rights enshrined in the Charter to life. It defines relationships between the Commission, Court and member states.**			
African Charter on the Rights and Welfare of the Child • **Recognises that the child, due to the needs of his or her physical and mental development requires particular care with regard to health, physical, mental, moral and social development, and requires legal protection in conditions of freedom, dignity and security.**	01.07.1990	29.11.1999	41
African Charter on Human and Peoples' Rights	27.06.1981	21.10.1986	53
AU Convention Governing Specific Aspects of Refugee Problems in Africa • **This agreement attempts to address the constantly increasing numbers of refugees in Africa and is desirous of finding ways and means of**	10.09.1969	20.06.1974	45

alleviating their misery and suffering as well as providing them with a better life and future. • **It also recognises the need for an essentially humanitarian approach towards solving the problems of refugees.**			

Source: ACHPR, Available from http://www.achpr.org/instruments/(Accessed 2013-10-24).

Table 5 above reveals the level of political will that member states have as indicated in the high number of ratifications on the Constitutive Act, the Charter, and the AU Convention Governing Specific Aspects of Refugee Problems in Africa. However, the low number of ratifications on the Women's protocols, the protocol establishing the African Court, as well as Charter on Democracy, Elections and Good Governance all deserve a much closer investigation which will be argued in the next section.

In addition to the human rights instruments, the treaties establishing the Regional Economic Communities[522] on the African continent have specific commitments towards human rights. For instance, the SADC Treaty under Article 5(c) endorses and requires its member states to observe human rights norms. The 2003 Charter of Fundamental Social Rights in SADC as well as the SADC Organ on Politics, Defence and Security

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[522] See Treaty Establishing the Economic Community of Central African States (ECCAS, 1983/85); Treaty Establishing the Arab Maghreb Union (AMU, 1989/89); Treaty of the Southern African Development Community (SADC, 1992/93); Treaty of the Economic Community of West African States (revised) (ECOWAS, 1993/93); Treaty Establishing a Common Market for Eastern and Southern Africa (COMESA, 1993/94); Agreement Establishing the Inter-Governmental Authority on Development (IGAD, 1996/96) and Treaty Establishing the East African Community (EAC, 1999/2000).

Co-operation[523] require member states to promote the development of democratic institutions and practices within their territories and encourage the observance of universal human rights as provided for in the Charters and Conventions of the OAU/AU and United Nations respectively.

4.5.1 The Human Rights Challenges

Thus far, this work has illustrated the multiple regional and continental human rights norms and standards that have been adopted on the continent. Despite the existence of these instruments, there exists a huge challenge of monitoring and enforcement.

It is recorded that since its inception in 1963, the policy organs of the OAU/AU have adopted 42 (forty-two) treaties.[524] These treaties provide the basis for collective actions and keys in addressing the political, economic and social challenges that impede Africa's integration and development efforts. Therefore their importance is paramount to the success of continental integration. The following Table presents AU Treaties and Charters in addition to those indicated in Table 15.

See figure on next page

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523 See SADC Status Report by Dithake, A., Available from http://www.sadccngo.org/resources/SADC_Status_Report_Towards_Poverty_Conference.Finalada.pdf. See also SADC Documents, available from http://www.sadc.int/key-documents/ (accessed 2011-11-16).

524 See African Union, "OAU/AU Treaties, Conventions, Protocols and Charters" Available from http://www.au.int/en/treaties. (Accessed 2013-10-11).

Table 16: Ratification Status of OAU/AU Instruments

Instrument	Ratification status
OAU Charter (1963)	
General Convention on the Privileges and Immunities of the Organization of African Unity (1965)	37
Phyto-Sanitary Convention for Africa (1967)	10
African Convention on the Conservation of Nature and Natural Resources (1968)	31
African Civil Aviation Commission Constitution (1969)	44
OAU Convention Governing the Specific Aspects of Refugee Problems in Africa (1969)	45
Constitution of the Association of African Trade Promotion Organizations (1974)	14
Inter-African Convention Establishing an African Technical Co-operation Programme (1975)	6
Cultural Charter for Africa (1976)	34
Convention for the Elimination of Mercenarism in Africa (1977)	31
Additional Protocol to the OAU General Convention on Privileges and Immunities (1980)	8
Convention for the Establishment of the African Centre for Fertilizer Development (1985)	6
Agreement for the Establishment of the African Rehabilitation Institute (ARI) (1985)	26
Bamako Convention on the Ban of the Import into Africa and the Control of Transboundary Movement and Management of Hazardous Wastes within Africa (1991)	25
Treaty Establishing the African Economic Community (1991)	49

African Maritime Transport Charter (1994)	13
The African Nuclear-Weapon-Free Zone Treaty (1996)	36
OAU Convention on the Prevention and Combating of Terrorism (1999)	41
Protocol to the Treaty Establishing the African Economic Community Relating to the Pan-African Parliament (2001)	47
Protocol Relating to the Establishment of the Peace and Security Council of the African Union (2002)	47
African Convention on the Conservation of Nature and Natural Resources (Revised Version) (2003)	9
Protocol of the Court of Justice of the African Union (2003)	16
African Union Convention on Preventing and Combating Corruption (2003)	34
Protocol on Amendments to the Constitutive Act of the African Union (2003)	28
Protocol to the OAU Convention on the Prevention and Combating of Terrorism (2004)	14
Charter for African Cultural Renaissance (2006)	6
African Youth Charter (2006)	33
Protocol on the Statute of the African Court of Justice and Human Rights (2008)	5
Statute of the African Union Commission on International Law (2009)	2
African Charter on Statistics (2009)	6
Protocol on the African Investment Bank (2009)	2
African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa (2009)	19
Revised Constitution of the African Civil Aviation	3

Commission (2009)	
Revised African Maritime Transport Charter (2010)	4
African Charter on Values and Principles of Public Service and Administration (2011)	6
Agreement for the Establishment of the African Risk Capacity Agency (2012)	0

Source: OAU/AU, "Treaties, Conventions, Protocols and Charters". Available from http://www.au.int/en/treaties

4.5.1.1 Low Ratification Levels

Table 15indicates the ratification status of human rights documents. From this table it is observed that there is a very low number of ratifications recorded on the African Charter on Democracy, Elections and Governance, the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of the African Court on Human and Peoples' Rights and the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa. These are not the only examples that may be provided. In addition to the observations derived from Table 15, Table 16 also records a trend of low ratifications in respect of the following human rights related instruments:

- Protocol on the Statute of the African Court of Justice and Human Rights;
- Charter for African Cultural Renaissance;
- Protocol to the OAU Convention on the Prevention and Combating of Terrorism;
- African Convention on the Conservation of Nature and Natural Resources;
- Statute of the African Union Commission on International Law; and the
- African Charter on Values and Principles of Public Service and Administration.

It is submitted that these statistics reveal the inertia with which African governments approach their international agreements. A line should be drawn between the adoption of instruments and ratification of such instruments. Adoption symbolises the willingness of AU Member States to be part of a collective which is a looser form of integration. Ratification suggests a deeper commitment of the member states to the shared values embodied in the relevant instruments. In particular, ratification signifies the acceptance by the ratifying states not only of the legal obligations enshrined in the instruments, but also their commitment to respond to Africa's mutual development and integration challenges which these instruments deal with. It is after ratification that the next level of commitment, domestication, may then be pursued by a shared collective. Domestication of the instruments serves to mobilise Africans, as it ensures that the advocated values become part of the domestic practices and legislative framework in their respective countries.[525]

4.5.1.2 Enforcing Human Rights Standards

The importance and impact of ratification is critical to the application of international law. In instances where a dispute arises, ordinary citizens may then be able to hold the State accountable through its international law obligations.

A standard example of such within the African context is the case *of Longwe v Intercontinental Hotels Limited*.[526]The facts are that, the complainant, a human rights

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[525] See AU, Concept Note for the Regional Workshop on the Importance of Ratification and Domestication of OAU/AU Treaties of Direct Relevance to African Union Shared Values p 3-5. Available from http://legal.au.int/en/sites/default/files/LC10305%20_E%20Original.pdf.(Accessed 2013-10-11). Also note that the non-ratification of a Treaty does not constitute a rejection of the Treaty.

[526] *Sara Longwe v Intercontinental Hotels* 1992/HP/765 1993 4 LRC 221.

and gender activist in Zambia, had gone to Lusaka's Intercontinental Hotel with her partner. At the Hotel, Sara's partner remained in the car in the garage while she went to the hotel to look for a friend. She was refused access by Hotel security on the grounds that she was not accompanied by a male partner. Hotel policy dictated that it would disallow access to certain parts of the Hotel to unaccompanied women.[527]

The restriction did not apply to unaccompanied men. In a bid to fight what she saw as discrimination based on gender and sex contrary to the non-discrimination clause in section 23 of the Zambian Constitution, Sara decided to petition the High Court. She argued that besides article 23 of the Constitution, the conduct of the Hotel constituted discrimination from which she was protected under the Convention on the Elimination of all Forms of Discrimination against Women (CEDAW) and the African Charter on Human and Peoples' Rights. The respondent (Intercontinental Hotels Limited) averred that the petitioner had no right to cite conventions which Zambia had not yet domesticated in local law and which the Court, therefore, had no jurisdiction to apply. However, the Court was alive to its discretion to apply the undomesticated conventions which the country had ratified. In the court's ruling, Musumali. J., held as follows:

> It is my considered view that ratification of such documents by a nation state without reservations is a clear testimony of the willingness of the State to be bound by the provisions of such a document. Since there is willingness, if an issue comes before court which would not be covered by local legislation but would be covered by such international document, I would take judicial notice of that treaty or Convention in my resolution of the dispute.[528]

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527 See summary of facts in *Sara Longwe v Intercontinental Hotels* 1992/HP/765 1993 4 LRC 221.
528 *Sara Longwe, Ibid* note 526.

The case was decided in favour of the complainant. Similar cases following such interpretation include the South African cases of *Hoffman v South African Airways*,[529] *K v K*,[530] and the landmark decision of *S v Makwanayane*.[531] In the Hoffman case, the Court opined that the need to eliminate unfair discrimination did not arise only from Chapter 2 of the South African Constitution but also arose out of international obligations since South Africa had ratified a range of anti-discrimination Conventions, including the African Charter on Human and Peoples' Rights.[532] The *K v K* decision concerned an application for the return of an abducted minor child to the jurisdiction of the Court of its habitual residence. The Court took into account the fact that South Africa had ratified the United Nations Convention on the Rights of the Child[533] and as such was bound to give effect to Article 3(1) of the Convention which imposes that:

> In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.[534]

Also, in declaring the death penalty unconstitutional, a substantial portion of the *Makwanayane* judgment was devoted to canvassing South Africa's international law obligations.[535]

It is submitted that these cases represent the ideal interpretation for a region that wishes to integrate at both political and economic levels. Citizens should be able to find

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529 2001 (1) SA 1.
530 1999 (4) SA p703.
531 1995 (3) SA 391.
532 At para 51.
533 1989.
534 Art 3(1).
535 See para 33-39.

recourse in international standards even when the domestic laws are not clear on the application of human rights norms. It is only when human rights and basic freedoms are guaranteed within the region that the developmental index of such a region may improve. It is submitted that with the current low ratification levels of human rights norms and standards, the ability of the African people to hold their governments accountable when they are in breach of international human rights obligations will remain a distant pipe dream, at least for some time to come.

The impact of ratification in international law has evolved to such an extent that an Australian Court ruled that the ratification of treaties creates a legitimate and enforceable expectation on the side of ordinary citizens.[536] A legitimate expectation arises from principles of fairness and reasonableness to the situation where a person has an expectation or interest in a public body retaining a long-standing practice or keeping a promise. It was developed by the courts in an effort to promote administrative fairness. As such, it provides a useful window through which to view judicial attempts to mediate between individual interests and collective demands in the modern administrative state[537]

In the case of *Minister for Immigration and Ethnic Affairs v Teoh,*[538]the Immigration Minister of Australia ordered that Mr.Teoh, a Malaysian citizen with family and children in Australia, be deported from Australia on the basis of his conviction for heroin

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536 *Minister for Immigration and Ethnic Affairs v Teoh*1995 128 ALR 353.

537 See *Administrator, Transvaal v Traub* 1989 (4) SA 731 (A),*SA Veterinary Council v Szymanski* 2003 (4) SA 42 (SCA) at para 20 and more recently, *Duncan v Minister of Environmental Affairs* 2010 (6) SA 374 (SCA).

538 1995 128 ALR 353.

importation and possession. Mr.Teoh sought to have the decision to deport him reconsidered on the grounds that the hardship it would cause his wife and children had not been adequately considered. The Federal Court of Australia overturned the deportation order, and the High Court of Australia was then called upon to review the case. The question before the Court was to what extent the Convention on Rights of Child applied in Australian law given that Australia had ratified the Convention but had not yet incorporated its provisions into its national law by statute. The Court opined as follows:

> The position seems to be that even though the Convention is not part of Australian municipal law, the children have a legitimate expectation that their father's application should be treated by the Minister in a manner consistent with the Convention and that in doing so the Minister would observe the requirements of procedural fairness to the extent necessary for Australia, as a State Party, to comply with its international commitments under the Convention.[539]

It is submitted that the Australian decision was a welcome development for the enforcement of human rights. This sort of interpretation is yet to be tested at continental level on the African soil.

The wording in African Union protocols seems to be indicative of what the Union will expect its judicial bodies to conclude when faced with a matter in which a state is in breach but has not ratified such instruments. The Protocol establishing an African Court of Justice in which Article 18 provides that;

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[539] at para 56.

> The States which are not members of the Union shall not be allowed to submit cases to the Court. The Court shall have no jurisdiction to deal with a dispute involving a Member State that has not ratified this Protocol.

It is from such indications that one may infer that the low ratification levels are a way of escaping obligations that will be imposed at international level against governments that will be found to be wanting in respect of their human rights obligations.

4.5.1.2 Implications of the Protocol on the Statute of the African Court of Justice and Human Rights

In 2008 the AU adopted the Protocol on the Statute of the African Court of Justice and Human Rights.[540] It has become apparent that there are multiple legal instruments that attempt to establish judicial bodies on the African continent and as such before the contents of the 2008 Protocol are canvassed, a firm understanding of the current status quo is important.

The African Court on Human and Peoples' Rights, established in terms of the Protocol to the African Charter on the Establishment of an African Court on Human and Peoples' Rights is the first judicial body on the continent. This Protocol entered into force in 2004, establishing the African Human Rights Court, located in Arusha, Tanzania. It is still the only continental Court that exists in Africa today.[541]

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[540] Available from http://www.africa-union.org/root/au/Documents/Treaties/text/Protocol%20on%20the%20Merged%20Court%20-%20EN.pdf. (Accessed 2013-10-24).

[541] See Protocol to the African Charter on Human and Peoples' Rights on the Establishment of the African Court on Human and Peoples' Rights. http://www.achpr.org/instruments/court-establishment/

The African Court on Human and Peoples' Rights has the jurisdiction to hear all cases and disputes submitted to it concerning the interpretation and application of the African Charter on Human and Peoples' Rights.[542] The Court is further mandated to complement the protective mandate of the African Commission on Human and Peoples` Rights.[543]

The African Court of Justice, was anticipated in the AU Constitutive Act, and established under the 2003 Protocol establishing an African Court of Justice. Article 19 of the Court Protocol provides that the Court has the jurisdiction to hear matters relating to;

a) the interpretation and application of the Act;
b) the interpretation, application or validity of Union treaties and all subsidiary legal instruments adopted within the framework of the Union;
c) any question of international law;
d) all acts, decisions, regulations and directives of the organs of the Union;
e) all matters specifically provided for in any other agreements that States Parties may conclude among themselves or with the Union and which confer jurisdiction on the Court;
f) the existence of any fact which, if established, would constitute a breach of an obligation owed to a State Party or to the Union; and
g) the nature or extent of the reparation to be made for the breach of an obligation.

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542 Art 3.
543 Art 2.

To date, the Protocol has only received 16 ratifications.

Taking instruction from the framework of the EU,[544] the AU Assembly in 2004 took a decision that the African Court on Human and Peoples' Rights and the Court of Justice should be merged into one Court.[545] The Court will have two Sections, a General Affairs Section composed of eight (8) judges and a Human Rights Section composed of eight (8) judges. Article 17 of the Protocol to the Court provides that the General Affairs Section shall be competent to hear all cases submitted to it under Article 28 of the Statute save those concerning human and/or peoples' rights issues. The Human Rights Section shall be competent to hear all cases relating to human and/or people's rights. The Protocol on the Statute of the African Court of Justice and Human Rights provides that the jurisdiction of the Court shall extend to;

a) the interpretation and application of the Constitutive Act;
b) the interpretation, application or validity of other Union Treaties and all subsidiary legal instruments adopted within the framework of the Union or the Organization of African Unity;
c) the interpretation and the application of the African Charter, the Charter on the Rights and Welfare of the Child, the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, or any other legal instrument relating to human rights, ratified by the State Parties concerned;

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544 The Court of Justice of the European Union has the ability to review the legality of legislative acts, of acts of the Council, of the Commission and of the European Central Bank, other than recommendations and opinions, and of acts of the European Parliament and of the European Council intended to produce legal effects vis-à-vis third parties. The European Court of Human Rights Has jurisdiction on matters concerning the interpretation and application of the European Convention for the Protection of Human Rights and Fundamental Freedoms and the Protocols thereto which are referred to it.

545 See Assembly/AU/Dec.45 (III) Rev.1

d) any question of international law;

e) all acts, decisions, regulations and directives of the organs of the Union;

f) all matters specifically provided for in any other agreements that State Parties may conclude among themselves, or with the Union and which confer jurisdiction on the Court;

g) the existence of any fact which, if established, would constitute a breach of an obligation owed to a State Party or to the Union; and

h) the nature or extent of the reparation to be made for the breach of an international obligation.[546]

Critical to the function of any judicial body is the determination of persons eligible to submit cases to such a body. The Protocol provides that the following entities are entitled to submit cases before the Court;

a) State Parties to the Protocol;

b) the Assembly, the Parliament and other organs of the Union authorized by the Assembly; or

c) a staff member of the African Union on appeal, in a dispute and within the limits and under the terms and conditions laid down in the Staff Rules and Regulations of the Union;

In addition to the above, Article 30 provides that following entities shall also be entitled to submit cases to the Court on any violation of a right guaranteed by the African Charter, the Charter on the Rights and Welfare of the Child, the Protocol to the African

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[546] Art 28.

Charter on Human and Peoples' Rights on the Rights of Women in Africa, or any other legal instrument relevant to human rights ratified by the State Parties concerned:

a) state Parties to the Protocol;
b) the African Commission on Human and Peoples' Rights;
c) the African Committee of Experts on the Rights and Welfare of the Child;
d) African Intergovernmental Organizations accredited to the Union or its organs;
e) African National Human Rights Institutions;
f) individuals or relevant Non-Governmental Organizations accredited to the African Union or to its organs, subject to the provisions of Article 8 of the Protocol.

At the time of writing this work in November 2013, the Protocol had received five (5) of the required fifteen (15) ratifications for it to enter into force. This means that until the requisite number of ratifications has been obtained, the Court will remain inoperative. It is submitted that the African Commission and the African Court on Human and Peoples rights remain the only two continental bodies from which Africans can seek relief to enforce their human rights. The African Commission has been very instrumental in establishing some important working practices and jurisprudence, but this has not been without its own constraints. These include the fact that its recommendations are not legally binding and are often not implemented expeditiously.[547]

On the other hand, the hurdle facing the African Court on Human and Peoples' rights is the low number of ratifications it has received since 2003, indicating the unwillingness of

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[547] See for instance 30th Activity Report of the African Commission on Human and Peoples' Rights. Available from http://www.achpr.org/files/activity-reports/30/achpr49_actrep30_2011_eng.pdf. (Accessed 2013-10-11)

member states to be bound or subjected to its jurisdiction. At a meeting of Experts on the Review of the OAU/AU Treaties held from 18 to 20 May, 2004, in Addis Ababa, Ethiopia the Chairperson of the AU Commission stated that "the slow pace of signature and ratification of these treaties by Member States is worrisome, bearing in mind the process of integration that the Member States had embarked on." *Neumayer* observed that:

> For treaty ratification to work, there must be conditions for domestic groups, parties, and individuals and for civil society to persuade, convince, and perhaps pressure governments into translating the formal promise of better human rights protection into actual reality.[548]

His observations are evident in the case of *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya*.[549] The complainants alleged violations resulting from the displacement of the Endorois community, an indigenous community, from their ancestral lands, the failure to adequately compensate them for the loss of their property, the disruption of the community's pastoral enterprise and violations of the right to practise their religion and culture, as well as the overall process of development of the Endorois people. The Commission ruled in favour of the Endorois community. It is important to note that these evictions occurred in 1970 and it took over thirty years of civil protests, domestic litigation and public outcries to reach a conclusion compelling the Kenyan government to act appropriately. It is submitted that human rights in Africa will require a more dedicated and functional judicial mechanism to resolve such disputes. It is thus

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548 Neumayer, E., "Do International Human Rights Treaties Improve Respect for Human Rights?" 2005 ***Journal of Conflict Resolution*** Vol. 49 no. 6 p 925-953.

549 276 / 2003.

compelling on African leaders to ratify the new Court Protocol so that it may become operational sooner than later.

4.6 Legislative framework

Another aspect identified by *Estrada et al* as critical to completing the puzzle towards integration is a legislative framework. It is submitted that the ability of a region or continent to have well-structured laws and regulations is becoming increasingly important within the context of globalisation and regionalism. The concept of continental integration as defined in this work and globalisation are closely related phenomena. Globalisation has been defined as;

> ...the growing interdependence of the world's people... it is about increasing inter-connectedness and inter-dependence among the world's regions, nations, governments, business, institutions, communities, families and individuals... it fosters the advancement of "global mentality" and conjures the picture of a borderless world through the use of information technology to create partnerships to foster greater financial and economic integration.[550]

In the same light, regional or continental integration has been defined in this work as the unification of nation states into a larger whole or their willingness to shed some of their sovereignty to a supra-national body. *Steffek* has observed that the globalization debate has within the last few decades drawn open public attention to the fact that states are ceding increasingly more competences to international organizations, and in turn have become influenced by their rules and decisions. As a consequence, a widespread debate regarding the legitimacy of these kinds of governance 'above' or 'beyond' the

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[550] See Obadan, M.I., "Globalization and economic management in Africa". 2003 ***Nigeria Tribune***, p 9.

nation-state features emerged.[551] He has also described international institutions as slowly starting to acquire characteristics of a state.[552] The observation that international institutions are beginning to acquire characteristics of a state is very cardinal to this section of the work in an attempt to indicate the importance of a legislative framework.

A state has been defined as 'an association of a considerable number of men living within a definite territory, constituted in fact as a political society and subject to the supreme authority of a sovereign, who has the power, ability and means to maintain the political organization of the association, with the assistance of the law, and to regulate and protect the rights of the members, to conduct relations with other states and to assume responsibility for its acts'.[553] The 1963 Montevideo Convention articulated the following qualifications for statehood:

a) a permanent population;

b) a defined territory;

c) government;

d) capacity to enter into relations with the other states.[554]

Article 3 of the Convention provides that 'the political existence of the state is independent of recognition by the other states. Even before recognition the state has the right to defend its integrity and independence, to provide for its conservation and

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551 Steffek, J., "The Legitimation of International Governance: A Discourse Approach". ***European Journal of International Relations*** Vol 9 (2) p 5.

552 Steffek, J., *Ibid* note 551, p 5.

553 Grant, T., "Defining Statehood: The Montevideo Convention and its Discontents".1998 ***Columbia Journal of Transnational Law***.Vol 37 p 403-457.

554 See Art 1 of the Montevideo Convention on the Rights and Duties of States 1933. See also *S v Banda and Others 1989 BLR.*

prosperity, and consequently to organize itself as it sees fit, to legislate upon its interests, administer its services, and to define the jurisdiction and competence of its courts'. It is argued that inferences may be drawn between these requirements and what the African Union aspires to achieve.

Steffek's observations are indeed correct in that the African Union has begun to acquire state-like features. For instance, it is a political society consisting of member states that have the power to pass collective decisions, resolutions and directives through various organs and it can conduct relations with other organizations such as the European Union and United Nations. Another example illustrating how the AU has been slowly acquiring features of a state is the manner in which its organs loosely reflect the *trias politica* of a traditional democratic state. The following table places organs of the AU in accordance to their democratic function.

Table 17: Roles played by AU Organs

Branch of Government	AU Organ
Executive	• The Assembly of the Union • The Executive Council • The Commission • The Peace and Security Council
Legislative	• The Pan-African Parliament • The Economic, Social and Cultural Council
Judiciary	• The African Commission on Human and Peoples' Rights • The African Court on Human and Peoples' Rights • *The Court of Justice and Human Rights*

Having illustrated how the African Union is slowly attaining state-like characteristics it is imperative to reflect back on the requirements of the Montevideo convention. Of importance from these discussions to the current discourse is the ability of the African Union to legislate upon its interests, administer its services, and to define the jurisdiction and competence of its organs. In a study that undertook to examine the legal interactions among community, national, regional and international legal systems within the context of economic integration, *Oppong* argued that a community must have well-structured and managed relations between itself and other legal systems as a necessary condition for its effectiveness. By structured relations, he referred to a legal framework that;

a) defines the relations between community and national laws;
b) spells out the modalities for implementing community law in member states;
c) defines the respective competences of the community and member states; and
d) anticipates and provides rules for resolving conflicts of laws and jurisdictions.[555]

4.6.1 The Pan African Parliament

In order to achieve the above, there is a need for a strong and vibrant legislative institution within the framework of the African Union. The role played by the Assembly, the Commission and the Executive Council of the Union cannot be discounted from the achievements of the Union. However, if the Union is to succeed in its integration objectives, then a stronger legislative organ is a must. The Constitutive Act provides

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[555] Oppong F.R., "Relational Issues of Law and Economic Integration in Africa," ***University of British Columbia***, 2009. p 31. (Unpublished Thesis)

that in order to ensure the full participation of African peoples in the development and economic integration of the continent, a Pan-African Parliament should be established.[556] In 2001, AU member states adopted the Protocol to the Treaty Establishing the African Economic Community Relating to the Pan-African Parliament.[557]

The functions of the Pan-African Parliament as provided in Article 3 of the Protocol are to:

a) facilitate the effective implementation of the policies and objectives of the OAU/AEC and, ultimately, of the African Union;
b) promote the principles of human rights and democracy in Africa;
c) encourage good governance, transparency and accountability in member states;
d) familiarize the peoples of Africa with the objectives and policies aimed at integrating the African Continent within the framework of the establishment of the African Union;
e) promote peace, security and stability;
f) contribute to a more prosperous future for the peoples of Africa by promoting collective self-reliance and economic recovery;
g) facilitate cooperation and development in Africa;
h) strengthen continental solidarity and build a sense of common destiny among the peoples of Africa; and

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556 Art 17.
557 Available from http://www.au.int/en/treaties (Accessed 2013-10-11)

i) facilitate cooperation among Regional Economic Communities and their Parliamentary fora.[558]

The Protocol further outlines that the Parliament may;

a) examine, discuss or express an opinion on any matter, either on its own initiative or at the request of the Assembly or other policy organs and make any recommendations it may deem fit relating to, inter alia, matters pertaining to respect of human rights, the consolidation of democratic institutions and the culture of democracy, as well as the promotion of good governance and the rule of law;
b) discuss its budget and the budget of the Community and make recommendations thereon prior to its approval by the Assembly;
c) work towards the harmonization or co-ordination of the laws of member states.
d) make recommendations aimed at contributing to the attainment of the objectives of the OAU/AEC and draw attention to the challenges facing the integration process in Africa as well as the strategies for dealing with them;
e) request officials of the OAU/AEC to attend its sessions, produce documents or assist in the discharge of its duties;
f) promote the programmes and objectives of the OAU/AEC, in the constituencies of the Member States;
g) promote the coordination and harmonization of policies, measures, programmes and activities of the Regional Economic Communities and the parliamentary fora of Africa;

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[558] Art 3.

h) adopt its Rules of Procedure, elect its own President and propose to the Council and the Assembly the size and nature of the support staff of the Pan-African Parliament; and

i) perform such other functions as it deems appropriate to achieve the objectives.

In addition, the drafters of the Protocol were careful not to overlook the fact that in a continental integration setup, there already exists national and sub-regional parliaments. As a result Article 18 of the Protocol provides that Parliament shall work in close co-operation with the Parliaments of the Regional Economic Communities and the national parliaments or other deliberative organs of member states. To this effect, the Pan-African Parliament may, in accordance with its Rules of Procedure, convene annual consultative fora with the Parliaments of the Regional Economic Communities and the national parliaments or other deliberative organs to discuss matters of common interest.

With reference to the above it can be argued that the powers conferred upon the Parliament are broad enough for the institution to play the role identified by *Oppong*. However, the challenge with the Pan African Parliament begins here. Article 2(3) of the Protocol states that the ultimate aim of the Pan-African Parliament is to evolve into an institution with full legislative powers. Its members are elected by universal adult suffrage. However, until such time as the member states decide otherwise by amending the Protocol, the Pan-African Parliament remains a consultative body with and advisory powers only. This presents a challenge within the framework of the African Union since without legislative powers, the Union seems to belong to a few elite leaders, disengaging the ordinary people and slowing down the integration agenda.

4.6.2 AU legitimacy and the Pan African Parliament

Legitimacy in general terms may refer to the popular acceptance of authority and in this context the authority and presence of the African Union on continental affairs. In his work, *Krajewski* has defined legitimacy in two forms, being positive and normative.[559]He argues that positive legitimacy addresses the question whether a norm of international law or a decision of an international organisation is accepted as legitimate by the international legal community.[560] This encompasses actual compliance with the norm or decision, but also relates to the perception of the norm from the perspective of those who have to comply with it.[561] Normative legitimacy is based on the processes, structures or institutional frameworks of how a rule is created or how a decision is made. On the other hand, it can also be based on the substantive results of a rule or decision[562] According to the same author, democracy in international organisations requires that every state has an equal right and practical opportunity to participate in the decision-making process of the international organisation.

It is submitted that *Krajewski's* definitions and observations are correct. They however do not take into account a certain aspect of legitimacy and democracy. One of the key principles of representative democracy is connecting citizens to the decisions that affect them and ensuring public accountability for those decisions. One cannot rely solely on member states taking decisions on behalf of their citizens. This principle underlies decentralization, community empowerment and participatory development. It also

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559 See Krajewski, M., "Legitimizing global economic governance through transnational parliamentarization: The parliamentary dimensions of the WTO and the World Bank" ***TranState Working Papers***, Paper No 136, p 2.

560 Krajewski, M., *op-cit* note 559, p 2.

561 Krajewski, M., *op-cit* note 559, p 2.

562 Krajewski, M., *op-cit* note 559, p 2.

underlies widely accepted elements of good governance, namely transparency, accountability of citizens' representatives, independent scrutiny, clear laws predictably applied and effective mechanisms to ensure checks and balances.[563]The report of the Panel of Eminent Persons on United Nations–Civil Society Relations entitled "We the peoples: civil society, the United Nations and Global Governance" observes that:

> Public opinion has become a key factor influencing intergovernmental and governmental policies and actions. The involvement of a diverse range of actors, including those from civil society and the private sector, as well as local authorities and parliamentarians, is not only essential for effective action on global priorities but is also a protection against further erosion of multilateralism.

The report further noted that:

> Concerning democracy, a clear paradox is emerging: while the substance of politics is fast globalizing (in the areas of trade, economics, environment, pandemics, terrorism, etc.), the process of politics is not; its principal institutions (elections, political parties and parliaments) remain firmly rooted at the national or local level. The weak influence of traditional democracy in matters of global governance is one reason why citizens in much of the world are urging greater democratic accountability of international organizations.[564]

Taking the observations of the report in mind, one crucial aspect of the rising disaffection with globalization is the lack of citizen participation in the global institutions that shape people's daily lives.[565] Any governance model should be inclusive of the civil society. The African Union and NEPAD have already been criticized for their lack of

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563 Willetts, P., "The Cardoso Report on the UN and Civil Society: Functionalism, Global Corporatism, or Global Democracy?". 2006 ***Global Governance*** p 305-324.

564 See The Cardoso Report on the UN and Civil Society: Functionalism, Global Corporatism, or Global Democracy.

565 Falk, R. and Strauss, A., "Toward Global Parliament", 2001 ***Foreign Affairs***, Vol. 80, No. 1 p 212-220.

citizen participation. *The Daily Monitor,*[566] a well-known web-based publication in the region has observed that, very little is known of the NEPAD initiative and the African Union on the continent. Both emerged from the highest political level without any serious and sustained effort to consult with stakeholders and key actors. Neither is a subject for public discourse in the continent. There is no evidence of any on-going serious debate on them even in the national parliaments.

Another author, *Olowu* wrote that one of the criticisms levelled against the African Union was the virtually unilateral manner by which some African political leaders established the body without proper consultations with their peoples or significant popular participation.[567] It is submitted that legitimacy and accountability lie at the heart of democracy and the values entrenched within the Constitutive Act. Therefore, it is only correct that the AU adopts a citizen inclusive form of governance.

The Pan African Parliament cannot continue to exist as a consultative and advisory body only. The Parliament was created to promote popular participation and representation of African peoples in decision-making, good governance, oversight, accountability and transparency. Since its establishment, there has not been any amendment to the powers of the Parliament with a view to achieving the full legislative powers envisaged in Article 2(3) of the Protocol.[568] Furthermore, the current practice

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566 The Daily Monitor, 6 March 2002 Posted on AllAfrica.com http://allafrica.com/stories/200203050452.html.(Accessed 2013-10-11)

567 Olowu, D., *op-cit* note 58, p 214.

568 In fact, the process seems to have been frozen due to 'sovereignty considerations'. The process of evaluating and reviewing the mandate of PAP was launched by the Assembly of Heads State and Government of the AU in January 2009. The amendments cover the 28 Articles in the draft protocol, of which 26 have already been debated and adopted by government experts tasked to review the Protocol. Articles, 8 and 11 of the Protocol which deal with functions and powers of PAP, were

whereby members on the Parliament are nominated from other respective national parliaments, undermines the actual independence of such members, as they will probably be beholden to their principals and they are thus likely to be able to pursue national interests or agendas as an alternative to continental representation. The independence of the parliamentarians is crucial in a democratic society since parliament should participate in the creation of treaties/ protocols, scrutinise and oversee executive action, as well as facilitate public participation and involvement in the legislative and other processes within the African Union.

In addition, an effective Parliament will be able to monitor and set timelines within which member states and the regional communities have to enact legislation to give effect to the agreements that they willingly enter into.

4.6.2.1 A European Union Parliamentary Perspective

It has already been established in this Chapter that one of the elements of good governance is the involvement of the ordinary people in decision-making, a characteristic that is lacking in the African Union arena. The African Union integration agenda seems to be known and owned only by the political elites in the African region whereas the Treaty on the European Union provides that;

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deferred to allow government experts to seek the opinion of their governments. This is due to concerns about the national sovereignty of Member States. See http://www.pan-africanparliament.org/News.aspx?ID=889 (Accessed 2013-10-24).

a) the functioning of the Union shall be founded on representative democracy;[569]

b) citizens are directly represented at Union level in the European Parliament;[570]

c) political parties at European level contribute to forming European political awareness and to expressing the will of citizens of the Union.[571]

It is submitted that these provisions in the EU Treaty are a basic example of how much citizen participation in the EU is fostered and valued. The European Parliament is directly elected by universal suffrage, whereas the African Pan African Parliament is composed of members nominated by their respective governments. This gives the European Union greater democratic legitimacy to the process of European integration, linking it directly with the will of the people. The Union is made even more democratic because it gives the Parliament a greater role to play, by creating genuine European political parties and by giving ordinary people a greater say in European Union policy-making via non-governmental organisations and other voluntary associations.[572]

In addition to the above, the Treaty on the European Union created the post of Ombudsperson. The European Parliament appoints the Ombudsperson who remains in office for the duration of the Parliament. The Ombudsperson's role is to investigate complaints against EU institutions and bodies. Complaints may be brought by any EU citizen and by any person or organisation living or based in a member country. The

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569 Art 10(1).
570 Art 10(2).
571 Art 10(4).
572 EU, "Europe in 12 Lessons", Available from http://europa.eu/abc/12lessons/lesson_9/index_en.htm (Accessed 2011-10-03).

Ombudsperson tries to arrange an amicable settlement between the complainant and the institution or body concerned.[573]

It is important to also mention that European Union citizens have, amongst others, the following rights;

a) the right to vote and to stand as candidates in elections to the European Parliament and in municipal elections in their member state of residence, under the same conditions as nationals of that State;[574] and
b) the right to petition the European Parliament, to apply to the European Ombudsperson, and to address the institutions and advisory bodies of the Union in any of the Treaty languages and to obtain a reply in the same language.[575]

Reflecting on the above provisions, it is submitted that the gap between the ordinary citizen and the European Union governance model is minimized, thus allowing for the integration project to be owned and understood by the people of the region, an idea that has not yet taken root in the African continental processes.

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573 Article 228 (ex Article 195 TEC), A European Ombudsman, elected by the European Parliament, shall be empowered to receive complaints from any citizen of the Union or any natural or legal person residing or having its registered office in a Member State concerning instances of maladministration in the activities of the Union institutions, bodies, offices or agencies, with the exception of the Court of Justice of the European Union acting in its judicial role. He or she shall examine such complaints and report on them. In accordance with his duties, the Ombudsman shall conduct inquiries for which he finds grounds, either on his own initiative or on the basis of complaints submitted to him direct or through a Member of the European Parliament, except where the alleged facts are or have been the subject of legal proceedings. Where the Ombudsman establishes an instance of maladministration, he shall refer the matter to the institution, body, office or agency concerned, which shall have a period of three months in which to inform him of its views. The Ombudsman shall then forward a report to the European Parliament and the institution, body, office or agency concerned. The person lodging the complaint shall be informed of the outcome of such inquiries.

574 Article 20(b) (ex Article 17 TEC).

575 Article 20(d) (ex Article 17 TEC).

Further, the importance of the autonomy of organs in international organisations cannot be over emphasised and has been well-illustrated in the European Union. In the European case of *European Parliament v Council of the European Communities,*[576] the European Parliament brought an application in which it sought to annul legislation promulgated by the Commission without having properly considered the reservations of the Parliament. In granting the application in favour of the Parliament, the Court opined that by setting up a system for distributing powers among the different Community institutions, assigning each institution to its own role in the institutional structure of the Community and the accomplishment of the tasks entrusted to the Community, the Treaties had created an institutional balance. It is submitted that observance of that balance means that each of the institutions must exercise its powers with due regard for the powers of the other institutions. It also requires that it should be possible to penalize any breach of that rule which may occur. The Court also observed that:

> The Court, whom under the Treaties has the task of ensuring that in the interpretation and application of the Treaties the law is observed, must therefore be able to maintain the institutional balance, and in order to do so must be able to review observance of the prerogatives of the various institutions by means of appropriate legal remedies. Although the Treaties contain no provision giving the Parliament the right to bring an action for annulment, it would be incompatible with the fundamental interest in the maintenance and observance of the institutional balance which they establish for it to be possible to breach the Parliament's prerogatives without that institution being able, like the other institutions, to have recourse to one of the legal remedies provided for by the Treaties which may be exercised in a certain and effective manner .

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[576] Case C-70/88 *European Parliament v Council* [1990] ECR I-2041.

It is argued that this is the ideal position which the African Union should work towards. The Pan African Parliament should not only become an advisory body whose recommendations are not binding on the AU Assembly or other organs. It should play the same Parliamentary role that national parliaments play and this role should be respected within the Union processes.

The importance of maintaining institutional balance with international organisations is just as important as maintaining the separation of powers within a nation state. It is submitted that since this work has already argued and illustrated that international organisations such the African Union have begun attaining state-like characteristics, it flows from such inferences that the international organisations should also respect the separation of powers within themselves. Parliamentary organisations in particular, play various roles beyond legislative functions; one of which is the oversight and control of executive bodies. This role has also been endorsed by the NEPAD as a critical ingredient to the strengthening of political governance and building the capacity to meet developmental needs.[577] It is therefore submitted that if the African Union is to succeed, it should first embrace such ideals.

4.6.2.2 EU Parliamentary Processes

Having identified that the AU and EU are similar in design, it is then instructive to focus on the manner in which the European organs of integration relate to one another, in particular the legislative organs.

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[577] NEPAD, *op-cit* note 113, p 18.

The Parliament is a directly elected parliamentary institution of the European Union. The European Parliament draws up proposals to lay down the provisions necessary for the election of its members by direct universal suffrage in accordance with a uniform procedure in all member states or in accordance with principles common to all member states.[578]The Treaty provides that the European Parliament has its seat in Strasbourg, France, where the twelve (12) periods of monthly plenary sessions, including the budget session, are held. The periods of additional plenary sessions are held in Brussels, Belgium. The committees of the European Parliament meet in Brussels. The General Secretariat of the European Parliament and its departments remain in Luxembourg.[579]

There is a clearly defined role that national parliaments play within the Union together with the European Parliament. The Treaty on the European Union, in Article 12 provides the following ways in which the gap between the national parliaments and the community parliament is eliminated:

- national parliaments are informed and receive draft legislative acts;
- through the principle of subsidiarity, the community parliament acts where action of individual countries is insufficient;
- national parliaments take part in evaluation mechanisms for the implementation of the Union policies in the areas of freedom, security and justice;
- national parliaments take part in the revision procedures of the Treaties; and

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578 Article 223 (ex Article 190(4) and (5) TEC), Consolidated version of the Treaty on The Functioning of The European Union (2010/C 83/01).

579 Protocol (No 6) On the Location of the Seats of the Institutions and of certain Bodies, Offices, Agencies and Departments of the European Union.

- national parliaments are notified of applications for accession to the Union[580]

In addition, the Union has a separate Protocol that outlines the role of national parliaments in the European Union.[581] It is through this Protocol that the Union promotes the exchange of information and best practices between national Parliaments and the European Parliament as well as organising inter-parliamentary conferences on specific topics, in particular to debate matters of common foreign and security policy, including common security and defence policy.[582] It is submitted that these measures, though progressive, are not being implemented in the Pan African Parliament and the Union would benefit immensely from such practices.

The European Parliament exercises legislative and budgetary functions as well as functions of political control and consultation.[583] These legislative and budgetary functions are carried out together with the Council,[584] thereby restricting the decision making powers of the Council unlike in the AU framework where the Summit is the ultimate decision making body.

Under the auspices of Article 17 (8), the European Parliament is endowed with the power to vote on a motion of censure against the Commission. This is a true reflection of democracy since the Parliament is composed of directly elected representatives by the citizens and these representatives have the ability to dissolve an Executive body

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580 Article 12 (a)-(e).
581 Protocol (No 1) on the Role of National Parliaments in The European Union.
582 Article 10, Treaty on European Union.
583 Article 14.
584 Article 16 (1).

within the Union. It is submitted that the opposite is reflected in the African region. The Pan African Parliament does not have the powers to hold accountable various organs of the Union against their Treaty obligations.

The Parliament plays another very important role in the European Union. It curtails the abuse of power by the Council. Unlike in the African position where the Summit can initiate and monopolise the process of promulgating new protocols or legislation, the EU arrangements grant the Parliament plenty of oversight and monitoring powers in this regard. There are three main procedures for enacting new EU laws:

a) consultation;
b) assent; and
c) co-decision.

The main difference between them is the way Parliament interacts with the Council. Under the consultation procedure, Parliament merely gives its opinion; under the co-decision procedure, Parliament genuinely shares power with the Council. The European Commission, when proposing a new law, must choose which procedure to follow. The choice, in principle, depends on the 'legal basis' of the proposal, in other words which Treaty article it is based on.

4.6.2.2.1 The consultation procedure

Under the consultation procedure, the Commission sends its proposal to both the Council and Parliament but it is the Council that officially consults Parliament and other

bodies such as the European Economic and Social Committee and the Committee of the Regions whose opinions are an integral part of the EU's decision-making process. In some cases, consultation is compulsory because the legal basis requires it and the proposal cannot become law unless Parliament has given its opinion. In other cases consultation is optional and the Commission will simply suggest that the Council consult Parliament. In all cases, Parliament can:

- approve the Commission's proposal;
- reject it; or
- or ask for amendments.

If Parliament asks for amendments, the Commission considers all the changes Parliament suggests. If it accepts any of these suggestions it sends the Council an amended proposal. The Council examines the amended proposal and either adopts it as it is or amends it further. In this procedure, as in all others, if the Council amends a Commission proposal it must do so unanimously.

4.6.2.2.2 The Assent Procedure

The assent procedure means that the Council has to obtain the European Parliament's assent before certain, very important decisions are taken. The procedure is the same as in the case of consultation, except that Parliament cannot amend a proposal: it must either accept or reject it. Acceptance ('assent') requires an absolute majority of the vote cast.

4.6.2.2.3 The co-decision procedure

In the co-decision procedure, Parliament and the Council share legislative power. The Commission sends its proposal to both institutions. They each read and discuss it twice in succession. If they cannot agree on it, it is put before a 'conciliation committee', composed of equal numbers of Council and Parliament representatives. Commission representatives also attend the committee meetings and contribute to the discussion. Once the committee has reached an agreement, the agreed text is then sent to Parliament and the Council for a third reading, so that they can finally adopt it as law.[585]
It is submitted that if the above discussed procedures are incorporated into the processes of the Africa Union, the powers of the Summit would be justifiably constrained and this would prevent the establishment of a Union in which powers are concentrated into one organ.

4.7 Summary

This Chapter defined political integration from the perspective of the African Union and identified the political aspects as outlined in the Minimum Integration Program of the Union. Through the usage of statistical data gathered from different sources on the democracy and rule of law index of selected African states, the Chapter was able to define political stability and subsequently prove the symbiotic relationship between political stability and the economic development of African states.

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[585] European Commission, *op-cit* note 218.

The Chapter appraised the work of the NEPAD and the AU Peace and Security Council by deliberating the goals and processes that these institutions have to execute and then criticized the inadequate implementation mechanism and shortfalls of their founding documents. The work discussed the human rights protocols of the continent and identified protocols that remain inoperative due to the fact that they have not received the requisite number of ratifications, signalling the low political will that plagues the integration agenda. A comprehensive discussion of the legislative authority of the Union was carried out and criticized for not being inclusive of the ordinary citizens of the continent. Throughout the Chapter, cases and practices from African and European jurisdictions were used to clarify arguments and recommend reforms for African experiences in order to strengthen the African integration efforts.

CHAPTER 5 INTEGRATION AND THE RIGHT TO DEVELOPEMT

5.1 Introduction

> There is a direct and demonstrable relationship between individual liberty and economic progress. Indeed, it was the protection of individual liberties which unleashed a people's creative and entrepreneurial spirit. Governments now have an overriding responsibility to their citizens; genuine and sustainable development has to be fostered primarily by expanding individual human rights.

The fourth Chapter focused on political integration. It defined political integration, political stability, development and democracy. It argued for the co-relation between development and the attainment of both political and economic development. It also discussed the human rights infrastructure of Africa and from it emerged the judicial debates surrounding application, enforcement, ratification and domestication of these ideals.

Having discussed all these arrangements, a common theme has presented itself repeatedly in the previous Chapters. The theme is that it is through integration that African states wish to attain a measurable level of economic and political development. The conditions for development i.e. peace, stability and trade infrastructure have been discussed in the previous Chapters. This work would be incomplete if it did not articulate the relationship between human rights and development and eventually answer the question as to whether there is such a right to development. This is the task of this Chapter.

5.2 AU Integration and Development

Throughout this work, the concepts of political and economic development have been repeatedly argued in an attempt to show how the African Union can better achieve them. The founding documents of the Union and its concerned institutions also continually make reference to political and economic development. The Constitutive Act makes reference to the following selected objectives;

a) accelerate the political and socio-economic integration of the continent;
b) establish the necessary conditions which enable the continent to play its rightful role in the global economy and in international negotiations;
c) coordinate and harmonize the policies between the existing and future Regional Economic Communities for the gradual attainment of the objectives of the Union;
d) advance the development of the continent by promoting research in all fields, in particular in science and technology;
e) promote co-operation in all fields of human activity to raise the living standards of African peoples; and
f) promote sustainable development at the economic, social and cultural levels as well as the integration of African economies.

Similarly, the objective of NEPAD is to consolidate democracy and sound economic management on the continent. Through the NEPAD, African leaders are making a commitment to the African people and the world to work together in re-building the continent. The attainment of this objective is anchored on the following strategies;

a) economic growth and development and increased employment;

b) reduction in poverty and inequality;

c) diversification of productive activities, enhanced international competitiveness and increased exports;

d) increased African integration.[586]

The AU/NEPAD African Action Plan (AAP) is the defining statement of Africa's current priority programmes and projects related to the promotion of regional and continental integration.[587] It is submitted that all these documents and the treaties establishing the various regional communities all contain similar objectives related to the economic and political development of Africa.

The NEPAD also incorporates a strategy for overseeing the attainment of the Millennium Development Goals (MDG's). The formulation of the MDGs, and the monitoring mechanisms in place to chart progress toward their realization, helps to clarify some of the existing gaps in of African development and integration.Enunciated in 2000 at the UN Millennium Summit and affirmed at the 2002 International Conference on Financing for Development in Monterrey, Mexico, the eight MDGs call for the eradication of extreme poverty and hunger, the achievement of universal primary education, the promotion of gender equality and the empowerment of women, reduction of child mortality, the improvement of maternal health, the combating of HIV and AIDS,

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586 NEPAD, *op-cit* note 113, p 14.

587 AU, "NEPAD African Action Plan (AAP)", Available from http://www.nepad.org/system/files/AAP%20final%20web%20130111.pdf. (Accessed 2013-10-24).

malaria, and other diseases, environmental sustainability, and the development of a global partnership for development.[588]

Participants at the Millennium Summit and the Monterrey Conference agreed to achieve the MDGs by 2015. The World Bank and the IMF issue annual Global Monitoring Reports that monitor progress to this end. These reports provide detailed assessments of the contributions of developing countries, developed countries, and international financial institutions toward meeting development commitments, and propose specific recommendations to achieve greater compliance.

The 2006 Global Monitoring Report, for example, details the fact that many countries are off track in meeting the MDGs, particularly in Africa and South Asia, but provides evidence that higher quality aid and better policy environments are accelerating progress in some countries, and that the benefits of this progress are reaching poor families. It also argues that sustained monitoring is needed to ensure continued progress, and to prevent the cycle of accumulating unsustainable debt from repeating itself. It argues further that international financial institutions, on their part, need to focus on development outcomes rather than on inputs, and support the efforts of developing countries to strengthen their statistical and institutional capacities.[589]

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588 See UN Resolution on the Adoption of the Millennium Development Goals A/RES/55/2 of September 2000. UN, "Millennium Development Goals", Available fromwww.unmillenniumproject.org/html/about.shtm.(Accessed 2013-10-24).

589 World Bank and the International Monetary Fund, Global Monitoring Report on the Millennium Development Goals; Mutual Accountability – Aid, Trade and Governance (April 20, 2006).

Despite these grand ideals, the success of integration has not reached its apex as evidenced in the previous Chapters of this work. Chapter three elucidated the economic hurdles that the continent still has to overcome in terms of trade liberalisation. The fourth Chapter identified the political shortcomings and conflicts which stand in the way of political development.

5.3 AU Integration and the Right to development

The right to development first surfaced in international law in the African Charter on Human and Peoples' Rights. Article 22 of the African Charter states that:

> All peoples shall have the right to their economic, social and cultural development with due regard to their freedom and identity and in the equal enjoyment of the common heritage of mankind. States shall have the duty, individually or collectively, to ensure the exercise of the right to development.[590]

Since Article 3(h) of the Constitutive Act articulates that the Union aims to promote and protect human and peoples' rights in accordance with the African Charter on Human and Peoples' Rights and [other relevant human rights instruments], it is then possible to infer through this provision that the Union is also bound to give credence to the rights enshrined in the Universal Declaration on Human Rights and similar conventions and declarations.

In the 1986 UN Declaration on the Right to Development, one of several instruments to emerge from the UN General Assembly as a result of efforts by developing states to

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590 ACHPR, *op-cit* note 510, Art 22.

reshape the international legal order in ways that would address social and economic concerns of the global south, the right to development was captured as follows:

> The right to development is an inalienable human right by virtue of which every human person and all peoples are entitled to participate in, contribute to, and enjoy economic, social, cultural and political development, in which all human rights and fundamental freedoms can be fully realized.[591]

The Declaration recognises that the realization of the right to development requires full respect for the principles of international law concerning friendly relations and co-operation among states in accordance with the Charter of the United Nations. It also places a duty on member states to co-operate with each other in ensuring development and eliminating obstacles to development. States should realize their rights and fulfil their duties in such a manner as to promote a new international economic order based on sovereign equality, inter-dependence, mutual interest and co-operation among all states, as well as to encourage the observance and realization of human rights.[592]

The "responsibility" for the creation of this enabling environment encompasses three main levels:

a) States acting collectively in global and regional partnerships;[593]
b) States acting individually as they adopt and implement policies that affect persons not strictly within their jurisdiction;[594] and

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591 Declaration on the Right to Development Art 141/1281986.
592 Art 3.
593 Art 3.
594 Art 4.

c) States acting individually as they formulate national development policies and programmes affecting persons within their jurisdiction.

The right can further be discussed in terms of internal and external dimensions. The internal dimensions of the right require states to exercise their sovereign power over resources and revenues in ways that promote development for the benefit of its population. Article 2(3) of the Declaration, for example, imposes on states "the duty to formulate appropriate national development policies."[595] Article 8 requires states to undertake "at the national level all necessary measures for the realization of the right to development."[596] The external dimensions of the right speak to the exercise of sovereign power in the international arena. Article 3(1), for example, imposes positive obligations on states to create "international conditions favourable to the realization of the right to development."[597] Article 4(1) provides that states are under an individual and collective obligation "to formulate international development policies with a view to facilitating the full realization of the right to development."[598] Other Articles refer to duties of international cooperation and assistance, further specifying the external dimensions of the right.[599]

It is submitted that the right to development provides an inclusive framework and approach to the policies and programmes of all relevant actors at the global, regional, sub-regional and national levels. This right integrates aspects of both human rights and

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595 Art 2(3).
596 Art 8.
597 Art 3(1).
598 Art 4(1).
599 Art 3(3), 4(2).

development. The African Union has correctly adopted it within its documents as successful integration leads to development.

It is important to note that the Declarationon the Right to Developmentis not, in itself, a legally binding instrument.[600] Its Preamble, however, expressly refers to the purposes and principles of the UN Charter and thus it may be regarded as an authoritative or persuasive interpretation of the Charter. The UDHR also contains a series of principles and rights that are based on human rights standards enshrined in other international instruments that are legally binding[601] such as the International Covenant on Civil and Political Rights (ICCPR)[602] and the International Covenant on Economic, Social, and Cultural Rights (ICESCR). The ICESCR enshrines more specific rights to international cooperation and assistance that are contained in Article 28 of the Universal Declaration. Both the ICCPR and the ICESCR enshrine the right of self-determination, and specify that self-determination entitles "all peoples" to "freely pursue their economic, social and cultural development."[603]

The right to development is classified as a third generation right. First generation human rights were the first to be conceived by the United Nations, and were fundamentally political.[604] These rights are conceived more in negative terms. These are rights such as those set forth in Articles 2–21 of the Universal Declaration of Human Rights, including freedom from gender, racial, and equivalent forms of discrimination; the right

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600 Öberg, M.D., "The Legal Effects of Resolutions of the UN Security Council and General Assembly in the Jurisprudence of the ICJ". ***European Journal of International Law***, 2005 Vol 16, p 879.

601 As shown in the previous Chapter.

602 *Adopted* Dec. 19, 1966, 999 U.N.T.S. 171 (entered into force Mar. 23, 1976).

603 Art.1, ICCPR; Art. 1, ICESCR.

604 Meron, T., "On a hierarchy of international human rights".1986, ***The American Journal of International Law***, Vol 80(1), p 1-23.

to life, liberty, and security of the person; freedom from slavery or involuntary servitude; freedom from torture and from cruel, inhuman, or degrading treatment or punishment; freedom from arbitrary arrest, detention, or exile; the right to a fair and public trial; freedom from interference in privacy and correspondence; freedom of movement and residence; the right to asylum from persecution; freedom of thought, conscience, and religion; freedom of opinion and expression; freedom of peaceful assembly and association; and the right to participate in government, directly or through free elections.

The second generation of human rights is fundamentally social and economic.[605]Illustrative are some of the rights set forth in Articles 22–27 of the Universal Declaration of Human Rights, such as the right to social security; the right to work and to protection against unemployment; the right to rest and leisure, including periodic holidays with pay; the right to a standard of living adequate for the health and well-being of self and family; the right to education; and the right to the protection of one's scientific, literary, and artistic production.[606]

The third generation of human rights embraces collective rights. This gives the individual the right to be part of a collective group.[607] For instance, Article 28 of the Universal Declaration of Human Rights, proclaims that "everyone is entitled to a social and international order in which the rights set forth in this declaration can be fully realized." Others include the right to political, economic, social, and cultural self-

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605 Meron, T., *Ibid* note 604, p 19.

606 Elkins, Z., Ginsburg, T., and Simmons, B., "Getting to Rights: Treaty Ratification, Constitutional Convergence, and Human Rights Practice". 2013 ***Harvard International Law Journal*** Vol 54, p 61-219.

607 Meron, T. *Ibid* note 604.

determination; the right to economic and social development; and the right to participate in and benefit from "the common heritage of mankind" the right to peace, the right to a clean and healthy environment, and the right to humanitarian disaster relief.[608] The right to development is also classified amongst these third generation rights.

5.3 Enforcement of the Right to development

With reference to the previous Chapters, it is at this point common knowledge that human rights have been assimilated into the founding documents of the Union. *Alston* recorded that in sociology, adherents of the World Society School claim that international human rights norms are scripts of modernity that "reflect legitimating ideas dominant in the world system at the time of their creation.[609]AU member states have also not been shy to incorporate human rights into their Constitutions; in fact, countries all over the world are quick to show their support for the development of human rights. The following scatter graph illustrates results of a study by *Stephen* illustrating the incorporation of human rights into domestic Constitutions over the years.

See figure on next page

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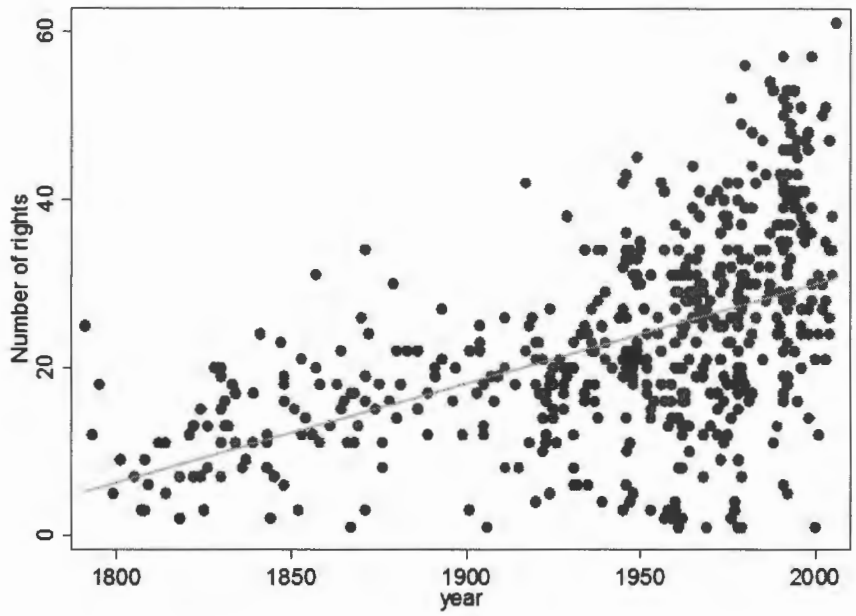
608 Alston, P., "A Third Generation of Solidarity Rights: Progressive Development or Obfuscation of International Human Rights Law?" ***Netherlands International Law Review***, Vol 29(03), p 307-322.

609 Elkins, Z., *op-cit* note 606, p 65.

Figure 7: Scatterplot illustrating Human Rights adoption trends into Constitutions



Source: Stephen, S., "Human Right to Development: Between Rhetoric and Reality, 2004, ***Harvard International Law Journal*** Vol. 17, p 143

As expected, the number of rights in Constitutions has increased over time. It is however submitted that despite human rights being claimed to be universal, African governemnts have in some instances fallen short of the required standards.[610]Many have questioned the genuine embrace of these rights worldwide, and a raft of observers from pundits, practitioners to scholars have questioned whether rights on paper have influenced the enjoyment of human rights on the ground.[611] Selected examples of such scenarios include;

a) South Africa: Domestically, refugees are entitled to protection by the South African Bill of Rights and the Refugees Act of 1998. But the extensive gap

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610 Elkins, Z., *op-cit* note 606. p 65.

611 Elkins, *Z., op-cit note* 606, p 64.

between refugee law in theory and the law as implemented in practice in South Africa unfortunately results in many refugees not enjoying the rights and protections guaranteed to them."[612] The xenophobic attacks in South Africa have indicated a need for improving the immigration policies and the protection of rights of immigrants. At the heart of the issue is a question that likely dwells in the minds of many refugees in South Africa: "Is this really a place to call home?"

b) Democratic Republic of Congo: Across the country, many people die in detention from hunger and atrocious prison conditions.[613] Most prisons receive no government budget, and prisoners are fed by their families. The interior of most facilities is controlled by prisoners themselves, and not surprisingly, escapes and violence are common.[614] Records and monitoring are so poor that the Government does not even know how many prisons and prisoners are in the country. Further, impunity for all forms of killings is the norm. This is in part due to systemic problems in the justice system, especially corruption at all levels, regular political interference and severe resource constraints. While there have been some recent improvements in the military justice system in the east of the country, impunity for senior commanders remains pervasive.[615]

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612 McKnight, J., "Through the Fear: A Study of Xenophobia in South Africa's Refugee System." ***Journal of Identity and Migration Studies***. 2008 Vol: 2 Issue: 2 p 18-42.

613 Observations of the 14th Session of the UNHRC. Available from www.un.org/webcast/unhrc/ (Accessed 2013-12-10).

614 UNHRC, *Ibid* note 613.

615 UNHRC, *Ibid* note 613.

c) Zambia: Despite the constitutional provision prohibiting discrimination (Art. 23), gender discrimination in Zambia is still pervasive.[616] It limits women's opportunities to access land, education, credit and other productive assets and creates a power imbalance that prevents women and girls from taking full control of their lives. Thus, women are over-represented among the extremely poor; they are more likely to be unemployed, they are less literate, drop out of school more often and are more likely to live with HIV and AIDS than men.[617]

The previous Chapter articulated how treaty provisions give rise to a legitimate expectation that was successfully enforced in the Australian case of *Minister for Immigration and Ethnic Affairs v Teoh.*[618]It also discussed selected African judgments where the applicants successfully relied on treaty provisions on the basis that they were ratified by the respondent state.

It can also be argued that the right to development is enforceable due to its international legal status. Its international legal status as a human right derives from the fact that international law, according to the principle *pacta sunt servanda*, provides that a treaty in force between two or more sovereign states is binding upon the parties to it and must be performed by them in good faith.[619]The international legal validity of a norm, that is what makes it part of international law, rests on a relatively straightforward exercise in legal positivism: a norm possesses international legal validity if its enactment,

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616 UNHRC, *Ibid* note 613.
617 UNHRC, *Ibid* note 613.
618 1995 128 ALR 353.
619 Vienna Convention, *op-cit* note 46, Art 26.

promulgation or specification is in accordance with more general rules that international law lays down for the creation of specific legal rights and obligations.[620]

Elkins et al has argued that Human rights law does not implement itself; instead it requires social actors to mobilize around it and to demand chances on the ground. They concluded that international law matters when local activists, courts and others are able to utilize it in domestic practice, and that constitutional incorporation is one mechanism by which the international legal regime for human rights has an impact locally.[621] It is submitted that this observation then reverts back to the importance of having an involved civil society and a functional Pan African Parliament as discussed in the previous Chapter.

In their work, *Elkins et al* also suggested three channels through which human rights law, domestic and/or international, may be used to improve human rights on the ground;

a) direct treaty effects, by which governments change their behaviour in response to the specific prescriptions or proscriptions of an international obligation without necessarily adjusting their domestic law;
b) direct constitutional effects, which imply that government-rights behaviour is constrained by the content of the domestic constitution in the absence of international treaty; and

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620 Kingsbury, B., "Legal Positivism as Normative Politics: International Society, Balance of Power and Lassa Oppenheim's Positive International Law," 2002 ***European Journal of International Law*** Vol 13 p 401.

621 Elkins, Z., *op-cit* note 606, p 64.

c) indirect treaty effects, by which treaty ratification stimulates a demand for legal consistency, which in turn increases the likelihood that the rights contained in the treaty will be constitutionalized, and thereby become a tool for domestic legal as well as political mobilization. Support for these last two "constitutional" channels comports with an emerging theme of the new literature on the efficacy of international human rights law, which asserts that effective human rights protection requires domestic institutions and conditions.[622]

The above phrase "protection requires propitious domestic institutions" has been echoed in various judgments. In the South African Constitutional Court case of *Soobramoney v Minister of Health (Kwazulu-Natal),*[623]the appellant was a diabetic who suffered from heart disease and cerebro-vascular disease. His kidneys failed in 1996 and his condition had been diagnosed as irreversible. He asked to be admitted to the dialysis program of the Addington Hospital (a state hospital). He was informed that he did not qualify for admission. Because of limited resources the hospital had adopted a policy of admitting only those patients who can be cured within a short period and those with chronic renal failure who were eligible for a kidney transplant. He applied to the Durban High Court claiming that he had a right to receive renal dialysis treatment from the hospital in terms of s 27(3) (which provided that no one could be refused emergency medical treatment) and s 11 (the right to life) of the 1996 Constitution. The application was dismissed.

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622 Elkins, Z., *op-cit* note 606, p 64.*Ibid.*
623 1998 (1) SA 765 (CC).

On appeal, the Constitutional Court held that the right not to be refused emergency medical treatment meant that a person who suffered a sudden catastrophe which called for immediate medical attention should not be denied ambulance or other emergency services which were available and should not be turned away from a hospital which is able to provide the necessary treatment. Since the applicant suffered from chronic renal failure and would require dialysis treatment two to three times a week to keep him alive the Court decided that this was not an emergency which called for immediate remedial treatment. The reasoning of the Court is well captured in the following statement;

> The applicant in this case presented his claim in a most dignified manner and showed manifest appreciation for the situation of the many other persons in the same harsh circumstances as himself. If resources were co-extensive with compassion, I have no doubt as to what my decision would have been. Unfortunately, the resources are limited, and I can find no reason to interfere with the allocation undertaken by those better equipped than I to deal with the agonising choices that had to be made.[624]

Less than three years after the *Soobramoney* judgment, the same court had to deliver a similar reasoning in *Government of the Republic of South Africa and Others v Grootboom and Others*.[625] The Court was faced with a situation in which the respondents had been evicted from their informal homes situated on private land earmarked for formal low-cost housing. They successfully applied to the High Court for an order requiring the government to provide them with adequate basic shelter or housing until they obtained permanent accommodation. The government appealed the decision. In laying the matter to rest the Constitutional Court did agree that socio-economic rights were justiciable however due regard to the availability of resources

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624 at para 59.
625 2001 (1) SA 46

should be taken into consideration and each case should be treated according to its own merits. The Court opined that:

> The third defining aspect of the obligation to take the requisite measures is that the obligation does not require the state to do more than its available resources permit. This means that both the content of the obligation in relation to the rate at which it is achieved as well as the reasonableness of the measures employed to achieve the result are governed by the availability of resources. Section 26 does not expect more of the state than is achievable within its available resources.[626]

The impact of these two judgements to this work is that though the work has argued that the right to development does exist and has been given legal force through various documents on the African continent and that this right is attainable through various means including successful integration programmes, there is an interpretative limit to a claim that arises out of this right since a member state that does not have the capacity or resources to deliver such development cannot be ordered to materialise such development conditions beyond its available resources.

It can however be argued that there is an obligation on governments to ensure that they maximise and invest efforts in the right programmes in order to achieve the maximum level of development and integration. For instance, Article 2 of the ICESCR provides that;

> Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.

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[626] at para 41.

It is submitted that the ideal position in the future would be to operationalize the African Court of Justice and Human Rights and allow the Organs of the Union to contest each other decisions and those of member states on grounds that their policy positions defeat the integration agenda.

5.4 Summary

The fifth Chapter culminated the work of the third and fourth Chapter under the umbrella right to development. It illustrated how the founding documents of the Union give birth to the right to development and the literature surrounding this right. It articulated the challenges that spring up upon trying to enforce such a right in court of law. The next Chapter concludes and provides the recommendations suggested by this work.

CHAPTER 6 CONCLUSION AND RECOMMENDATIONS

6.1 Introduction

This Chapter presents the summary and conclusions of the study. It also presents the recommendations that may better improve the pursuit of politico-legal and economic integration in Africa.

This study set out to investigate the status and impediments in the way of regional and continental integration in Africa by evaluating both the political and economic perspectives of various initiatives launched under the auspices of the former Organisation of African Unity and the current African Union. Evidently, the study would have been incomplete if it did not discuss the many regional economic communities that have been established to further the objectives of the Treaty establishing the African Economic Community.

6.2 Major findings of the study

This work has made the various findings in the field of African political and economic integration. They are that:

a) regional integration was first identified as a strategy by African states for over-coming colonial rule, underdevelopment and dependency on western states;
b) the ultimate goal of the African Union is full political and economic integration leading to the United States of Africa;

c) the strong ties amongst African states that were strengthened by the fight against colonialism was one of the factors why the OAU had never considered expelling any of its members;

d) the deterioration and erosion of democracy, peace and stability is not a short-term phenomenon that occurs overnight but rather can be identified at its early stages by proactive mechanisms;

e) regional integration still rests as a fundamental part of Africa's development;

f) the Lagos Plan enjoined African countries to establish sub-regional economic groupings as a means for the eventual creation of the African Economic Community. However, this enjoinment did not foresee and guard against the possibility of multiple memberships;

g) overlapping memberships to a custom union or other regional economic arrangements are highly detrimental to the state since it has to subscribe resources and political will to two or more different arrangements.

h) overlapping memberships cause confusion, inertia and most importantly legal uncertainty thereby stifling trade liberalisation efforts;

i) many African states still guard their sovereignty closely and perceive that yielding their sovereignty to a continental body is tantamount to losing their independence;

j) sovereignty is often used to window-dress internal misdeeds and to bar neighbours from intervening on matters of appalling human rights violations that ultimately undermine the efforts of regional integration;

k) the African Union infrastructure still lacks supra-national and national institutions that are capable of implementing its values;

l) the African Union infrastructure does not contain an institutionalised mechanisms for the promotion and management of Union affairs at national level;

m) the low political commitment and perceived or real losses and sacrifices involved, leads to a number of countries being reluctant to fully implement integration programmes on a timely basis;

n) one avenue to deal with poverty, human rights abuses, corruption and economic mismanagement in Africa is to remove the focus of member states from narrow domestic interests since international trade cannot be pursued or negotiated individually;

o) the NEPAD initiatives, the APRM process and the functions of the Peace and Security Council play a positive role in African politico-legal and economic development. It has however been shown that these mechanisms are more reactive than preventative and as such, intervene too late in the internal affairs of member states;

p) the countries with a better democratic environment tend to have a higher development index;

q) it has been quantified that armed conflicts cause a reduction in the per-capita Gross Domestic Product growth rate of a nation experiencing a civil war/ conflicts.

r) the policy direction of the African Union is too concentrated into the AU Assembly;

s) European integration forms a big part of International Relations theory and has been studied at great length. As such, there are some practices and established

principles of regional integration from the European experience that the African Union may benefit from;

t) African leaders realize that the success of African development solely rests on African shoulders;

u) the African Union has regressed from the original timelines of the African Economic Community. The highest regression is Phase 2 which involves the most critical element of strengthening of African regional integration arrangements and the harmonisation of policies concerned. A thirteen (13) year postponement is noted in this regard.

v) Africa's poor intra-trade performance is also attributed to the limited progress among African countries in fostering structural transformation. This structural transformation relates to the building of roads, bridges, railway lines and power grids;

w) One Stop border posts are one way in which border traffic can be reduced in order to facilitate the smoother and quicker movement of goods and services.

x) A critical aspect of sovereignty is that it forms a basic structure of governance. Sovereign states have the obligation to govern the economy in such a way as to promote the wealth and welfare of the community. This exercise of sovereignty should however be carried out with due regard to the agreements and decisions made at international level if integration is to be achieved; and

y) a state cannot plead a rule or gap in its own municipal law as a defence to a claim based on international law;

It is further submitted that the findings in this work are not and should not be construed as superlative. The conditions for successful regional integration still remain many and

varied. This is the nature of studies or phenomena that includes economic and political concepts as the outcome for success usually does not rely on one variable but rather a series of fluid inputs.

6.3 Conclusion

With reflection on the observations and literature that this work has canvassed, it is submitted that the African grand vision to integrate at political, economic and legal spheres is indeed the right path that the continent should invest its human and capital resources towards. It is further submitted that the establishment of the African Union and its regional economic communities is the first step towards the attainment of full politico-legal and economic integration. It is also submitted that the current interpretation and application of the objectives of the Union is inadequate if Africa is to attain the goals of the integration agenda. Clearly, the "success conditions" for regional integration are many and varied. This work has identified and discussed some of these conditions and should not be perceived to be the panacea or solution to all regional integration challenges.

If Africa is to successfully attain regional and continental integration, member states should be willing to share their decision-making on matters of common interest with supra-national institutions so as to ensure a uniform, steady and focused translation of integration ideals into tangible outcomes. This will call upon African leaders to revise the Protocol establishing the Pan African Parliament as well as operationalizing the Protocol on the Statute of the African Court of Justice and Human Rights.

African integration has been marred by missed opportunities and postponed targets. This work has proven that the resources and potential for African integration exist within the continent and all that is required is the political will to be garnered and directed towards reaching the goals as set out in the Treaty establishing the African Economic Community.

Political and economic development has been stifled by the lack of legal certainty due to member states subscribing to multiple integration arrangements as well as the lack of infrastructure to facilitate the movement of goods and services.

Regional integration requires commitment from all levels of governance. In addition to political will, there also has to be integrity and credibility from the leaders who purport to drive the integration process forward. The work has indicated that the absence of good governance and respect for human rights within the region is detrimental to the totality of African integration; therefore the strategy for successful integration has to embody solutions to address the instability plaguing the African political climate.

6.4 Recommendations

In order for the African continent to re-position itself in an attempt to harness the benefits of regional integration, it is recommended that;

a) the Union resuscitate the values of Pan Africanism and adapt such philosophies with the changing times in order to Unite African leaders, their people and their roots;

b) the Union educate leaders and people of the continent about regional integration in order to dispel myths surrounding it. The awareness should apart from tackling the lack of political will also boldly send out the message that the ultimate goal of the African Union is full political and economic integration leading to the United States of Africa;

c) member states should become aware and appreciate that they need to pursue higher human rights indexes in order to pave the path for economic development;

d) member states and the Union should reach a clear and resolute decision on the issue of multiple memberships;

e) the Union grant supra-national status to institutions of the Union for the equitable and speedy attainment of integration;

f) the Union and member states should as soon as possible create mechanisms with decision making powers to manage Union affairs at regional and national level;

g) the operationalization of the Pan African Parliament should be pursued with the utmost determination to bring the Parliament to full functionality as a Continental legislative body;

h) the operationalization of the African Court of Justice and Human Rights be completed as soon as possible in order to allow the body to function as a fully-fledged continental judiciary. This will ensure that the development of integration

jurisprudence from an international law perspective is not delayed. The Court will also pursue the enforcement of Human rights norms and practices;

i) the NEPAD initiatives, the APRM process and the functions of the Peace and Security Council should be headed by proactive leaders. These bodies should also be insulated from interests of the Heads of State;

j) the Union should further lead the continent in the following sectors with clear and predictable deliverables;

   a. the establishment and upgrading of regional land, air, and other means of transportation and communication;
   b. the creation of a cross-border power and energy generation and distribution network;
   c. the establishment, advancement, and diversification of regional financial and commodity markets;
   d. the establishment of a regional higher education system by facilitating wider access through specialization in regional integration;

6.5 Future Research Agenda

In conducting this work, it has become evident that the study of regional integration has been thus far focused on general economic policy as well as areas of international relations and international law. Not much work has been done in terms of analysing and predicting how the private sector will be affected by the collapse of market protection mechanisms and whether the solution to this lies in a continental merger and acquisition framework led by the Union. It is also much deserving that research be carried out on how to ensure that integration does not only benefit the big foreign multinational

corporations but also indigenous African businesses and the ordinary African whose livelihood depends solely on vending self-grown Agricultural produce.

In a nutshell, the study of integration has in the past been focused at elite levels; causing an imbalance in the body of knowledge.

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