

Challenges to regional integration in the SADC Region: A legal perspective.

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**Dissertation submitted in fulfilment of the requirements for the degree of
Master of Laws in the School of Postgraduate Studies and Research, Faculty
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CANDIDATE'S DECLARATION

I, Ilyayambwa Mwanawina, hereby declare that this dissertation is original and has never been presented in any other institution. I further declare that any secondary information has been duly acknowledged in this dissertation.

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DECLARATION BY SUPERVISOR

I, Professor Melvin L. M. Mbao, hereby declare that this dissertation by Mr Ilyayambwa Mwanawina for the degree of Master of Laws (LLM) entitled “Challenges to regional integration in the SADC Region: A legal perspective,” be accepted for examination.

Prof. Melvin L. M. Mbao

November 2011

DEDICATION

This dissertation is dedicated to my parents, who saw through the process of my education, despite trying times. It is further dedicated to the people of Africa, whose daily struggle is to overcome poverty, hunger and disease.

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LIST OF ABBREVIATIONS

AEC	African Economic Community
AIDS	Acquired Immune Deficiency Syndrome
AU	African Union
COM	Council of Ministers
COMESA	Common Market for East and Southern Africa
EAC	East African Community
ECA	Economic Commission for Africa
ECHR	European Court of Human Rights
ECOWAS	Economic Community of West African States
EEC	European Economic Community
EPA	Economic Partnership Agreements
EU	European Union
FTA	Free Trade Area
HIV	Human Immune Virus
ICM	Integrated Committee of Ministers
ICTR	International Criminal Tribunal for Rwanda
LPA	Lagos Plan of Action
MMA	Multilateral Monetary Agreement
MoU	Memoranda of Understanding
NEPAD	New Partnership for Africa's Development
OAU	Organisation of African Unity
REC	Regional Executive Committee
RIFF	Regional Integration Facilitation Forum

RISDP	Regional Indicative Strategic Development Plan
SACU	South African Customs Union
SADC	Southern Africa Development Community
SADCBRIG	SADC Brigade
SADCC	Southern African Development Co-ordination Conference
SCUs	Sectoral Co-ordinating Units
SNCs	SADC National Committees
TDCA	Trade Development and Cooperation Agreement
TFTA	Tripartite Free Trade Area

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Valente v The Queen (1986) 24 DLR (4th) 161 (SCC).

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International Instruments

Year	Title
1948	Treaty of Brussels.
1963	Organisation of African Unity.
1965	Merger Treaty.
1992	The SADC Treaty.
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.

Regional Declarations and Protocols

1991	Windhoek Declaration on the Freedom of the Media.
1992	Towards the Southern African Development Community.

1997	Gender and Development: A Declaration by Heads of State or Government of the Southern African Development Community.
1998	The Prevention and Eradication of Violence against Women and Children: An Addendum to the 1997 Declaration on Gender and Development by SADC Heads of State or Government.
1999	Declaration on Productivity.
2001	Declaration on Information and Communication Technology.
2003	Declaration on HIV/AIDS.
2004	Dar-Es-Salaam Declaration on Agriculture and Food Security in the SADC Region.

Protocols

1966	Optional Protocol to the International Covenant on Civil and Political Rights.
1992	Protocol on Immunities and Privileges.
1992	Protocol to the Treaty Establishing the Southern African Development Community on Immunities and Privileges.
1995	Protocol on Shared Watercourse Systems.

1996	Protocol on Combating Illicit Drugs.
1996	Protocol on Energy.
1996	Protocol on Trade.
1996	SADC Protocol on Transport, Communications and Meteorology.
1997	Protocol on Education and Training.
1998	Protocol on Development of Tourism.
1999	Protocol on Health.
1999	Protocol on Wildlife Conservation and Law Enforcement.
2000	Amendment Protocol on Trade.
2000	Protocol on Legal Affairs.
2000	Protocol on Mining.
2000	Revised Protocol on Shared Watercourses.
2000	Protocol on Tribunal and the Rules of Procedure Thereof.
2001	Protocol against Corruption.
2001	Protocol on Control of Firearms, Ammunition and other related materials.

2001	Protocol on Culture, Information and Sport.
2001	Protocol on Fisheries.
2001	Protocol on Politics, Defence and Security Co-operation.
2002	Agreement Amending the Protocol on Tribunal.
2002	Protocol on Extradition.
2002	Protocol on Forestry.
2002	Protocol on Mutual Legal Assistance in Criminal Matters.
2005	Protocol on the Facilitation of Movement of Persons.

Principles

2005	SADC Principles and Guidelines Governing Democratic Elections.
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Conventions

1950	European Convention on Human Rights.
1950	European Convention for the Protection of Human Rights and Fundamental Freedoms Rome, 4.XI.

1969 Vienna Convention on the Law of Treaties.

1969 American Convention on Human Rights.

Charters

1981 African Charter on People's and Human Rights.

1997 Charter of the Regional Tourism of Southern Africa.

2003 Charter of Fundamental Social Rights in SADC.

2003 SADC Mutual Defence Pact.

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ABSTRACT

The Southern African Development Community (SADC), formerly known as the Southern African Development Coordination Conference (SADCC), is an organization of 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

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. 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 transformation from SADCC to SADC indicated that the body would no longer be a loose association (conference) of states but rather a regional body that would have a legally binding effect on its member states. The question is, when the member states assembled in Windhoek, August 1992, did they create an institutional framework, and policies that would have enough legal force to ensure that the institutional agenda of integration is not defeated by member states? The argument of this dissertation is that the Treaty and the policies established afterwards contain principle imperfections that are self defeating for the pursuance of regional integration.

The work will begin by discussing regional integration in general, highlighting the historical origins of SADC as well as the role of the African Union. The work will then discuss the dimensions and functioning of SADC, laying the foundation for a proper critique on how the institutional framework contains inherent weaknesses that eventually hinder the progression of SADC. The dissertation ultimately will discuss and benchmark the European Union against SADC, in an attempt to extract important lessons for the progression of SADC.

CHAPTER ONE: INTRODUCTION

1.1 Background to the Study

Regional economic groupings emerged and continued to be relevant in world politics as far back as 1948, when the Benelux countries formed the first ever customs union. Subsequently, the European Coal and Steel Community was founded in 1951. That was followed by the European Economic Community (EEC) or Common Market in 1957, with the main aim of 'preventing war between France and Germany'. This later metamorphosed into the now successful European Union.¹

From an African perspective, regional integration was identified as a strategy by African states for overcoming colonial rule, underdevelopment and dependency on western states. This perspective is echoed by Kwame Nkrumah:

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.²

The Organisation of African Unity (OAU) was established on 25 May 1963 in Addis Ababa, Ethiopia, on signature of the OAU Charter by representatives of 32

¹ McDonald, A. S. K, "Regional Integration in Africa; The case of ECOWAS", *University of Zurich*, 2005, pg 26.

² Nyirabu M., "Appraising regional integration in Southern Africa : feature. 2004." *African Security Review*, Vol 13, Issue 1. p.21.

governments. A further 21 states joined gradually over the years, with South Africa becoming the 53rd member on 23 May 1994.³

When in 1963 a few African leaders met in Addis Ababa for the founding of the OAU, they believed that in order to liberate the continent from colonialism and racism they had to be united. The aims of the OAU were to promote the unity and solidarity of African States; co-ordinate and intensify their co-operation and efforts to achieve a better life for the peoples of Africa; defend their sovereignty, territorial integrity and independence; eradicate all forms of colonialism from Africa; promote international co-operation, giving due regard to the Charter of the United Nations and the Universal Declaration of Human Rights; and co-ordinate and harmonise members' political, diplomatic, economic, educational, cultural, health, welfare, scientific, technical and defence policies.⁴

Over the years, the OAU helped foster solidarity among the newly independent states and preserve the ideals of inviolability of inherited borders and sovereign equality of nations. It was also successful in spear-heading the fight against minority regimes in Southern Africa and against apartheid in South Africa. The upshot of that struggle against colonialism has been that today, apart from Western Sahara, every African territory is now independent. However, weighed down with debts and bureaucracy, and as a consequence of its policy of non-interference in the internal

³ Department of Foreign Affairs, "Organization of African Unity (OAU) / African Union (AU)," <http://www.dfa.gov.za/foreign/Multilateral/africa/oau.htm> (accessed 2011-11-16).

⁴ Article 2 of the OAU Charter, 1963.

affairs of sovereign states, the OAU failed to prevent conflicts, stop genocides or challenge dictators.⁵

Serious efforts towards regional integration in Africa were initiated in the 1970s culminating in 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 (AEC). The LPA identified three stages to realise this goal: trade liberalisation, the establishment of custom unions and the creation of a single economic community.⁶

Over time the priorities of the OAU started to change. Human rights became a more important concern and in 1981 the African Charter on Human and Peoples' Rights was adopted.⁷ With the end of the Cold War, the OAU had to reconsider its role in African development. African leaders recognized that ever-present conflicts on the African continent badly hurt African development leading in 1993 to the adoption of the OAU Mechanism for Conflict Prevention, Management and Resolution was adopted. With the new mechanism, intervention in what was formerly considered as

⁵ http://ec.europa.eu/development/body/publications/courier/courier194/en/en_030.pdf (accessed 2011-11-16).

⁶ Nyirabu, M., *Ibid* note 2, p.22.

⁷ OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), available from University of Minnesota, Human Rights Library <http://www1.umn.edu/humanrts/instree/z1afchar.htm> (accessed 2011-11-16). See also Towards a Human Rights Agenda, West Africa 1st-7th July 2002.

internal conflicts became possible, but the Charter's stress on non-intervention became one factor in the mechanism's lack of effectiveness.⁸

It was by acclamation that the Assembly of Heads of State and Government in July 1999 in Algiers, Algeria accepted an invitation from Colonel Moammar Ghadafi to the 4th Extraordinary Summit in September in Sirté, Libya. The purpose of the Extraordinary Summit was to amend the OAU Charter to increase the efficiency and effectiveness of the OAU.⁹ The Summit decided to establish an African Union.

The objectives of the African Union are to:

- achieve greater unity and solidarity between the African countries and the peoples of Africa;
- defend the sovereignty, territorial integrity and independence of its member states;
- accelerate the political and socio-economic integration of the continent;
- promote and defend African common positions on issues of interest to the continent and its peoples;
- encourage international cooperation, taking due account of the Charter of the United Nations and the Universal Declaration of Human Rights;
- promote peace, security, and stability on the continent;
- promote democratic principles and institutions, popular participation and good governance;

⁸ See Hestermeyer, H., "African Union replaces Organization of African Unity." *German Law Journal*, Vol. 3, N^o. 8, 2002.

⁹ AU, http://www.au2002.gov.za/docs/background/oau_to_au.htm (accessed 2011-11-16).

- promote and protect human and peoples' rights in accordance with the African Charter on Human and Peoples' Rights and other relevant human rights instruments;
- establish the necessary conditions which will enable the Continent to play its rightful role in the global economy and in international negotiations;
- promote sustainable development at the economic, social and cultural levels as well as the integration of African economies;
- promote cooperation in all fields of human activity to raise the living standards of African peoples;
- coordinate and harmonise the policies between the existing and future Regional Economic Communities for the gradual attainment of the objectives of the Union;
- advance the development of the continent by promoting research in all fields, in particular in science and technology; and
- work with relevant international partners in the eradication of preventable diseases and the promotion of good health on the continent.¹⁰

It is not yet clear whether the AU is the right vehicle to shape Africa's future. The enormous challenge the AU is already facing confirms the fact that change cannot happen overnight. This is because the African Union succeeded an organisation that was widely criticized for its inability to mediate the continent's conflicts. The most critical element of the AU is its authority to intervene in the internal affairs of member states. Apparently in order to redress the statutory inhibitions of its predecessor,

¹⁰ Article 3, Constitutive Act of the African Union, 2000 available from http://www.africa-union.org/root/au/aboutau/constitutive_act_en.htm (accessed 2011-11-16).

during life threatening conflicts or incidents, the Constitutive Act of the AU waters down the principles of territorial integrity and non-interference with the inclusion of Article 4(h) which preserves 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.¹¹ The issue now is whether the AU will be able to use its new powers or whether the competing interests of its leaders will paralyse it. Notwithstanding some initial scepticisms, the African Union opens a new era for Africa, where peace, democracy, and good governance are finally considered the necessary pre-requisites for development.¹²

1.1.1 Regional Integration

According to *Moeti* and *Mukamunana*, regional integration is a process through which a group of nation states voluntarily, in various degrees, share each other's markets and establish mechanisms and techniques that minimize conflicts and maximize internal and external economic, political, social and cultural benefits of their interaction.¹³ They further mention that it is a process whereby two or more countries in a particular area join together to pursue common policies and objectives in matters of general economic development or in particular economic field of common interest to the mutual advantage of all the participating states. Thus,

¹¹ Olowu, D., "Regional Integration, Development, and the African Union Agenda: Challenges, Gaps and Opportunities." 2003 13 *IOWA Journal of Transnational and Comparative Problems* p. 222.

¹² Carbone, M., "From OAU to AU: turning a page in the history of Africa," September 2002, available from http://ec.europa.eu/development/body/publications/courier/courier194/en/en_030.pdf (accessed 2011-11-16).

¹³ Moeti, K., Mukamunana, R., "Challenges of regional integration in Africa: policy and administrative implications." 2005. *Journal of Public Administration: Conference Proceedings*, Oct. p 92.

although regional integration integrates the social, cultural, and economic dimensions, the basic and underlying element of it, is the economic dimension.¹⁴

For a variety of reasons, it often makes sense for nations to co-ordinate their economic policies, in what is often referred to as regional integration. Such co-ordination has the potential to generate benefits that are not possible otherwise. Regionalism, for instance, has great potential as a means of peaceful development. Strong supra-national institutions can result in a de-emphasis on national borders and a resultant decline in border-driven conflicts. It can also assist in lessening customs barriers in a continent like Africa with too many small nations. Additionally, regionalism facilitates export trade especially for landlocked countries of the world, the majority of whom are in Africa, totalling 14 in number. Regional integration also has the potential of encouraging the development and the sharing of new technologies and products among cooperating countries in addition to creating regional economies of scale especially in infrastructure.¹⁵

Regional integration refers to the unification of nation states into a larger whole. Regional integration can also 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 resulting in different degrees of integration depending on predefined criteria.¹⁶

¹⁴ Moeti, K., Mukamunana, R., *Ibid* note 13, p 92.

¹⁵ Christopher, K., "Regional Integration: what does it mean and is it a panacea to Africa's economic problems?" 2009. *Africa Growth Agenda*. p 12.

¹⁶ Soomer, J., "Building Strong Economies Depends on You and Me," 2003. <http://www.eccb-centralbank.org/PDF/newspaper3.pdf> (accessed 2011-11-16).

According to *Van Niekerk*,¹⁷ regional integration can be defined along three dimensions:

1.1.2 Geographic scope

Geographic integration refers to the appearance of a common sense of distinctiveness and purpose combined with the creation and execution of institutions that express a particular identity, shape and collective action within a geographical region. For instance, the Southern Africa Development Community member states share a common geographical location, Southern Africa.

1.1.3 Substantive coverage

Under this dimension, what brings about the sense of distinctiveness and purpose amongst member states are the activities that are carried out within that grouping. It may be a grouping that is concerned with the movement of labour, or a grouping concerned with the movement of goods and services. It is however very rare to find a grouping that is concerned with just one aspect, in practice regional integration efforts address multiple challenges at a time.

1.1.4 Depth of integration

The third dimension involves the intensity of the integration. Regional integration arrangements may be defined by the intensity of their character. Some regional arrangements are so deeply embedded that they involve the sacrifice of state

¹⁷ Kritzinger-van Niekerk, L., Senior Economist, World Bank Country Office in RSA, "Regional Integration: Concepts, Advantages, Disadvantages and Lessons of Experience," http://www.sarpn.org.za/documents/d0001249/P1416-RI-concepts_May2005.pdf (accessed 2011-11-16).

sovereignty, to some extent, for the benefit of the region. The depth of integration may be further sub-divided as follows:

(a) Co-operation

This may be the weakest and issue-focused arrangement. Countries may cooperate for a joint development project. They may also do so for facilitating exchange of information and best practices.

(b) Harmonization/co-ordination

Under this form of integration, member states imply a higher and more formalized degree of co-operation and commitment, hence a more effective lock-in arrangement as compared to simple co-operation.

(c) Integration

It implies a higher degree of lock-in and loss of sovereignty, and also tends to apply to a broader scope, although it could as well be limited to a specific market. It may imply a more unified market for goods (FTA and custom unions), factors (common markets), and also a common currency such as in the European Union. A deepest form is a federated union such as that of the United States of America, which includes political as well as economic integration, including in infrastructure-related services (telecom, air-transport). Typically, a very high degree of economic interactions – trade, investment, etc. - could make integration more cost-effective as opposed to simple harmonization/co-ordination, as the opportunity cost of exit rises. Also, the scope of integration and the concomitant complexity call for countries to

relinquish sovereignty to a supra-national agency, the purest form being a federal government.¹⁸

1.1.5 Regional integration versus regional cooperation

There is a vast difference between integration and co-operation. Co-operation may be the weakest and issue-focused arrangement as countries may co-operate for a joint development project. They may also do so for facilitating exchange of information and best practices or may also co-operate as in the manner of the G7 on monetary and exchange rate policy issues. In cooperation countries retain full control of their domestic affairs and if heeded, 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 regular exchange and consultation, 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 transfer and best practice sharing, etc.¹⁹

¹⁸ Kritzinger-van Niekerk, *Ibid* note 17, page 7.

¹⁹ Kritzinger-van Niekerk, *Ibid* note 17, page 6.

1.1.6 Democracy and integration

The Economic Commission for Africa (ECA) has been at the forefront of the good governance debate, repeatedly pointing out the centrality of governance factors underlying the contemporary African predicament and stressing the interrelationship between good governance and sustained economic development.²⁰

It is submitted that there is a very strong link between democracy, integration and development. Issues of good governance have been a concern in Africa for some time but only recently has the intrinsic linkage between good governance and sustainable human development, including poverty reduction been so crisply recognized and articulated. In the New Partnership for Africa's Development (NEPAD)²¹ document, for example, African leaders recognized that the process of achieving economic growth and development is heavily influenced by a considerable number of political factors, including good economic, corporate and political governance as prerequisites for sustained development.²² In addition, it should be recognised that the attainment of sustainable economic development by a state cannot be attained in isolation, thus the need to integrate is almost unavoidable in contemporary times.

²⁰ African Development Forum, "Perspectives on Governance in Southern Africa: Recommendations and Plan of Action." Eastern and Southern Africa Workshop Preparatory to the Fourth African Development Forum (ADF IV) on Governance for a Progressing Africa. Available from http://www.uneca.org/adfiv/documents/workshop_reports/ADF_IV_Recommendations_South_Africa.htm (accessed 2011-11-16).

²¹ UNECA, A Summary of NEPAD Action Plans, Available from <http://www.uneca.org/unregionalconsultations/documents/NEPAD%20Action%20Plans%20summary.pdf> (accessed 2011-11-16).

²² African Development Forum, *Ibid* note 20.

Democracy should not be seen as the mere holding of regular elections in the context of this dissertation. It also requires the development of a generally accepted set of values that ensure fair electoral practices, predicated on representation, accountability, inclusiveness, transparency, gender equality, tolerance and respect for diversity. These basic values have been agreed upon by Southern African countries and are expressed in various declarations and instruments to which they are signatory, namely, the Windhoek Declaration on the Freedom of the Media (1991), the SADC Treaty of 1992, and the 1997 SADC Declaration on Gender and Development. In 2001, Southern African leaders identified their common agenda as including the promotion of common socio-political values and systems that are transmitted through democratic, legitimate and effective institutions, and the consolidation and maintenance of democracy, peace and security.²³ The trend has led to, among other things, the adoption of the 2002 Regional Indicative Strategic Development Plan by SADC member States.²⁴

SADC region has made significant strides in the consolidation of the citizens' participation in the decision-making processes and consolidation of democratic practices and institutions. The constitutions of all SADC member states enshrine the principles of equal opportunities and full participation of the citizens in the political processes of their countries.²⁵ This is further affirmed in the SADC Principles and Guidelines Governing Democratic Elections.

²³ SADC Treaty as amended, 2001.

²⁴ African Development Forum, *Ibid* note 20.

²⁵ SADC Principles and Guidelines Governing Democratic Elections, pg 1. Available from <http://www.eisa.org.za/PDF/sadcguidelines.pdf> (accessed 2011-11-16).

Despite these achievements, major challenges remain. These include pockets of conflict in some countries of the region, and some situations in which election results are not acceptable to all parties involved in the election, resulting, on occasion, in violence and instability, with Zimbabwe and the Democratic Republic of Congo being main flashpoints. Even in those countries where there is a certain level of acceptance of election results, elements of discontent can be discerned following elections.²⁶ It is therefore submitted that democracy is a concept that should not only be defined on paper but translated into action beyond the meetings and conferences. Good governance guarantees resource prioritization and targeting and ensures people-level participation in development programmes. In order to achieve this, Southern African countries need to develop strong, people-centred governance institutions and establish a culture of political and social inclusion.²⁷ This dissertation will later discuss ways in which the vision of regional bodies could be better translated into action by member states through regional integration.

1.1.7 Regional integration in Southern Africa

In Africa, the Southern African Customs Union (SACU) formed as far back as 1910, represents the oldest of such groupings in the region. Apart from the fact that it was first muted by the colonialists, after independence, member states willingly rejoined

²⁶ Matlosa, K *et al*, 2009, Preventing and Managing Violent Election-Related Conflicts In Africa: Exploring Good Practices, *Eisa Symposium. Conference Report* Available from <http://www.eisa.org.za/PDF/symp09cp.pdf> (accessed 2011-11-16).

²⁷ African Development Forum, *Ibid* note 20.

the group.²⁸ This was followed by the founding of the Southern African Development Co-ordination Conference [SADCC] in 1980, which was later renamed in the 1992 Lusaka Declaration as the Southern Africa Development Community [SADC], when South Africa became a member.

The original objective of SADCC was to protect member states against the destabilizing tendencies of the apartheid regime in South Africa, while guaranteeing infrastructural assistance and policy co-ordination. In 1996, it gradually matured into a free trade area, under an institutional structure in 2001 as articulated in Article 5 of the 1992 SADC Treaty.²⁹

1.1.8 A background to the Southern African Development Community (SADC)

The Southern African Development Community (SADC), formerly known as the Southern African Development Co-ordination 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.³⁰

²⁸ See generally Sidaway, J. and Gibb, R. 1998. SADC, COMESA, SACU: Contradictory Formats for Regional Integration in Southern Africa, in Simon, D. *South Africa in Southern Africa: Reconfiguring the Region*. Oxford. pp 164-84.

²⁹ McDonald, A. S. K, *Ibid* note 1, page 26.

³⁰ 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).

The first SADCC conference, held in Arusha, Tanzania, in 1979, was attended by Angola, Botswana, Mozambique, Tanzania, and Zambia, the so-called "front-line states"—together with representatives from donor governments and international aid agencies. Lesotho, Swaziland, Malawi, and Zimbabwe joined the following year, while Namibia joined in 1990. In April 1980, SADCC's strategy for "economic liberation" was formalized in the Lusaka Declaration, outlining a programme of action which gave initial priority to integrating and improving regional transport links.³¹

By the late 1980s, it became apparent that SADCC needed strengthening. This was necessitated by the attainment of independence and sovereign nationhood by Namibia in 1990 which formally ended the struggle against colonialism in the region. Again, in Angola and Mozambique, concerted efforts to end internal conflicts and civil strife were bearing positive results. In South Africa, the process was underway to end the inhuman system of apartheid, and to bring about a constitutional dispensation acceptable to all the people of South Africa. These developments took the region out of an era of conflict and confrontation, to one of peace, security and stability, which have been found to be the pre-requisites for cooperation and development.³²

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 purpose of

³¹ SADC, <http://www.sadc.int/about-sadc/> (accessed 2011-11-16).

³² SADC Regional Indicative Strategic Development Plan (RISDP), pg 2, www.sadc.int/attachment/download/file/74. (accessed 2011-11-16).

transforming SADCC into SADC was to promote deeper economic cooperation and integration to help address many of the factors that made it difficult to sustain economic growth and socio-economic development, such as continued dependence on the exports of a few primary commodities.³³ It had then become an urgent necessity for SADC governments to urgently transform and restructure their economies. The small size of their individual markets, the inadequate socio-economic infrastructure and the high per capita cost of providing this infrastructure, as well as the countries' low-income base made it difficult for them to individually attract or maintain the necessary investments for their sustained development.³⁴

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. 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:

- harmonise political and socio-economic policies and plans of member states;
- encourage the peoples of the region and their institutions to take initiatives to develop economic, social and cultural ties across the region, and to

³³ Schoeman, M. From SADCC to SADC and Beyond: The Politics of Economic Integration. Available from <http://eh.net/XIIICongress/Papers/Schoeman.pdf>. (accessed 2011-11-16).

³⁴ SADC Regional Indicative Strategic Development Plan, *Ibid* note 32, page 3.

participate fully in the implementation of the programmes and projects of SADC;

- create appropriate institutions and mechanisms for the mobilisation of requisite resources for the implementation of programmes and operations of SADC and its institutions;
- 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;
- promote the development, transfer and mastery of technology;
- improve economic management and performance through regional co-operation;
- promote the co-ordination and harmonisation of the international relations of member states; and
- secure international understanding, co-operation and support, and mobilise the inflow of public and private resources into the region.³⁵

Africa has experienced a myriad of challenges emanating from within the continent itself and from without. The continent has been marred by several decades of political, military confrontations and civil unrests, marked by economic decline as well as social instability. The achievement of political independence by SADC member states, which started in the early 1960s, was finally completed with the attainment of independence of Namibia in 1990 and the end of the South African apartheid regime in 1994. Despite the much welcome and common decolonization that has occurred within the region, the challenge now rests in co-ordinating the

³⁵ The Treaty of the Southern African Development Community as amended, 1992.

efforts of each country in order to achieve the SADC common agenda as outlined in the Treaty.

The Southern African Region is considered the most likely on the African continent to develop a common market, promote co-operation and enhance trade.³⁶ The Southern African Development Community (SADC), one of the building blocks for the integration process is viewed by some as one of the more promising African regional integration initiatives. The Economic Commission for Africa observed that the SADC could become one of the world's top 20 regional economic blocs.³⁷ In 1996, the SADC Trade Protocol on Trade Co-operation was adopted with the aim of reducing trade barriers among member countries and moving the region toward a free trade area. Participating countries agreed to phase out tariffs on intra-SADC trade, and to liberalise sensitive products by 2012. There are, however problems as an audit report has suggested that Malawi, Mozambique, Zimbabwe and Tanzania are not up to date on the implementation of their tariff phase down schedules.³⁸

Like in any organisation, the existence and precise attainment of objectives depends on having the ability and political will to change in response to surrounding conditions. SADC has undergone and is still undergoing a process of re-calibrating and re-engineering of its business processes. At the same time, it is imperative to note that the re-structuring of SADC institutions occurs at a time when important

³⁶ See Economic Commission for Africa, "Annual Report on Integration in Africa 2002 Overview," Addis Ababa, March 2002.

³⁷ Economic Commission for Africa, *Ibid* note 36.

³⁸ Audit Report on the Implementation of the SADC Protocol on Trade, available from <http://www.mic.gov.mz/docs/dri/intRegional/pdf/Audit%20Study%20Executive%20Summary%20for%20SADC%20Secretariat.pdf> (Accessed 2011-11-16).

transformations are also taking place both at the continental and global levels. In the African context the most significant factors affecting SADC relate to the transformation of the Organization of African Unity (OAU) into the African Union (AU) and the launching of the New Partnership for African Development (NEPAD).³⁹

The organisation has made 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 policies to combat corruption and monitor (guide) elections within member states. A problem area, however, is that the treaty has failed to specify mechanisms to ensure that all members uniformly implement protocols. In addition some have complained that the signing of protocols has been slow.⁴⁰

The Treaty under Article 6 (1)⁴¹ and 6 (5)⁴² 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

³⁹ SADC Regional Indicative Strategic Development Plan, *Ibid* note 32 page 2.

⁴⁰ South African Institute of International Affairs, "SADC Barometer," Issue 8. March 2005.

⁴¹ 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.

⁴² Member States shall co-operate with and assist institutions of SADC in the performance of their duties.

'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, for instance. This is in contrast to the European Union where member states retain all powers not explicitly handed to the Union. In some areas the EU enjoys exclusive competence. These are areas in which member states have renounced any capacity to enact legislation. In other areas the EU and its member states share the competence to legislate. While both can legislate, member states can only legislate to the extent to which the EU has not.⁴³ With hindsight, one then reflects on the recent situation in Zimbabwe where the government enacted various pieces of legislation in contrary to the principles and values of SADC.

Through Article 16(1)⁴⁴ of the SADC Treaty, the organisation has established a Tribunal. This body acts as a court of law would do at a domestic level. However this being at a sub-continental level, there are legal hurdles that should be dealt with first such as the notion of state sovereignty which most states use as a defence even in the presence of gross violations of human rights. Under international law, the Tribunal is considered as an international court, just like the European Court of Justice or the East African Court of Justice. Although it is called a Tribunal, it must be distinguished from other international tribunals that are *ad hoc* in nature, for example, the International Criminal Tribunal for Rwanda (ICTR).⁴⁵

⁴³ http://en.wikipedia.org/wiki/European_Union (Accessed 2011-11-16).

⁴⁴ The Tribunal shall be constituted to ensure adherence to and the proper interpretation of the provisions of this Treaty and subsidiary instruments and to adjudicate upon such disputes as may be referred to it.

⁴⁵ SADC Tribunal, A guide to the SADC Tribunal. Available from http://www.sadctribunal.org/pages/SADC_T_Guide.htm (accessed 2011-02-27).

The Tribunal is not a court of appeal from domestic courts. However, like other international courts the requirement that a litigant must have exhausted all local remedies before approaching the Tribunal also applies.⁴⁶ The Tribunal applies this rule with the necessary exceptions and flexibilities as is the case with other international courts. Domestic courts will normally have their domestic standards as a benchmark and will attempt to determine whether the state has lived up to those standards. The Tribunal, on the other hand, will have SADC law and international law as its standard. A member state may therefore be in conformity with its own laws but those laws may be in stark violation of SADC law. It is in this regard that a decision of the Tribunal may have the effect of overturning that of a domestic court.⁴⁷

Article 16 (4)⁴⁸ and (5)⁴⁹ of the Treaty further vests on the Tribunal the competence to pronounce on whether the actions of member states are in line with the good governance principles as outlined in Article 4⁵⁰ as well as other additional protocols

⁴⁶ *United Republic of Tanzania v Cimexpan (Mauntius) Ltd and Others*, SADC (T) 01/2009, *Mike Campbell and others v The Republic of Zimbabwe*, SADC (T) No. 2/2007.

⁴⁷ SADC Tribunal, *Ibid* note 44.

⁴⁸ The Tribunal shall give advisory opinions on such matters as the Summit or the Council may refer to it.

⁴⁹ The decisions of the Tribunal shall be final and binding.

⁵⁰ SADC and its Member States shall act in accordance with the following principles:

- a. sovereign equality of all Member States;
- b. solidarity, peace and security;
- c. human rights, democracy and the rule of law;
- d. equity, balance and mutual benefit; and
- e. peaceful settlement of disputes.

in line with Article 22 of the Treaty.⁵¹ It is important to note that as a remedial strategy, Article 33 (1)⁵² of the Treaty empowers the organisation to impose appropriate sanctions on a member state who fails to uphold SADC principles, acts in a manner that undermines the objectives of SADC, or enacts policies or legislation that is *contra* SADC law. Article 33 (4)⁵³ of the Treaty empowers the Secretariat of the organisation to apply appropriate sanctions against a member state once all procedures have been satisfied.

Despite the above mentioned treaty provisions, the enforceability of Regional International Law is brought into perspective by the recent regional developments. In *Mike Campbell (PVT) Limited and Another v Republic of Zimbabwe*,⁵⁴ 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 the farmers' property rights. The matter was

⁵¹ Member States shall conclude such Protocols as may be necessary in each area of co-operation, which shall spell out the objectives and scope of, and institutional mechanisms for, co-operation and integration.

⁵² Sanctions may be imposed against any Member State that:

- a. persistently fails, without good reason, to fulfil obligations assumed under this Treaty;
- b. implements policies which undermine the principles and objectives of SADC; or
- c. is in arrears in the payment of contributions to SADC, for reasons other than those caused by natural calamity or exceptional circumstances that gravely affect its economy, and has not secured the dispensation of the Summit.

⁵³ The sanctions referred to in paragraph 3 of this Article shall be applied by the Secretariat without reference to the Summit or Council except that the application of the sanctions shall be subject to the Secretariat notifying -

- a. prior to any meeting of SADC, Member States in default; and
- b. Member States at the beginning of any meeting of SADC.

⁵⁴ (2/07) [2007] SADCT 1 (13 December 2007).

also pending in the Supreme Court of Zimbabwe at the time. As a result, the applicant sought an interim measure to interdict the Government of Zimbabwe from evicting Mike Campbell (PVT) Limited and the other white farmers, from the land in question pending the outcome of the Tribunal decision.

Meanwhile, in January 2008, the Zimbabwe Supreme Court threw out Campbell's challenge to the constitutionality of Amendment 17. The Court roundly rejected Campbell's argument that the Zimbabwean Constitution contained essential features that could not be overridden by the amendment.⁵⁵ Having exhausted his domestic remedies, Campbell was now clear to proceed with his suit in the Tribunal. The SADC Tribunal, in its November 2008 Campbell judgment, concluded that the Zimbabwean government had breached its obligations under Article 4 of the SADC Treaty by denying Campbell and the seventy-seven other farmers the "right of access to the courts and the right to a fair hearing, which are essential elements of the rule of law." It also concluded that "although Amendment 17 did not explicitly refer to white farmers . . . its implementation affected white farmers only and consequently constituted indirect discrimination or de facto or substantive inequality."⁵⁶

The Zimbabwean government scoffed at the SADC Tribunal's order. President Mugabe described the decision as "absolute nonsense."⁵⁷ In April 2009, pro-Mugabe

⁵⁵ *Mike Campbell (Pvt) Ltd. v. Minister of National Security Responsible for Land, Land Reform & Resettlement*, [2008] ZWSC 1, <http://www.saflii.org/zw/cases/ZWSC/2008/1.pdf>.

⁵⁶ *Mike Campbell (Pvt) Ltd.*, [2008] SADCT 2, at 59.

⁵⁷ Cris Chinaka, "Mugabe Says Zimbabwe Land Seizures Will Continue," *MAIL & GUARDIAN* (S. Afr.), Feb. 28, 2009, available from <http://www.mg.co.za/article/2009-02-28-mugabe-says-zimbabwe-land-seizures-will-continue>(accessed 2011-11-16).

militants forcibly evicted Campbell.⁵⁸ This study will later critique the weaknesses of the organisation in relation to such incidences.

Critics have further highlighted difficulties that exist with respect to litigation before this sub-regional judicial body.⁵⁹ These include, and are not limited to, procedural delays, complications of the requirement to exhaust local remedies, accessibility of the tribunal by legal and physical persons from all corners of the SADC region as well as organic and financial obstacles to a smooth functioning of the SADC Tribunal.⁶⁰

These challenges are further complicated by the decision of the SADC Summit to suspend the Tribunal. The communiqué of the Southern African Development Community (SADC) Summit of Heads of State and Government, issued on 17 August 2010, announced that a review of the role, functions and terms of reference of the SADC Tribunal (the Tribunal) would be undertaken and concluded within six months. Additionally, it was determined that the Tribunal would not receive any new cases pending the completion of the review process.⁶¹ However it is important to note that after the anticipated review period, the Tribunal was still under suspension.

⁵⁸ Robyn Dixon, Tough Zimbabwe Farm Family Survives Another Blow, L.A. TIMES, Sept. 7, 2009, available at <http://articles.latimes.com/2009/sep/07/world/fg-zimbabwe-farmer7> (accessed 2011-11-16).

⁵⁹ See Ebobrah, T.S, (2009) Human rights developments in sub-regional courts in Africa during 2008, *African Human Rights Law Journal*, Vol 9, p 312-335.

⁶⁰ International Commission of Jurists, SADC Review Process. [www.icj.org/dwn/database/SADC-review process-Programme.pdf](http://www.icj.org/dwn/database/SADC-review%20process-Programme.pdf) (accessed 2011-03-07).

⁶¹ Summary of Press release available from <http://www.swradioafrica.com/Documents/SADC%20Tribunal%20legal%20opinion%20SALC%20HR%20orgs%204%20Nov%202010.pdf> (Accessed 2011-11-16).

The SADC Extraordinary summit held on the 20th of May 2011 in Windhoek, Namibia, resolved to extend the suspension of the SADC Tribunal until August 2012. This has raised concern over the ability of SADC to uphold the rule of law and many observers have termed this a threat to human rights.⁶² This challenge will later be discussed at length in the chapters 3 of this work.

There is complexity with regard to the implementation of Protocols, and it is at two levels, namely at the inter-governmental and national levels. Monitoring and enforcement mechanisms in the Protocols framework therefore have a crucial impact on achieving accountability and implementation.⁶³ The question arises as to how effective are the SADC National Committees (SNCs), Integrated Committee of Ministers (ICM), Council of Ministers, and the SADC Summit at ensuring detailed monitoring and enforcement compliance to the numerous Protocols that member states continue to bind themselves to? In order to answer this question, this study will critique the composition and roles played by these structures as per the SADC Treaty.

The presence of Southern Africa in world affairs is remarkably insulated from regional tensions within Africa itself. Africa retains a capacity for continental action in international politics despite the growth of inequalities and conflicts. Legal hurdles such as respecting each country's sovereignty though such a state maybe in direct violation of SADC Treaty principles or conducts itself in a manner that defeats or will

⁶² Daily News, "Blow to the Rule of Law as SADC Suspends Tribunal,"

<http://www.dailynews.co.zw/index.php/news/34-news/2648-blow-to-rule-of-law-as-sadc-suspends-tribunal.htm> (Accessed 2011-11-16).

⁶³ Gender Links, <http://www.genderlinks.org.za/article/action-will-make-sadc-gender-protocol-a-reality-2007-07-13> (Accessed 2011-11-16).

have a detrimental effect towards the regional agenda have cropped up in the foregone decade and will continue to crop up in the future. A recent example is the Zimbabwean situation, the tendency of a member state to pursue its own agenda through Economic Partnership Agreements (EPA) with Western states and giving less political will to the regional agenda are issues that SADC continually faces.

South Africa's history, its belated entry to the group and its sheer economic dominance are delicate issues that have to be managed with sensitivity. This is particularly so in areas of macro-economic and trade reforms where the differences that exist in the pace of liberalization and the prospective deal between South Africa and the EU have the potential to create discomfort among the other members of the Community. To add to this, South Africa was recently admitted to the group of emerging economies called BRICS (Brazil, Russia, India, China, and now South Africa).

With regards to the Trade Development and Cooperation Agreement (TDCA) (between South Africa and the European Union) and the SADC-EU Economic Partnership Agreements negotiations, there are a number of complicated issues surrounding regional integration that have emerged in the Southern African region in recent years. When South Africa entered into negotiations with the European Union, it chose to do so alone and did not include the BLNS (Botswana, Lesotho, Namibia, and Swaziland) who are also members of SACU. The Agreement has had a huge impact on the BLNS who are effectively *de facto* parties to the TDCA. Because of the common external tariff in SACU, the BLNS will be forced to reduce their tariffs on imports from the EU at the rate agreed by South Africa in the TDCA.

In pursuit of the broader objectives of the African Union to accelerate economic integration of the continent, with the aim of achieving economic growth, reducing poverty and attaining sustainable economic development, the Tripartite Summit of the Heads of State and Government of the Common Market for East and Southern Africa (COMESA), East African Community (EAC) and the Southern Africa Development Community (SADC) met in Kampala, Uganda on 22nd October 2008.⁶⁴ The Summit resolved to establish a Free Trade Area (FTA) encompassing the member/partner States of COMESA, EAC, and SADC with the ultimate goal of establishing a single Customs Union in Eastern and Southern Africa

Swanepoel observed that SADC, COMESA and the EAC should, on an individual basis, focus on addressing institutional and administrative challenges, as well as the implementation of the various integration commitments they have made. This would ensure that the RECs are on an equal footing to create a foundation on which to create an efficient and beneficial FTA which can bear the fruit of enhancing regional integration in Eastern and Southern Africa.⁶⁵ This work will elucidate on the most important institutional challenges that SADC needs to address.

Member states of SADC face problems with regard to employment creation. There is not enough investment to employ more people and create decent jobs with the result

⁶⁴ Final Communiqué of The COMESA-EAC-SADC Tripartite Summit of Heads of State and Government, pg 1. Available from http://www.tralac.org/cause_data/images/1694/FinalCommuniqueKampala_20081022.pdf. (accessed 2011-01-17).

⁶⁵ Swanepoel, S., 2011. "An Analysis of Regional Integration Issues in Africa, Focusing on the SADC-COMESA-EAC Tripartite FTA," *Trade Law Centre of Southern Africa (TRALAC)*. Available from http://www.givengain.com/cause_data/images/1694/Swanepoel_Final_20110620_edu.pdf. (accessed 2011-08-12).

that countries have taken a protectionist approach within their labour markets, resulting in very inefficient flow of labour within the region. The region has high unemployment rates and thus affecting the lives of many people. There is also the need for social security and assistance nets for the unemployed.

The region also needs to guard against child labour practices since such practices cannot be combated by individual state efforts but rather by a co-ordinated approach at a regional level which automatically calls for reform of legislation. There exists as well a problem of human trafficking. The problem of human trafficking is such that the country from which the victims are obtained is not necessarily the country in which they will be sold or exploited. The victims are ferried across multiple borders, as such, collective efforts by member states are required to effectively police this problem.

There exists a huge legal challenge towards unifying efforts towards the SADC objectives as the member states still maintain their sovereignty as such regional agreements may not have a direct effect on the internal governance systems of member states. Much research and understanding of the SADC regional model needs to be done as such there is still room to improve the legal framework of the regional integration model. As a respected author has aptly observed:

Whether or not to integrate with the world economy is a false choice. . . . We must integrate, but we will reap far greater rewards from integration in the world economy if our own house is integrated first. Therefore, we should choose actions that

accelerate African integration, with the political will and selectivity of actions required.⁶⁶

1.2 Problem Statement

This study is primarily concerned with the inherent weaknesses within the regional infrastructure⁶⁷ of SADC and their impact on the attainment of its objectives as documented in the Treaty as well as accompanying protocols. The question the study seeks to answer is: What causes SADC to have a weak institutional framework and how does this institutional framework impact on its performance as a regional body? The factors to be investigated are both intrinsic (within SADC) and exogenous (outside SADC).

In order to fully comprehend the problem that this study explores, one should make reference once more to the historical background of SADC. Before its metamorphosis from SADCC to SADC, the main aims of SADCC were the need to reduce economic dependence particularly, but not only, on South Africa; assist Southern African countries to break away from colonialism and as well as the fight against the inhumane apartheid rule in South Africa. By the late 1980s, it became apparent that SADCC needed strengthening. The attainment of independence and sovereign nationhood by Namibia in 1990 formally ended the struggle against colonialism in the region. In some of the other countries, for example, Angola and

⁶⁶ K.Y. Amoako, Statement to the Council of Ministers, 67th Ordinary Session of the Organization of African Unity, Addis Ababa, Ethiopia, 26 February 1998.

⁶⁷ Regional infrastructure in this context refers to the Treaty, Protocols, Institutions and the roles that they play within SADC as required by relevant instruments adopted by SADC.

Mozambique, concerted efforts to end internal conflicts and civil strife were bearing positive results. In South Africa, the process was underway to end the inhuman system of apartheid, and to bring about a constitutional dispensation acceptable to all the people of South Africa. These developments took the region out of an era of conflict and confrontation, to one of peace, security and stability, which remain prerequisites for co-operation and development.⁶⁸

The problem under investigation begins here; the transformation from SADCC to SADC indicated that the body would no longer be a loose association (conference) of states but rather a regional body that would pass legally binding decisions on its member states. When the member states assembled, in Windhoek in August 1992, they created an institutional framework and policies. The institutional framework and policies that followed after that were to have enough legal force to ensure that the institutional agenda of integration is not defeated by any member states. The central thrust of this dissertation is that the Treaty, Protocols and the policies established afterwards contain principle imperfections that are self-defeating for the pursuance of regional integration.

According to the SADC Treaty, Article 5(1)(b) espouses that the body should promote common political values, systems and other shared values which are transmitted through institutions which are democratic, legitimate and effective; it is then upon member states that they translate this vision into reality on the ground. In the event that a member state fails or defeats this objective, the sanctions shall be

⁶⁸ SADC Regional Indicative Strategic Development Plan, *Ibid* note 30, page 2.

determined by the Summit on a case-by-case basis.⁶⁹ This shows that the Summit also discharges quasi judicial roles. It goes without saying that this presents a clash of interests and a lack of separation of powers. The Summit consists of heads of states (highly political beings) and in the event one of them is in breach of treaty obligations, their close cohesion and allegiance to each other will likely play a role in the manner in which these sanctions are implemented or determined at all, e.g. Zimbabwean President Robert Mugabe's disdain for SADC resolutions as will be observed later in the *Mike Campbell* case.

It is clear that the notion of separation of powers seems to have been ignored when designing this Treaty. The notion requires that;

some credible body must be vested with the power to blow the whistle when the parameters of the constitutional covenant are transgressed. Without such power that covenant *has no teeth*. The body armed with that power cannot be the alleged transgressor itself. It cannot be the State agency accused of the transgression. In a credible democracy it can therefore only be the judiciary. It and it alone must have the final power to decide whether the impugned enactment or decree of a powerful legislature, or the action of an equally powerful executive or administration, has transgressed the constitutional covenant.⁷⁰

Undoubtedly this is a legal challenge towards regional integration as will be observed in the chapters to follow. The organisation has on occasion failed to clamp down on

⁶⁹ Article 33 (2), SADC Treaty.

⁷⁰ Address by Chief Justice I Mahomed to The International Commission of Jurists, Cape Town on the 21st of July 1998.

treaty transgressions. The argument of this research is that there are so many instances in which the framework is self defeating and does not promote the efficacy that is embedded in well recognised principles of law such as judicial independence and separation of powers.

The Tribunal's judges' terms and conditions of service, salaries and benefits are determined by the Council of Ministers.⁷¹ It is submitted further that this presents yet another challenge considering the fact that depending on the state who may be prosecuted; the question of judicial independence may be raised. For instance, if the Head of State of Malawi, as a member state of SADC is granted the opportunity to influence directly which Justice serves on the SADC Tribunal and for how long and if they are somehow dissatisfied with the Justices rulings, they can remove or suspend such a Justice, then there is a serious lack of judicial independence. The primary guarantees of judicial independence are that the judiciary be appointed by a body that is itself independent of legislative and executive influence; that judges and magistrates enjoy security of tenure; and that their conditions of service, including remuneration, are adequate and are not subject to executive or legislative manipulation.⁷² The recent suspension of the Tribunal does not engender any form of judicial independence. When a political body such as the SADC Summit, can decide to put on hold the functions of a judicial body, implications such as the gradual erosion of the rule of law begin to simmer in the eyes of a reasonable observer. This dissertation implicates these simmering concerns.

⁷¹ Article 10, Protocol on Tribunal and Rules Thereof, 2000.

⁷² *R v Généreux* (1992) 88 DLR (4th) 110 (SCC), *The Queen in Right of Canada v Beauregard* (1986) 30 DLR (4th) 481 (SCC), *Valente v The Queen* (1986) 24 DLR (4th) 161 (SCC), *Van Rooyen & Others v The State (The General Council of the Bar Intervening)* 2002 (5) SA 246 (CC) and *De Lange v Smuts NO & Others* 1998 (3) SA 785 (CC).

Despite the existence of the SADC Treaty, the body seemingly is failing to regulate the actions of member states in relation to becoming members of other competing sub-regional groupings. On a continental basis and also within sub-regions, many Southern African countries belong to several groupings or sub-groupings that sometimes compete, conflict or overlap amongst themselves rather than complement each other. This adds to the burden of harmonisation and co-ordination, and is a wasteful duplication in view of constrained resources,⁷³ thus further weakening the attainment of economic integration amongst member states. There is a lacuna as how to manage the membership of member states to other REC's. For instance, a SADC member state may also be a member of the Common Market for Eastern and Southern Africa (COMESA). Multiple memberships of regional integration bodies do not only stress countries scarce financial, institutional and human resources but also constrain deeper economic integration.⁷⁴ The SADC legal framework is too silent on the technicalities of multiple memberships. It does not address questions such as:

- Would member states that have multiple memberships with other regional groups be in breach of their Treaty obligations?
- Would member states be in breach of treaty obligations if they entered into economic partnership agreements (EPA) with the European Union or other similar bodies without consulting with member states that will be ultimately affected?

⁷³ FONDAD, "From: Africa in the World Economy - The National, Regional and International Challenges," The Hague, December 2005, www.fondad.org (accessed 2011-02-12).

⁷⁴ SEATINI Bulletin Vol. 9, No. 07, www.seatini.org. (accessed 2011-03-21).

- Are member states free to pursue their own economic and political interests⁷⁵ outside the scope of the integration model?

The 1969 Vienna Convention on the Law of Treaties codified and progressively developed the international law relating to treaties, namely the customary and other rules governing conclusion, implementation, interpretation, and termination of international agreements. The internationally recognised principle of *pacta sunt servanda* applies to the inter-state relations of SADC 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*.⁷⁶ This good faith basis of treaties implies that a party to the treaty cannot invoke provisions of its domestic law as justification for a failure to perform a Treaty obligation.⁷⁷ SADC experiences slow ratification of protocols and reluctant implementation of agreed plans. Due to low political commitment and/or perceived or real losses and sacrifices involved, a number of

⁷⁵ Recent developments within the SADC political sphere generated headlines such as "Mugabe Doesn't Need SADC - Or So He Says" available from <http://mandebvhu.instablogs.com/entry/mugabe-doesnt-need-sadc-or-so-he-says/>, "Mugabe defies SADC" available from <http://www.dailynews.co.zw/index.php/news/34-news/1983-mugabe-defies-sadc.html>, "Mugabe Defies SADC Leaders" available from <http://allafrica.com/stories/200110190383.html>, "Zimbabwe defies SADC on new land regulations" available from <http://www.thefreelibrary.com/Zimbabwe+defies+SADC+on+new+land+regulations.-a0193800160>. These headlines can be said to depict an open defiance of SADC by Zimbabwe.

⁷⁶ Article 26, Vienna Convention on the Law of Treaties, 1969.

⁷⁷ *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.*

countries have been reluctant to fully implement integration programmes on a timely basis.⁷⁸

Having laid such a foundation, what mechanisms does SADC have when a member state is in breach of this principle and are such mechanisms sufficient? Is it sufficient that member states bear the sole obligation to transform treaty obligations into domestic legislation or should SADC adopt a supra-national approach on certain programmes to ensure uniform enforcement amongst member states? These questions will later be addressed in the Chapters that follow.

The SADC region has made significant strides in the consolidation of the citizens' participation in the decision-making processes and consolidation of democratic practices and institutions. The Constitutions of all SADC member states enshrine the principles of equal opportunities and full participation of the citizens in the political process. The Protocol on Politics, Defence and Security Cooperation provides that SADC shall "promote the development of democratic institutions and practices within the territories of State Parties and encourage the observance of universal human rights as provided for in the Charter and Conventions of the Organization of African Unity [African Union] and the United Nations."⁷⁹ However, regular multi-party, free and fair elections do not make a democracy. SADC is only as good as what its membership desire and while the members' commitment to SADC is patchy, with varying degrees of commitment although the summits do discuss significant issues

⁷⁸ <http://www.fondad.org/uploaded/Africa%20in%20the%20World%20Economy/Fondad-AfricaWorld-Chapter11.pdf> (accessed 2011-11-16).

⁷⁹ Article 2(2)(g), SADC Protocol On Politics, Defence and Security Co-Operation, 2001.

behind closed doors.⁸⁰ Against this background the problems that this study envisages to interrogate are:

- How can SADC ensure, through legislative means, that the agreements at regional level are transformed and broken down into actionable plans at national level?
- What lessons can be learnt from other bodies such as the EU on matters of regional integration, in particular on the role of political will to successful implementation of regional treaties?

While SADC is one of the most dynamic Regional Executive Committees (REC) in the continent, politico-legal strains exist, and it has not been always possible for all countries to take a common position with respect to aligning their domestic objectives, laws as well as actions with the spirit of the integration agenda coupled by the fact that the organisation is seemingly unable to enforce its decisions as well as the decisions of its respective bodies, for instance the SADC Tribunal.

This study's central theme is therefore not about benchmarking the successes of SADC against its failures over the years but about identifying the areas within the legal framework of SADC that may be enriched or improved with reference to well known legal standards and principles that will eventually permit SADC to strive towards the regional integration agenda.

⁸⁰ Alex Vines, Head of Africa Programme, Chatham House Speech delivered to the Instituto Superior de Relações Internacionais (ISRI), Maputo, Mozambique, 2008 Available at http://www.chathamhouse.org.uk/files/11275_260308vines.pdf(accessed 2011-02-12).

1.3 Aims and Objectives of the study

The central aim of this study is to:

- Identify the infrastructural weaknesses that are inherent within the SADC institutional framework that impact negatively on the attainment of its objectives.

The secondary aims of this study are to:

- Identify the gaps within the monitoring and enforcement mechanisms of SADC that impact negatively on the efficiency of SADC;
- Highlight the impact of national sovereignty in the regional agenda;
- Draw attention to other best practises in regional integration efforts of other regions; and
- Seek solutions that will strengthen the institutional framework of SADC.

1.4 Rationale and justification of the study

It is submitted that, the challenges faced by states worldwide have called for new approaches to governance. A state can no longer exist in isolation; there are more advantages in belonging to a regional or continental grouping as compared to being in splendid isolation. As such, as more states within Africa turn towards integration as a solution to economic and socio-political challenges, there is a need to generate a comprehensive, scientific understanding on how these regional arrangements could be fortified to ensure their efficiency, a fortification that this study envisages to

provide in the end. Underpinning the need to understand how integration processes can be efficiently managed is the deteriorating circumstances under which the peoples of Africa are subjected to while statesmen and regional groupings struggle to reap the benefits of regional integration.

Affirming the above submission, *Olowu* has observed that while it is remarkable that there has have been voluminous discussions about the economic quotient of contemporary pan- Africanism, one might surmise that the socio-political dimensions of Africa's development have not received equal attention and investigation. This is of critical significance to the efficacy of the emerging regional integration agenda. 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 productive, it becomes germane to consider the dynamics that would ensure that end.⁸¹

Within the realm of sociological jurisprudence, law, morality and economics cannot be separated. It is submitted 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.⁸² Welfare in this context refers to the socio-political and economic needs of the society. Regional integration is a legal process that aims at promoting the welfare of the parties concerned and in context with the current topic, the welfare of the people of Southern Africa.

⁸¹ *Olowu*, D., *Ibid* note 11, page 219.

⁸² Roederer, C and Moellendorf, D., *Jurisprudence*, Lansdowne 2004 at 201.

Effective regional integration⁸³ has a major role to play in helping African countries address their common concerns. The experience of societies in the developed world shows that the process of market integration can also serve as a basis for the consolidation of peace and security, ideals that are much required in Africa. Regional integration generally involves a somewhat complex web of co-operation between countries within a given geographical area. It demands harmonization of policies in such sectors as trade, investment, infrastructural development, as well as monetary and fiscal policies of member states. The overall objective is essentially to ensure stability and sustainable economic growth and development within the integrating area.⁸⁴

What is needed to achieve these objectives? First, there must be the political will to adhere to regional integration objectives, and to give them priority over domestic considerations. Second, a resolute effort must be made to achieve greater institutional and economic policy convergence. This assumes that countries establish ambitious, but feasible timetables for instituting reforms and establishing regional institutions, while realistically evaluating the resources required. Third, strong, efficient regional institutions are required. In fact, such institutions should be authorized to develop appropriate policies independent of national interests without, however, losing sight of each member's particular situation. They should also have enough human and material resources to assist member countries in implementing these policies.⁸⁵

⁸³ Kritzinger-van Niekerk, *Ibid* note 17, page 1-12.

⁸⁴ McDonald, A. S. K, *Ibid* note 1, page 26.

⁸⁵ Statement by Alassane D. Ouattara, Deputy Managing Director International Monetary Fund, "Regional Integration in Africa An Important Step Toward Global Integration," Monaco, April 14,

It is submitted that the third requirement indicated in the above paragraph is in harmony with what this study seeks to investigate. Without a regional body that is well equipped to harmonise and chart a way forward for the common attainment of the regional agenda, regional bodies would be just an "old boys club" where leaders meet and discuss challenges and possible solutions, thereafter no concrete mechanism to translate these solutions into reality in place.

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. This is because there are still many pockets of resistance to what SADC envisages and without proper implementation and enforcement mechanisms, the SADC common agenda will forever remain a pipe dream to the people of the SADC region.

The case for economic integration remains compelling in order to reverse the marginalisation of the continent and to integrate Africa into the international economy. In this respect, great attention must be given to creating the conditions necessary for attracting foreign investment and encouraging the international competitiveness of local enterprises. In addition, significant progress has to be made in extending democratic governments across the continent, in promoting sound economic policies, and in improving the overall business environment.⁸⁶

1999 available at <http://www.imf.org/external/np/speeches/1999/041499.htm> (accessed 2011-02-12).

⁸⁶ Christopher K., "Regional Integration: what does it mean and is it a panacea to Africa's economic problems?" 2009. *Africa Growth Agenda*. p 14.

Economic mismanagement and corruption have hastened the impoverishment of citizens and created uncharacteristically high levels of poverty. The inadequate provision of public health services, combined with the HIV and AIDS pandemic have further removed economically-active individuals from participating in the development of their countries.⁸⁷ This situation further undermines efforts to promote development, and places an even greater burden on badly-managed economies,⁸⁸ thereby straining the integration agenda as well.

SADC remains the region's most important catalyst for integration, but is certainly underperforming from the perspective of institutional efficacy. When the efficacy of an institution is reduced or hampered, the starting point to try and revitalise it is from within. The institutions of SADC as well as the role played by member states in driving the integration agenda should be scrutinized before it negatively impacts on the governance of the whole region.

The study will allow a new line of thought to be pioneered in the field of regional integration and state relations as both institutions are dependent on the success of the 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*.

⁸⁷ See UNAIDS Report On The Global Aids Epidemic 2010. Available from http://www.unaids.org/globalreport/documents/20101123_GlobalReport_full_en.pdf. (accessed 2011-11-16).

⁸⁸ The Centre for Conflict Resolution, "Whither SADC? Southern Africa's Post-Apartheid Security Agenda," Cape Town: pg 31 Available from <http://www.ccr.org.za/images/stories/SADC.pdf> (accessed 2011-11-16).

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

1.5 Hypothesis

The SADC regional framework lacks a supra-national approach in areas where the regional body is required to hold member states in breach of their regional obligations and as such member states continue to act in a manner that defeats the regional vision.

1.6 Research Methods and Data Collection

The study examines the areas within the legal framework of SADC and its institutions that may be enhanced so as to enable SADC to drive forward the regional integration agenda efficiently.

In order to achieve this, the study adopts a qualitative⁸⁹ approach. This method involves the perusal of primary sources such as treaties, case law and official documents of the SADC 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. Of fundamental importance to

⁸⁹ Qualitative research often attempts to answer a question rather than to test a hypothesis. Instead of devising "test conditions," qualitative researchers examine ongoing social processes, <http://www.wjh.harvard.edu/nsfqual/Coutin%20Paper.pdf> (accessed 2011-05-20).

this study, selected provisions of the founding document of SADC; the SADC Treaty will be examined as well as the Protocols establishing other institutions of SADC that are intended to complement the institutional integration agenda. The study also draws on comparative material from other similar arrangements, principally from the European Union.

Judicial opinions that will be relevant to the elucidation principles of law will be drawn from the literature of courts of member states within the region (Southern Africa), the findings and opinions of the SADC Tribunal and where such sources have been exhausted; reference has been made to a wider range of databases? The study also embraces 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 unpublished material that will enrich this work.

In addition to the above, the author has attended an extensive Winter School Course in Tilburg University, Netherlands, organised by the North West University Mafikeng Campus, Faculty of Law from the 11-23 January 2011. The content of the lectures encapsulated expert views on challenges mainly faced by the African and European integration models using a comparative approach. This course provided the much needed insight on regional organisations from an international perspective.

1.7 Literature Review

Regional integration is a powerful world-wide trend that has existed for a very long time. However, very little research has been conducted that focuses on African

integration efforts. The concept of regional integration has been mostly documented on European efforts. This is because of the major strides, economically, that the EU has managed to muster to date. Africa has only now begun to realise the wonders that can be achieved through integration. In Africa, integration was first used in its most superficial form, co-operation, to fight against colonialism.

It is submitted that since the attainment of independence, African states have shifted focus to enriching their democracies and awakening the full potential of African economies.⁹⁰ Generally speaking scholarly literature about SADC that deeply interrogates the functioning of the organisation is relatively limited, the hope is thereby to make an important contribution to the limited store of knowledge.

It is also important to note that most researchers who have mastered the field of integration are in the field of economics and political sciences. This has had an impact on the availability of literature from a legal perspective.

Mistry highlights the following challenges to regional integration:

- The failure of African governments to translate their commitments in regional treaties and agreements into substantive changes in national policies, legislation, rules, and regulations. There was no follow-through in translating regional commitments into national actions.

⁹⁰ See generally *Nepad Historical Overview*. Available from http://www.dfa.gov.za/au.nepad/historical_overview.htm. Accessed 2011-10-28.

- The unwillingness of African governments to subordinate immediate national political interests in order to achieve long-term regional economic goals or to cede the essential elements of sovereignty to regional institutions.
- The absence of monitoring and enforcement mechanisms to ensure adherence to agreed timetables on such matters as tariff and non-tariff barrier (NTB) reductions or in achieving more difficult objectives.⁹¹

The first two submissions by *Mistry* relate to challenges that are brought about by member states themselves. The third challenge can be disaggregated into those challenges that are institution based. However having identified these challenges, it is submitted that *Mistry* does not articulate or proffer solutions to these challenges, hence there is a need for further more nuanced studies on the topic.

Nzweni has observed that the rallying point in integration discourse and theorizing is the issue of sovereignty and state interest. Regional systems are made up of many members with differing ideological and political leanings representing equally diverse groups. This state of affairs will logically entail a multiplicity of interests and motivations in matters that concern the group. Nevertheless, rationality assumes that when people come together in a group for a particular policy purpose, individual peculiarities are often put aside for the overall productiveness of the group.⁹² The current discourse will articulate how to manage these different interests, those of SADC member states to ensure that they remain focused on the regional agenda.

⁹¹ Mistry, Percy (2000), "Africa's Record of Regional Co-operation and Integration." *African Affairs* (2000), 99, pp 553-57.

⁹² Nzweni O., "Africa's Regional Integration: A Reflection on Grand Theory," *Journal of Public Administration: Special Issue* 1, Vol 46 March 2011. p 896.

Ngandwe⁹³ is of the opinion that the notion of state sovereignty is often used to window dress the internal misdeed and to bar neighbours from intervening on matters of appalling human rights violations that ultimately undermine the efforts of regional integration, peace and security. Instructive of this regard, he goes on further to highlight the human rights violations in Zimbabwe and the inertia by SADC member states to deal with those violations within the SADC accords.

In addition, the notion of state sovereignty may be sacrificed for the attainment of regional objectives. The key lesson learned from these efforts around the world is that regional integration is a politically driven process, underpinned by the recognition that sovereign interests are best advanced through regional actions. Therefore, relations between Africa's leading national economies and their smaller neighbours are a critical factor in the success of regional integration and in informing programmes to accelerate integration.⁹⁴

Affirming the above submission on state sovereignty in general, Southern African leaders have been reluctant to strengthen regional institutions and create efficient follow-up mechanisms at the regional level. However, there are various reasons for this reluctance. Strengthening regional institutions would require giving them political power, which would be taken away from the national level.⁹⁵

⁹³ Ngandwe P.J, "Regional Cooperation and Integration: The African Perspective," Paper presented at Tilburg University, Winter School 12th January 2011.

⁹⁴ Economic Commission for Africa: African Development Forum, "Defining Priorities for Regional Integration 2002," pg 4 Available from http://www.uneca.org/adfiii/docs/adf3_rept.pdf. (accessed 2011-02-12).

⁹⁵ Economic Integration in Southern Africa. Available from <http://www.helsinki.fi/developmentstudies/research/HannunWP.pdf> (accessed 2011-11-16).

Ngandwe also points out the following challenges faced by SADC integration efforts:

- a general lack and shortage of resources on the African continent;
- duplicity and multiplicity of regional cooperation arrangements;
- lack of trust between participants;
- lack of ownership of the integration agenda;
- lack of credible leadership; and
- lack of political will by some of the Africans.

The challenges highlighted by *Ngandwe* are challenges that emanate from the inter-state relations as well, as outside the governing structure of the regional body. This illustrates the fact that the success of any regional integration initiative is heavily dependent on the co-operation of member states.

The existing literature canvasses all these points, however, does not suggest solutions on how to improve inter-state co-operation within SADC. It does not address questions such as: How does a regional body ensure that member states participate effectively and contribute towards the objectives of the regional body? How does a regional body regulate its membership so as to avoid duplicity of mandates? It is submitted that this study aims to make a meaningful contribution towards the on-going search for solutions to the problems.

To add on the institution based challenges, *Isaksen* and *Tjønnelan* identified the following as key factors which have led to the poor integration performance of SADC during the 1990s:

- the SADC secretariat in Gaborone lacks the power, authority and resources required to facilitate regional integration;
- the sector co-ordinating units in the member states are highly uneven in their ability to pursue and implement policies;
- SADC's Programme of Action lacks a clear regional focus, it covers too many areas, and the majority of projects are mainly national;
- limited capacity to mobilise the region's own resources, including the private sector, for the implementation of the Programme of Action and an overdependence on external financial resources; and
- growing political divisions within SADC and a failure to address governance, peace and security issues.⁹⁶

The major challenges to integration in Africa as identified by *Adedeji*⁹⁷ range from lack of political will, lack of sanctions against non-performers, and overlapping memberships. Others are the over-reliance of governments on tariff revenues, inequitable sharing of costs and benefits of integration, an unrealistic timetable, the practice by member States of signing protocols and not implementing them, and low private sector and civil society participation. He also observed that what was needed was a 'new regionalism', consisting of political, economic, security, and coherence components in the context of globalization. Therefore, a major requirement for

⁹⁶ Isaksen, J. and Tjønneland, E., (2001): "Assessing the Restructuring of SADC - Positions, Policies and Progress." *Chr. Michelsen Institute*, Report 2001:6.

⁹⁷ at the Third African Development Forum Conference.

success of Africa's regional integration is the provision for free movement of people and capital across regional borders.⁹⁸

The African Development Forum has noted that regional integration arrangements can also promote political cooperation, as members commit themselves to common objectives. The arrangements provide a platform for addressing common political problems and external threat.⁹⁹ For Africa, a continent that has been devastated by civil wars and unstable political regimes, integration would be a great platform to cooperate against such.

The Forum has further noted that there is a worldwide trend towards accelerated regional economic integration with several experiments in sub-regional economic integration across the globe. Accelerating the pace of regional integration in Africa requires a strong and pertinent understanding of similar processes across the world, along with an appreciation of the specific conditions in Africa.¹⁰⁰ Therefore the mere transplantation of techniques and policies from other regional integration bodies outside Africa will not benefit Africa. The structures need to be accustomed to African circumstances.

In a nutshell, the African Development Forum acknowledges the challenges as identified by other authors and further suggests that there is a need to foster a strong

⁹⁸ Economic Commission for Africa: African Development Forum, "Defining Priorities for Regional Integration" 2002, pg 9 (http://www.uneca.org/adfiii/docs/adf3_rept.pdf) (accessed 2011-02-12).

⁹⁹ Economic Commission for Africa: African Development Forum, "Annual Report on Integration in Africa 2002," pg 3 (<http://www.uneca.org/adfiii/docs/ARIA2002overview.pdf>) (accessed 2011-11-16).

¹⁰⁰ Economic Commission for Africa *Ibid* note 98, page 4.

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⁹⁸ Economic Commission for Africa: African Development Forum, "Defining Priorities for Regional Integration" 2002, pg 9 (http://www.uneca.org/adfiii/docs/adf3_rept.pdf) (accessed 2011-02-12).

⁹⁹ Economic Commission for Africa: African Development Forum, "Annual Report on Integration in Africa 2002," pg 3 (<http://www.uneca.org/adfiii/docs/ARIA2002overview.pdf>) (accessed 2011-11-16).

¹⁰⁰ Economic Commission for Africa *ibid* note 98, page 4.

and pertinent understanding of regional integration. The forum fell short in outlining what entails a strong and pertinent understanding which will be one of the objectives of this study. This study will identify solutions that are not a mere transplantation of ideas from other regional integration efforts, but rather efforts that are suited to African conditions.

1.8 Scope and limitations of the study

This dissertation is concerned with the legal challenges that SADC as a regional organisation, a sub grouping to the African Union, face in its endeavour to achieve the goals outlined in its founding Treaty as well as the spirit of its additional protocols from a legal perspective. The study focuses on the Institutional framework of SADC and identify the general factors within the framework that impeach negatively on the efficacy of SADC.

The core focus of the study is the Southern African Region however the study will draw a comparative analysis with the European Union and other kindred organisations where necessary.

SADC has a plethora of guiding documents, protocols, charters, memoranda of understanding etc. These organic documents provide the building blocks upon which this study is crafted.

1.9 Scope of the Study

Chapter one is an introduction to this work, a historical discussion of SADC, the research objectives, rationale and justification of the study, the methodological approach to be utilised by the author and an outline of the thesis structure. Further the discussions in this Chapter links integration with democracy and development.

Chapter two discusses the current status quo of SADC. It is a revelation of the SADC framework, revealing the key elements of the SADC Treaty and additional Protocols. It discusses the key bodies of SADC, their roles and objectives towards the integration model. It also brings to light the SADC Regional Indicative Strategic Development Plan as well as the general principles of international law that are applicable within the SADC Region.

Chapter three discusses the challenges facing the relationship between SADC institutions and national institutions of member states as well discuss the dynamics of public international law and eventually discuss institutional flaws in the framework of SADC.

Chapter four discusses the European Union and pit it against the SADC institutional integration framework.

Chapter five provides a conclusion to this study and make recommendations towards strengthening the institutional framework.

1.10 Ethical Considerations

The study has been conducted with adherence to the following principles; non-maleficance, beneficence, autonomy, justice, fidelity, respect for participants' rights and dignity.

Important ethical guidelines that have been taken into consideration are informed consent, confidentiality, anonymity appropriate referral, discontinuance and non deception. The author further ensured that work that is not of his original doings is well acknowledged.

CHAPTER 2: THE ARCHITECTURE OF SADC

2.1 Introduction

The previous chapter dealt with the historical and broad background of regional integration in Africa focusing on the metamorphosis of the SADC from SADCC. This chapter focuses mainly on the SADC institutional framework, in particular the machinery and processes within SADC. It highlights the most prominent features of the Treaty which are at the heart of the integration agenda. It highlights the building blocks of the institution (SADC), such as the Summit, Council of Ministers, Tribunal as well as their statutory functions as embodied in the Treaty and other documents thereafter revealing how these institutions relate with one another.

2.2 The Establishment of SADC

On August 17 1992, the High Contracting parties of SADC ushered in three important documents:

- A Declaration by the Heads of State or Government of Southern African States;¹⁰¹

The Declaration "Towards the Southern African Development Community" affirmed the Heads of State's commitment to establish a Development Community in the Region, conscious of their duty to promote the

¹⁰¹ SADC, "Towards the Southern African Development Community." Available from <http://www.sadc.int/index/browse/page/119>. (accessed 2011-11-16).

interdependence and integration of our national economies for the harmonious, balanced and equitable development of the Region, inter alia recognising that, in an increasingly interdependent world, mutual understanding, good neighbourliness, and meaningful co-operation among the countries of the Region are indispensable to the realisation of the ideals reflected in SADC Treaty.

- Protocol to the Treaty Establishing the Southern African Development Community on Immunities and Privileges;

The Protocol to the Treaty Establishing the Southern African Development Community¹⁰² on Immunities and Privileges was proclaimed pursuant to Article 31 of the SADC Treaty which provides that "SADC, its institutions and staff shall, in the territory of each Member State, have such immunities and privileges as are necessary for the proper performance of their functions under this Treaty, and are similar to those accorded to comparable international organisations."

- The Treaty establishing the organisation;

The SADC Treaty is the primary guiding document of the organisation. It is through this document that the principles and objectives as well as the primary functioning of the organisation are outlined. Furthermore the inter-state relations of SADC states are managed through the Treaty.

¹⁰² Available from <http://www.sadc.int/index/browse/page/153> (accessed 2011-11-16).

2.3 The Legal Status of SADC

The Treaty provides that the SADC shall be an international organisation, and shall have legal personality with the capacity and power to enter into contract, acquire, own or dispose of movable or immovable property and to sue and be sued.¹⁰³

This Article endows SADC with legal personality. It is also accepted that in order for SADC to perform certain functions, it requires this personality so that its staff can perform functions on its behalf. It is submitted that the governing instruments and international law set the parameters within which international organisations operate and carry out their functions. As is 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.¹⁰⁴

The legal status of international organisations was well captured in the International Court of Justice Advisory Opinion of the 11 April 1949. The legal question before the Court was whether 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, has 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

¹⁰³ Article 3(1), SADC Treaty.

¹⁰⁴ 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).

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 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.¹⁰⁵

Originally, international treaty rules were 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.¹⁰⁶ The Vienna Convention on the Law of Treaties¹⁰⁷ codifies several cornerstones of contemporary international law. The five important principles are:

- Free consent;
- Good faith;

¹⁰⁵ *Reparation for Injuries Suffered in the service of the United Nations, Advisory Opinion*: I.C. J. Reports 1949, p. 174.

¹⁰⁶ The International Law Treaties, Available from <http://www.public-international-law.net/> (accessed 2011-05-25).

¹⁰⁷ Available from http://untreaty.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf (accessed 2011-11-16).

- *Pacta sunt servanda*;
- *Rebus sic stantibus*; and
- *Favor contractus*;

They will now be discussed seriatim.

2.2.1 Free consent

According to the principle of free consent, international agreements are binding upon the parties and solely upon themselves. These parties cannot create either obligations or rights for third States without their consent. This is embodied in paragraph three of the Preamble as well, as Article 34¹⁰⁸ of the Convention.

2.2.2 Good faith

As well as free consent, good faith is of fundamental importance to the conduct of international relations in general and is therefore recognized as an international principle according to the terms of the Vienna Convention. Article 31(1)¹⁰⁹ as well as Article 62(2)(b)¹¹⁰ of the Convention reflect this spirit.

¹⁰⁸ A treaty does not create either obligations or rights for a third State without its consent.

¹⁰⁹ 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.

¹¹⁰ 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.

2.2.3 *Pacta sunt servanda*

In *Reuter's* words, this 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".¹¹¹ The rule is based on good faith; this entitles states to require that obligations be respected and to rely upon the obligations being respected. This good faith basis of treaties implies that a party to the treaty cannot invoke provisions of its domestic law as justification for a failure to perform its treaty obligations.

2.2.4 *Rebus sic stantibus*

According to this principle, extraordinary circumstances can lead to the termination of a Treaty. These circumstances can consist either in a material breach of a given treaty by one of the States Parties,¹¹² in a permanent disappearance of an object indispensable for the execution of the treaty¹¹³ or in a fundamental change of circumstances.¹¹⁴

¹¹¹ The International Law of Treaties, *Ibid* note 106.

¹¹² Article 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.*

¹¹³ Article 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.*

¹¹⁴ Article 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.*

2.2.5 Favor contractus

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 the contract.

In order to shed more light on the framework of SADC, a breakdown of the important facets of the Treaty will follow.

2.3 The Principles and Objectives of SADC

The SADC Treaty provides that member states shall act in accordance with the following principles:

- sovereign equality of all member states;
- solidarity, peace and security;
- human rights, democracy and the rule of law;
- equity, balance and mutual benefit; and
- peaceful settlement of disputes.¹¹⁵

In addition to the above mentioned principles, member states are required under the auspices of the principles to promote the objectives of SADC which are outlined in Article 5 as follows:

¹¹⁵ Article 4(a)-(e).

- promote sustainable and equitable economic growth and socio-economic development that will ensure poverty alleviation with the ultimate objective of its eradication, enhance the standard and quality of life of the people of Southern Africa and support the socially disadvantaged through regional integration;
- promote common political values, systems and other shared values which are transmitted through institutions which are democratic, legitimate and effective;
- consolidate, defend and maintain democracy, peace, security and stability;
- promote self-sustaining development on the basis of collective self reliance, and the interdependence of member states;
- achieve complementarily between national and regional strategies and programmes;
- promote and maximise productive employment and utilisation of resources of the Region;
- achieve sustainable utilisation of natural resources and effective protection of the environment;
- strengthen and consolidate the long standing historical, social and cultural affinities and links among the people of the Region;
- combat HIV and AIDS or other deadly and communicable diseases;
- ensure that poverty eradication is addressed in all SADC activities and programmes; and
- mainstream gender in the process of community building.¹¹⁶

¹¹⁶ Article 5(1)(a)-(k).

Having outlined the objectives of SADC, it is important to note that the Treaty under Article 5(2) articulated the general strategies to be implemented in order to support the attainment of the objectives. They include the harmonisation of political and socio-economic policies of member states,¹¹⁷ creation of appropriate institutions and mechanisms for the mobilisation of requisite resources,¹¹⁸ the development of policies aimed at the elimination of obstacles to the free movement of capital and labour,¹¹⁹ encouraging the people and institutions to develop cultural, economic and social ties across the region,¹²⁰ promoting development of human resources,¹²¹ mastery of technology¹²² as well as improvement of international relations.¹²³

The current vision of SADC is one of a common future within a regional community that will ensure economic wellbeing, improvement of the standards of living and quality of life, freedom and social justice, peace and security for the peoples of Southern Africa. This shared vision is anchored in the common values and principles and the historical and cultural affinities that exist amongst the peoples of Southern Africa.¹²⁴

¹¹⁷ Article 5(2)(1).

¹¹⁸ Article 5(2)(3).

¹¹⁹ Article 5(2)(4).

¹²⁰ Article 5(2)(2).

¹²¹ Article 5(2)(5).

¹²² Article 5(2)(6).

¹²³ Article 5(2)(8).

¹²⁴ Chanda, D., "Regional integration in southern Africa focusing on the future of SADC and SACU," 2010, page 16. Available from http://www.givengain.com/cause_data/images/1694/Chanda_Final_Edited_20101115.pdf (accessed 2011-04-23).

Further, in order to sustain a regional community, a viable economy should be in place to fuel the community financially and create a market for the goods and services within the community. As such, the Heads of State and Government of the Common Market for Eastern and Southern Africa (COMESA), the East African Community (EAC) and the Southern African Development Community (SADC) 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 (FTA); infrastructure development to enhance connectivity and reduce costs of doing business as well as industrial development to address the productive capacity constraints.¹²⁵

In order to achieve what is envisaged in the tripartite alliance, SADC first needs to facilitate a harmonization and co-ordination process amongst its member states to eliminate trade barriers and bottlenecks in the way of successful integration.

2.4 Obligations of SADC Member States

The SADC Treaty provides that member states should abide by the following undertakings:

- member states undertake to adopt adequate measures to promote the achievement of the objectives of SADC, and must refrain from taking any

¹²⁵ Communiqué of Second COMESA-EAC-SADC Tripartite Summit. Available from http://about.comesa.int/attachments/435_110614_Communicu%C3%A9%20of%20Second%20COMESA-EAC-SADC%20Tripartite%20Summit.pdf (accessed 2011-08-23).

measure likely to jeopardise the sustenance of its principles, the achievement of its objectives and the implementation of the provisions of the Treaty;

- member states undertake not to discriminate against any person on grounds of gender; religion, political views, race, ethnic origin, culture, ill health, disability, or such other ground as could be determined by the Summit;
- SADC should not discriminate against any member state;
- member states should take all steps necessary to ensure the uniform application of the Treaty;
- member states should take all necessary steps to accord the Treaty the force of national law; and
- member states should co-operate with and assist institutions of SADC in the performance of their duties.¹²⁶

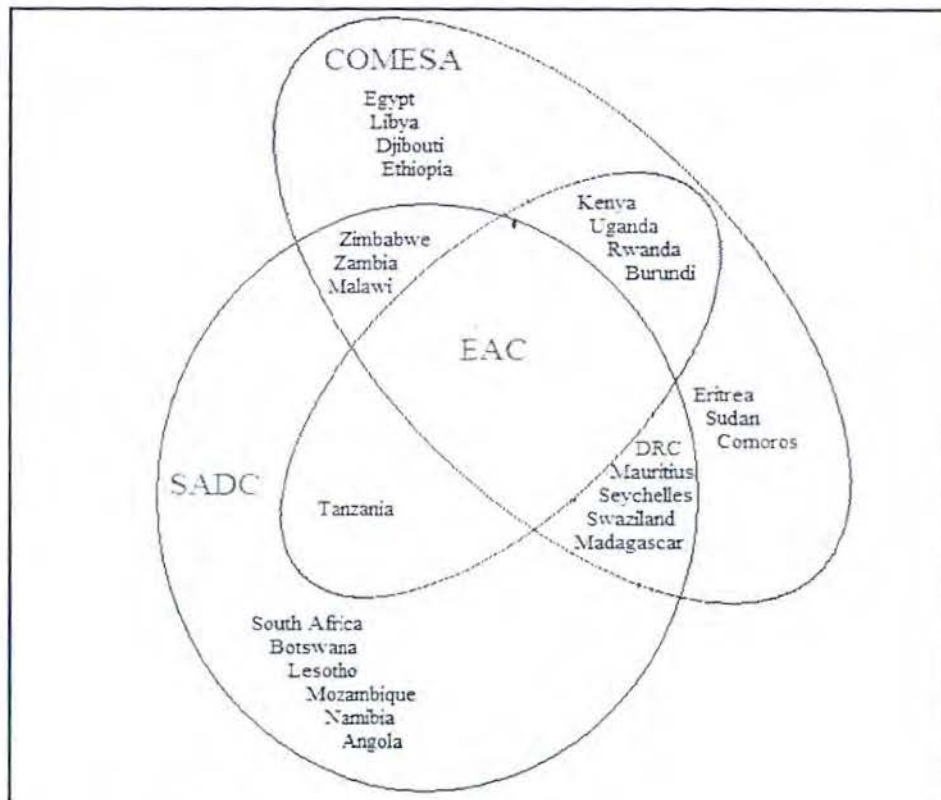
Despite the above, it is submitted that the SADC institutional framework lacks the legal mechanisms required to translate these undertakings into action. For instance, Article 6(5) requires that member states translate the spirit of the Treaty into national law, Article 6(6) calls for co-operation between member states and SADC institutions. The reality is that member states constantly repudiate SADC law and the decisions of SADC institutions such as that of the recently suspended SADC Tribunal. The monitoring and implementation institutions within SADC do not have the required jurisdiction to ensure that member states comply with Treaty obligations and decisions. These are challenges that are further elucidated in the next Chapter.

¹²⁶ Article 6(1)-(6).

2.5 Membership of SADC¹²⁷

The Treaty provides that the Summit must determine the procedures for the admission of new members and for accession to the Treaty by such members,¹²⁸ thereafter the Council considers and recommends to the Summit any application for membership of SADC.¹²⁹ The following table illustrates regional membership.

Figure 1: Regional Memberships.¹³⁰



Source: Kalenga. P Senior Trade Adviser, SADC Secretariat¹³¹

¹²⁷ Multiple memberships will be discussed in the following Chapters as an Institutional weakness.

¹²⁸ Article 8(2).

¹²⁹ Article 8(3).

¹³⁰ Notes: SADC: Southern African Development Community; COMESA: Common Market for Eastern and Southern Africa; SACU: Southern African Customs Union; RIFF: Regional Integration Facilitation Forum; EAC: East African Community; MMA: Multilateral Monetary Agreement.

It is submitted that the manner in which SADC determines its membership and allows or fails to curb its members from becoming members of other competing regional groupings is an attribute of a failing institutional framework. The disadvantages of having multiple memberships will be discussed in the next Chapter however the overlapping memberships as illustrated in Figure 1 are an indication of clashing mandates within the Southern African body.

2.6 SADC Protocols

The SADC Treaty is the constitution of the regional organisation. The organisation is entitled to adopt additional legal instruments to guide its regional efforts. These legal documents may be in the form of Protocols, Declarations, Memoranda of Understanding (MoU), Charters and Principles. The Treaty provides that member states should conclude such Protocols as may be necessary in each area of co-operation, which should spell out the objectives and scope of, and institutional mechanisms for, co-operation and integration.¹³²

Such protocols enter into force thirty (30) days after the deposit of the instruments of ratification by two thirds of the member states. Once a Protocol has entered into force, a Member State may only become a party thereto by accession.¹³³ The following illustration shows Protocols that are in force:

¹³¹ Kalenga. P. 2011. "The Grand Tripartite FTA: Is Namibia Ready to Engage?" Senior Trade Adviser, SADC Secretariat," pg 3. Available from http://www.fesnam.org/pdf/2011/TripartiteFTA_Namibia.ppt(Accessed 2011-11-16).

¹³² Article 22(1).

¹³³ Article 22(5).

Table 2: SADC Protocols in force.

Protocols			
Instrument	Signature Date	Enforcement Date	Purpose
Protocol on Control of Firearms, Ammunition and other related materials	14 Aug 2001	8 Nov 2004	To promote and facilitate co-operation and exchange of information; and To prevent, combat and eradicate illicit manufacturing of firearms, ammunition used to commit crime and destabilize the region.
Protocol Against Corruption	14 Aug 2001		To promote and strengthen the development, by all member states, mechanisms needed to prevent, detect, punish and eradicate corruption in the public and private sector.
Protocol on Culture, Information and Sport	14 Aug 2001		To co-operate in the areas of culture, information and sport to attain harmonisation of policies and creation of an environment conducive to the realisation of SADC's regional integration agenda.
Protocol on Combating Illicit Drugs	24 Aug 1996	20 March 1999	To eliminate drug trafficking, money laundering, corruption and the illicit use and abuse of drugs through co-operation among law enforcement agencies through co-ordinated programmes.
Protocol on Education and Training	8 Sept 1997	31 July 2000	To develop and implement a

			common system of regular collection and reporting of information by member states about current status and future demand and supply, and the priority areas for provision of education and training in the region.
Protocol on Energy	24 Aug 1996	17 April 1998	Strive to harmonise national and regional energy policies, strategies and programmes on matters of common interest based on equity, balance and mutual benefit.
Protocol on Extradition	3 Oct 2002		To ensure co-operation and co-ordination in the prevention and suppression of crime due to increased easy access to free cross-border movement of people.
Protocol on the Facilitation of Movement of Persons	Aug 2005		To develop policies aimed at progressive elimination of obstacles to the movement of persons in the region generally and within the territories of member states.
Protocol on Fisheries	14 Aug 2001	8 August 2003	To promote and enhance food security and human health; safeguard the livelihood of fishing communities; generate economic opportunities for nationals in the region; ensure that future generations benefit from these renewable resources; and

			alleviate poverty with the ultimate objective of its eradication.
Protocol on Forestry	3 Oct 2002		To promote the development, conservation, sustainable management and utilisation of all types of forests and trees; promote trade in forest products to eradicate poverty and generate economic opportunities for the people of the Region.
Protocol on Health	18 Aug 1999	14 Aug 2004	To co-operate in addressing health problems and challenges facing member states through effective regional collaboration and mutual support.
Protocol on Immunities and Privileges	17 Aug 1992	30 Sept 1993	In accordance with international standards, to provide immunities and privileges incidental for the effective performance of SADC functions under the Treaty.
Protocol on Legal Affairs	7 August 2000		To provide legal assistance to SADC and all its institutions and member states in matters relating to the interpretation and implementation of the Treaty, Protocols and related subsidiary legal instruments.
Protocol on Mining	8 Sept 1997	10 Feb 2000	To promote the interdependence and integration of mining policies for the accelerated development and growth of the mining sector in the Region; and to ensure economic and social development

			and integration of regional economies with a view to achieving competitiveness and increasing regional market share in international markets.
Protocol on Mutual Legal Assistance in Criminal Matters	3 Oct 2002		To develop common rules in the field of mutual assistance in criminal matters as a contribution to the development of regional integration.
Protocol on Politics, Defence and Security Co-operation	14 Aug 2001	20 March 2004	To promote peace and security in the Region
Protocol on Shared Watercourse Systems	28 Aug 1995	28 Sept 1998	To foster closer co-operation for judicious, sustainable and co-ordinated management, protection and utilisation of shared watercourses and advance the SADC agenda of regional integration and poverty alleviation.
Revised Protocol on Shared Watercourses	7 Aug 2000	22 Sept 2003	
Protocol on Development of Tourism	14 Sept 1998	26 Nov 2002	To use tourism as a vehicle to achieve sustainable social and economic development through the full realisation of its potential for the region; and to ensure an equitable, balanced and complimentary development of tourism industry region-wide.
Protocol on Trade	24 Aug 1996	25 Jan 2000	To further liberalise intra-regional trade in goods and services on the basis of fair, mutually equitable and beneficial trade

			arrangements, complimented by Protocols in other areas; ensure efficient production within SADC reflecting the current and dynamic comparative advantages of its members; contribute towards the improvement of the climate for domestic, cross-border and foreign investment; enhance economic development, diversification and industrialisation of the region; and establish a Free Trade Area in the SADC Region
Amendment Protocol on Trade	7 Aug 2000	7 August 2000	
SADC Protocol on Transport, Communications and Meteorology	24 Aug 1996	6 July 1998	To establish transport, communications and meteorology systems which provide efficient, cost-effective and fully integrated infrastructure and operations, which best meet the needs of customers and promote economic and social development while being environmentally and economically sustainable.
Protocol on Tribunal and the Rules of Procedure Thereof	7 Aug 2000	14 Aug 2001	To adjudicate over disputes between States, between natural or legal persons and States, subject to the natural or legal person's exhaustion of all available remedies, or is unable to proceed under the domestic jurisdiction.
Agreement Amending the Protocol	3 Oct 2002	3 Oct 2002	

on Tribunal			
Protocol on Wildlife Conservation and Law Enforcement	18 Aug 1999	30 Nov 2003	To establish within the region and respective member states common approaches to the conservation and sustainable use of wildlife resources and to assist with the effective enforcement of laws governing those resources.

Source: Dithlake. A, SADC Status Report¹³⁴

Table 3: SADC Declarations and Principles in force

Declarations			
Dar-Es-Salaam Declaration on Agriculture and Food Security in the SADC Region	15 May 2004		To promote development of Agriculture to ensure food security, and as a catalyst for sustainable and equitable economic growth, socio-economic development and thus ensuring poverty alleviation.
Declaration on HIV/AIDS	4 July 2003		To commit member states in ensuring the combating of HIV and AIDS pandemic and other communicable diseases such as Malaria and Tuberculosis through effective regional collaboration, mutual support and the participation of all key stakeholders.
Declaration on Information and	14 Aug 2001		To give ICT priority for national and

¹³⁴ SADC Status Report by Abie Dithlake 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).

Communication Technology			regional socio-economic development and accord such recognition in their national programmes in the effort of turning the Region into an information-based economy.
Declaration on Productivity	18 Aug 1999		To ensure improved living standards for all people of the region, by harnessing the human, capital and material resources at its disposal in the most productive and sustainable manner through the formulation and adoption of appropriate national and regional policies and strategies at the macro-institutional and enterprise levels to enhance productivity.
Gender and Development: A Declaration by Heads of State or Government of the Southern African Development Community. Note that a Gender and Development Protocol has been in the pipeline for some time, and was expected to be signed during the 2007 Summit in Lusaka. Some member states wanted more time to consult, and it is expected to be signed during the 2008 Summit to be held in South Africa.	8 Sept 1997		To ensure integration and mainstreaming of issues into the SADC Programme of Action and Community Building initiatives as a catalyst to the sustainable development of the SADC region.
The Prevention and Eradication of Violence Against Women and Children: An Addendum to the 1997	14 Sept 1998		To commit SADC and its member states to take urgent measures to prevent and deal with the increasing

Declaration on Gender and Development by SADC Heads of State or Government			levels of violence against women and children.
Principles			
SADC Principles and Guidelines Governing Democratic Elections	2005		To enhance the transparency and credibility of elections and democratic governance, as well as ensuring the acceptance of election results by all contesting parties.

Source: Dithlake. A, SADC Status Report.¹³⁵

Table 4: SADC Charters

SADC Charters			
Charter of Fundamental Social Rights in SADC	26 Aug 2003	26 Aug 2003	To facilitate, through close and active consultations among social partners and in a spirit conducive to harmonious labour relations. It embodies recognition of the universality and indivisibility of basic human rights proclaimed in instruments such as the United Nations Universal Declaration of Human Rights, the African Charter on Human and Peoples' Rights, the Constitution of ILO, the Philadelphia Declaration and other relevant

¹³⁵ SADC Status Report by Abie Dithlake 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).

			international instruments.
SADC Mutual Defence Pact	26 Aug 2003		To operationalise the mechanisms of the Organ for Mutual co-operation in defence and security matters.
Charter of the Regional Tourism of Southern Africa (RETOSA)	8 Sept 1997	8 Sept 1997	

Source: Dithlake. A, SADC Status Report.¹³⁶

2.7 SADC Institutions

The success of any regional integration project depends on the organization and synchronisation of its own internal bodies. The key SADC institutions as provided for in Chapter 5 of the SADC Treaty as amended are:¹³⁷

- 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.¹³⁸

¹³⁶ SADC Status Report by Abie Dithlake 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).

¹³⁷ Article 9(1), SADC Treaty.

¹³⁸ Article 9(1)(a)-(h), SADC Treaty.

It is submitted that the success of SADC relies on the proper functioning of each of these bodies. Each SADC institution has a role to play towards the attainment of the regional objectives. These roles will now be discussed seriatim.

2.7.1 The Summit of Heads of State or Government

The SADC summit is the body responsible for the overall policy direction of the organisation.¹³⁹ The Summit is composed of Heads of States of member states to the organization. The Summit appoints the Executive Secretary and the Deputy Executive Secretary of the organisation after the advice or recommendation from the Council.¹⁴⁰

Article 10 (3) of the SADC Treaty requires the Summit to adopt legal instruments for the implementation of the provisions of the SADC Treaty, it further provides that the Summit may delegate this authority to the Council or any other institution of SADC as it may be appropriate. The Treaty further provides that protocols are approved by the Summit on the recommendation of the Council, and thereafter become an integral part of the Treaty.¹⁴¹

The Summit is the body within the organisation that determines the procedures that apply to prospective members in order for them to be admitted and accession to the Treaty thereof.¹⁴² In the event that there has been breach of Treaty obligations by a

¹³⁹ Article 10(2) SADC Treaty.

¹⁴⁰ Article 10(7) SADC Treaty.

¹⁴¹ Article 22 (2) SADC Treaty.

¹⁴² Article 8(3) SADC Treaty.

member state, appropriate sanctions are determined by the Summit on a case-by-case basis.¹⁴³

Moyo has argued that the SADC institutional structure, particularly the enormous legislative and executive powers reposed 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-the hallmark of inter-governmentalism and its preoccupation with statism.¹⁴⁴

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, a body heavily loaded with political leaders who can be said to have too much political interest. This submission will be later explored in the next Chapter as an institutional weakness.

2.7.2 The Council of Ministers

The Council of Ministers consists of Ministers from each Member State, usually from the Ministries of Foreign Affairs and Economic Planning or Finance as recommended in the Treaty.¹⁴⁵ The Council is responsible for overseeing the functioning and development of SADC and ensuring that policies are properly implemented. The

¹⁴³ Article 33 (2) SADC Treaty.

¹⁴⁴ 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, pg 26.

¹⁴⁵ Article 11(1) SADC Treaty.

Council meets at least four times a year to ensure speedy decision-making and allow an opportunity and time to discuss regional affairs in detail.¹⁴⁶ Article 11 of the SADC Treaty engraves other functions of Council as follows:

- advise the Summit on matters of overall policy and efficient and harmonious functioning and development of SADC;
- approve policies, strategies and work programmes of SADC;
- direct, co-ordinate and supervise the operations of the institutions of SADC subordinate to it;
- recommend, for approval to the Summit, the establishment of directorates, committees, other institutions and organs;
- create its own committees as necessary;
- recommend to the Summit persons for appointment to the posts of Executive Secretary and Deputy Executive Secretary;
- determine the Terms and Conditions of Service of the staff of the institutions of SADC;
- develop and implement the SADC Common Agenda and strategic priorities;
- convene conferences and other meetings as appropriate, for purposes of promoting the objectives and programmes of SADC; and
- perform such other duties as may be assigned to it by the Summit or this Treaty.¹⁴⁷

¹⁴⁶ SADC Council of Ministers, http://www.afdevinfo.com/htmlreports/org/org_48950.html (accessed 2011-04-27).

¹⁴⁷ Article 11(2)(c)-(l).

It is submitted that the Council, plays a lot of oversight and monitoring functions. However these functions are further diluted by the fact that they seem to lack the independence required to drive its decisions forward since they have to report to or advise the Summit under Article 11(2)(c).

The Council also plays a role in the constitution, composition and benefits of the Tribunal in accordance with Article 3(2),¹⁴⁸ Article 4(3),¹⁴⁹ as well as Article 12(3)¹⁵⁰ of the Protocol on the Tribunal and Rules thereof. It is submitted that the nomination and selection of judicial officers by ministers presents an important question as to whether there is complete separation of powers, and further if the benefits of the Tribunal are determined by the Council, it is submitted that then the Tribunal is not properly insulated from factors that may hinder its independence. This argument underscores the implications of the suspension of the Tribunal to the notion of judicial independence and rule of law in the next chapter.

2.7.3 Commissions

The Treaty provides that Commissions be constituted to guide and coordinate cooperation and integration policies and programmes in designated sectoral

¹⁴⁸ The Council shall designate five (5) of the Members as regular Members who shall sit regularly on the Tribunal. The additional five (5) Members shall constitute a pool from which the President may invite a Member to sit on the Tribunal whenever a regular Member is temporarily absent or is otherwise unable to carry out his or her functions.

¹⁴⁹ The Members shall be selected by the Council from the list of candidates so nominated by Member States. Nominations for the first appointment shall be called within three (3) months, and the selection shall be held within six (6) months, of the date of entry into force of this Protocol.

¹⁵⁰ The terms and conditions of service, salaries and benefits of the Registrar and other staff shall be determined by the Council on the recommendation of the Tribunal.

areas.¹⁵¹ The composition, powers, functions, procedures and other matters related to each Commission are prescribed by the relevant protocol approved by the Summit.¹⁵²

2.7.4 The Standing Committee of Officials

The Standing Committee of officials consists of one permanent secretary or an official of equivalent rank from each Member State, preferably from a ministry responsible for economic planning or finance.

The Committee is basically a technical advisory committee to the Council. Decision making within the committee is done by consensus.

2.7.5 The Secretariat

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.¹⁵³ Article 14 (1) of the SADC Treaty outlines the following responsibilities for the Secretariat:

- strategic planning and management of the programmes of SADC;

¹⁵¹ Article 12(1) SADC Treaty.

¹⁵² Article 12(2) SADC Treaty.

¹⁵³ African Union, "SADC" <http://www.africa-union.org/recs/sadcprofile.pdf> (accessed 2011-11-16).

- implementation of decisions of the Summit, Troika of the Summit, Organ on Politics, Defence and Security Co-operation, Council, Troika of the Council, Integrated Committee of Ministers and Troika of the Integrated Committee of Ministers;
- organisation and management of SADC meetings;
- financial and general administration;
- representation and promotion of SADC;
- co-ordination and harmonisation of the policies and strategies of member states;
- gender mainstreaming in all SADC programmes and activities;
- submission of harmonized policies and programmes to the Council for consideration and approval;
- monitoring and evaluating the implementation of regional policies and programmes;
- collation and dissemination of information on the Community and maintenance of a reliable database;
- development of capacity, infrastructure and maintenance of intra-regional information communication technology;
- mobilization of resources, co-ordination and harmonization of programmes and projects with co-operating partners;
- devising appropriate strategies for self-financing and income generating activities and investment;
- management of special programmes and projects;
- undertaking research on community-building and the integration process; and

- preparation and submission to the Council, for approval, administrative regulations, standing orders and rules for management of the affairs of SADC.¹⁵⁴

It is submitted that the Secretariat is overburdened by the vast Treaty obligations it has to execute thus affecting the ultimate success of SADC. The next Chapter will also illustrate how this problem is further compounded by the fact that the SADC Secretariat struggles with capacity problems that ultimately hinder the performance of all functions to be executed by it.

Under the auspices of Article 15(2), the Executive Secretary liaises closely with other institutions, guides, supports and monitors the performance of SADC in the various sectors to ensure conformity and harmony with agreed policies, strategies, programmes and projects. This is further echoed in the Regional Indicative Strategic Development Plan (RISDP) in which it is indicated that at the operational level, management and co-ordination of the RISDP during implementation is primarily the responsibility of the Secretariat.¹⁵⁵

The Executive Secretary is responsible to the Council for the following:

- consultation and co-ordination with Governments and other institutions of member states;

¹⁵⁴ Article 14 (1)(a)-(p).

¹⁵⁵ SADC Regional Indicative Strategic Development Plan, *op-cit note* 32, page pg 86.

- pursuant to the direction of Council, Summit or on his or her own initiative, undertaking measures aimed at promoting the objectives of SADC and enhancing its performance;
- promotion of co-operation with other organisations for the furtherance of the objectives of SADC;
- organising and servicing meetings of the Summit, the Council, the Standing Committee and any other meetings convened on the direction of the Summit or the Council;
- custodianship of the property of SADC;
- appointment of the staff of the Secretariat, in accordance with procedures, and under Terms and Conditions of Service determined by the Council;
- general administration and financial administration of the Secretariat;
- preparation of Annual Reports on the activities of SADC and its institutions;
- preparation of the Budget and Audited Accounts of SADC for submission to the Council;
- diplomatic and other representations of SADC;
- public relations and promotion of SADC; and
- such other functions as may, from time to time, be determined by the Summit and Council.¹⁵⁶

The priorities determined by the Secretariat are informed by how the Secretariat can best contribute to the overall objective of SADC. These priorities include:

- trade, finance and investment;

¹⁵⁶ Article 15 (1)(a)-(l).

- enhancing capacity for human resources development;
- stakeholder participation;
- gender mainstreaming;
- promotion of SADC image;
- policy, formulation and harmonisation; and
- strengthening of institutions involved in community building.¹⁵⁷

2.7.6 The Tribunal

It is important to begin by declaring that at the time of writing this work, the Tribunal had been suspended this following a decision of the Summit to effectively suspend the operations of the Tribunal by failing to appoint judges to the Tribunal and by instructing the Tribunal not to take new cases or to hear any cases until August 2012 taken at the SADC Extraordinary Summit of 20 May 2011.¹⁵⁸ The implication and complexities of this decision will be highlighted in the next Chapter; nevertheless a discussion of the body will continue to illustrate the status quo before the suspension.

SADC, as an international organisation, is bound to act in accordance with and within the scope of the constituent documents governing its institutions. Furthermore, SADC cannot act without considering the consequences of its decision; particularly

¹⁵⁷ Profile: Southern African Development Community (SADC), <http://www.africa-union.org/recs/sadcprofile.pdf> accessed 2011-04-29.

¹⁵⁸ Statement by the SADC Lawyers Association following the decision of the SADC Extraordinary Summit to extend the suspension of the SADC Tribunal. Available from <http://www.swradioafrica.com/Documents/Statement%20on%20the%20continued%20suspension%20of%20the%20SADC%20Tribunal%5B1%5D.pdf> (accessed 2011-11-16).

where those consequences impact on the fundamental rights recognised under customary international law.¹⁵⁹ In any organisation, there is a need to ensure that there is legal compliance. The SADC Tribunal is the judicial organ of the community with jurisdiction over contentious and non-contentious proceedings.¹⁶⁰ 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.¹⁶¹

A protocol expounding the 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.¹⁶²

2.7.6.1 Composition and Functioning of the Tribunal

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.¹⁶³ According to the Protocol on the Tribunal, the Tribunal elects its president from the crop of judges whose term shall

¹⁵⁹ The Commercial Farmers' Union of Zimbabwe, "Legal Opinion on implications on decision on SADC Tribunal." page 29 Available from http://www.cfuzim.org/index.php?option=com_content&view=article&id=1069:legal-opinion-on-implications-on-decision-on-sadc-tribunal&catid=44:legal-cases&Itemid=91 (accessed 2011-04-05).

¹⁶⁰ Khulekani, M., *Ibid* note 144, page 37.

¹⁶¹ Article 16, SADC Treaty.

¹⁶² Protocol on Tribunal and Rules of Procedure Thereof, adopted on 7th August 2000.

¹⁶³ The Commercial Farmers' Union of Zimbabwe, *Ibid* note 159, page 42.

be for a period of three years.¹⁶⁴ The judges' terms and conditions of service, salaries and benefits are determined by the Council of Ministers.¹⁶⁵

The Protocol is unequivocal in the requirement that the Tribunal consist of ten members. Article 3(2) further stipulates that of the ten members, the Council "designates five (5) of the Members as regular Members who shall sit regularly on the Tribunal. The additional five (5) Members shall constitute a pool from which the President may invite a Member to sit on the Tribunal whenever a regular Member is temporarily absent or is otherwise unable to carry out his or her functions."

In terms of article 3(3) of the Tribunal Protocol: "The Tribunal is constituted by three (3) Members; provided that the Tribunal may decide to constitute a full bench composed of five (5) Members." Read together, the above-mentioned provisions clearly require that the Tribunal be comprised of ten members and that at all times there are five members available to constitute a full bench.¹⁶⁶

The Tribunal gives advisory opinions¹⁶⁷ on such matters as the Summit or the Council may refer to it.¹⁶⁸ Article 16(5) of the SADC Treaty provides that the decisions of the Tribunal are final and binding. This clause has been rendered redundant within the Community as will be illustrated in the next Chapter.

¹⁶⁴ Article 7.

¹⁶⁵ Article 10.

¹⁶⁶ The Commercial Farmers' Union of Zimbabwe, *Ibid* note 159, page 47.

¹⁶⁷ Note that these advisory opinions are, by nature not binding.

¹⁶⁸ Article 16(4) SADC Treaty.

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 states¹⁶⁹ 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 remedies¹⁷⁰ or is unable to proceed under the domestic jurisdiction¹⁷¹ and finally that the Tribunal has exclusive jurisdiction in disputes between organs of the community or between community personnel and the community.¹⁷²

In order to reach just conclusions, the Tribunal is expected to develop its own jurisprudence as well as to have due regard to the general principles and rules of public international law and any rules and principles of the law of member states.¹⁷³

2.7.7 The Troika

The Troika of each institution functions as a steering committee of the institution and is, in between the meetings of the institution, responsible for:

¹⁶⁹ Article 15(1) Protocol on the Tribunal.

¹⁷⁰ 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.

¹⁷¹ Article 15(2), Protocol on the Tribunal.

¹⁷² Article 18-19, Protocol on the Tribunal.

¹⁷³ Article 21(b), Protocol on the Tribunal.

- decision - making;¹⁷⁴
- facilitating the implementation of decisions;¹⁷⁵ and
- providing policy directions.¹⁷⁶

The SADC Troika System vests authority in the incumbent Chairperson, in-coming Chairperson who is the Deputy Chairperson at the time and the immediate Previous Chairperson to take quick decisions on behalf of SADC that are ordinarily taken at policy meetings scheduled at regular intervals: Integrated Committee of Ministers (ICM); the Council of Ministers (CM) and the Summit of Heads of State and Government. The Summit and the ICM meet annually, while the Council of Ministers meets biannually – in February to approve the Annual budgets and in August to prepare the Summit agenda.¹⁷⁷

In accordance with Article 9A of the Treaty, this form of decision making applies to the following institutions:

- the Summit;
- the Organ;
- the Council;
- the Integrated Committee of Ministers; and
- the Standing Committee of Officials.

¹⁷⁴ Article 9A(6)(a).

¹⁷⁵ Article 9A(6)(b).

¹⁷⁶ Article 9A(6)(c).

¹⁷⁷ The Troika – SADC, Available from http://www.afdevinfo.com/htmlreports/org/org_48885.html (Accessed 2011-04-23).

2.7.8 Organ on Politics, Defence and Security Co-operation

Peace, security and political stability are the linchpins for socio-economic development. The vision of the Southern African Development Community (SADC) reminds the member states and citizens of their historical bonds underpinning the shared future. It is in pursuance of this desire that SADC concluded the Protocol on Politics, Defence and Security Cooperation to serve as an instrument for dealing with the Southern African region's political, defence and security challenges.¹⁷⁸

The SADC member states, convinced that peace, security and strong political relations are critical factors in creating a conducive environment for regional cooperation and integration¹⁷⁹ promulgated the Protocol on Politics, Defence and Security Cooperation. The Protocol read in conjunction with Article 9(1) (b) of the SADC Treaty, establishes the Organ on Politics, Defence and Security Co-operation. The decision to create this Organ is further referenced to in the Gaborone Communiqué of 28 June 1996.¹⁸⁰

The Protocol under Article 2 provides that the general objective of the Organ shall be to promote peace and security in the Region.¹⁸¹ Other objectives are:

¹⁷⁸ Strategic Indicative Plan for the Organ on Politics, Defence and Security Cooperation, pg 5.

¹⁷⁹ Preamble of the Protocol on Politics, Defence and Security Cooperation.

¹⁸⁰ The Summit of Heads of State or Government of the Southern African Development Community (SADC) met in Gaborone, the Republic of Botswana, on 28th June 1996, under the Chairmanship of his Excellency, Sir Katumile Masire, President of the Republic of Botswana, to launch the SADC Organ on Politics, Defense, and Security. Communiqué available from http://www.iss.co.za/af/regorg/unity_to_union/pdfs/sadc/communiques/HoS%2096x.pdf (Accessed 2011-11-16).

¹⁸¹ Article 2(1).

- protect the people and safeguard the development of the Region against instability arising from the breakdown of law and order, intra-state conflict, inter-state conflict and aggression;
- promote political co-operation among State Parties and the evolution of common political values and institutions;
- develop common foreign policy approaches on issues of mutual concern and advance such policy collectively in international fora;
- promote regional co-ordination and co-operation on matters related to security and defence and establish appropriate mechanisms to this end;
- prevent, contain and resolve inter-and intra-state conflict by peaceful means;
- consider enforcement action in accordance with international law and as a matter of last resort where peaceful means have failed;
- promote the development of democratic institutions and practices within the territories of State Parties and encourage the observance of universal human rights as provided for in the Charters and Conventions of the Organisation of African Unity and United Nations respectively;
- consider the development of a collective security capacity and conclude a Mutual Defence Pact to respond to external military threats;
- develop close co-operation between the police and state security services of State Parties in order to address:
 - (i) cross border crime; and
 - (ii) promote a community based approach to domestic security;
- observe, and encourage State Parties to implement, United Nations, African Union and other international conventions and treaties on arms control, disarmament and peaceful relations between states;

- develop peacekeeping capacity of national defence forces and co-ordinate the participation of State Parties in international and regional peacekeeping operations; and
- Enhance regional capacity in respect of disaster management and co-ordination of international humanitarian assistance.¹⁸²

It is submitted that if the Organ had executed all its roles as outlined in the Protocol on Politics, Defence and Security Cooperation, the unpredictable political climate that plagues the Southern African region would have been put under control, however the region, as we speak suffers from political strife. The next Chapter further canvasses this point.

The Organ reports to the Summit as per Article 3(1) and has the following structures to enable it to achieve its role:

- Chairperson of the Organ;
- Troika;
- Ministerial Committee;
- Inter-State Politics and Diplomacy Committee (ISPDC);
- Inter-State Defence and Security Committee (ISDSC); and
- such other sub-structures as may be established by any of the ministerial committees.

¹⁸² Article 2 (2)(a)-(l).

The Organ has jurisdiction over inter-state, and intra-state matters relating to:

- a conflict over territorial boundaries or natural resources;
- a conflict in which an act of aggression or other form of military force has occurred or been threatened;
- a conflict which threatens peace and security in the Region or in the territory of a State Party which is not a party to the conflict.
- large-scale violence between sections of the population or between the state and sections of the population, including genocide, ethnic cleansing and gross violation of human rights;
- a military coup or other threat to the legitimate authority of a State;
- a condition of civil war or insurgency;
- a conflict which threatens peace and security in the Region or in the territory of another State Party and
- In consultation with the United Nations Security Council and the Central Organ of the Organisation of African Unity Mechanism for Conflict Prevention, Management and Resolution, the Organ may offer to mediate in a significant inter-or intra-state conflict that occurs outside the Region.¹⁸³

The methods employed by the Organ to prevent, manage and resolve conflict by peaceful means including preventive diplomacy, negotiations, conciliation, mediation, good offices, arbitration and adjudication by an international tribunal.¹⁸⁴ Where peaceful means of resolving a conflict are unsuccessful, the Chairperson acting on the advice of the Ministerial Committee may recommend to the Summit that

¹⁸³ Article 11.

¹⁸⁴ Article 11 (3)(a).

enforcement action be taken against one or more of the disputant parties.¹⁸⁵ The Act further provides that the Summit shall resort to enforcement action only as a matter of last resort and, in accordance with Article 53 of the United Nations Charter¹⁸⁶, only with the authorization of the United Nations Security Council.

2.7.9 Integrated Committee of Ministers

It is submitted that the Integrated Committee of Ministers is a supplementary body to the Council of Ministers. It shall, with respect to its responsibilities under paragraph 2 of Article 12, have decision making powers to ensure rapid implementation of programmes that would otherwise wait for a formal meeting of the Council.¹⁸⁷ It is the responsibility of the Integrated Committee of Ministers to:

- oversee the activities of the core areas of integration which include:
 - trade, industry, finance and investment;
 - infrastructure and services;
 - food, agriculture and natural resources; and
 - social and human development and special programmes;

¹⁸⁵ Article 11 (3)(c).

¹⁸⁶ The Security Council shall, where appropriate, utilize such regional arrangements or agencies for enforcement action under its authority. But no enforcement action shall be taken under regional arrangements or by regional agencies without the authorization of the Security Council, with the exception of measures against any enemy state, as defined in paragraph 2 of this Article, provided for pursuant to Article 107 or in regional arrangements directed against renewal of aggressive policy on the part of any such state, until such time as the Organization may, on request of the Governments concerned, be charged with the responsibility for preventing further aggression by such a state.

¹⁸⁷ Article 12(3).

- monitor and control the implementation of the Regional Indicative Strategic Development Plan in its area of competence;
- provide policy guidance to the Secretariat;
- make decisions on matters pertaining to the directorates;
- monitor and evaluate the work of the directorates; and
- create such permanent or ad hoc subcommittees as may be necessary to cater for cross-cutting sectors.¹⁸⁸

The responsibilities of the ICM seem to overlap with the monitoring functions of the Secretariat as well as that of the Council of Ministers. It is submitted that this is an unnecessary duplication of duties and highly detrimental to an already struggling organisation.

2.7.10 SADC National Committees

It is submitted that SADC National Committees co-ordinate their respective individual Member State interests relating to SADC at a National level. It is expected that each member state shall create¹⁸⁹ a SADC National Committee consisting of stakeholders.¹⁹⁰ The stakeholders as envisaged in Article 16A (13) are government, private sector, civil society, non-governmental organizations, workers and employers organizations.

The Treaty further outlines the responsibilities of the Committees as to:

¹⁸⁸ Article 12(2)(a)-(f).

¹⁸⁹ Article 16A(1).

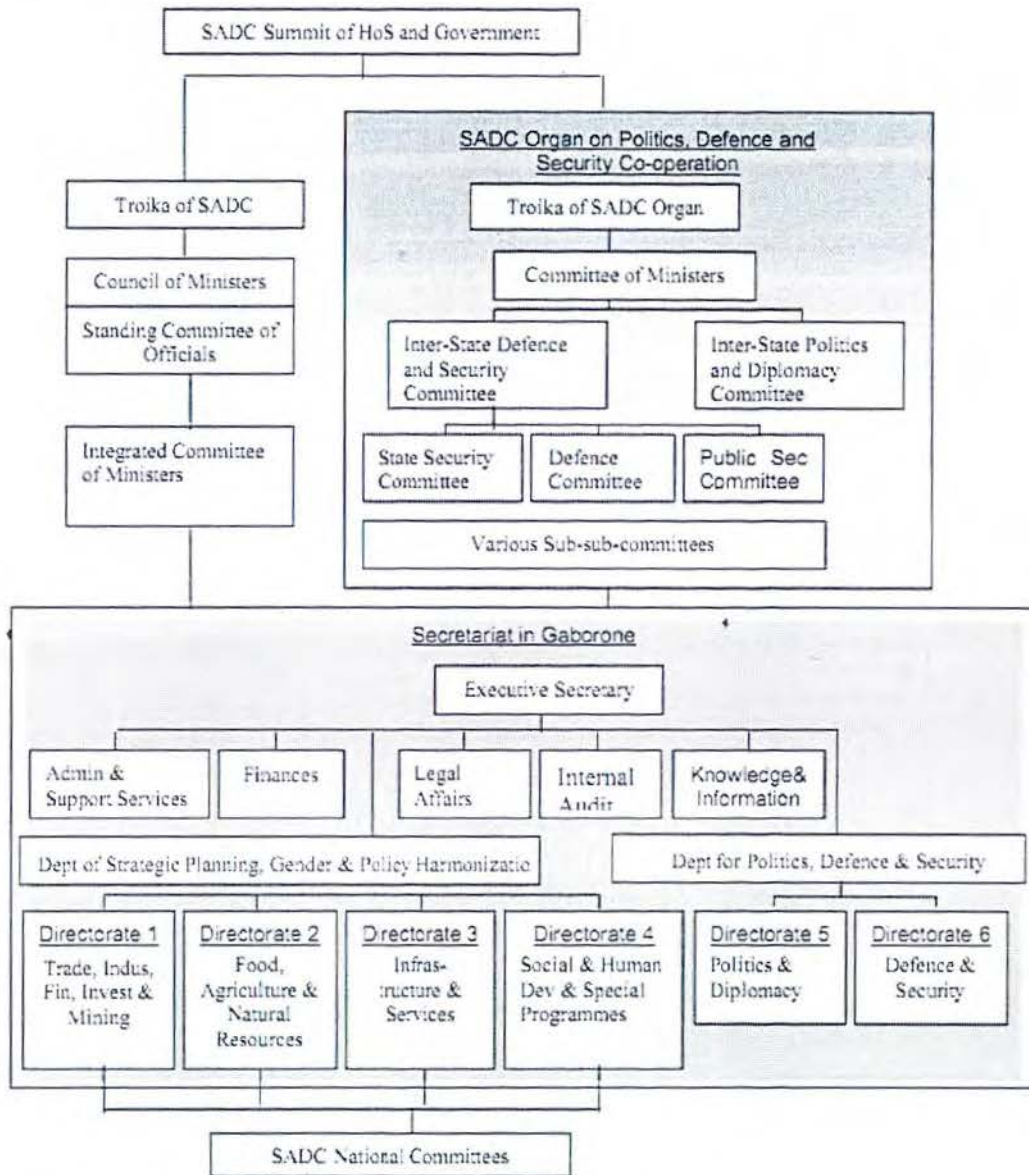
¹⁹⁰ Article 16A(2).

- provide input at the national level in the formulation of SADC policies, strategies and programmes of action;
- coordinate and oversee, at the national level, implementation of SADC programmes of action;
- initiate projects and issue papers as an input to the preparation of the Regional Indicative Strategic Development Plan, in accordance with the priority areas set out in the SADC Common Agenda; and
- create a national steering committee, sub-committees and technical committees.¹⁹¹

The discussions above, relating to SADC Institutions are well summarised in the following figure.

¹⁹¹ Article 16A.

Figure 5: SADC Organogram.

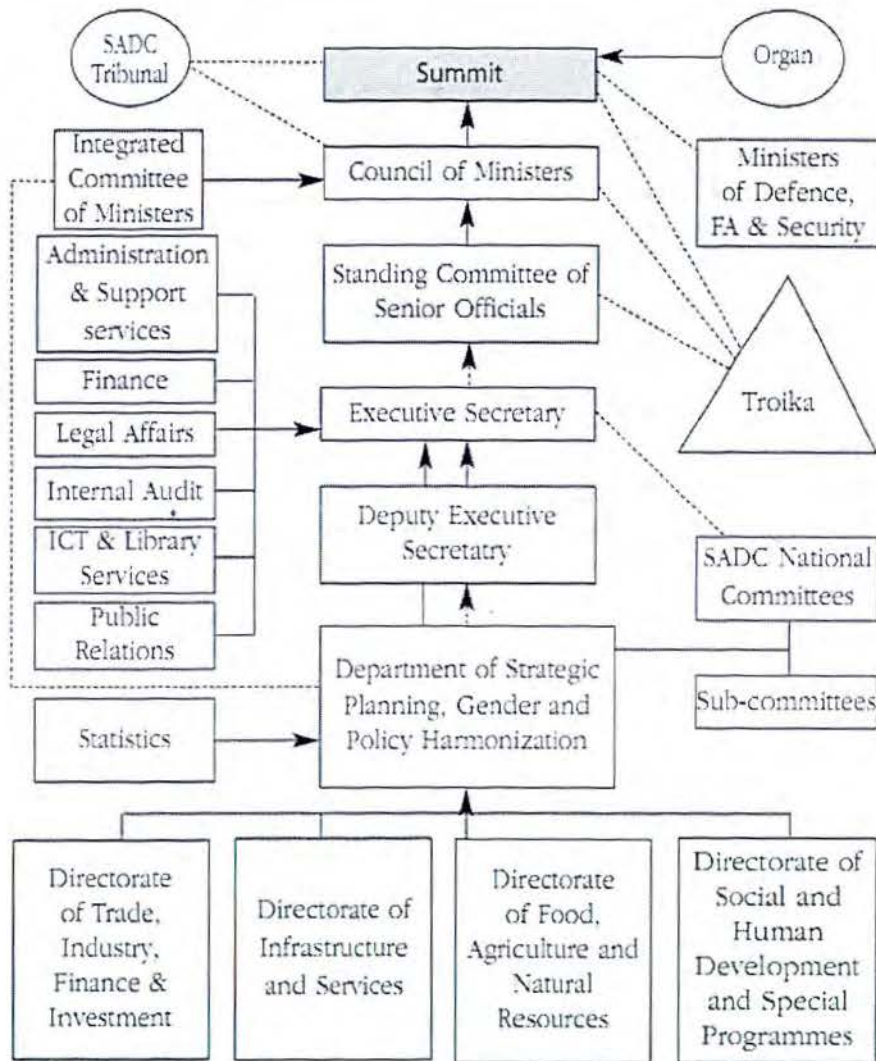


Source: Institute of Security Studies
 (http://www.iss.co.za/AF/RegOrg/unity_to_union/pdfs/sadc/organogram.pdf)¹⁹²

¹⁹² Accessed 2011-05-29.

The following figure illustrates the Functional and Reporting relationship between SADC Institutions.

Figure 6: SADC Reporting Lines



Key: — Reporting Relationship
 Functional Relationship

Source: Southern African Regional Poverty Network (SARN) (http://www.sarn.org.za/documents/d0000914/IRRD_Confronting_the_Region_2004_reg_integration.pdf)¹⁹³

¹⁹³ Accessed 2011-05-29.

2.8 Other Key Structures

2.8.1 SADC Mutual Defence Pact

A defence pact implies that two or more states believe that their defence and security requirements would best be met in a community of states. It is also an indication that states have come closer in their relationship to the extent that they can entrust their security needs to other member states of the pact. In most cases such a defence pact suggests that the signatory states do not target each other militarily. Such a pact would be perceived as a non-aggression agreement—or security arrangement—that would ensure assistance by other pact members if one or more of its members were attacked by an external aggressor, or were under threat from an internal source to such an extent that survival was at stake.¹⁹⁴

The climax of the long evolution towards regional security in the Southern African Development Community (SADC) occurred at the organization's August 2003 Summit with the signing of the community's Mutual Defence Pact, a process that had commenced in 1996 following the creation of the SADC organ.¹⁹⁵ This is indicative of the slow ratification process that has marred most progress within SADC.

The Pact under Article 3(1) subscribes that State Parties should, in accordance with the principles of the Charter of the United Nations, settle any international dispute in which they may be involved, by peaceful means, in such a manner that regional and international peace, security and justice are enhanced. This indicates that state

¹⁹⁴ Ngoma, N., "SADC'S Mutual Defence Pact: a final move to a security community?" *The Round Table*, Vol. 93, No. 375, pg 411 July 2004.

¹⁹⁵ Ngoma, N., *Ibid* note 194, page 411.

parties should attempt to resolve whatever conflicts they may have through peaceful means. Article 6 of the Pact outlines the following in terms of Collective Self-Defence and Collective Action:

- An armed attack against a State Party is considered a threat to regional peace and security and such an attack should be met with immediate collective action.
- Collective action must be mandated by the Summit on the recommendation of the Organ.
- Each State Party participates in such collective action in any manner it deems appropriate.
- Any such armed attack, and measures taken in response thereto, should immediately be reported to the Peace and Security Council of the African Union and the Security Council of the United Nations.¹⁹⁶

It is submitted that such an initiative would help unite and consolidate the security aspirations of the region and prevent the divisions that arose out of the South African military intervention in Lesotho in 1998. The intervention was as a result of unrest over elections in Lesotho apparently sanctioned by SADC; however the challenge at the time was that SADC did not have a formally recognized peace and security structure.

The Pact further takes into cognisance the following principles;

¹⁹⁶ Article 6.

Non Interference

Without prejudice to the provisions of Article 11 (2) of the Protocol on Politics, Defence and Security Cooperation, State Parties undertake to respect one another's territorial integrity and sovereignty and, in particular, observe the principle of non-interference in the internal affairs of one another.¹⁹⁷

Confidentiality

The Protocol provides that parties should not disclose any classified information obtained in the implementation of the Pact, or any other related agreements, other than to their own staff, to whom such disclosure is essential for purposes of giving effect to the Pact or such further agreements pursuant to the Pact.¹⁹⁸

State Sovereignty

The sovereign equality of all States and their intention to strengthen the bonds that exist amongst them on the basis of respect for their independence and non-interference in their internal affairs;¹⁹⁹

It is submitted that with due regard to the above mentioned principles, they to some extent render the Pact toothless since states can continue with international law breach and can always claim non interference and state sovereignty.²⁰⁰

¹⁹⁷ Article 7(1).

¹⁹⁸ Article 12(1).

¹⁹⁹ As stated in the 6th Preamble of the Pact.

²⁰⁰ The complexities of state sovereignty will be discussed in the next Chapter.

2.8.2 The Regional Indicative Strategic Development Plan

The decision to develop a Regional Indicative Strategic Development Plan (RISDP) was taken by SADC Heads of State and Government in their meeting of 1999, in Maputo, Mozambique. The purpose of the exercise was to review the operations of SADC Institutions in order to enhance their efficiency and effectiveness in delivering the Organization's overarching goals of social and economic development and poverty eradication.

Institutional reforms that took place within SADC between 2001 and 2004 were partly informed by the need to turn SADC into an efficient vehicle for leading a concerted war against poverty. The reforms led to the rationalization of SADC implementation institutions, especially the Sectoral Co-ordinating Units (SCUs), SADC Focal Points and the SADC Secretariat and the creation of new and coherent directorates in the Secretariat and multi-stakeholder National Committees.

Siphamandla observed that the hope of such reforms was that SADC would overcome the old problems of poor co-ordination of the implementation of the grandiose SADC agenda, organizational incoherence and institutional lethargy at national level. The second element of this reform was the consolidation of the SADC policy agenda into two holistic plans: the SADC Regional Indicative Strategic Development Plan (RISDP) and the Strategic Indicative Plan of the Organ for Politics, Defence and Security Co-operation (SIPO). The former consolidated the regional development agenda scattered between over twenty different policies,

protocols and declarations into one policy document with clear and achievable targets and time-frames.²⁰¹

The RISDP is indicative in nature, merely outlining the necessary conditions that are *sine quo non* towards achieving those goals. In order to facilitate monitoring and measurement of progress, it sets targets and time-frames for goals in the various fields of co-operation. The purpose of the RISDP is to deepen regional integration in SADC. It provides SADC member states with a consistent and comprehensive programme of long-term economic and social policies. It also provides the Secretariat and other SADC institutions with a clear view of SADC's approved economic and social policies and priorities.²⁰² The following have been identified in the RISDP as key enablers for integration within SADC:

- peace, Security, Democracy and Good Political Governance;
- economic and Corporate Governance;
- intensifying the fight against HIV and AIDS;
- gender mainstreaming and the empowerment of women;
- rapid adoption and internalisation of Information;
- communication Technologies;
- diversification of regional economies through, *inter-alia*, industrial development and value addition;
- trade liberalisation and development;
- liberalisation in the movement of factors of production;

²⁰¹ Siphamandla Z., "SADC integration and poverty eradication in Southern Africa : an appraisal." 2010. *Africa Insight*. Vol 39, Issue 4, March. p 39.

²⁰² Regional Indicative Strategic Development Plan, *op-cit* note 32, Executive Summary.

- research, science and technology innovation, development and diffusion;
- the creation of an enabling institutional environment;
- productivity and competitiveness improvements;
- private sector development and involvement; and
- development of a balanced and socially equitable information and knowledge based society.

The Plan further vests the Summit²⁰³ and various policy organs including Council and Integrated Committee of Ministers to exercise continuous oversight of the implementation of the Plan to ensure consistency of outputs against the Vision and Mission, and achievement of set targets.²⁰⁴

It is submitted that throughout the Plan, words such as *Monitoring*, *Evaluation* and *Coordination* are used as a means to enforce the strategy; there are no fail safe measures such as penalties or sanctions that would be pinned against a member state which does not convert the Plan into action. For instance, SADC has failed to reach its Free Trade Area goal by 2008 as identified in the RISDP and the organs tasked with implementing the RISDP have no one to hold accountable.

2.9 SADC Parliamentary Forum

The Southern African Development Community's Parliamentary Forum (SADC PF) was established in 1997 in accordance with Article 9 (2) of the SADC Treaty as an

²⁰³ Further discussed as a framework weakness.

²⁰⁴ Regional Indicative Strategic Development Plan, *op-cit* note 32, page 89.

autonomous institution of SADC. It is a regional inter-parliamentary body composed of Thirteen (13) parliaments representing over 3500 parliamentarians in the SADC region.

The objectives of the SADC Parliamentary Forum are outlined in Article 5 of the Constitution as follows:

- to strengthen the implementation capacity of SADC by involving parliamentarians in SADC activities;
- to facilitate the effective implementation of SADC policies and projects;
- to promote the principles of human rights and democracy within the SADC region;
- to familiarize the people of SADC countries with the aims and objectives of SADC;
- (e) to inform SADC of popular views on development and other issues affecting SADC countries;
- to provide a forum for discussion on matters of common interest to SADC;
- to promote peace, democracy, security and stability on the basis of collective responsibility by supporting the development of permanent conflict resolution mechanisms in the SADC sub-region;
- to contribute to a more prosperous future for the peoples of SADC by promoting collective self-reliance and economic efficiency;
- to hasten the pace of economic co-operation and development integration based on the principle of equity and mutual benefits;
- to strengthen regional solidarity and build a sense of common destiny among the people of SADC;

- to encourage good governance, transparency and accountability in the region and in the operation of SADC institutions;
- to facilitate networking with other organizations of parliamentarians;
- to promote the participation of non-governmental organizations, business and intellectual communities in SADC activities;
- to study and make recommendations on any issue in order to facilitate the more effective and efficient operation of SADC institutions, including the harmonization of laws; and
- to provide any other service that may be in the furtherance of the objectives of SADC and the SADC Parliamentary Forum.²⁰⁵

The Forum seeks to bring regional experiences to bear at the national level, to promote best practices in the role of parliaments in regional cooperation and integration as outlined in the SADC Treaty and the Forum Constitution. Its main aim is to provide a platform for parliaments and parliamentarians to promote and improve regional integration in the SADC region, through parliamentary involvement.²⁰⁶

It is submitted that despite the objectives of the SADC PF being so progressive and having the ability to contribute positively to the integration agenda, the forum has been denied the legitimacy it deserves within the region. It has not been well recognised in the SADC Treaty and as such its impact is not well recorded within SADC. The next Chapter will fully canvass this issue and illustrate the negative implications of not having a Community Parliament.

²⁰⁵ Article 5(c)-(n).

²⁰⁶ SADC Parliamentary Forum, <http://www.sadcpf.org/index.php?disp=about>. (Accessed 2011-07-25).

Summary

The main crux of this Chapter was the SADC institutional framework. It has highlighted the main institutions within SADC which form the building blocks of the regional organisation and ultimately are the heartbeat of the integration agenda as well as the principles and obligations that the SADC member states have to promote and abide by respectively. The illustration, Figure 1, has not only shown the countries that constitute the SADC membership but has also revealed which one of the SADC member states belong to other regional groupings, signifying the overlapping membership that are detrimental to the integration agenda.

The Chapter has also revealed how the integration process is carried out by these institutions through giving a comprehensive discussion of their roles and objectives as tabulated in the SADC Treaty. The supporting Protocols, Charters and Memoranda of Understanding have as well been included in the Chapter to show how the institutions and the legal framework relate with one another.

A discussion and exposure of Strategic Development plan and the Mutual Defence Pact indicates the SADC campaign through focus areas towards the integration mission. The Chapter has gone deeper to show the reporting and functional lines within SADC in order to foster an understanding of the internal atmosphere of SADC. The Chapter has laid the foundation for a proper analysis of the framework flaws which will be the gist of the next Chapter.

CHAPTER 3 CONFRONTING THE DRAW-BACKS WITHIN THE SADC LEGAL FRAMEWORK

3.1 Introduction

The previous chapter dealt with the institutional framework of SADC. The dynamic, multi-faceted, and in some instances, antagonistic interplay between national interests and regional interests, requires an institutional framework that is both efficient and effective in driving forward an integration agenda such as that of SADC. This chapter will critique the areas of the SADC legal framework that are not representative of good standards of Community law.

As indicated in the previous chapters, the transition from a *Co-ordination Conference* (SADCC) into a *Community* (SADC) was a clear indication that the rules had to change to cater for the closer ties that the Community envisaged to build.

According to *Oppong*, 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 refers to a legal framework that:

- defines the relations between community and national laws;
 - spells out the modalities for implementing community law in member states;
 - defines the respective competences of the community and member states;
- and

- anticipates and provides rules for resolving conflicts of laws and jurisdictions.²⁰⁷

The object of such a legal framework should be to ensure the overall effectiveness of the community. SADC is not a state, however a common denominator that is present within the grouping of member states and SADC is a legal system that attempts to bring order through legislative and enforcement mechanisms. Therefore, it is submitted that in order to build a Community, in this instance SADC, there should be a strong and efficient legal system, one that is not subject to political manipulation, a system that will be able to develop its own jurisprudence in the pursuit of justice as well as socio-economic and political welfare.

In order to secure sustainable human and economic development, democracy and good political governance are conditions that are necessary at all times. However, these factors are lacking from within the SADC environment not because they are not captured in the legal framework but because the framework is not strong enough to thwart any attempts that defeat the attainment of such. This study identifies the following as legal challenges within the SADC framework:

- a) An inflated notion and abuse of state sovereignty;
- b) Grey areas between national and regional competence;
- c) Multiple memberships to customs unions;
- d) The general deficiency of democracy, rule of law and human rights within member states;

²⁰⁷ Oppong F.R., "Relational Issues of Law and Economic Integration in Africa," *Vancouver, University of British Columbia*, 2009. pg 31.

- e) Lack of ownership of the integration programme;
- f) An absence of credible leadership within the SADC region;
- g) The absence of separation of powers within the SADC institutional structure;
- h) The absence of the rule of law;
- i) Lack of efficient monitoring and enforcement mechanisms;
- j) Vague membership requirements; and
- k) The absence of a functional community parliament.

3.2 Classifying the Challenges

In order to make the study more understandable and to ensure that the arguments are well captured in a coherent and logical manner, it is important to adopt some sort of scientific grouping of the challenges. These challenges may be classified into two; exogenous and intrinsic challenges.

3.2.1 Exogenous Challenges

These challenges are not directly linked to the institutional framework but are as a result of failure by the regional body to properly regulate, legislate or pronounce upon. They result out of omissions by the SADC institutional framework.

3.2.2 Intrinsic Challenges

These challenges emerge directly from within the institutional framework of SADC. They emanate from the decisions of SADC or from the legal texts of SADC. They will be discussed seriatim.

3.3 Exogenous Challenges

3.3.1 An inflated notion and abuse of State Sovereignty

The first chapter indicated the change from SADCC to SADC. The former represented a loose collaboration between countries in the region with member states retaining complete autonomy and control over their national agenda. This allowed member states to collaborate but still pursue different social and economic agendas. For this reason, the SADCC had a weak centre in the form of a small Secretariat whose legal mandate was limited to mere co-ordination and facilitation of regular meetings. It did not have any mandate to ensure implementation of decisions of the conference. Thus, the Conference did not have a sufficiently distinct legal and institutional identity *per se* and its decisions were not binding on member states.²⁰⁸

With the establishment of SADC, the regional governance framework changed substantially in the sense that SADC member states committed themselves to surrender to SADC a measure of sovereignty in order to empower the organisation to harmonise and integrate economic, social and political policies in the region.²⁰⁹

3.3.1.1 Defining Sovereignty

As classically conceived, the doctrine of state sovereignty has in the past been described as "the supreme, absolute, and uncontrollable power by which an independent state is governed and from which all specific political powers

²⁰⁸ Development Bank of Southern Africa, "Governance and social policy in the SADC region: An issues analysis," 2009, page 13. Available from <http://www.dbsa.org/Research/DPD%20Working%20papers%20documents/DPD%20No%202.pdf>.

²⁰⁹ Development Bank of Southern Africa, *Ibid note* 208, page 13.

are derived; the intentional independence of a state, combined with the right and power of regulating its internal affairs without foreign interference. Sovereignty is the power of a state to do everything necessary to govern itself, such as making, executing, and applying laws; imposing and collecting taxes; making war and peace; and entering into treaties or engaging in commerce with foreign nations."²¹⁰

The **Island of Palmas Case**,²¹¹ a case involving a territorial dispute over the Island of Palmas between the Netherlands and the United States which was heard by the Permanent Court of Arbitration is the *locus classicus* on the meaning of state sovereignty.

The Island of Palmas is two miles in length, three-quarters of a mile in width, and had a population of about 750 when the decision of the arbitrator was handed down. In 1898, Spain ceded the Philippines to the United States in the Treaty of Paris (1898) and the Island of Palmas was located within the boundaries of that cession to the United States. In 1906, the United States discovered that the Netherlands also claimed sovereignty over the island, and the two parties agreed to submit to binding arbitration by the Permanent Court of Arbitration. On January 23, 1925, the two governments signed an agreement to that effect. Instruments of ratification were exchanged in Washington on April 1, 1925. The agreement was registered in the League of Nations Treaty Series on May 19, 1925. The arbitrator in the case was Max Huber, a Swiss national. The question the arbitrator was to resolve was whether the Island of Palmas, in its entirety, was a part of the territory of the United States or of the Netherlands.

²¹⁰ Legal Dictionary, "National Sovereignty,"

<http://legaldictionary.thefreedictionary.com/National+sovereignty>. (Accessed 2011-11-16)

²¹¹ Hague Court Reports 2d 83 (1932), (Perm. Ct. Arb. 1928), 2 U.N. Rep. Intl. Arb. Awards 829.

The legal issue presented was whether a territory belongs to the first discoverer, even if they do not exercise authority over the territory, or whether it belongs to the state which actually exercises sovereignty over it.

The arbitrator found in favour of the Netherlands. The arbitrator noted that Spain could not legally grant what it did not hold and the Treaty of Paris could not grant to the United States the Island of Palmas if Spain had no actual title to it. The arbitrator concluded that Spain held an inchoate title when she "discovered" Palmas. However, for a sovereign to maintain its initial title via discovery, the arbitrator said that the discoverer had to actually exercise authority, even if it were as simple as that of planting a flag. In indicating authority by the Netherlands, the arbitrator agreed with their submission that the Netherlands showed that the Dutch East India Company had negotiated treaties with the local princes of the island since the 17th century and had exercised sovereignty, including a requirement of Protestantism and the denial of other nationals on the Island.

The legal principle extracted from this case is that "sovereignty in the relations between States signifies independence. Independence in regard to a portion of the globe is the right to exercise therein, to the exclusion of any other State, the functions of a State."²¹² It is submitted that the gamut of this definition was such that a state cannot only claim that it is sovereign, it has to have a measure of control over the internal functions of such a territory to the extent that it is capable of excluding other states from exercising sovereign rights over such a state.

²¹² Max Huber in *Hague Court Reports* 2d 83 (1932), (Perm. Ct. Arb. 1928), 2 U.N. Rep. Intl. Arb. Awards 829.

Today, when international lawyers say that a state is sovereign, all that they really mean is that it is independent. The theory of sovereignty began as an attempt to analyze the internal structure of a state. There must be, within each state, some entity which possesses supreme legislative and or supreme political power. Then by a shift of meaning, the word came to be used to describe, not only the relationship of a superior to his inferiors within a state, but also the relationship of the ruler or of the state itself towards other states. But the word still carried its emotive overtones of unlimited power above the law, and this gave a totally misleading picture of international relations. The fact that a ruler can do what he likes to his own subjects does not mean that he can, either as a matter of law or as a matter of power politics, do what he likes to other states.²¹³

3.3.1.2 The Challenge with Sovereignty

Though the SADC Treaty, under Article 4(a), provides for the sovereign equality of all member states,²¹⁴ SADC is expected to graduate from a mere co-operation to deeper regional integration where a degree of supra-nationalism is expected to gradually override the historical emphasis on state sovereignty.²¹⁵ The organisation observed²¹⁶ that its integration project would require some transfer of state

²¹³ Malanczuk, P., Akehurst, M., *A Modern Introduction to International Law*, 6th ed, London. Routledge 1987, page 15.

²¹⁴ Article 4(a), SADC Treaty.

²¹⁵ Karuombe, B., "The Role of Parliament in Regional Integration – The Missing Link." TRALAC. Accessed 2011-07-30. Available from http://www.tralac.org/cause_data/images/1694/MRI2008Chapter9Karuombe.pdf. (Accessed 2011-07-15).

²¹⁶ See generally Nathan, L., "An Uncommon Approach to Common Security in Southern Africa," Crisis States Programme, London School of Economics. Available from <http://www.tandfonline.com/doi/pdf/10.1080/03057070600830755> (Accessed 2011-11-16).

sovereignty from the national to the regional level. Yet member states have been loath to surrender a measure of sovereignty to a security regime that encompasses binding rules and the possibility of interference in domestic affairs.²¹⁷ This reluctance, as some authors have observed, stems from the political weakness of states and from the lack of common values, mutual trust and a shared vision of the security regime.²¹⁸

To drive the point forward, this study will cite examples from three SADC members to illustrate the complexities of Sovereignty.

3.3:1.3 The Republic of Zimbabwe

One of the biggest challenges that can be attributed to gross human rights violations and government regimes that continue to subject the citizenry to inhabitable living conditions is when governments abuse state sovereignty. The SADC situation is worsened by the fact that, the legal infrastructures seems to condone the "sovereignty defence".

It is submitted that the SADC Treaty and other documents of international importance within the SADC Region are heavily entrenched with the principle of sovereignty. This is because the crafters of the documents, The Heads of States and Ministers deliberately frame these documents to ensure that their political interests are not compromised. The Treaty, which was concluded in an era of emerging

²¹⁷ Nathan, L., *Ibid* note 216, page 606.

²¹⁸ Nathan, L., *Ibid* note 216, page 606-607.

democracy and hopefulness, presents the principle simply as sovereign equality of states under Article 4(a).

The Organ of Politics, Defence and Security Cooperation Protocol, which was concluded in a period of inter- and intra-state conflict, includes the principles of strict respect for sovereignty, sovereign equality, political independence and non-interference in domestic affairs.²¹⁹ The SADC Mutual Defence Pact, finalised in the midst of the Zimbabwe crisis, contains three substantive provisions on non-interference in domestic affairs²²⁰

It is instructive to note that Article 10(1) of the Treaty endows the Summit with supreme policy making powers and further under Article 10(2) and 10(3) the same body is responsible for policy direction, control and adoption of legal instruments. Basically the Summit makes the laws and further dictates how those laws should be implemented amongst themselves. Another example of the Summit being vested with a role that should not be subjected to political processes is at the Organ on Politics, Defence and Security Cooperation. The Protocol provides that where

²¹⁹ Protocol On Politics, Defence And Security Co-Operation, fourth preambular, *RECOGNISING AND RE-AFFIRMING the principles of strict respect for sovereignty, sovereign equality, territorial integrity, political independence, good neighbourliness, interdependence, non-aggression and non-interference in internal affairs of other States*; Available from <http://www.sadc.int/key-documents/protocols/protocol-on-politics-defence-and-security-cooperation/> (Accessed 2011-11-16).

²²⁰ SADC Mutual Defence Pact, Article 7(1) *Without prejudice to the provisions of Article 11 (2) of the Protocol on Politics, Defence and Security Cooperation, State Parties undertake to respect one another's territorial integrity and sovereignty and, in particular, observe the principle of non-interference in the internal affairs of one another.* Article 12(1) *State Parties undertake not to disclose any classified information obtained in the implementation of this Pact, or any other related agreements, other than to their own staff, to whom such disclosure is essential for purposes of giving effect to this Pact or such further agreements pursuant to this Pact, and in the Preamble RECOGNISING the sovereign equality of all States...*

peaceful means of resolving a conflict are unsuccessful, the Chairperson, acting on the advice of the Ministerial Committee may recommend to the Summit²²¹ that enforcement action be taken against one or more of the disputant parties.²²² It is submitted that such decisions would have better been handled by the Tribunal since the Summit has in the past shown reluctance to take strong action against one of its own members. The Research and Advocacy Unit described how Zimbabwe uses sovereignty as a defence to regional scrutiny as follows:

De-constructing the ZANU PF position around these terms is relatively simple: land reform leads to Western-imposed sanctions, which leads to the desire by Western nations for regime change through elections, and that now means that Western puppets [and even now SADC] are planning to interfere with Zimbabwe's sovereign status. And it is breathtakingly simple to run a campaign using this framework, and so extremely difficult to argue against such evocative rhetoric using fact and logical argument.²²³

With the recent land redistribution programme in Zimbabwe, the Republic of Zimbabwe has on several occasions raised the notion of state sovereignty as a defence to its negative human rights record. The state has on several occasions indicated that parties outside Zimbabwe cannot interfere in the internal affairs of the Republic, for instance, The Troika Summit of the Organ on Politics, Defence and Security Cooperation met in Livingstone, Zambia, on the 31 March 2011 to consider

²²¹ *Further discussed as a framework weakness.*

²²² Article 11 (3)(c).

²²³ Research and Advocacy Unit, Zimbabwe, "Land reform, sanctions, regime change, and sovereignty," page 1. Available from http://www.kubatana.net/docs/demgg/rau_land_sanctions_change_110509.pdf (Accessed 2011-11-16).

the political and security situation in the region, in particular in the Republics of Madagascar and Zimbabwe. On Zimbabwe, the Summit received the report on the political and security situation in the country as presented by the President of the Republic of South Africa in his capacity as SADC facilitator.

The Summit noted with great concern the polarization of the political environment as characterized by, *inter alia*, resurgence violence, arrests and intimidation in Zimbabwe. The Summit resolved, amongst other things, that there must be an immediate end to the violence, intimidation, hate speech, harassment, and any other form of action that contradicted principles of good governance and democracy.²²⁴

This reported provoked the following response as captured by *The Zimbabwean*:

It's widely understood that it was a scathing report by Zuma on the state of Zimbabwe's political crisis that spurred SADC to change its tone towards the situation. Zuma reportedly had harsh warnings about the political stalemate, saying that "unprecedented upheavals," seen in North Africa recently, would happen in Zimbabwe if there weren't major reforms. A furious Mugabe then accused **SADC of trying to interfere in Zimbabwe's internal affairs**. He claimed Zuma was just a facilitator to the dialogue and "cannot prescribe anything," while saying that SADC has no business 'meddling' in Zimbabwe's affairs.²²⁵ (emphasis added)

²²⁴ SADC Communiqué, Summit of the Organ on Politics, Defence and Security Cooperation, 31 March 2011, Livingstone, Republic of Zambia. Available from http://www.kubatana.net/docs/demgg/sadc_troika_zambia_110331.pdf (Accessed 2011-11-16).

²²⁵ The Zimbabwean, "Moyo further strains Zim, SA relations with fresh attack on Zuma," 2011-05-11. Available from <http://www.thezimbabwean.co.uk/news/39488/moyo-further-strains-zim-sa-relations-with-fresh-attack-on-zuma.html> (accessed 2011-11-16).

It is submitted that human rights violations cannot be termed internal affairs since the Republic of Zimbabwe voluntarily agreed to be bound by the SADC Treaty; a Treaty which aims to promote human rights. SADC member states have an obligation to keep each other in check and when their observations conclude that a state is deliberately defeating the objectives of the SADC Treaty, it becomes a regional concern.

3.3.1.4 The Kingdom of Swaziland

The Kingdom of Swaziland is another example which can be cited to have used and overstretched its sovereignty. The SADC Council of Non-Governmental Organisation has raised concern on the continued denial to the people of Swaziland of their inalienable right to participate in electoral and other democratic processes and has called upon SADC to ensure that the Kingdom of Swaziland establishes a constitutional democracy.²²⁶

Swaziland is ruled by King Mswati III, an absolute monarch, and his government which is intolerant of any political organization or political activity. The monarchy was consolidated through the usurpation of power and annulment of the constitution by royal decree in 1973. The immediate result of the decree was that judicial, executive and legislative powers were all vested in the King, a situation that still exists today even though a new Constitution was adopted in 2005. The new Constitution did not repeal the 1973 decree, the King still appoints and controls the Judiciary and has the

²²⁶ SADC-CNGO, FOCCISA, SATUCC and CNONGD, Civil Society Statement at the occasion of 5th SADC Civil Society Forum held in Kinshasa, Democratic Republic of Congo. Available from http://sadccngo.org/resources/forum_communique.pdf (accessed 2011-11-16).

power to veto (or disregard) any bills passed by parliament.²²⁷ The *States in Transition Observatory* published their report on the 2008 elections in Swaziland. It was reported, among other things, that the Elections Boundaries Commission was unilaterally appointed by King Mswati, it was accountable to him and it could not be challenged in court. Furthermore it was chaired by one Gija Dlamini who is a Chief and a brother to King Mswati. The Deputy Chairperson was the Deputy Attorney General who is also appointed by the King.²²⁸ Given the above, the Independence of the EBC is clearly questionable and this situation goes against the spirit proposed by the SADC guidelines.²²⁹

In **National Constitutional Assembly v. Prime Minister and Others**,²³⁰ decided on 21 May 2009, Swaziland's highest court ruled that the Tinkhundla based electoral system which excludes political parties from the electoral process did not constitute a violation of freedom of association as guaranteed by Article 25²³¹ of the Swaziland Constitution. This judgment is definitely in violation of the SADC Principles and Guidelines Governing Democratic Elections.

²²⁷ Institute for Democracy in Africa (IDASA), "Swaziland Country Brief,"

http://idasa.krazyboyz.co.za/our_products/resources/output/swaziland_country_brief_2/?pid=states_in_transition (Accessed 2011-08-05).

²²⁸ Institute for Democracy in Africa (IDASA)

<http://idasa.krazyboyz.co.za/media/uploads/outputs/files/Zim%20March%20SADC%20Guidelines.pdf> Accessed 2011-08-05.

²²⁹ SADC Principles and Guidelines Governing Democratic Elections, 2005.

²³⁰ A discussion of the Case is available from

[http://swazilandsolidaritynetworkcanada.wikispaces.com/ICJ+++Statement+Regarding+the+S+waziland+Supreme+Court's+Ruling+in+the+Case+of+National+Constitutional+Assembly+\(NC+A\)+v.+Prime+Ministe+%26+Others,+2009++June+4,+2009](http://swazilandsolidaritynetworkcanada.wikispaces.com/ICJ+++Statement+Regarding+the+S+waziland+Supreme+Court's+Ruling+in+the+Case+of+National+Constitutional+Assembly+(NC+A)+v.+Prime+Ministe+%26+Others,+2009++June+4,+2009) (Accessed 2011-11-16).

²³¹ Available from <http://www.ide.uniswa.sz/documents/resources/constitution2004.pdf>

Despite numerous calls by the international community and the existence of the SADC principles, the Kingdom of Swaziland seems adamant to maintain the *status quo*, as an important aspect of its sovereignty.

3.3.1.5 The Republic of Madagascar

On the 16th of March 2009, soldiers seized the presidential palace and the central bank. President Ravalomanana was not at the palace during the attack. Hundreds of supporters reportedly camped outside his residence, on the outskirts of the capital, to protect him. Rajoelina's supporters began to take control of other government offices, including that of the Prime Minister, and Rajoelina reportedly installed himself in the Presidential offices on March 17.²³²

President Ravalomanana announced that he was stepping down and transferring authority to a military directorate led by the military's most senior officer, navy admiral Hyppolite Ramaroson. Ramaroson later announced that the military was transferring authority to Rajoelina as President of a High Authority for Transition (HAT).²³³ The country's highest court publicly proclaimed Rajoelina's legitimacy the following day, and he was inaugurated as president of the HAT on March 21 2009.

²³² Ploch, L., "Madagascar's Political Crisis, Congressional Research Service." 2010 Available from http://www.cq.com/graphics/crsreports/R40448_2010-02-01.pdf (Accessed 2011-07-15).

²³³ BBC News, "Madagascar president forced out." 17 March 2009 <http://news.bbc.co.uk/2/hi/africa/7948196.stm> (Accessed 2011-11-16).

Rajoelina suspended the parliament, which was dominated by Ravalomanana's party.²³⁴

Ravalomanana would later be found guilty of treason in his absence. The 2009 events in Madagascar are completely devoid of SADC principles on human rights, democracy and the rule of law as outlined in the Treaty. Despite the existence of these principles, the military government in place has ignored all calls by SADC to restore a constitutional order within the state. In March 2011, the SADC Extraordinary Summit urged Rajoelina to vacate the office of the president as a matter of urgency paving way for the unconditional reinstatement of President Marc Ravalomanana.²³⁵ Rajoelina simply ignored SADC,²³⁶ ostensibly on the basis of Madagascar's sovereignty.

The SADC Treaty strives for good governance, and durable peace and security. Entrenched within the principle of good governance is accountability. Accountable governance suggests the answerability of a state system, (including the government and other institutions of the state) to its constituency- the people. Accountability requires clarity about whom and on whose behalf an institution or organ is making and implementing decisions, and how does it derive its power and legitimacy to do

²³⁴ WLUMI, "Madagascar: New president suspends parliament." Available from <http://www.wlumi.org/node/207> (Accessed 2011-11-16).

²³⁵ We should note that he is at the moment of writing this paper in exile in South Africa together with his family and being denied passage back to his country. See also Bloomberg Business Week, "SADC Won't Intervene to Return Ravalomanana to Madagascar," June 28, 2011. <http://www.businessweek.com/news/2011-06-28/sadc-won-t-intervene-to-return-ravalomanana-to-madagascar.html> (Accessed 2011-11-16).

²³⁶ Newsday, "Regionalism, sovereignty threaten SADC." 15 August 2011. <http://www.newsday.co.zw/article/2010-06-29-regionalism-sovereignty-threaten-sadc> (Accessed 2011-11-16).

so. This means in effect having clear procedures agreed to by all members of the political community about how decisions are to be made and ensuring transparency and adequate flow of information in the decision making process.²³⁷ This is further affirmed by the SADC Regional Indicative Strategic Development Plan;²³⁸ however, the chaos in Madagascar presents a lack of accountability by the Madagascan officials.

3.3.2 Grey areas between National and Regional competence

It has already been stated that a community must have well-structured and managed relations between itself and other legal systems as a necessary condition for its effectiveness as well as clearly defined relations between community laws and national laws.²³⁹ Treaties are the principal sources of international law. Very often they resemble contracts in national systems of law, but they can also perform functions which in national systems would be carried out by Acts of Parliament, by conveyances, or by the memorandum of association of a company.²⁴⁰

Olowu has observed that a strong institutional setup at both regional and national levels is central to the integration of regional objectives into state policies. It is critical that the literature on regional integration in Africa focuses on the roles, functions and strengthening of regional organizations. Far less attention has been paid to the

²³⁷ Adejumobi, S., "Engendering Accountable Governance in Africa." Available from <http://unpan1.un.org/intradoc/groups/public/documents/CAFRAD/UNPAN008475.pdf> (Accessed 2011-11-16).

²³⁸ promote common political values, systems and other shared values which are transmitted through institutions which are democratic, legitimate, and effective; consolidate, defend and maintain democracy, peace, security and stability.

²³⁹ Oppong F.R., *Ibid* note 207, page 31.

²⁴⁰ Malanczuk, P and Akehurst, *Ibid* note 213, page 24.

institutional frameworks for regional integration at the national and interface level. There can be no effective regional integration without national integration and participation.²⁴¹

The SADC Treaty under Article 5 strives for the achievement of complementarity between national and regional strategies and programmes.²⁴² It is submitted that though this has been engraved within the Treaty, SADC has failed to articulate how this will be achieved. To illustrate this gap, the SADC Principles and Guidelines Governing Democratic Elections will be used as an anchor. These principles provide a useful set of standards that attempt to secure the attainment of democracy within SADC member states. However, these principles and guidelines seem to be dissolved by national legislation and as such the pursuit for a region governed by free and fairly elected representatives remains a pipedream. The Republic of Botswana and the Republic of Zimbabwe will be used to illustrate the above submissions.

3.3.2.1 The Republic of Botswana

Article 4 of the Treaty stipulates that "human rights, democracy and the rule of law" are principles guiding the acts of its members. Article 5 of the Treaty outlines the objectives of SADC, which commits the member states to "promote common political values, systems and other shared values which are transmitted through institutions, which are democratic, legitimate and effective. It also commits member states to

²⁴¹ Olowu D., *op-cit* note 11, page 231-232.

²⁴² Article 5(1)(e).

“consolidate, defend and maintain democracy, peace, security and stability” in the region.²⁴³

Underpinned by such a background, the Southern African Development Community leaders adopted the SADC Principles and Guidelines Governing Democratic Elections. Principle 2.1.7 of the guidelines requires that the electoral institutions of SADC member states be impartial. It is submitted that despite this position at regional level, the status quo in Botswana is different.

Sebudubudu and *Osei-Hwedie* observed that The Independent Electoral Commission of Botswana is composed of seven members, who are appointed by the Judicial Service Commission (JSC). It consists of a chairperson, who must be a judge of the High Court, a legal practitioner, and five other members, who are selected from a list of persons recommended by the All Party Conference.²⁴⁴ The failure to guarantee expressly the institutional independence of the IEC in the Constitution has resulted in a perception by opposition parties that the institution is just another government department which lacks independence from government and is therefore not competent to manage credible democratic elections.²⁴⁵ This perception is perhaps given further credence by the fact that the IEC is placed under the Ministry of Presidential Affairs and Public Administration in the Office of the President.²⁴⁶

²⁴³ Preamble of the SADC Principles and Guidelines Governing Democratic Elections. Available from <http://www.eisa.org.za/PDF/sadcguidelines.pdf> (Accessed 2011-09-05).

²⁴⁴ Section 65A (1) of the Constitution.

²⁴⁵ Somolakae, G. & Lekorwe, M., “An Evaluation of the 1999 Elections.” Proceedings of a Workshop held 26–27 June 2000, Grand Palm Hotel, Gaborone (IEC, 2000) 67.

²⁴⁶ See Government Notice 356 of 2002 (5 September 2002), which sets out the various ministerial

The public's reading of the independence of an elections management body is essential for building public confidence in the electoral process. Where the public has doubts about the independence of the elections management body, it is more likely to have less confidence in the electoral process thereby undermining democracy. It is not only opposition political parties that have questioned the independence of the IEC; senior politicians in the ruling Botswana Democratic Party (BDP) have also raised similar concerns. Ponatshego Kedikilwe, a former Cabinet Minister and senior member of the ruling party, has called upon the government to guarantee the IEC total independence in its organisational structure. He argued that the IEC must not only be independent, but must also be seen to be independent.²⁴⁷

It is submitted that the manner in which the Independent Electoral Commission of Botswana is constituted under the Ministry of Presidential Affairs and Public Administration does not comply with requirement of institutional independence as demanded by the SADC principles. It is further submitted that there is no mechanism in SADC to ensure compliance of these principles other than SADC election observer teams who have a very limited mandate and cannot compel any institutional reforms.

3.3.2.2 The Republic of Zimbabwe

The Republic of Zimbabwe has been a topic of discussion in many African governance meetings, including SADC. A selected number of pieces of legislation

portfolios.

²⁴⁷ Mmegi, "PHK Calls for Total Independence of IEC," Tuesday 8 March 2005. Available from <http://www.mmegi.bw/2005/March/Tuesday8/747674320517.html>. (Accessed 2011-11-16)

will be analysed against the benchmarks established under the SADC principles and guidelines.²⁴⁸

The following table is illustrative of Zimbabwe's compliance with the SADC Principles:

Figure 7: Zimbabwe Electoral Legislation against the SADC Principles

SADC Standard	Statute in Breach	Policy in Breach
<p>Full participation of citizens in the political process²⁴⁹</p> <p>Freedom of association²⁵⁰</p>	<p>Public Order and Security Act (POSA) s 24 – requiring notice of intention to hold a public gathering</p>	<p>POSA s 24 – the common police practice of interpreting this provision to mean that no gathering, including closed private party planning meetings, can take place without police permission, wrongly extending the application of this law</p>

²⁴⁸ 2005 (No. 6 of 2005) as amended in 2007.

²⁴⁹ Principle 2.1.1.

²⁵⁰ Principle 2.1.2.

<p>Equal access to state media for all political parties²⁵¹</p>	<p>The Broadcasting Services Act s. 4 places control of appointments to the all-powerful Broadcasting Authority of Zimbabwe Board in the hands of the President and his minister. Effectively this gives total control of the state media and the power grant or refuse broadcast</p>	<p>The opposition has been refused access to the state media consistently at all times, and independent media groups have been refused broadcasting licenses.</p>
<p>Equal opportunity to exercise the right to vote and be voted for²⁵²</p>	<p>The restriction of postal ballots under s. 71 of the Electoral Act to members of the armed forces, diplomats (and spouses) effectively disenfranchises millions of Zimbabwean citizens living abroad.</p> <p>The effect of s 17 as read with s 51 of the Electoral Act is to empower the military to decide the number and location of polling stations</p>	<p>The practice of requiring members of the armed forces serving abroad to vote in the presence of their commanding officers mitigates strongly against the right to make a free choice in the election</p> <p>The number and location of polling stations has a bearing on the voters' ability to exercise the right to vote freely. In the 2002 election very few polling stations were sited in urban areas, causing long queues and preventing hundreds of</p>

²⁵¹ Principle 2.1.5.

²⁵² Principle 2.1.6.

		<p>thousands from voting. In the rural areas the location of some polling stations (eg close to militia camps), was intimidating to opposition supporters. Giving authority to the military to make these decisions will only exacerbate this problem</p>
<p>Independence of Judiciary & impartiality of electoral institutions²⁵³</p>	<p>The appointment of members to the Electoral Supervisory Commission (ESC) under s. 61 of the Constitution, of the Delimitation Commission under s. 59 of the Constitution, of the Zimbabwe Electoral Commission (ZEC), and of the Registrar-General are all done effectively by the President - thus compromising the independence and impartiality of all Zimbabwe's electoral bodies.</p>	<p>The lack of independence and impartiality of the Judiciary was clearly demonstrated by the unreasonable delays in hearing election challenges for the 2000 parliamentary elections and 2002 presidential election.</p>

Source: Institute for Democracy in Africa (IDASA) <http://idasa.krazyboyz.co.za/media/uploads/outputs/files/Zim%20March%20SADC%20Guidelines.pdf> Accessed 2011-08-05.

In addition to the above information, the Sunday Times have recently reported the following:

²⁵³ Principle 2.1.7.

The Public Order and Security Act (Posa) was introduced in Zimbabwe in 2002 by a Zanu-PF dominated parliament. The Act was amended in 2007. Political activists and civic organisations regard Posa as what helped President Robert Mugabe consolidate his power. The law gave untold powers to the ZRP. Through this legal framework, the partisan ZRP members have the final say when it comes to public gatherings such as rallies. The more antidemocratic sections of Posa are those which make it an offence to "cause disaffection among police force or defence force", "publish or communicate false statements prejudicial to the State" and "undermine the authority of, or insult, the President."²⁵⁴

The above submissions indicate the conflict between the regional vision and domestic affairs. The Treaty requires member states to adopt adequate measures to promote the achievement of the objectives of SADC, and requires them to 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 the Treaty.²⁵⁵ The Treaty further requires member states to take all necessary steps to accord this Treaty the force of national law.²⁵⁶ However these provisions are toothless without a framework that monitors and ensures compliance with regional policies.

²⁵⁴ Timeslive, "MDC wants police to act within law," 07 August, 2011. Available from <http://www.timeslive.co.za/sundaytimes/2011/08/07/mdc-wants-police-to-act-within-law> (Accessed 2011-11-16).

²⁵⁵ Article 6(1).

²⁵⁶ Article 6(5).

Another protocol that can be used to illustrate the consequences of unclearly managed legal relationships is the SADC Protocol on Gender and Development. The Protocol under Article 3(a) aims to provide for the empowerment of women, to eliminate discrimination and to achieve gender equality and equity through the development and implementation of gender responsive legislation, policies, programmes and projects. It is assumed that since the Heads of SADC member states have ushered in such a document, that all government institutions would act under such a premise. It is submitted that the spirit of SADC Protocols do not reflect in the actions of state organs for instance the women of Zimbabwe have had varying experiences with national law enforcement agencies and many of them are unpleasant. These experiences are the same regardless of whether the women are activists or not, but perhaps worse for female activists. Police officers have been responsible for some of the most serious human rights and rule of law violations in Zimbabwe today.²⁵⁷ These violations include systematic rape, abductions, violence and denial of basic services. It is further submitted that the victims cannot directly claim their rights under the Protocol in a domestic court in Zimbabwe because of the unfavourable and uncooperative political climate.

3.3.2.3 The Ideal Position

In English law, the courts have received the basic doctrines of community law into English law and litigation. They have adapted well to the new constitutional

²⁵⁷ Institute for Democracy in Africa (IDASA), "Women and Law Enforcement in Zimbabwe," March 2011. Available from http://idasa.krazyboyz.co.za/media/uploads/outputs/files/women_and_law_enforcement.pdf (Accessed 2011-11-16).

arrangements and to their role in them. They have been remarkably resilient and free of 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.²⁵⁸ However within the SADC region it is up to each member state to decide on the domestication of its regional treaty obligations.

The general rule of international law is that a state cannot plead a rule or gap in its own municipal law as a defence to a claim based on international law. In *Nold v. Commission*,²⁵⁹ 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 the United States Court of Appeals, O'Connor, J in *Boos v Barry*²⁶⁰ 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.

What may, and often does, happen is what is termed as 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

²⁵⁸ Moser, P. and Katrine, S., *The Legacy of Advocate General Jacobs at the European Court of Justice*, Edward Elgar Publishing Limited, 2008. Page 103.

²⁵⁹ 1974 ECR 491, 407.

²⁶⁰ 485 U.S. 312.

position is unaffected and is not overruled by the contrary rule of international law but rather the state as it operates internationally has broken a rule of international law and the remedy will lie in the international field, whether by means of diplomatic protest or judicial action.²⁶¹ However, it is submitted that SADC seems to accept the situation as it is. With the Tribunal suspended and the Summit showing no willingness to take any major steps to address this situation apart from the usual expression of dissatisfaction at meetings, it seems countries will be allowed to continue disregarding community law for the furtherance of domestic interests.

It is further submitted that the relationship between Municipal and International law should be transformative and not confrontational. *Shaw*, in explaining the doctrine of transformation wrote that it 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.²⁶² However, it is further submitted that this transformative approach would only be effective if the parliaments of the SADC member states were proactive and willing to transform their domestic legislation to be in harmony with the regional agenda.

²⁶¹ Shaw, M.N., (2008), *International Law*. New York: Cambridge pg 133.

²⁶² Shaw, M.N., *Ibid* note 261, page 139.

3.3.3 Multiple memberships to Customs Unions

The SADC Treaty calls on upon member states to comply with the following principles:

- equity, balance and mutual benefit;
- the promotion of sustainable, equitable economic growth and socio-economic development;
- the improvement of economic management and performance;
- member states should refrain from taking any measures likely to jeopardise the sustenance SADC principles; and
- the achievement of its objectives and the implementation of the provisions of the SADC Treaty.

It is submitted that these provisions are defeated by the inability of the SADC Treaty or the institutions to effectively regulate the membership of member states to other regional arrangements, in particular membership to customs unions.

Overlapping memberships to a custom union presents challenges, particularly when trading blocs move towards deeper levels of economic integration. For example, 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.²⁶³

The multiple membership conundrums have also fragmented SADC countries during negotiations for Economic Partnership Agreements (EPAs) with the European Union with some member states negotiating outside the SADC umbrella. The following table illustrates the membership of African states to regional groupings.

Figure 8 Table indicating Membership within the Tripartite Agreement

Country	SADC	EAC	COMESA
Angola	X		
Botswana	X		
DRC	X		X
Lesotho	X		
Madagascar	X		X
Malawi	X		X
Mauritius	X		X
Mozambique	X		
Namibia	X		
Seychelles	X		X
South Africa	X		
Swaziland	X		

²⁶³ SADC TODAY, "States face overlapping membership decision,"

<http://www.sardc.net/editorial/sadctoday/view.asp?vol=667&pubno=v11n1>. (Accessed 2011-08-10).

Tanzania	X	X	
Zambia	X		X
Zimbabwe	X		X
Burundi			X
Kenya			X
Rwanda			X
Uganda			X
Comoros			X
Djibouti			X
Egypt			X
Eritria			X
Libya			X
Sudan			X

Source: Jensen, H.G. and Sandrey, R., 2011. *The Tripartite Free Trade Agreement: A Computer Analysis of the Impacts*.pg 40. Stellenbosch: TRALAC.

There is an overlap in membership to an extent unmatched anywhere else in the world. It is also true that regional integration in Southern Africa is under a test as over-lapping membership amongst the members of SADC AND SACU will now have to choose which of the two groupings to join given the fact that technically no country can belong to two customs unions.²⁶⁴

Mtshali has observed that countries in the same SADC region differ too much in terms of levels of economic development. This has made economic convergence very difficult and poses a serious challenge, as economic convergence is a

²⁶⁴ Chanda, D., 2010. "Regional Integration in Southern Africa focusing on the future of SADC and SACU," page 9. Stellenbosch: TRALAC.

requirement for economic integration. Secondly, Africa is characterized by weak institutions that fail to perform their functions. If economic integration relies on effective and efficient institutions, Africa is still a long way from being fully integrated. In addition, there is a persistent culture of non-compliance with the provisions of the signed treaties as well as decisions taken by different bodies. The monitoring bodies do not have the necessary authority or power to enforce decisions. The argument around this is that political leaders in Africa fear that giving these institutions the necessary power will diminish their state sovereignty.²⁶⁵

Mtshali further argues that this challenge will have to be addressed before southern and eastern Africa can realize the grand goal of a Tripartite Free Trade Area (TFTA), which is proposed by COMESA, SADC and the EAC and was announced by the Heads of State and Government of countries belonging to these RECs in Kampala in 2008. The TFTA could be the answer to the issues of overlapping membership for some African states. It also offers a bigger market, especially for the larger economies in the region. However, 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. Commitment to the success of the TFTA first requires that all member states should see and appreciate the benefits of the TFTA. In addition, it will require that states make the necessary financial commitments.²⁶⁶

Jensen is of the view that the necessary starting point for the envisaged Tripartite Free Trade area is the fully functioning operation of the three sub-FTAs in the

²⁶⁵ Mtshali, S.N. 2011. "Regional integration in Southern and Eastern Africa: Challenges to the Regional Economic Communities." page 1-15. *Stellenbosch: TRALAC*.

²⁶⁶ Mtshali, S.N., *Ibid* note 265, page 16.

region.²⁶⁷ It is admitted here that in order to reach this point there needs to be a resolution of the overlapping memberships in the region.

Overlapping memberships do not only affect trade, they also have far-reaching repercussions in the area of security co-operation. 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 (SADCBRIG). Such an initiative would require both funding and a pledge of human resources from member states. *Mandrup* has observed that, for instance, Tanzania, Madagascar and the Indian Ocean Islands, and the Democratic Republic of Congo (DRC) all take part in setting up the SADCBRIG, but in reality also belong to other regions. This is problematic in the sense that the situation creates uncertainty about who contributes to what regional brigade²⁶⁸ and even if the states would resolve to contribute to all the regional arrangements that they belong to, it would overstretch the little resources that they have.

3.3.4 The General deficiency of democracy, rule of law and human rights culture within member states

Malan and *Cillers* have opined that the greatest deficiency within SADC arguably relates to the absence of integrated systems, processes and methods to deal with the issues of human rights violations and the advancement of democracy and good

²⁶⁷ Jensen, H.G. and Sandrey, R., 2011. "The Tripartite Free Trade Agreement: A Computer Analysis of the Impacts," page 6. *Stellenbosch: TRALAC*.

²⁶⁸ 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.

governance.²⁶⁹ This is clearly a contentious issue and one about which many SADC member countries are sensitive. Countries, such as Zambia²⁷⁰ and Zimbabwe, have been accused of being undemocratic in election-related practices, while some see South Africa as drifting towards one-party dominance in the absence of an effective political opposition to the ANC. In other countries, such as Malawi and Lesotho, military and paramilitary intervention in politics remains a real threat.²⁷¹

The SADC Treaty envisages a Community underpinned by principles of human rights, democracy and the rule of law.²⁷² This argument has already been underlined by the atrocities in Zimbabwe, the challenges in Madagascar, the constitutional debacle in the Kingdom of Swaziland, and the electoral management system in Botswana as articulated above. We shall now bring forth other examples to explicate the position of democracy, human rights and the rule of law within SADC.

3.3.4.1 The Republic of Malawi

Raz indicates that one of the requirements for the rule of law is that the discretion of crime preventing agencies should not be allowed to pervert the law.²⁷³ *Slaa* shows

²⁶⁹ Malan, M and Cilliers, J., SADC Organ On Politics, Defence And Security: Future Development. Institute for Security Studies. Occasional Paper No 19 - March 1997

²⁷⁰ Note that here we refer to the MMD regime which came to an end in September 2011.

²⁷¹ Willibrod, P.S., "Challenges For The SADC Parliamentary Forum: Experience And Contribution." page 23. Institute for Security Studies. Accessed 2011-07-30. Available from <http://www.iss.co.za/pubs/Books/guardiansaug04/Slaa.pdf> (Accessed 2011-11-16).

²⁷² Article 4(c).

²⁷³ See Raz J., *The Authority of Law, Essays on Law and Morality The Rule of Law and Its Virtue.* Oxford: Clarendon Press, 1979.

that in a truly democratic society, security and defence personnel cannot be members of a political party or of any organisation with political tendencies.

This has not been the situation, for example in Malawi, various reports have indicated that the police are a tool for the government, usually deployed to suppress anti-government protests.²⁷⁴ A recent call by SADC Council of Non-Governmental Organisations further indicates that the use of lethal force by Malawian Police, in a direct contravention of the United Nations Basic Principles on the Use of Force and Firearms by Law Enforcement Agencies, had resulted in the death of 18 innocent civilians during demonstrations against economic hardships and bad governance by the Malawi government. Hundreds others were wounded and hospitalized.²⁷⁵ Malawians were demonstrating against increasing human rights violations, repression and failure by the government to solve the deepening socio-economic crisis characterized by the shortages of fuel and foreign currency, high cost of living, massive unemployment and highly constrained fiscal space.²⁷⁶

²⁷⁴ See United States Bureau of Democracy, Human Rights and Labour "2010 Human Rights Report: Malawi." Available from <http://www.state.gov/g/drl/rls/hrrpt/2010/af/154356.htm> (Accessed 2011-11-16).

²⁷⁵ Southern Africa Development Community Council of Non Governmental Organisations (SADCCONGO), "Killings, detentions and repression reach alarming levels: SADC TO ACT NOW ON MALAWI." Available from <http://www.fesmedia.org/statements-and-reports/detail/datum/2011/07/25/malawi-killings-detentions-and-repression-reach-alarming-levels-sadc-to-act-now-on-malawi/> Accessed 2011-07-28.

²⁷⁶ SADCCONGO. *Ibid* note 275.

3.3.4.2 The Kingdom of Swaziland

The SADC Lawyers Association, in a communiqué to the people of Swaziland on the 15th of April 2011 highlighted that the government of Swaziland had, as was widely expected, unleashed the police on the peaceful demonstrators resulting in the violent breakup of the demonstrations as the police used teargas and water cannons to disperse the demonstrators. A number of leaders and co-ordinators of the demonstrations were also detained. These protests were as a result of a yoke of absolutism by Africa's last remaining absolute monarch that does not adequately guarantee fundamental rights and freedoms despite the existence of a Constitution that provides for these rights and freedoms. The government has, over the years, used a heavy-handed approach in dealing with any dissent in the country, resulting in the creation of an atmosphere of fear where freedom of association, freedom of assembly and freedom of expression have been severely curtailed.²⁷⁷ In addition to Swaziland, there are many *de jure* democracies in SADC whose executives are intolerant of dissent, hardly accountable to parliament and insufficiently committed to respecting human rights and the rule of law.²⁷⁸

²⁷⁷ Statement by the SADC Lawyers Association in solidarity with the people of Swaziland. "Southern Africa Development Community Lawyers Association Communiqué of 15th April 2011." Available from

<http://www.tls.or.tz/docs/headlinesdocs/Statement%20by%20the%20SADC%20Lawyers%20Association%20in%20solidarity%20with%20the%20people%20of%20Swaziland.pdf>.

²⁷⁸ Nathan, L., *Ibid* note 216, page 614.

3.3.4.3 The Republic of Zambia

In the 14th session²⁷⁹ of the United Nations Human Rights Council, the Council observed as follows:

- "In accordance with the Zambian Constitution, an independent Human Rights Commission was established in 1997. The Commission is mandated to investigate complaints of human rights abuses and can assist in the rehabilitation of victims of violations. While the Commission benefits from a fairly broad mandate, the expert is concerned that its capacity and effectiveness is limited by a lack of funds and enforcement powers, as well as hesitancy in addressing abuses that are politically sensitive and follow up on initial recommendations when these have been rejected by the Government.²⁸⁰
- Despite the constitutional provision prohibiting discrimination (art. 23), gender discrimination in Zambia is still pervasive. 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.

²⁷⁹ 6 May 2010.

²⁸⁰ Carmona, M.S., "Report of Independent Expert on the Question of Human Rights and Extreme Poverty." Mission to Zambia 20 to 28 August 2009 A/HRC/14/31/Add.1 pg 7. Available from <http://www.ohchr.org/EN/Issues/Poverty/Pages/AnnualReports.aspx>.

- Progress in the fight against corruption is slowed by political obstacles. In particular, the decision of the Government to dismantle the Task Force on Corruption established by the late President Levy Mwanawasa to investigate corruption during the administration of former President Frederick Chiluba is a serious cause of concern. While it might be appropriate to give the task to the Anti-Corruption Commission, the Commission will need adequate financial, human and technical resources to be able to address high profile corruption cases. The Anti-Corruption Commission seems insufficiently strong to prosecute politically sensitive cases, since its own Statute establishes, for example, that the Commission presents recommendations to the “appropriate authority” (the executive power), instead of presenting independent reports to the legislator.”

It is submitted that these observations by the UNHRC are an indication that the politico-legal climate in Zambia is contrary to Article 4(c) of the SADC Treaty, the SADC Protocol on Gender and Development as well as the SADC Protocol on Corruption.

3.3.4.4 The Democratic Republic of Congo

In the 14th session²⁸¹ of the United Nations Human Rights Council, the Council observed as follows:

- “In the west of the country, unaccountable and politicized security forces in Kinshasa and Bas Congo killed hundreds of opposition supporters in 2007

²⁸¹ Held on the 1st June 2010.

and 2008. Despite the very real threat of further violence as the next election approaches, little international attention is paid to the issue, and the Government has taken no steps towards reform of the security sector.

- Across the country, many people die in detention from hunger and atrocious prison conditions. 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. Records and monitoring are so poor that the Government does not even know how many prisons and prisoners are in the country.
- Children and women accused of being witches are also killed in the DRC, with officials all too often turning a blind eye to the violence. Similarly, private acts of "justice" against suspected criminal are common, and the police response is slow or non-existent. Human rights defenders and journalists are also regularly threatened, and some have been killed for their efforts to promote respect for human rights.
- 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."

It is submitted that the above observations are a direct contravention of Article 4(c) of the SADC Treaty. It is submitted that the SADC institutions failure to act against such is an indication of impunity within the region.

3.3.4.5 The Republic of South Africa

The SADC Treaty strives for solidarity, peace and security as well as²⁸² equity, balance and mutual benefit.²⁸³ It further aspires to strengthen and consolidate the long standing historical, social and cultural affinities and links among the people of the Region.²⁸⁴ However, extinguishing these aspirations is the status of cultural tolerance and indifference amongst nationals and non-nationals within South Africa. *McKnight* observes xenophobic violence.

- "The United Nations Office of the Resident Co-ordinator for South Africa published a report on 3 June 2008, entitled "Violence against Foreigners in South Africa," which detailed the chronology of the events. One hundred refugee camp sites housed more than 30,000 displaced people. A disaster was declared in Johannesburg, Gauteng Province; a similar declaration was to be issued for the Western Cape, which plays host to the largest number of displaced persons, nearly 20,000. On the campus of the University of the Western Cape, Professor Julia Sloth-Nielsen described the attacks that took place in Cape Town as occurring "like cannons, one after the next, each hour."

²⁸² Article 4(b).

²⁸³ Article 4(d).

²⁸⁴ Article 5(1)(h).

- The attacks in the country were also the first time since 1994 that South African troops have been deployed to stop violence on the streets. The xenophobic attacks in South Africa have stirred many discussions concerning the reasons for the violence, the acceptability of the government's response, and the need for improved immigration policies. 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?"
- Domestically, refugees are entitled to protection by the South African Bill of Rights and the Refugees Act of 1998. But the extensive gap between refugee law in theory and the law as implemented in practice in South Africa unfortunately results in many refugees not experiencing the rights and protections guaranteed to them.²⁸⁵

The African Peer Review Monitoring Project has also reported that they felt that the South African government was not doing enough to address the issue of xenophobia and pointed out that there is even an element of denialism on behalf of some officials. The group noted that this issue was raised in the Country Review Report, but was subsequently ignored by government.²⁸⁶

²⁸⁵ 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.

²⁸⁶ South African Institute of International Affairs (SAIIA), "Implementing the APRM, Views from Civil Society," South Africa Report June 2011 p 58. Available from http://www.saiia.org.za/images/stories/pubs/books/aprm_amp_report_sa_20110628.pdf (Accessed 2011-11-16).

It is submitted that the above submissions indicate an atmosphere of hostility towards foreign nationals which is not only a denial of basic human rights fundamental freedoms but also ultimately defeats democratic aspirations of SADC.

3.3.4.6 Linking Democracy, Rule of Law and Human Rights with Development

The SADC Treaty continues to aspire for a region where human rights are afforded to all peoples. The SADC Social Charter²⁸⁷ embodies the recognition by governments, employers and workers in the region of the universality and indivisibility of basic human rights proclaimed in instruments such as the United Nations Universal Declaration of Human Rights (1948), the African Charter on Human and Peoples' Rights (1980), the Constitution of the ILO, the Philadelphia Declaration and other relevant international instruments. *Moyo* has concluded that all the human rights codified in these instruments are directly transported to the sub-region, the words 'such as' and 'other relevant international instruments' show that the list of international instruments referred to is by no means intended to be exhaustive. As a result, the rights entrenched in other important instruments such as the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights are within the ambit of article 3(1) of the SADC Social Charter.²⁸⁸

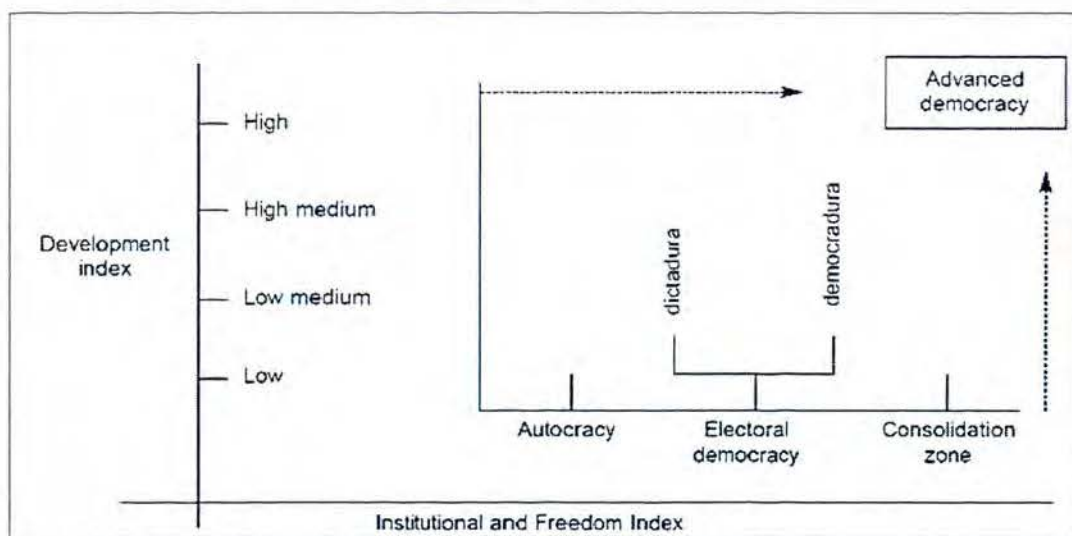
²⁸⁷ Article 3(1).

²⁸⁸ *Moyo, A., "The protection and promotion of socio-economic rights in the SADC region," conference paper. 2010. ESR Review: Economic and Social Rights in South Africa, Vol 11, Issue 3, Nov. p 12*

It is submitted that democracy cannot flourish in the absence of human rights and human rights cannot be afforded to people in an environment that is devoid of the rule of law. The submissions above indicate that there is a gross absence of these factors within the SADC region. Development under democratic conditions is more likely than under authoritarianism.²⁸⁹ Therefore until the regional body has found solutions to the undemocratic and inhumane conditions that the peoples of Southern Africa are subjected to, sustainable economic development in the region will for some time to come, remain a pipedream.

The following tables indicate the views of *Breytenbach*. He recognises that there is a strong rapport between development and democracy.

Figure 9 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.

²⁸⁹ Breytenbach, W., "Democracy in the SADC region - a comparative overview: essay." 2002. *African Security Review*, Vol 11, Issue 4. p 90

Figure 10 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.

In summarising the results in the above tables, it is evident that countries with better political governance tend to have a higher development index. It is submitted that though democracy is not the only factor that may determine the development of a country, it does play an important role and cannot be over-looked if SADC is to advance as one regional bloc. Economic growth, good governance, political stability and strong institutions are core prerequisites for effective regional cooperation.²⁹⁰ Therefore until SADC builds a strong regional body, there will be no development that will come to the region as envisaged in the Treaty.

²⁹⁰ See generally Page, S., (2000) Regionalism among Developing Countries. Basingstoke: Macmillan.

As Nyirabu has correctly observed, the pursuit of development will be futile if peace and stability are elusive in the region.²⁹¹ These conflicts result in a terrible loss of human lives, population dislocation, economic stagnation as well as environmental degradation. Copson has succinctly noted; "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."²⁹²

3.3.5 The lack of ownership of the integration project

The SADC Treaty aims to promote common political values, systems and other shared values which are transmitted through institutions which are democratic, legitimate and effective.²⁹³ Further, SADC aspires to strengthen and consolidate the long standing historical, social and cultural affinities and links among the people of the Region.²⁹⁴ It is submitted that the attainment of these objectives would require a system of governance at regional level that involves the peoples of the region in the

²⁹¹ See Nyirabu M., *op-cit* note 2, p.25 and Copson R, W., *Africa's wars and prospects for peace*, Sharpe, New York, 1994.

²⁹² See Nyirabu M., *op-cit* note 2, p.25 and Copson R, W., *Africa's wars and prospects for peace*, Sharpe, New York, 1994.

²⁹³ Article 5(1)(b).

²⁹⁴ Article 5(1)(h).

integration agenda. The non-involvement of citizen participation is an element of bad governance and would in the end be selfdefeating for SADC to cast a blind eye to this element.²⁹⁵

In the SADC region, there are already cracks indicating that the degree to which the civil society is involved in the integration agenda is lacking. The lack of ownership in the integration agenda is evident from the observations of *Siphamandla*.²⁹⁶ He observes that civil society in the SADC countries has failed to build consensus on subjects of integration, thus weakening their ability to drive the regional agenda on poverty. On the Mozambican side, rumblings of discontent emerged from communities in Matola, who complained that they had not been consulted about the Maputo Development Corridor.

Any governance model should be inclusive of the civil society. The African Union and NEPAD have already been criticized for their lack of citizen participation. *The Daily Monitor*,²⁹⁷ 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 ongoing serious debate on them even in

²⁹⁵ See generally Olowu D., *op-cit* note 11, page 228.

²⁹⁶ Siphamandla Z., "SADC integration and poverty eradication in Southern Africa: an appraisal." 2010. *Africa Insight*. Vol 39, Issue 4, March. p 45. The project involved the rehabilitation of road and rail links between the Mozambican port of Maputo and South Africa's economic heartland of Gauteng.

²⁹⁷ The Daily Monitor, 6 March 2002 Posted on AllAfrica.com
<http://allafrica.com/stories/200203050452.html>.

the national parliaments. *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.²⁹⁸ It is submitted that the SADC initiative should steer away from these perceptions if it is to achieve the spirit of Article 5 (1) of the Treaty.

It submitted that SADC's inertia in domesticating its vision, thereby involving politicians even at lower national levels is aggravated by the fact that there is no political will to follow through on the promise of transformation. *S/aa* has observed that even representatives of the population at domestic level in the regions' Parliaments are largely uninformed and are hardly ever involved in the various processes, except when required to ratify treaties and protocols.²⁹⁹ A number of countries are in fact lagging behind in the ratification process, and almost all fall short of domesticating even the ratified protocols.

In summary, any integration project has to be owned not only by high level politicians, but all stakeholders even at the grassroots level in order for it to be successful. SADC therefore has to find a solution to this gap between the Summit and the grassroots to eventually give the integration project legitimacy and momentum amongst the people.

Kirkby correctly observes that participatory-constitution making means applying the principles of democratic procedure, transparency and accountability during the entire

²⁹⁸ *Olowu D.*, *op-cit* note 11, page 214.

²⁹⁹ *Willibrod, P.S.*, *Ibid* note 271, page 24.

process. If a constitution addresses the basic distribution of state power, then the people must be actively involved to express their desires and restrain political elites from hijacking the process.³⁰⁰

3.3.6 The absence of credible leadership

It has already been outlined in Chapter 2 that the Summit is the highest decision-making body in SADC. It is vested with so many legislative and executive powers that it seems as if it can take any decision it deems fit, including the recent suspension of the Tribunal, a decision which clearly was an error in law. There seems to be no recourse to judicial review of the decisions of the Summit. The region has already lost confidence in the ability of the Summit-led SADC to make decisions without taking into account their own political interests. We should further take into consideration that the Summit is composed of Heads of States, persons who already at national level, are responsible for the democratic challenges already mentioned in this Chapter. The perceptions of the region on the Summit are reflected in the following media statements.

The SADC has become an old boys club, an institution of heads of state. There was no subject of substance on the table for these leaders."³⁰¹

³⁰⁰ Hatchard, J., (2001) Some Lessons on Constitution-Making from Zimbabwe. *Journal of African Law* 45. p 215.

³⁰¹ Mail and Guardian Online 'Disappointing SADC is just an old boys club'. Johannesburg, South Africa Aug 20 2011 07:11. <http://mg.co.za/article/2011-08-20-disappointing-sadc-is-just-an-old-boys-club/> Accessed 2011-09-07.

"Zimbabwean and Swaziland activists on Friday slammed the failure of a summit of regional leaders to act on political crises threatening their countries."³⁰²

"Needless to say these were not the only pressing subjects that the summit side stepped but they illustrate once again that SADC leaders have no interest in addressing issues that really matter to the region's citizens - and that this annual summit has become nothing more than an old boy's jamboree."³⁰³

It is submitted that the state of affairs within SADC are such that member states who are in breach of their Treaty obligations are the ones who later sit and adjudicate on such matters directly affecting them in Summit meetings. This is further affirmed by the following extract from former SADC Tribunal Judge, Justice Pillay:

Well of course decisions are taken unanimously, but we made the point that, in international law, the practice has always been that in spite of the unanimity rule a single country with a conflict of interest like Zimbabwe should never be allowed to be judge and party at the same time.³⁰⁴

It is submitted that to drive a regional integration project forward requires a pool of leaders who are selfless. These leaders should have the confidence of the people and in turn the people will have confidence in the integration agenda.

³⁰² Mail and Guardian Online, *Ibid* note 299.

³⁰³ Allfrica. com, "Summit Fails SADC Citizens." <http://allafrica.com/stories/201108191802.html>. Accessed 2011-09-07.

³⁰⁴ Mail and Guardian Online, 'Killed off by 'Kings and Potentates'', 19 August 2011. <http://mg.co.za/article/2011-08-19-killed-off-by-kings-and-potentates/>. (Accessed 2011-08-22).

The most possible way to ensure that SADC leaders become accountable to the people is through a community parliament. However the SADC Parliamentary Forum has already been marginalised within the regional framework as such there is a need to revisit the framework, to ensure that the regional organisation can be held accountable to the people of the region.

3.4 Intrinsic Challenges

3.4.1 The Absence of Separation of Powers

It is submitted that in a community, the pursuit of human rights, democracy and the rule of law has to be accompanied by a clear separation of powers in governance processes. Classical constitutional theory holds that policy-making is the task of the highest-ranking political officials in government. Legislative organs give effect to that policy by enacting legislation in accordance with the parliamentary procedures prescribed by the Constitution; and judicial bodies, the court, resolve any disputes as to the meaning or effect of law.³⁰⁵

3.4.1.1 The Summit

The SADC Summit is the body responsible for the overall policy direction of the organisation.³⁰⁶ In the event that there has been breach of Treaty obligations by a member state, the appropriate sanctions are determined by the Summit on a case-

³⁰⁵ Hoexter C., 2007. *Administrative Law in South Africa*. Cape Town: Juta and Co. p 23.

³⁰⁶ Article 10(2) SADC Treaty.

by-case basis.³⁰⁷ Article 10 (3) of the SADC Treaty provides that the Summit should adopt legal instruments for the implementation of the provisions of the SADC Treaty. SADC and member states should not discriminate on the listed grounds and any other ground as determined by the Summit.³⁰⁸ The Summit elects the Chair and Deputy Chairperson of SADC, as well as the Executive Secretary and Deputy Executive Secretary of SADC. These powers are also reflected in Article 10 (A) where the Summit is given the powers to elect the Chairperson and Deputy of the Organ on Politics Defence and Security Co-Operation. Article 16(4) provides that the Tribunal should give advisory opinions on such matters as the Summit or the Council may refer to it, therefore curtailing the scope of the Tribunal. The Summit also determines the value of financial pledges that member states make to the regional body under Article 28(2) of the Treaty. To finally consolidate its position well, any amendments to the Treaty require an adoption by seventy five per cent (75%) of the Summit.

It is submitted that the Summit plays roles that are legislative, executive and judicial. The governance model of the regional organization is then brought to question and it is very likely that decisions that are not favourable to members of the Summit, or points of discussion that may push Heads of State and Governments into an uncomfortable position will always be avoided. It is therefore submitted that in order to ensure that the regional agenda is not compromised by political interests, the SADC Treaty should be re-looked to ensure that there is a separation of powers.

³⁰⁷ Article 33 (2) SADC Treaty.

³⁰⁸ Article 6 (2).

3.4.1.2 Tribunal

Articles 3(2),³⁰⁹ 4(3),³¹⁰ as well as 12(3)³¹¹ of the Protocol on the Tribunal and Rules thereof represent a very unfavourable position for the consolidation of democracy in the Community. The Council of Ministers is composed of persons who, in summary, can be described as second in command after the Heads of States at domestic level. The Council, by being involved in designation of judicial officers as well as the terms and conditions of service, salaries and benefits of the Registrar and other staff is an error in principle. The next Chapter will illustrate the European experience.

In the Canadian case of *R v Valente*,³¹² the question arose whether the provincially appointed judges of Ontario's Provincial Court (Criminal Division) were disqualified from performing their duties by reason of their inability to presume an accused person innocent until proven guilty. This right was guaranteed by section 11(d) of the Canadian Charter of Rights and Freedoms. 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

³⁰⁹ The Council shall designate five (5) of the Members as regular Members who shall sit regularly on the Tribunal. The additional five (5) Members shall constitute a pool from which the President may invite a Member to sit on the Tribunal whenever a regular Member is temporarily absent or is otherwise unable to carry out his or her functions.

³¹⁰ The Members shall be selected by the Council from the list of candidates so nominated by Member States. Nominations for the first appointment shall be called within three (3) months, and the selection shall be held within six (6) months, of the date of entry into force of this Protocol.

³¹¹ The terms and conditions of service, salaries and benefits of the Registrar and other staff shall be determined by the Council on the recommendation of the Tribunal.

³¹² [1985] 2 S.C.R. 673.

authorize leaves of absence and paid extra-judicial work; and judges' salaries were fixed by regulation, not by statute.

Three essential conditions of judicial independence were identified, that could be applied independently and were capable of achievement by a variety of legislative schemes or formulas. They are:

- security of tenure, which embodies as an essential element the requirement that the decision-maker be removable only for just cause, "secure against interference by the executive or other appointing authority."
- a basic degree of financial security free from "arbitrary interference by the executive in a manner that could affect judicial independence."
- institutional independence with respect to matters that relate directly to the exercise of the tribunal's judicial function . . . judicial control over the administrative decisions that bear directly and immediately on the exercise of the judicial function.

It is submitted that these conditions are very far from being met when read with the current *status quo* in SADC. To bolster this submission, let us consider the following media report:

SADC Tribunal Rights Watch supports the action taken by four SADC Tribunal judges to demand compensation following the illegal and arbitrary decisions taken by the SADC Council of Ministers and Summit Heads of State and Government on 20 May 2011 not to reappoint them or allow them to remain in office pending a further review in August 2012.³¹³

³¹³ SW Radio Africa, "SADC Tribunal judges call for compensation." Available from <http://www.swradioafrica.com/pages/sadctrib240611.htm>. (Accessed 2011-07-24).

It is submitted that the above extract shows how vulnerable and un-insulated the judicial officers are in the SADC arena. There will be very little by way of progress towards the integration project if there is no body or institution that will uphold the rule of law.

3.4.2 Threats to the of the rule of law

In laying the foundation for a firm submission on how SADC countries fall short in observing the basic trends of the rule of law, a proper and holistic definition of the concept is apposite. According to *Dicey's* model of the rule of law, the rule of law is made up of three main principles:

- The absolute supremacy of the law: 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 me if there is a law that gives government the power to arrest me.
- Equality before the law: The law applies equally to all. Everyone, including the state, is bound by the same laws and subject to the jurisdiction of the same ordinary courts.
- 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. Therefore, even if there was no document called "the Constitution" (as in Britain) human rights protections are still found in the common law.³¹⁴

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.³¹⁵

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:

- All laws should be prospective, open and clear;
- Laws should be relatively stable;
- The making of particular laws should be guided by open, stable, clear and general rules;
- The independence of the judiciary must be guaranteed;
- The principles of natural justice must be observed;
- The courts should have review powers over the implementation of the other principles;
- The courts should be easily accessible; and

³¹⁴ Dicey, A.V., *An Introduction to the Study of the Law of the Constitution*, 10th ed. London Stevens & Co. 1982.

³¹⁵ Cooper, John et al. *Complete Works by Plato*, page 1402, Hackett Publishing, 1997.

- The discretion of crime preventing agencies should not be allowed to pervert the law.³¹⁶

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.³¹⁷

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*³¹⁸ it was interpreted to mean the following:

- 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.

³¹⁶ Raz J., *Ibid* note 273, page 10-15.

³¹⁷ 2005 (6) BCLR 529 (CC) at para 108.

³¹⁸ 1998 (2) SA 374 (CC).

- 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.

The Rule of Law includes the notion that no one is above the law. In *Lesapo v North West Agricultural Bank*,³¹⁹ 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*,³²⁰ the Court declared Section 8(a) of the Judges' Remuneration and

³¹⁹ 2000 (1) SA 409 (CC).

³²⁰ 2011 (5) SA 388 (CC).

Conditions of Employment Act³²¹ 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 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.
(emphasis added)

The principles of the rule of law, the separation of powers and judicial independence, underscored by international law, are indispensable cornerstones of constitutional democracy.³²² These principles are also encapsulated in the Basic Principles on the Independence of the Judiciary,³²³ and the Code of Minimum Standards of Judicial Independence.³²⁴

³²¹ Act 47 of 2001.

³²² at paragraph 40.

³²³ 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.

³²⁴ Adopted in New Delhi, India, 1982.

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. Having explained this transformation, it is submitted that the *SADC* Treaty as well as the additional protocols are loaded with provisions or aspects that militate against the rule of law. 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** (own emphasis added). The following discussion extrapolates from the institutional framework and developments within *SADC*, characteristics that fall short of the internationally accepted benchmarks.

3.4.2.1 The Suspension of the Tribunal by the Summit

A decision of the Summit to effectively suspend the operations of the Tribunal by failing to appoint judges to the Tribunal and by instructing the Tribunal not to take new cases or to hear any cases until August 2012 was taken at the *SADC* Extraordinary Summit of 20th May 2011.³²⁵ The Tribunal was until that decision by the Summit, the institution mandated to ensure adherence to and the proper interpretation of the provisions of the *SADC* Treaty and subsidiary instruments and to

³²⁵ Statement by the *SADC* Lawyers Association following the decision of the *SADC* Extraordinary Summit to extend the suspension of the *SADC* Tribunal. Available from <http://www.swradioafrica.com/Documents/Statement%20on%20the%20continued%20suspension%20of%20the%20SADC%20Tribunal%5B1%5D.pdf>.

adjudicate upon such disputes as could be referred to it.³²⁶ The suspension of the Tribunal has sent shock waves within the region signalling the analogy that the judicial body and its judges did not enjoy a measure of institutional independence. The protections surrounding that independence are well known. They include transparent appointment procedures, security of tenure, and separation of powers, and freedom from any outside pressure or interference and appropriate social protection. An international court must be exemplary in this respect. It must both be, and be perceived to be, wholly independent of the Contracting Parties, who may also be respondents before it.³²⁷

In *S and Others v Van Rooyen and Others*,³²⁸ the Court stated that judicial independence and impartiality are also implicit in the rule of law which is foundational to the Constitution. In this instance we should realize that the Tribunal was empowered to pronounce on the validity of state actions and to give advisory opinions on various matters as well as the interpretation of the Treaty and other documents. It is submitted that in the event that a state is in breach of its obligations or is acting in a manner that defeats the regional agenda, the independence of the Tribunal, to pronounce on such is not guaranteed. This is contrary to *Razs'* teachings which require that the independence of the judiciary should be guaranteed as well as courts having review powers over the implementation of the other principles. We

³²⁶ Article 16, SADC Treaty.

³²⁷ Southern Africa Litigation Centre, "SADC Tribunal: The Effective Suspension of the SADC Tribunal." A Legal opinion prepared by several NGOs, including SALC, addressing the implications of the decision to review the role, functions and terms of reference of the SADC Tribunal. Available from <http://www.southernafricalitigationcentre.org/news/2010/11/517>.

³²⁸ *S and Others v Van Rooyen and Others (General Council of the Bar of South Africa Intervening)* 2002 (5) SA 246 (CC).

should note that prior to its suspension, the Tribunal has heard a number of cases. The most significant of these was when the Tribunal found that parts of the Zimbabwean government's fast tracked land reform were illegal and discriminatory. The Tribunal had handed down a judgment that was disregarded by the Republic of Zimbabwe.³²⁹

In simplifying the dynamics of the suspension, we should realize that the Executive (Summit) suspended the judicial organ without an empowering provision. This is contrary to the principle established in the case of *Minister of Health and Another v New Clicks South Africa (Pty) Ltd and Others*³³⁰ in which Moseneke J stated that;

It is trite that a wielder of public power must exercise the power lawfully. That means the authority must be exercised within the bounds set by the empowering legislation, in a rational manner and within the constraints of the Constitution.³³¹

The SADC Summit is a body composed of Heads of States in the SADC Region. It is common that there should be a clear separation of powers within a democratic environment to ensure that the political interests of politicians do not hinder the administration of justice. It has however been observed that there is a clear confusion of political and judicial interest within SADC. Judge Ariranga Pillay³³² has poignantly that the basic principles of law are often poorly understood by the organisation's leadership and that, when they are understood, they are poorly valued

³²⁹ *Mike Campbell (Pvt) Ltd et al. v. Republic of Zimbabwe* (2/2007) [2008] SADCT 2.

³³⁰ 2006 (2) SA 311 (CC).

³³¹ at paragraph 716.

³³² Chief Justice of Mauritius (1996-2007), Former President of the SADC Tribunal..

and easily perverted to political ends.³³³ He went on to divulge how political considerations were taken into account when member states were debating on the concern that the Tribunal should not have jurisdiction in matters between individuals and member states.³³⁴ The above submissions clearly indicate a yawning lacuna in observing the rule of law within the SADC Summit.

The repercussions of the decision to suspend the Tribunal are grave at both domestic and regional level. Summit decisions are the product of collective agreement between the heads of member states. At the domestic level, SADC member states have endorsed a decision that not only offends against their respective constitutions but binding principles of international law. Regionally, the decision disregards the importance of regional tribunals to the integrity of the human rights system as a whole and, more immediately, ignores victims of violations in search of redress in instances where a state deliberately and consistently denies its citizens effective remedies.³³⁵ It is submitted that the consolidation, defence and maintenance of democracy, peace, security and stability as per Article 5(1)(c) of the SADC Treaty will require legislators to ensure that the judicial arm of the region is well established within established standards of constitutional and administrative law.

³³³ Mail and Guardian Online, *Ibid* note 302.

³³⁴ *Botswana and South Africa take the position that they have their own strong, independent institutions, but the fact is Botswana is scared of the Kalahari, that indigenous people might apply to the tribunal. That's why it changed its tune. Then Lesotho became scared about a land-related case which is pending at the summit. It is one of the pending cases that the summit has effectively killed.* From the Article "Killed off by 'Kings and Potentates'," Mail and Guardian Online. 19 August 2011. <http://mg.co.za/article/2011-08-19-killed-off-by-kings-and-potentates/>. (Accessed 2011-08-22).

³³⁵ Southern Africa Litigation Centre, "Closed for Business The Suspension of the SADC Tribunal." Available from www.southernafricalitigationcentre.org/download/6/53 (Accessed 2011-11-16).

3.4.3 Lack of efficient monitoring and enforcement mechanisms

Classically, signature and ratification are the most frequent means of expressing consent to a Treaty. In some cases the diplomats negotiating the treaty are authorised to bind their states by signing the treaty; in other cases their authority is more limited and the treaty does not become binding until it is ratified (that is approved by the legislature).³³⁶

The relationship between signature and ratification can be understood only in the light of history. In the olden days when slow communication made it difficult for diplomats to keep in touch with their sovereigns, ratification was necessary to prevent diplomats from exceeding their instructions; after receiving the text of the treaty and checking that his/her representatives had not exceeded their instructions, the sovereign was obliged to ratify their signatures.³³⁷

By 1800, however, the idea of a duty to ratify was obsolete, and ratification came to be used for a different purpose – to give the head of state time for second thoughts. With the rise of democracy, the delay between signature and ratification also gave a chance to public opinion to make itself felt. This is particularly important if negotiations had been conducted secretly, or if the treaty necessitated changes in municipal law, or if the constitution of the state concerned required the consent of the legislature for ratification.³³⁸

³³⁶ Malanczuk, P., Akehurst, M., *Ibid* note 213, page 125.

³³⁷ Malanczuk, P., Akehurst, M., *Ibid* note 213, page 124-125.

³³⁸ Malanczuk, P., Akehurst, M., *Ibid* note 213, page 125-126.

It is submitted that the SADC Parliamentary Forum would have been the first body closest to the Summit in which monitoring and enforcement of protocols and agreements occurs. However, *Willibrod* indicates that in most parliaments, MPs are not familiar with the treaties and protocols, and usually only see them at ratification stage. Even then a whole document is not seen by all MPs, except for those involved in the relevant Standing Committees. Parliamentarians have also indicated that in most cases, even these treaties and protocols have not been incorporated into domestic law; a matter that further complicates the oversight by the relevant committees of the parliaments, since most members are themselves in the dark.³³⁹

3.4.3.1 Impediments to trade and movement of persons

The SADC Treaty promotes sustainable and equitable economic growth and socio-economic development that will ensure poverty alleviation with the ultimate objective of its eradication, enhance the standard and quality of life of the people of Southern Africa and support the socially disadvantaged through regional integration.³⁴⁰ The objectives of the SADC Trade protocol are to:

- to contribute towards the improvement of the climate for domestic/cross border and foreign investment;³⁴¹ and
- to enhance the economic development, diversification and industrialisation of the region.³⁴²

³³⁹ Willibrod, P.S., *Ibid* note 269, page 24.

³⁴⁰ Article 5(1)(a).

³⁴¹ Article 2(3).

³⁴² Article 2(4).

Of concern to parliamentarians and other stakeholders of SADC integration is the SADC Protocol on the Facilitation of Free Movement of Persons which has been applauded as the most important Protocol, in fact so much so 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 which is unusual for SADC Protocols.³⁴³

SADC successfully centralised planning, policy formulation and administrative capacity at the Secretariat in Gaborone, but shortcomings are also evident. The Secretariat is still a weak organ and is struggling with bureaucratic tendencies, shortages of staff, and limited capacity to monitor and propose policy solution.³⁴⁴ There is also a feeling of de-commitment within SADC. Gross salary packages (including generous allowances) appear high although possibly not sufficient to be very attractive for staff from countries such as South Africa and Botswana, which have the highest salary levels in the region. Present SADC salary packages appear comparable to the salaries of other African regional institutions, but are below the levels of UN organisations and some of the international agencies recruiting in the region.³⁴⁵ It is submitted that a de-motivated workforce within SADC is bound to deliver half efforts to the regional organisation, resulting in half efforts to the integration agenda.

The SADC Protocol on Transport, Communications and Meteorology aims to establish transport, communications and meteorology systems which provide

³⁴³ Karuuombe, B., *Ibid* note 214, page 5.

³⁴⁴ Isaksen, J. and Tjønneland, E., *op-cit* note 93, page 5.

³⁴⁵ Isaksen, J. and Tjønneland, E., *Ibid* ncte 93, page 5-6.

efficient, cost-effective and fully integrated infrastructure and operations, which best meet the needs of customers and promote economic and social development while being environmentally and economically sustainable; develop policies aimed at progressive elimination of obstacles to the movement of persons in the region generally and within the territories of member states.

The Regional Indicative Strategic Development Plan³⁴⁶ proposes the establishment of:

- a customs union by 2010,
- a common market by 2015,
- a monetary union by 2016, and
- a single currency by 2018.

Although the RISDP initiative is a positive step towards regional integration, it lacks legal legitimacy because it has not been included in the SADC Treaty and more relevantly in the SADC Trade Protocol. SADC member states have chosen regional integration as part of their strategy for global participation as well as reducing and eliminating poverty, one of the biggest challenges affecting the region.³⁴⁷

Infrastructure is a vital element in trade facilitation and overall regional integration. The poor state of African transport and communication infrastructure contributes to delays in the delivery of goods and services and the consequent hiking of commodity

³⁴⁶ RISDP, *op-cit* note 30, page 66.

³⁴⁷ Saurombe A., "The SADC Trade Agenda, a tool to facilitate regional commercial law: an analysis." 2009. *SA Mercantile Law Journal*. page 700-701.

prices. Infrastructure plays a key role in trade by facilitating the movement of factors of production as well as the finished product from the supply to the demand side.³⁴⁸ *Limao* and *Venerables* state that labour movement and communication, capital availability and utilization, 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 asymmetries in trade. Communication infrastructure unlocks new opportunities, and improves connectivity between demand and supply sides in trade and facilitates better links between contributors in the value chain of products.³⁴⁹ However, it is not enough to create documents and not translate the vision into action. The following table indicates delays at just one border within the SADC region.

Figure 8: Border Post delays at Chirundu, Zambia/Zimbabwe Border

Vehicle Types	Travel Direction	Delays (in hrs)
Passenger Cars, Buses, Mini Buses, Light Vehicle	North-bound	1
	South-bound	1
Refrigerated trucks, Oil	North-bound	28.5

³⁴⁸ United Nations Economic Commission For Africa, "Study On The Establishment Of Inter-Recs' Free Trade Areas In Africa Drawing On Lessons From The Comesa-Sadc-Eac Fta Experience." pg 13 Available from http://www.uneca.org/crci/7th/Tripartite%20COMESA_EAC_SADC_FTA%20Study%20FINAL%20REPORT.pdf.

³⁴⁹ Limao, N. and Venables, J., 2001. "Infrastructure, geographical disadvantages, transport costs and trade." *Economic Review, World Bank*, Vol. 15, No. 3. Available from <http://economics.ouls.ox.ac.uk/12078/1/INFRAS.pdf> (accessed 2011-11-16).

tankers	South-bound	7
Heavy trucks, Containerised	North-bound	40.5
	South-bound	20

Source: Institute for Global Dialogue, *From Cape to Cairo: Exploring the COMESA-EAC-SADC Tripartite FTA*, p 90. Available from <http://www.igd.org.za/publications/africa-dialogue-series/item/download/59> (accessed 2011-11-16).

These delays are a major frustration to the movement of goods and services. Another major constraint to effective implementation is the lack of integrated corridor (roads, railways, bridges) development planning. This includes a comprehensive transport policy that provides integration between and within the different modes of transport, competition between providers, and the optimal utilisation of different modes of transport. Weak internal coordination capacity within the SADC Secretariat and the absence of a strategic framework that informs which corridor developments are prioritised further complicates the situation. It is submitted that such delays and mis-coordination will continue to hamper trade relations within SADC member states and unless such challenges are addressed, the protocols and tariff adjustments will not have much impact on improving trade since there are still frustrations in the movement of goods and services.

Recently there have been attempts to establish one-stop border posts in order to reduce the waiting times at borders,³⁵⁰ however this has been neutralized by the lack of skilled personnel to utilize the system well. In this respect *Kwaramba* has

³⁵⁰ This has already been done at Chirundu.

observed that the challenge that faces many African countries is the need to develop requisite capacities needed to implement modern techniques of doing trade. Developing the necessary infrastructure and human skills are two of the most important challenges Africa faces. Progress in these two areas is fundamental for African countries in general to have the capacity to effectively participate in any trade facilitation programmes that may emerge. 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.³⁵¹

3.4.3.2 Inefficient Monitoring Structures

Closely related to enhanced involvement of member states in the SADC agenda, is the role of SADC National Committees (SNCs) in the implementation of the Regional Indicative Strategic Development Plan (RISDP) and in coordinating and mobilising national consensus to regional initiatives. According to the Report on the Review of the Operations of SADC Institutions, the National Committees are responsible for implementing and monitoring SADC Programmes at national level and ensuring broad and inclusive consultations to prepare for inputs required by the Secretariat. The challenge is to ensure that SNCs are not only established but are also effectively functional. It is therefore essential that member states avail adequate resources and capacity to the SNCs to enable them to effectively discharge their

³⁵¹ Kwaramba, M., "Evaluation of Chirundu One Stop Border Post- Opportunities and Challenges," Trade & Development Studies Centre. 2010. Available from www.tradescentre.org.zw.

mandate.³⁵² However the SADC National Committees have raised the following challenges towards the execution of their mandate:

- the lack of qualified and experienced personnel;
- the lack of material resources (offices, equipment, etc);
- the lack of clarity on the SNC linkages to the SADC secretariat on budgetary provision for programmes and projects for implementation within the RISDP context;
- the lack of a mechanism for integrating SNCs into government systems and procedures;
- the lack of full comprehension of the function of SNCs by members of SADC;
- the lack of internalisation and understanding of the roles of SNCs by stakeholders; and
- the lack of technical capacity in SNC sub-committees.³⁵³

It is submitted that when bodies which are at the grassroots are not capacitated enough to execute their monitoring functions, their reports cannot be relied on, therefore the reports being generated by the Secretariat on the basis of information that they receive from the SADC National Committees is not credible enough. In a

³⁵² RISDP, *op-cit* note 30, pg 85. This is also affirmed at page 90 of the RISDP; The Secretariat and the SADC National Committees will be responsible for ensuring that progress on the RISDP is monitored on a regular basis. The SADC National Committees will monitor implementation plans at national levels and provide status reports to the Secretariat on a continuous basis...

³⁵³ Nzewi, O. and Zakwe, L., "Democratising Regional Integration in Southern Africa SADC national committees as platforms for participatory policy-making." 2009, pg 14. Available from <http://www.cps.org.za/cps%20pdf/RR122.pdf> (accessed 2011-11-16).

nutshell, the incapacity within the SADC National Committees jeopardises the integration agenda.

It is further submitted that the institutional framework of SADC does not afford member states with a clearly codified guidelines which explain the role that the SADC National Committees are supposed to play at domestic level. In Botswana, by virtue of the SADC Secretariat being located within the capital city, the Secretary for Economic and Financial Policy in the Ministry of Finance and Development Planning is Botswana's SADC National contact person. At the national level, the SADC National Committee (SNC) has been established to specifically provide input in the formulation of SADC policies, strategies and programmes and to co-ordinate and oversee the implementation of SADC programmes. The SADC National Committee operates through four clusters namely; Food Agriculture and Natural Resources (FANR); Trade, Industry, Finance and Investment; Infrastructure and Services (IS); and Social and Human Development and Special Programs (SHDSP) in line with the SADC Secretariat structure. Each directorate has a sub-committee which reports to the SADC National Committee.³⁵⁴

However, the same should not be expected in countries that are far from appreciating the role of international law, the SADC National Committees are systematically pushed away from their role. *Zakwe and Nzewi*³⁵⁵ have argued that without such guidelines, member states develop their own operational structure for SNCs and appear to adjust their SNC operations based on national priorities and

³⁵⁴ <http://www.gov.bw/en/Ministries--Authorities/Ministries/Ministry-of-Finance-and-Development-Planning1/Acts1/SADC-National-Committee/> (Accessed 2011-08-08).

³⁵⁵ Nzewi, O. and Zakwe, L., *Ibid* note 351, page 39.

convenience. For example in Mozambique, the SNC plenary meets once a year. Also, Mozambique's establishment of provincial SNCs moves away from provisions in the Treaty which provides for three levels of SNC structure at the national level and includes the national steering committee, the sub-committees, and the technical committees. In the case of Mozambique, the SNC operations extend beyond the basic provisions (specified in the Treaty) and become trapped by resource and capacity constraints.

In other countries, such as Zambia and Malawi, SNCs arrange meetings in an *ad hoc* way and without input from relevant stakeholders. The result is that, first, the development of measurable criteria for reporting for the purposes of decision-making in SADC becomes problematic. For instance, where reports coming from member states on sectoral programmes do not reflect public support and how they are integrated into national plans, implementation of these projects is likely to run into difficulties. Secondly, the lack of efficiency and effectiveness in the operations of SNCs translates to slow and weak movement towards the complementarity in national priorities, policies and legislation needed for the implementation of regional priority projects and programmes at the national level.

3.4.4 Vague membership requirements³⁵⁶

The United Nations Conference on Trade and Development has observed that one major problem with regional groupings in Africa is their great proliferation, resulting in

³⁵⁶ The overlapping membership is illustrated in Figure 1, Chapter 2.

overlaps and inconsistencies.³⁵⁷ Overlapping membership of countries across Regional Executive Committees further adds to the capacity and resource constraints. According to a UNECA survey of regional integration in Africa, overlapping memberships make it difficult for African countries to pay their dues to various Regional Executive Committees. These lead to conflicting or duplicative programme implementation as well as limiting meeting attendance.³⁵⁸

Multiple and over-lapping memberships are largely seen as significant obstacles to regional integration in Africa because they hinder harmonization and normalization as well as the enforcement of rules of origin. For example, the EAC is already a Common Market and has four of its members in fourteen (14) COMESA and one in SADC. Five SADC member states (Botswana, Lesotho, Namibia, Swaziland, and South Africa) are members of the Southern African Customs Union (SACU)³⁵⁹

The sluggish implementation of the SADC Protocol on Trade, overlapping memberships in competing trade organisations and the inability to take common positions in negotiations with third parties does not necessarily imply that SADC

³⁵⁷ United Nations Conference on Trade and Development (UNCTAD), "World Investment Report, 2011," United Nations, Geneva. Available from <http://www1.unctad-docs.org/files/UNCTAD-WIR2011-Full-en.pdf> (accessed 2011-11-16).

³⁵⁸ United Nations Development Programme, "Regional integration and Human development: A Pathway for Africa," pg 18. Available from http://www.unesco.org/library/PDF/RegIntegAndHumanDev_Africa_web.pdf (accessed 2011-11-16).

³⁵⁹ United Nations Economic Commission For Africa, "Study On The Establishment Of Inter-Recs' Free Trade Areas In Africa Drawing On Lessons From The Comesa-Sadc-Eac Fta Experience." pg 13 Available from http://www.uneca.org/crci/7th/Tripartite%20_COMESA_EAC_SADC_FTA%20Study%20FINAL%20REPORT.pdf (accessed 2011-11-16).

member states are opposed to trade liberalisation and a deepening of economic integration. There may, however, be competing and different visions within SADC about the type of regional integration they wish to see. This is reinforced by the very wide differences between the member states in the size, structure and strength of their economies.³⁶⁰ It is submitted that these different visions on what shape SADC should take crop up because countries do not necessarily negotiate trade related aspects with a single mandate within the ambit of SADC.

For half a century, the European Union has pursued integration while taking in new members. Most of the time, the two processes took place in parallel. A growing membership has been part of the development of European integration right from the start. Today's EU, with 27 member states and a population of close to 500 million people, is much safer, more prosperous, stronger and more influential than the original European Economic Community of 50 years ago, with its 6 members and population of less than 200 million. The application from a country wishing to join is submitted 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. 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:

³⁶⁰ Isaksen, J. and Tjønneland, E., *op-cit* note 93, page 13.

- stable institutions that guarantee democracy, the rule of law, human rights and respect for and protection of minorities;
- 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;
- the ability to assume the obligations of membership, in particular adherence to the objectives of political, economic and monetary union.³⁶¹

It is submitted that the membership requirements of SADC are highly insufficient and allow SADC to admit and keep member states that defeat the integration agenda. If there was a clear set criterion apart from signature and ratification of the SADC Treaty, SADC would be able to monitor precisely the nature of a state before admission and even after admission a state would be required to keep a certain minimum standard, failing which its membership would be reviewed.

It is further submitted that a country that is a member to more than one regional organisation is straining the few resources that are available at its disposal. Countries have to contribute in terms of human resources; financial pledges as well as infrastructure to keep the machinery of the regional organisation running, therefore in a continent where most countries face severe capital restrictions, it would not be economically sound to have multiple memberships.

³⁶¹ European Commission, "Conditions for Enlargement." Available from http://ec.europa.eu/enlargement/the-policy/conditions-for-enlargement/index_en.htm. (Accessed 2011-08-07).

3.4.5 The absence of a community parliament

The consolidation of democratic governance does not end in successfully completing free and fair elections. Such elections are rather a beginning, a critical but nonetheless preliminary step on the road towards democratic maturity. It requires long-term and comprehensive efforts to build up and consolidate representative and well-functioning parliaments, able to ensure sound implementation of its law-making and over-sight powers. Modern democracy embraces change because it results from a reasoned political manner inspired by politicians listening to their electorate and developing well founded arguments, based on factual research and political vision. This in turn requires well organised parliamentary organisations which can support the elected representatives in their work. Transparency, accountability, mutual respect and a constitutional setting which allows a proper check and balance are indispensable to this process.³⁶²

SADC does not have a parliamentary body like the European Parliament. The European Parliament allows exchanges between national parliaments which enhances and strengthens their mission within each country and contributes to the regional dissemination of democratic values. Co-operation between parliaments at different levels of development is therefore a fundamental means of encouraging democracy.

³⁶² European Parliament, Office for Promotion of Parliamentary Democracy, "Strengthening Parliaments Worldwide." Available from http://www.europarl.europa.eu/pdf/oppd/Page_1/oppd_flyer_en.pdf (accessed 2011-11-16).

The SADC Parliamentary Forum aspires to develop into a regional parliamentary structure. Established in 1996, it was approved by the Summit in 1997 as an autonomous institution of SADC, not officially belonging to SADC. The SADCPF is an international organisation in its own right but linked to SADC. According to its Constitution, it is a Parliamentary Consultative Assembly, striving to involve people and parties in SADC in the regional integration process. Among other things, it aims to strengthen SADC's implementation capacity by involving parliamentarians, their parties and NGOs in SADC activities, promoting the principles of human rights and democracy and educating people on SADC.³⁶³

Despite the existence of the forum, its principle and objectives, the attainment of regional integration is severely constrained by the fact that SADC officials are deliberately reluctant to grant the forum the status it deserves. SADC is very reluctant to transform the Forum into a proper regional parliament with powers to hold the SADC Summit accountable. It seems as if the SADC members are not interested in having their decisions scrutinized and power circumscribed by a supra-national parliament. In fact, the Forum has not even managed to establish a formal relationship with the Executive.³⁶⁴

The reasons advanced for the refusal to establish a SADC Parliament include:

- financial and resource (technical, human) constraints arising from the creation of the SADC Parliament and also sustaining the Pan-African Parliament;

³⁶³ International Democracy Watch, "SADC Parliamentary Forum." Available from <http://idw.csfederalismo.it/index.php/sadc-parliament> (accessed 2011-11-16).

³⁶⁴ as above

- unwillingness to cede of a degree of sovereignty by national parliaments and member states before the Parliament is empowered to legislate;
- current configuration of the geopolitical regions of the African Union (AU), which is the basis of organisation for PAP, excludes a significant number of SADC countries; and
- the need to respect national policies in the context of a regional framework.³⁶⁵

Attention in this instance is directed at the second and third reasons for not establishing the Parliament. It is submitted that these reasons simply underline the attitudes of SADC Heads of State and their unwillingness to shed part of their sovereignty for the achievement of broader regional objectives that will benefit all. The United Nations Development Programme has also observed that although most African citizens are aware of the advantages of regional integration, political considerations hamper the process in most parts of the continent.³⁶⁶

Akehurst has observed that many treaties which are subject to ratification are never ratified, simply as a result of the inertia inherent in any large administrative machine; treaties are negotiated in a spirit of popular enthusiasm which soon wanes afterwards, so that there is no pressure for ratification.³⁶⁷ It is submitted that the tool that is required to exert pressure towards ratification and eventually domestication of regional Treaties is a community parliament, however if such a body is denied its

³⁶⁵ Karuuombe, B., *Ibid* note 215, page 18.

³⁶⁶ United Nations Development Programme, "Regional integration and Human development: A Pathway for Africa," page 18. Available from http://www.unesco.org/library/PDF/RegIntegAndHumanDev_Africa_web.pdf (accessed 2011-11-16).

³⁶⁷ Malanczuk, P and Akehurst, *Ibid* note 213, page 126.

legitimacy in the framework by the Summit, then there will be no checks and balances and eventually no pressure.

This challenge is not only prevalent in Southern Africa. *Karuuombe* has argued that the transformation of the Pan-African Parliamentary Forum into a regional 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 instituted without legislative powers, and its assumption of such powers after the first five years is not automatic but will depend on executive assent. Only the East African Legislative Assembly was given limited legislative powers whilst the ECOWAS Parliament has mere consultative and advisory powers. This brings to question the willingness and readiness of the African governments to subject themselves to regional and transnational parliamentary scrutiny and oversight.³⁶⁸

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 Administratie der Belastingen*³⁶⁹ given the following interpretation:

The Community constitutes a new legal order of international law for the benefit of which the states have limited their

³⁶⁸ Karuuombe, "The Role of Parliament in Regional Integration – The Missing Link," pg 17. TRALAC. Accessed 2011-07-30. Available from http://www.tralac.org/cause_data/images/1694/MRI2008Chapter9Karuuombe.pdf.

³⁶⁹ 1963 ECR 1 (Case 26/62).

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.

It is submitted that this position, where community law imposes directly binding obligations upon individuals as well as rights which can be enforced in domestic courts, can only be reached if the SADC Parliamentary Forum is afforded the competence of "direct effect".

The European Union has six exclusive competences. 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 issue decisions in these areas.³⁷⁰

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

³⁷⁰ 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).

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.³⁷¹

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 and more plentiful traffic.³⁷² The absence of a Community Parliament has resulted in the emergence of another politico-legal challenge, absence of enforcing mechanisms.

³⁷¹ United Nations Development Programme, "Regional integration and Human development: A Pathway for Africa," pg 18. Available from http://www.unesco.org/library/PDF/RegIntegAndHumanDev_Africa_web.pdf (accessed 2011-11-16).

³⁷² UNDP, *Ibid* note 371, pg 18-19.

3.5 Summary

This chapter identified the areas with the SADC legal institutional framework that fall short of well established principles of law, democracy and the rule of law. It has also illustrated how the failure of SADC to address these inadequacies in its institutional framework leads to a drawback in the regional integration agenda. In summary, the challenges that have been identified in this chapter can be captured in the following points:

- The SADC institutional framework is weakened by both intrinsic and exogenous factors.
- The pursuit of regional objectives cannot be efficiently embarked upon with the SADC member states seeking refuge behind the notion of state sovereignty while the regional objectives that the member states voluntarily agreed to bind themselves with become nothing but objectives on paper. The continuous disregard for international principles of law, such as *pacta sunt servanda* and *good faith* as contained in the Vienna law of treaties will only result in the defeat of the SADC vision and objectives.
- The lack of commitment by member states to ensure that they are bound by the decisions and resolutions that are taken by themselves in SADC institutions is detrimental to the regional agenda.
- The absence of systems, structures and mechanisms within the regional organisation to ensure that there are areas of regional competence and there

are areas of national competence will not only overburden the organisation in its attempts to monitor and ensure compliance with its principles but will also continue to result in national government legislating or acting in a manner that defeats the principles and objectives of the organisation.

- The inability of the SADC Treaty to ensure that members do not join other regional arrangements that duplicate or compete with SADC is self defeating as the efforts of member states are then spread across the continent and the pursuit of the SADC mandate is diluted by the pursuit of other mandates. Further multiple memberships strain the few resources that Southern African states have, leaving a limited financial pool for the attainment of SADC objectives.
- Southern African states are still battling with ensuring that democracy, the rule of law and human rights are accorded to the people. The SADC Treaty through its lack of a supranational approach, credible Summit and a fully functional Tribunal is failing to ensure that member states translate the principles into action. For as long as this is the status quo, the attainment of these values at regional level also seems futile, bearing in mind that this Chapter has illustrated the relationship between, democracy and development.
- In any governance model, the separation of power is a critical component as it is imperative. The SADC institutional framework cannot disregard these basic constitutional principles if it is to have a functional regional government. The Summit should be limited to an executive role; the SADC Parliamentary Forum

should be granted legitimacy within the SADC Treaty and be allowed to play its role as a legislative-check and balance institution; and the suspension on the Tribunal be lifted thereafter, it should be allowed to develop its jurisprudence without any political interference; its decisions respected.

- The role of the SADC National Committees should be strengthened at national level through the enactment of appropriate legislation at national level. These committees would then bear the responsibility of monitoring the implementation of the numerous SADC Protocols.
- there is an absence of concrete membership requirements to SADC. Members cannot be admitted on their geographical location only. This results in member states not giving regard to their obligations and to ensure that they do not act in a manner that defeats the regional objectives since they will always be SADC members. The lack of these requirements has also resulted in the fact that even a country with the worst human rights state of affairs can be admitted to SADC, adding to the challenges already facing SADC.

Having identified the intrinsic and extrinsic challenges that bottleneck the advancement of SADCs' integration agenda, the next Chapter will draw lessons from practices in the European Union.

CHAPTER 4: THE EUROPEAN UNION INTEGRATION MODEL: DRAWING LESSONS FOR THE ADVANCEMENT OF SADC

4.1 Introduction

The previous chapter highlighted and critiqued the areas of the SADC institutional framework that are not representative of good standards of community governance. It has also elucidated the politico-legal challenges within the SADC arena, including national sovereignty, lack of political will, the absence of a functional Tribunal and how the SADC legal framework falls short of the rule of law as well as not conforming to international best practices. This chapter discusses elements and perspectives from the European Union integration model. It will identify the basic essentials that characterise the EU regional governance framework that the SADC region should consider.

In just half a century of existence, the European Union (EU) has achieved remarkable things. It has delivered peace between its members and prosperity for its citizens. It has created a single European currency (the Euro)³⁷³ 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

³⁷³ It is acknowledged that at the time of compiling this work, the Euro zone was facing a debt crisis and possible recession, however it is submitted that even during this time the Euro was still a very strong currency against African currencies and the effects of the financial challenges were mostly felt in stock markets. The European governments could still afford to provide their people with all the basic services despite these challenges however in Africa, the effects would have been catastrophic.

environmental protection and development aid,³⁷⁴ aid which has found its way into the SADC region and therefore it makes economic and legal sense to understudy such a regional arrangement, to learn how it has become such a global force.

How is it that the EU has managed to navigate through some of the major challenges that are plaguing the SADC region? This chapter will attempt to extract some basic notions that the SADC region can inculcate in its endeavours. It is further submitted that the design of the two regional setups is very similar. The main difference is in the details on how they function internally otherwise they seem to have adopted a similar approach to regional integration. Below is a table illustrating the institutions that play a similar role in each of the regional arrangements.

Figure 11: Table Pegging SADC Institutions to EU Institutions

SADC Institutions	EU Institutions
Summit of Heads of State or Government	European Council
Council of Ministers	Council of the European Union
Standing Committee of Officials, Secretariat and the Integrated Committee of Ministers	European Commission
Tribunal	Court of Justice of the European Union, European Court of Human Rights
SADC National Committees	European Union Agencies
SADC Parliamentary Forum	European Parliament

³⁷⁴ European Commission, 2003. "How the European Union works: A citizen's guide to the EU Institutions." pg 3 Available from http://eeas.europa.eu/delegations/georgia/documents/virtual_library/08_euro_en.pdf (Accessed 2011-10-10).

4.1.2 The Treaty on European Union and the Treaty on the Functioning of the European Union

The two principal treaties upon which the EU is based are the Treaty on European Union³⁷⁵ and the Treaty on the Functioning of the European Union.³⁷⁶ 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;
- 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 Lisbon³⁷⁷ 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.³⁷⁸ These values are common to the member

³⁷⁵ Effective since 1993. Available from

<http://eurlex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2010:083:FULL:EN:PDF>
(Accessed 2011-10-03).

³⁷⁶ Effective since 1958. Available from

<http://eurlex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2010:083:FULL:EN:PDF>
(Accessed 2011-10-03).

³⁷⁷ Available from <http://eur-lex.europa.eu/JOHtml.do?uri=OJ:C:2007:306:SOM:EN:HTML>
(Accessed 2011-10-03).

³⁷⁸ See Article 1 and 2 of The Treaty on European Union.

states in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail.³⁷⁹ 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 movement of persons is ensured in conjunction with appropriate measures with respect to external border controls, asylum, immigration and the prevention and combating of crime.³⁸⁰

In the event that a state wishes to become part of the European Union, such a state has to undergo a series of processes which have now been termed *Europeanisation*. The concept of *Europeanisation* means, by and large, the reform of domestic structures, institutions and policies in order to meet the requirements of the systematic logic, political dynamics and administrative mechanisms of European integration. *Europeanisation* is often depicted as a constant interaction between the national and the European levels as a merger of the top-down and bottom-up perspectives.³⁸¹ It is submitted that this process is solely lacking in the SADC region. The primary premise of SADC membership seems to be geographic location, and as such countries with autocratic governance tendencies are still members of SADC despite the Treaty having "democracy" as one of the principles for the region.

It is further submitted that the commitment by the members of the European Union to transform and adapt the Union to the demands of the society as well as the

³⁷⁹ Article 2, The Treaty on European Union.

³⁸⁰ Article 3, The Treaty on European Union.

³⁸¹ Lucian T. and Diana M., "The Europeanisation Process and the Pre-Accession Dynamics in Romania." 2011. *CES Working Papers* Vol 3 Issue 1. p 65.

obstacles of integration is what enabled the EU to be successful and remain dominant in world politics. However this commitment is lacking in the SADC region. The challenges that have been identified in the previous chapter are evident of the lack of commitment by SADC leaders, for example, it has taken years for Botswana, Zambia and Zimbabwe to begin the construction of a bridge across the Zambezi river in order to facilitate transport and the movement of goods and services, therefore it leaves little confidence that other major challenges will be met with the commitment they require.

4.2 Managing the complexities of national sovereignty

European integration was largely negotiated in inter-governmental fora such as the Council. Ironically, the play of national interest and short and long-term political attitudes about sovereignty resulted in the empowering of European institutions in later years. It is significant that while neo-functionalists see this gradual empowerment of institutions as pointing to loss of national sovereignty, inter-governmentalists view it as a rational and conscious choice of member states through negotiations to solve a collective choice problem. In this case institutions are identified as originating from the conscious, rational intentions of their designers.³⁸²

The EU's success owes a lot to its unique nature and the way it works. The EU is not a federation like the United States, nor is it simply an organisation for co-operation between governments, like the United Nations. The countries that make up the EU

³⁸² Nzweni O., "Africa's Regional Integration: A Reflection on Grand Theory," *Journal of Public Administration*: Special Issue 1, Vol 46 March 2011, page 897.

(its member states) remain independent sovereign states but they pool their sovereignty in order to gain a strength and world influence none of them could have on its own. Pooling sovereignty means, in practice, that the member states delegate some of their decision-making powers to European institutions they have created, so that decisions on specific matters of joint interest can be made democratically at European level.³⁸³

Edward and Lane have observed that Community law is an autonomous legal system drawing inspiration from, but independent of the legal systems of the member states. Community law is an evolving legal order. Its substantive rules, obligations and remedies develop over time and the Court of Justice makes frequent reference to the present state of Community law. However there is a presumption that evolution or progression is in one direction that at any point in time there can be identified a state of the development of the law which embodies essential rights, obligations and remedies which cannot be reversed. The state of the law is referred to as the *aquis communautaire* and is fundamental to the continuous development of the community legal order.³⁸⁴

In the previous chapter, it has already been illustrated how Community law is supreme over national law as indicated in the European Court of Justice case of *NV Algemene Transporten Expeditie Onderneming van Gend en Loos v Nederlandse Administratie der Belastingen*. In another case, *Costa v ENEL* it was argued that the

³⁸³ European Commission, *ibid* note 374.

³⁸⁴ Edward A.O and Lane C.R., **European Community Law**. 2nd Ed. Butterworths. Law Society of Scotland. pg 53.

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:

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.³⁸⁵

The doctrine of international law, *pacta 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.³⁸⁶ 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.³⁸⁷

³⁸⁵ 1964 ECR 585 at 593 and 594.

³⁸⁶ Pg 133-134.

³⁸⁷ (No.2) [1991] HL.

In accordance with the principle of precedence over community law, the relationship between provisions of the Treaty and directly applicable measures of the institutions on the one hand and national law of the member states on the other is such that those provisions and measures that render automatically inapplicable and conflicting provisions of current national law and preclude the valid adoption of new legislative measures to the extent to which they would be incompatible with community provisions. 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.³⁸⁸ Unfortunately, the SADC prospects remain bleak as the Tribunal has been suspended and even if the suspension was to be up-lifted, the Protocol establishing the Tribunal and the SADC Treaty should be re-visited in order to give the Tribunal the requisite authority to enforce community standards.

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

³⁸⁸ *Simmenthal* 1978 ECR 629 AT 643B.

extent of that incompatibility has been well established.³⁸⁹ It is submitted that, in the SADC region, the Tribunal has not been allowed to develop its own jurisprudence and as such the effect of international law norms has not been fully explored.

4.3 The involvement of ordinary citizens in regional integration

It has already been established 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 SADC arena. The SADC integration agenda seems to be known and owned only by the political elites the SADC region. The ordinary citizens are simply not aware of what SADC envisages to achieve and how they can take part in its vision and activities. On the other hand, the Treaty on the European Union provides that:

- The functioning of the Union shall be founded on representative democracy;³⁹⁰
- Citizens are directly represented at Union level in the European Parliament;³⁹¹ and
- Political parties at European level contribute to forming European political awareness and to expressing the will of citizens of the Union.³⁹²

³⁸⁹ 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 & 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.

³⁹⁰ Article 10(1).

³⁹¹ Article 10(2).

³⁹² Article 10(4).

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. 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 by giving 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.³⁹³

In addition to the above, the Treaty on European Union created the post of Ombudsman. The European Parliament appoints the Ombudsman, who remains in office for the duration of the Parliament. The Ombudsman'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 an EU member country. The Ombudsman tries to arrange an amicable settlement between the complainant and the institution or body concerned.³⁹⁴

³⁹³ http://europa.eu/abc/12lessons/lesson_9/index_en.htm (Accessed 2011-10-03).

³⁹⁴ 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*

It is important to also mention that European Union citizens have, amongst others, the following rights:

- 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;³⁹⁵
- the right to petition the European Parliament, to apply to the European Ombudsman, 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.³⁹⁶

Reflecting on the above, 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 manifested yet in the SADC arena. In the SADC region, the Parliamentary Forum is not recognised in the Treaty and the persons who “represent” the ordinary citizens at regional level do so not because they have been mandated or elected by the people but because of the offices that they hold at domestic level, however they do not account to or involve the citizens or other parliamentarians in regional discussions as identified in the previous chapter.

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.

³⁹⁵ Article 20(b) (ex Article 17 TEC).

³⁹⁶ Article 20(d) (ex Article 17 TEC).

4.4 A functional and independent regional judiciary

Page observed that economic growth, good governance, political stability and strong institutions as being the immutable prerequisites for effective regional co-operation.³⁹⁷ It is also submitted that dispute settlement is the “backbone” of a multi lateral trading system since there will always be conflicts as such the pursuit towards a community in both SADC and EU should be coupled by the existence of a strong and efficient judicial system that will address any injustices in the region. SADC has in the past attempted to reach this ideal through the SADC Tribunal but has failed as has been highlighted in the previous chapters. The EU has had a highly efficient judicial system for many years and it is important that we try to understand the principles underpinning this system.

4.4.1 The Court of Justice of the European Union

The Court of Justice of the European Union has its seat in Luxembourg.³⁹⁸ Article 267³⁹⁹ (ex Article 234 TEC) grants the court jurisdiction to give preliminary rulings concerning:

- the interpretation of Treaties; and

³⁹⁷ See Page S., 2001, “Regionalism and Regional Integration in Africa,” ISBN 91-7106-484 2, SEK 100. (Working Paper).

³⁹⁸ Protocol (No 6) On the Location of the Seats of the Institutions and of certain Bodies, Offices, Agencies and Departments of the European Union.

³⁹⁹ The Treaty on the Functioning of the European Union.

- the validity and interpretation of acts of the institutions, bodies, offices or agencies of the Union.

In order to guarantee their independence, Article 4 of the Protocol on the Statute of the Court of Justice of the European Union requires that the Judges not hold any political or administrative office.⁴⁰⁰ When taking up their duties, they should give a solemn undertaking that, both during and after their term of office, they will respect their obligations, in particular the duty to behave with integrity and discretion as regards the acceptance, after they have ceased to hold office, of certain appointments or benefits. Any doubts on this point are settled by decision of the Court of Justice. If a decision concerns a member of the General Court or of a specialised court, the Court decides after consulting the court concerned.

Article 6 of the Protocol provides that a Judge may be deprived of his office or of his right to a pension or other benefits in its stead only if, in the unanimous opinion of the Judges and Advocates-General of the Court of Justice, he/she no longer fulfils the requisite conditions or meets the obligations arising from his/her office. The Judge concerned does not take part in any such deliberations. If the person concerned is a member of the General Court or of a specialised court, the Court decides after consulting the court concerned.⁴⁰¹ This position of independence has not been well addressed in the SADC perspective as after the suspension of the SADC Tribunal,

⁴⁰⁰ Protocol (No 3) on the Statute of the Court Of Justice of the European Union.

⁴⁰¹ The provision further provides that The Registrar of the Court shall communicate the decision of the Court to the President of the European Parliament and to the President of the Commission and shall notify it to the President of the Council. This means that political bodies are merely informed of decisions of Judicial bodies and are not required to participate.

which was in itself an erosion of judicial independence, the judges had to plead for their benefits or compensation from the Summit and Council of Ministers.⁴⁰²

Another impressive element in the EU Treaty is the status afforded to law academics. Article 19 of the Protocol provides that University teachers being nationals of member states whose law accords them a right of audience have the same rights before the Court as are accorded to lawyers. It is submitted that this then allows the Court to really develop and enrich its jurisprudence by not only limiting legal representation to lawyers but extending it to academics. In this instance the Court has a wider participation of intellectuals.

4.4.2 Jurisdiction

The Court of Justice of the European Union has the jurisdiction to review the legality of legislative acts, acts of the Council, of the Commission and of the European Central Bank, other than recommendations and opinions, and acts of the European Parliament and of the European Council intended to produce legal effects *vis-à-vis* third parties. It can also review the legality of acts of bodies, offices or agencies of the Union intended to produce legal effects *vis-à-vis* third parties.⁴⁰³ This entails that the decision of any office, body or personnel representing or acting on behalf of the European Union may be reviewed by the Court. The SADC experience has shown that the regional setup does not allow the decisions of the Summit, in particular the suspension of the Tribunal to be reviewed.

⁴⁰² See SW Radio Africa., "SADC Tribunal judges call for compensation." Available from <http://www.swradioafrica.com/pages/sadctrib240611.htm> (Accessed 2011-07-24).

⁴⁰³ Article 263 (ex Article 230 TEC) The Treaty on the Functioning of the European Union.

The Court of Justice of the European Union further has jurisdiction in actions brought by a Member State, the European Parliament, the Council or the Commission on grounds of lack of competence, infringement of an essential procedural requirement, infringement of the Treaties or of any rule of law relating to their application, or misuse of powers. Any natural or legal person may institute proceedings against an act addressed to that person or which is of direct and individual concern to them, and against a regulatory act which is of direct concern to them.⁴⁰⁴

Article 258 (ex Article 226 TEC) provides that if the Commission considers that a Member State has failed to fulfil an obligation under the Treaty, the Court delivers a reasoned opinion on the matter after giving the State concerned the opportunity to submit its observations. If the State concerned does not comply with the opinion within the period laid down by the Commission, the Commission may bring the matter before the Court of Justice of the European Union. It is submitted that the ability of any European Union body or member state to bring an action against another body or member state then allows for a clear separation of powers to be enforced by the Court in the event a body or member state claims the other acted *ultra vires*.

If the action is well-founded, the Court of Justice of the European Union then declares the act concerned to be void.⁴⁰⁵ Should the European Parliament, the European Council, the Council, the Commission or the European Central Bank, in infringement of the Treaties, fail to act, the member states and the other institutions

⁴⁰⁴ Article 263 (ex Article 230 TEC) The Treaty on the Functioning of the European Union.

⁴⁰⁵ Article 264 (ex Article 231 TEC).

of the Union may bring an action before the Court of Justice of the European Union to have the infringement established.

The action is admissible only if the institution, body, office or agency concerned has first been called upon to act. If, within two months of being so called upon, the institution, body, office or agency concerned has not defined its position, the action may be brought within a further period of two months. The institution whose act has been declared void or whose failure to act has been declared contrary to the Treaties is required to take the necessary measures to comply with the judgment of the Court of Justice of the European Union.⁴⁰⁶

Under Article 259 (ex Article 227 TEC), the Court of Justice may also hear applications where a member state claims that another member state has failed to fulfil an obligation under the Treaty. This enables member states to keep each other in check with regards to the Treaty obligations. The SADC practice has however been limited to diplomatic talks only, and no action thus reinforcing the view that SADC is really a "talking shop" or an "old boys club".

The Court of Justice has the jurisdiction to decide on the legality of an act adopted by the European Council or by the Council pursuant to Article 7 of the Treaty on European Union solely at the request of the Member State concerned by a determination of the European Council or of the Council and in respect solely of the procedural stipulations contained in that Article.⁴⁰⁷

⁴⁰⁶ Article 266 (ex Article 233).

⁴⁰⁷ Article 269.

The Court of Justice has jurisdiction in any dispute between member states which relates to the subject matter of the Treaties if the dispute is submitted to it under a special agreement between the parties.⁴⁰⁸

4.4.3 Enforcement of judicial decisions

The enforcement of international judicial decisions poses great challenges as we have seen with the SADC Tribunal in the previous chapter. There however seem to be clarity from the European perspective on how to manage the sensitive relations between states and international judicial bodies.

Article 299 (ex Article 256 TEC)⁴⁰⁹ provides that the enforcement of the Court's decisions is governed by the rules of civil procedure in force in the State in the territory of which it is carried out. The order for its enforcement is appended to the decision and without any formalities other than verification of the authenticity of the decision, by the national authority which the government of each Member State designates for such a purpose.⁴¹⁰ Once these formalities have been complied with, on the application by the party concerned, the latter may proceed to enforce the judgement in accordance with the national law, by bringing the matter directly before the competent authority.

⁴⁰⁸ Article 273 (ex Article 239 TEC).

⁴⁰⁹ Treaty on the European Union.

⁴¹⁰ Such a body should be made known to the Commission and to the Court of Justice of the European Union.

The Treaty goes further to provide that the enforcement may be suspended only by a decision of the Court, however, the courts of the country concerned have jurisdiction over complaints that enforcement is being carried out in an irregular manner. What this means is that national courts do not have a choice whether to enforce or not to enforce the decision, however they can hear applications pertaining to unbalanced enforcement of the decision by other authorities.

Two types of institutions are involved in the enforcement of the European Court of Justice decisions. On one hand there are institutions that verify the authenticity of the enforcement order, and on the other hand there are institutions which enforce the decision. Though the control of the legality of enforcement measures is of national jurisdiction competence, the suspension, termination or alteration of enforcement, is carried out only on a decision by the European Court of Justice. The institutions that verify the issuing entity vary from state to state: in Austria, for instance, this is the responsibility of the Ministry of External Affairs, while in Germany this is the attribution of the Federal Justice Ministry.⁴¹¹

We should also take note of the impact of the decision of *NV Algemene Transporten Expeditie Onderneming van Gend en Loos v Nederlandse Administratie der Belastingen*⁴¹² has had on the supremacy of community law as already discussed in this and the previous chapter. The supremacy of community law over national law

⁴¹¹ Dinu G and Dinu D., "Enforcement of European Court Decision, European Integration Realities and Perspectives," 2011. Available from

<http://proceedings.univdanubius.ro/index.php/eirp/article/view/722/652> (Accessed 2011-10-03).

⁴¹² 1963 ECR 1 (Case 26/62).

was further affirmed in the case of *Costa v ENEL*,⁴¹³ where the court opined as follows:

by creating a community of unlimited duration, having its own institutions, its own personality, its own legal capacity and capacity of representation on the international plane and, more particularly, real powers stemming from a limitation of sovereignty or a transfer of powers from the states to the community, the member states have limited their sovereign rights, albeit within limited fields, and have thus created a body of law which binds both their nationals and themselves.

and further opined that:

it follows from all these observations that the law stemming from the treaty, an independent source of law, could not, because of its special and original nature, be overridden by domestic legal provisions, however framed, without being deprived of its character as community law and without the legal basis of the community itself being called into question.

It is submitted that these two historical cases squarely placed Treaty or Community law well above domestic legislation giving the decision of the Court of Justice supremacy over national decisions. It is further submitted that this would be the ideal situation in all regional arrangements including SADC. However, it would be impossible to attain the ideal if there is no political will by member states to be cooperative put aside smaller national goals for the attainment of bigger regional objectives which will eventually benefit the whole region.

⁴¹³ 1964 ECR 585 (6/64).

4.4.4 Appointment of judicial officers

The Treaty provides that the Judges and Advocates-General of the Court of Justice are chosen from persons whose independence is beyond doubt and who possess the qualifications required for appointment to the highest judicial offices in their respective countries or who are *jurisconsults* of recognised competence; they are appointed by common accord of the governments of the member states for a term of six years, after consultation of the panel provided for in Article 255 of the Treaty.⁴¹⁴

Article 255 provides for the composition of such a panel in order to give an opinion on the candidates' suitability to perform the duties of Judge and Advocate-General of the Court of Justice and the General Court before the governments of the member states make the appointments referred to in Articles 253 and 254.

The panel comprises seven persons chosen from among former members of the Court of Justice and the General Court, members of national supreme courts and lawyers of recognised competence, one of whom is proposed by the European Parliament. The Council adopts a decision establishing the panel's operating rules and a decision appointing its members. It acts on the initiative of the President of the Court of Justice.

This appointment procedure of Judges as compared to the SADC procedure under the auspices of Article 3(2),⁴¹⁵ Article 4(3),⁴¹⁶ as well as Article 12(3)⁴¹⁷ of the

⁴¹⁴ Article 253 (ex Article 223 TEC).

⁴¹⁵ The Council shall designate five (5) of the Members as regular Members who shall sit regularly on the Tribunal. The additional five (5) Members shall constitute a pool from which the President may

Protocol on the Tribunal and Rules thereof, is more independent of political manipulation and gives a better guarantee of judicial independence since the Council (EU) is only involved in determining the rules for the panel, however all the critical decisions are left to the panel which is composed of judicial officers whose independence has been previously tested.

4.4.5 The European Court of Human Rights

The European Convention for the Protection of Human Rights and Fundamental Freedoms⁴¹⁸ was adopted by the Council of Europe in 1950 to guard fundamental freedoms and basic human rights in Europe. Together with its 11 Additional Protocols, the Convention which entered into force on September 3, 1953, represents the most advanced and successful international experiment in the field to date.⁴¹⁹

The Convention requires state parties to respect and protect human rights and ensure that the rights listed within the Convention are afforded to the people within the different states. The provisions enshrined within the Convention included

invite a Member to sit on the Tribunal whenever a regular Member is temporarily absent or is otherwise unable to carry out his or her functions.

⁴¹⁶ The Members shall be selected by the Council from the list of candidates so nominated by Member States. Nominations for the first appointment shall be called within three (3) months, and the selection shall be held within six (6) months, of the date of entry into force of this Protocol.

⁴¹⁷ The terms and conditions of service, salaries and benefits of the Registrar and other staff shall be determined by the Council on the recommendation of the Tribunal.

⁴¹⁸ Rome, 4.XI.1950.

⁴¹⁹ Encyclopaedia Britannica. 2011. "European Convention on Human Rights (ECHR)." Encyclopaedia Britannica Student and Home Edition. Chicago.

amongst others and not limited to the right to life; the prohibition of torture; the prohibition of slavery and forced labour; the right to liberty and security; the right to a fair trial; the prohibition of punishment without law; the right to respect for private and family life; freedom of thought, conscience and religion; freedom of expression; freedom of assembly and association; the right to marry; the right to an effective remedy; and the prohibition of discrimination.⁴²⁰ Cases are only admissible after local remedies have been exhausted.⁴²¹ The Court has observed that the purpose of Article 35 is to afford the Contracting States the opportunity of preventing or putting right the violations alleged against them before those allegations are submitted to the Convention institutions.⁴²²

The Court has however emphasised that the application of this rule must make due allowance for the context. Accordingly, it has recognised that Article 35 must be applied with some degree of flexibility and without excessive formalism. It has further recognised that the rule of exhaustion of domestic remedies is neither absolute nor capable of being applied automatically; in reviewing whether the rule has been observed, it is essential to have regard to the particular circumstances of the individual case.⁴²³

⁴²⁰ Article 1-14 ECHR.

⁴²¹ Article 35 (1) The Court may only deal with the matter after all domestic remedies have been exhausted, according to the generally recognised rules of international law, and within a period of six months from the date on which the final decision was taken.

⁴²² See for example, the *Hentrich v. France* judgment of 22 September 1994, Series A no. 296-A, p., and the *Remli v. France* judgment of 23 April 1996, Reports 1996-II, p. 571 & 33).

⁴²³ See *Selmouni v. France* (2000) 29 EHRR 403 at para 77.

Article 19 of the Convention provides that in order to ensure the observance of the engagements undertaken therein, there be set up a European Court of Human Rights. The Courts' jurisdiction extends to all matters concerning the interpretation and application of the Convention and the Protocols thereto which are referred to it.⁴²⁴ It is submitted that under Article 33,⁴²⁵ a state may bring another state before the court for an alleged breach of the Convention. Also under Article 34⁴²⁶ the Court may receive applications from individuals or NGO's against the state over an alleged breach of the convention. This allows for checks and balances within the whole region since individuals who believe their human rights have been violated and who are unable to obtain a remedy through their national legal system may petition the Court to hear the case and render a verdict. The Court, which also can hear cases brought by states, may award financial compensation, and its decisions often require changes in national law.⁴²⁷

4.4.6 Enforcement of judgements

Unlike the SADC position, the signatories to the Convention undertake to abide by the final judgment of the Court in any case to which they are parties.⁴²⁸ This reduces the confusion between international law and municipal law, since from the onset, a

⁴²⁴ Article 32.

⁴²⁵ Any High Contracting Party may refer to the Court any alleged breach of the provisions of the Convention and the Protocols thereto by another High Contracting Party.

⁴²⁶ The Court may receive applications from any person, non-governmental organisation or group of individuals claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in the Convention or the Protocols thereto. The High Contracting Parties undertake not to hinder in any way the effective exercise of this right.

⁴²⁷ Encyclopaedia Britannica, *Ibid* note 419.

⁴²⁸ Article 46 (1).

member state would be aware that such a judgment would have to be enforced at domestic level. The final judgment of the Court is transmitted to the Committee of Ministers, which supervises its execution,⁴²⁹ something missing in the SADC framework.

In the event that the Committee of Ministers considers that the supervision of the execution of a final judgment is hindered by a problem of interpretation of the judgment, it may refer the matter to the Court for a ruling on the question of interpretation.⁴³⁰ If the Committee of Ministers considers that a High Contracting Party refuses to abide by a final judgment in a case to which it is a party, it may, after serving formal notice on that State party and by decision adopted by a majority vote of two-thirds of the representatives entitled to sit on the Committee, refer to the Court the question whether that party has failed to fulfil its obligation.⁴³¹ It is submitted that this position indicates that all matters that require any form of judicial interpretation are left to the Court. There is very little room for political interest since all questions of Treaty obligations are handled by the Court.

4.5 A Regional Parliamentary Institution

The previous Chapters have revealed how the role of the SADC Parliamentary Forum has been suffocated and systematically excluded for the integration process. The importance of having a fully functional regional parliament cannot be over-emphasised any further. *Breytenbach* has observed that the secret of democratic

⁴²⁹ Article 46 (2).

⁴³⁰ Article 46 (3).

⁴³¹ Article 46 (4).

durability seems to lie in economic development... under democracy with parliamentary institutions,⁴³² therefore the question that beckons is what role should a Parliament play in a regional set up?

4.5.1 The European Parliament

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.⁴³³

The Treaty provides that the European Parliament has its seat in Strasbourg, France, where the 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.⁴³⁴

To begin with, 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

⁴³² Breytenbach, W., *op-cit* note 289, page 90.

⁴³³ 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).

⁴³⁴ Protocol (No 6) On the Location of the Seats of the Institutions and of certain Bodies, Offices, Agencies and Departments of the European Union.

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,⁴³⁵
- 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 Union⁴³⁶ policies in the area of area of freedom, security and justice;⁴³⁷
- national parliaments take part in the revision procedures of the Treaties,⁴³⁸ and
- national parliaments are notified of applications for accession to the Union⁴³⁹

In addition, the Union has a separate protocol that outlines the role of national parliaments in the European Union.⁴⁴⁰ 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.⁴⁴¹ It is submitted

⁴³⁵ Article 12 (a).

⁴³⁶ Article 12 (b).

⁴³⁷ Article 12 (c).

⁴³⁸ Article 12 (d).

⁴³⁹ Article 12 (e).

⁴⁴⁰ Protocol (No 1) on The Role of National Parliaments in The European Union.

⁴⁴¹ Article 10, Treaty on European Union.

that these measures to ensure that national parliaments as well as the regional parliaments are not captured well within the SADC Treaty.

The European Parliament exercises legislative and budgetary functions as well as functions of political control and consultation.⁴⁴² These legislative and budgetary functions are carried out together with the Council,⁴⁴³ thereby restricting the decision making powers of the Council unlike in the SADC 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 within the Union. It is submitted that the opposite is reflected in the SADC region. The SADC Parliamentary Forum is not directly recognised within the Treaty and the Summit, Council of Ministers, Integrated Committee of Ministers and Standing Committee of Officials cannot be held accountable by the Parliament

The Parliament plays another very important role in the European Union. It curtails the abuse of power by the Council. Unlike in the SADC position where the Summit can initiate and monopolise the process of promulgating new protocols or legislation, the EU arrangements grants the Parliament plenty of oversight and monitoring powers in this regard.

⁴⁴² Article 14.

⁴⁴³ Article 16 (1).

There are three main procedures for enacting new EU laws:

- consultation;
- assent; and
- 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.

4.5.2 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.

4.5.3 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.

4.5.4 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.⁴⁴⁴

4.6 Monitoring the EU integration agenda

The previous Chapters highlighted that in the SADC region, the principal document upon which the logical implementation of the integration programme as well as the sectoral linkages are outlined is the Regional Indicative Strategic Development Programme. It has also been established that the SADC National Committees are supposed to play monitoring and oversight role to the implementation of these programmes at national level through co-ordinating national consensus to regional initiatives.

However the challenge in SADC is that these bodies are rendered ineffective by budgetary constraints, insufficient human capital base, as well as lack recognition within the states in which they are supposed to operate.

The European experience instructs that national level arrangements such as inter ministerial coordination committees or consultation mechanisms or consultation mechanisms with chambers of commerce, trade unions and pressure groups are essential for effective participation in regional initiatives.⁴⁴⁵

⁴⁴⁴ European Commission, *Ibid* note 374.

⁴⁴⁵ Olowu, D., *op-cit* note 11, page 231-232.

The EU Parliament is the primary legislative body that plays a critical role of democratic supervision. Parliament exercises democratic supervision over the other European institutions. It does so in several ways.

First, when a new Commission is to be appointed, Parliament interviews all the prospective new members as well as the President of the Commission (nominated by the member states). They cannot be appointed without Parliament's approval.

Second, the Commission is politically answerable to Parliament, which can pass a 'motion of censure' calling for its mass resignation. More generally, Parliament exercises control by regularly examining reports sent to it by the Commission (general report, reports on the implementation of the budget, the application of Community law, etc.). Moreover, MEPs regularly ask the Commission written and oral questions. The members of the Commission attend plenary sessions of Parliament and meetings of the parliamentary committees, maintaining a continual dialogue between the two institutions. Parliament also monitors the work of the Council: MEPs regularly ask the Council written and oral questions, and the President of the Council attends the plenary sessions and takes part in important debates. Parliament can also exercise democratic control by examining petitions from citizens and setting up temporary committees of inquiry.⁴⁴⁶

In addition to a Parliament and a Commission that can hold the European Council accountable, the European Union has fully fledged agencies that monitor the integration agenda and objectives of the Union very closely. Policy agencies are

⁴⁴⁶ European Commission, *Ibid* note 374.

bodies governed by European public law; they are distinct from the EU Institutions (Council, Parliament, Commission, etc.) and have their own legal personality. They are set up by an act of secondary legislation in order to accomplish a very specific technical, scientific or managerial task. At present, these agencies are:

- Agency for the Cooperation of Energy Regulators (at planning stage) (ACER)
- Community Fisheries Control Agency (CFCA)
- Community Plant Variety Office (CPVO)
- European Agency for Safety and Health at Work (EU-OSHA)
- European Agency for the Management of Operational Cooperation at the External Borders (FRONTEX)
- European Asylum Support Office (at planning stage) (EASO)
- European Aviation Safety Agency (EASA)
- European Centre for Disease Prevention and Control (ECDC)
- European Centre for the Development of Vocational Training (Cedefop)
- European Chemicals Agency (ECHA)
- European Environment Agency (EEA)
- European Food Safety Authority (EFSA)
- European Foundation for the Improvement of Living and Working Conditions (EUROFOUND)
- European GNSS Agency (GSA)
- European Institute for Gender Equality (EIGE)
- European Maritime Safety Agency (EMSA)
- European Medicines Agency (EMA)
- European Monitoring Centre for Drugs and Drug Addiction (EMCDDA)

- European Network and Information Security Agency (ENISA)
- European Railway Agency – promoting safe and compatible rail systems (ERA)
- European Training Foundation (ETF)
- European Union Agency for Fundamental Rights (FRA)
- Office for Harmonisation in the Internal Market (Trade Marks and Designs) (OHIM)
- Translation Centre for the Bodies of the European Union (CdT)

It is submitted that, the fact that the agencies have their own legal personality and are governed by rules of public law, they are more effective since they necessarily do not have to depend on the EU for the execution of their monitoring and execution functions.

It is further submitted that in the SADC region, we have SADC National Committees which have to grapple with a multitude of issues and as such there is no specialisation, however in the European perspective, tasks a particular agency with a specific, technical, scientific or managerial task making them more efficient.

4.7 Summary

The previous Chapter explained the challenges plaguing the SADC integration efforts. Further adding to the struggling performance in SADC, this chapter discussed the functioning of the European Union and the similarities in the

institutional setup. It has shown how much commitment, effort and time it has taken the European Union to change from a simple establishment to the Union that it is today.

The Chapter has illustrated how pooling national sovereignty together to give more power to a regional arrangement has benefited the Union, giving it supra-national powers thus allowing it drive forward the integration agenda more effectively. Despite having a supra-national order, the EU has still managed to involve the ordinary citizens in the integration efforts and programmes of the region through an active and inclusive European Parliament. The Parliament is not only a place for dialogue but an institution that holds other institutions of the Union accountable.

A lot of work has also been achieved through the efforts of the Court of Justice of the European Union as well as the European Court of Human Rights. These judicial institutions are independent and have the jurisdiction to hear not only cases against member states but also complaints against the institutions of the Union. Citizens can also bring cases against member states and EU institutions. The uninterrupted functioning of these judicial bodies has allowed them to develop a rich jurisprudence and as such the human rights and governance record of the region is well above that of SADC.

Having explained the intrinsic and exogenous challenges facing SADC in the previous chapter, culminating to the discussion of the European Union *vis-à-vis* SADC in this Chapter, the next Chapter will recommend what the SADC should envisage to be.

CHAPTER 5 CONCLUSIONS AND RECOMMENDATIONS

5.1 Introduction

This chapter presents a summary and conclusions of the study. It also presents the recommendations that may better improve the institutional framework of SADC.

This work sought to unearth the stumbling blocks in the SADC juridical framework that are detrimental to the advancement of the SADC integration initiatives as well as the attainment of the SADC common agenda and propose solutions thereto. It focused on areas within the SADC legal framework that fall short of the well established principles of international law.

5.2 Summary of the Study

Chapter one of this work was the introductory chapter. In addition to outlining the problem statement and objectives of this study, it gave an overview of African integration efforts beginning from the OAU to the now AU as well as of the history behind Southern African regional integration efforts. It discussed the theories of regional integration and drew a distinction between integration and co-operation. The work also brought into perspective the causal link between the imperatives of regional integration, democracy and development.

The second chapter of the study discussed the composition and functioning of SADC. The chapter outlined the objectives of SADC as a whole and also indicated the principles of international law that are applicable to SADC as an inter-governmental regional organisation. It brought to light the Strategic Development Plan and the Mutual Defence Pact highlighting the SADC campaign through focus areas towards the integration mission. The Chapter went further to explicate the reporting and functional lines within SADC in order to foster an understanding of the internal atmosphere of SADC as well as the supporting Protocols, Charters and Memoranda of Understanding.

Chapter three of the work identified challenges within the SADC institutional framework that fell short of good standards of Community law. It classified the challenges into two categories: exogenous and intrinsic challenges.

The exogenous challenges were identified as those that were not directly linked to the institutional framework but impact negatively on the regional body's ability to carry out its objectives. They result out of omissions by the SADC institutional framework. The following exogenous challenges were discussed:

- an inflated understanding and abuse of the notion of state sovereignty;
- grey areas between national and regional competence;
- multiple memberships to customs unions;
- the general deficiency of democracy, rule of law and human rights within member states;
- lack of ownership of the integration programme; and

- an absence of credible leadership within the SADC region.

Intrinsic challenges were identified as those that emerged directly from the within the institutional framework of SADC. They emanated from the decisions of SADC or from the legal texts of SADC. The following intrinsic challenges were discussed:

- the absence of separation of powers within the SADC institutional structure;
- the absence of the rule of law;
- lack of efficient monitoring and enforcement mechanisms;
- vague membership requirements; and
- the absence of a functional community parliament.

The main findings of this study may be summarised as follows:

- the pursuit of regional objectives cannot be efficiently embarked upon with the SADC member states seeking refuge behind the notion of state sovereignty while the regional objectives that the member states voluntarily agreed to bind themselves become nothing but objectives on paper. The continuous disregard of principles of international law, such as *pacta sunt servanda* and *good faith* as contained in the Vienna Convention on the Law of Treaties, 1969 will only result in the non-realisation of the SADC vision and objectives;
- the lack of commitment by member states to ensure that they are bound by the decisions and resolutions that are taken by themselves in SADC institutions is detrimental to the regional agenda;

- the absence of systems, structures and mechanisms within the regional architecture to ensure that there are areas of regional competence and there are areas of national competence will not only over-burden the organisation in its attempts to monitor and ensure compliance with its organic principles but will also continue to result in national government legislating or acting in a manner that defeats the principles and objectives of the organisation;
- the fact that the SADC Treaty does not prioritize members from joining other regional arrangements that duplicate or compete with SADC is self defeating as the efforts of member states are then spread across the continent and the pursuit of the SADC mandate is diluted by the pursuit of other mandates. Further multiple memberships strain the few resources that Southern African states have, leaving a limited financial pool for the attainment of SADC objectives;
- Southern African states are still battling with ensuring that democracy, the rule of law and human rights are accorded to the people. The SADC Treaty through its lack of a supra-national approach, credible Summit and a fully functional Tribunal is failing to ensure that member states translate the principles into action. For as long as this is the status quo, the attainment of these values at regional level also seems futile, bearing in mind that this study had illustrated the relationship between, democracy and development;

- in any governance model, the separation of powers is a critical component as it is imperative to the avoidance of the corrosive effect of power. The SADC institutional framework cannot disregard these basic constitutional principles if it is to have a functional regional government. The Summit should be limited to an executive role; the SADC Parliamentary Forum should be elevated to a regional parliament and be allowed to play its role as a legislative-check and balance institution; and the suspension on the Tribunal be uplifted, thereafter, it should be allowed to develop its jurisprudence without any political interference; its decisions should be respected and complied with in the territories of member-states;
- the role of the SADC National Committees should be strengthened at national level through the enactment of appropriate legislation. These committees would then bear the responsibility of monitoring the implementation of the numerous SADC protocols in their member states; and
- there is an absence of concrete SADC membership requirements. Members cannot be admitted on their geographical location only. This results in member states not giving regard to their obligations and to ensure that they do not act in a manner that defeats the regional objectives since they will always be SADC members. The lack of these requirements has also resulted in the fact that even a country with the worst human rights record can be admitted to SADC, adding to the challenges already facing SADC.

Chapter four of the work discussed the institutional framework of the European Union, pegging it against the SADC integration model. It extracted the main characteristics that permit the EU to overcome the challenges that plague the SADC model. It illustrated the functions that the EU institutions perform as well as the decision-making processes with the EU that SADC may adopt in order to solve the challenges it is currently facing. This Chapter laid the foundation for the last Chapter, which highlights the recommendations of the work.

5.3 Conclusion

It is submitted that, with reflection to the observations and literature that this work has canvassed, the SADC institutional framework has inherent weaknesses that trump the regional organisation in driving the integration agenda effectively. The weaknesses with the institutional framework allow member states to disregard regional decisions in favour of their national interests. Monitoring and enforcement mechanisms are also lacking resulting in uninformed decision making processes.

The politico-legal environment of SADC has not fostered a proper understanding of national sovereignty. The observations recorded in chapter 3 are indicative of the fact that despite entering into Treaties and other international agreements, member states do not appreciate that these agreements are binding and have to be given the effect of national law within their territories. There is further total disregard for the decisions of the now suspended SADC Tribunal, a move that further affirms that the region does not respect the fundamentals of international law.

The SADC region is also experiencing an overlap of mandates between the member states and the regional organisation. The regional organisation has promulgated a multiplicity of Protocols to regulate areas of Tourism, Trade, Transport and Communications as well as Good governance. However instead of these Protocols informing the spirit of national legislation and decisions, there seems to be no connection between the two governance levels.

The values and principles espoused in the SADC Treaty and other supporting documents are not reflected at domestic level. In a nutshell there is no complementarity. This is illustrated by the lack of uniform observance and respect for human rights, the rule of law and democracy in the region. The lack of these values has already been canvassed to show that development will be severely hampered unless the values are entrenched within the region.

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 the absence of credible leadership within the region as well as political will. The work has further indicated the need for a firm and functional parliamentary forum to curb such characteristics if the integration project is to succeed.

5.4 Recommendations

In order for the Southern African region and in particular SADC, to reposition itself in an attempt to harness the benefits of regional integration, the following is recommended with regards to the SADC institutional framework:

- the powers vested upon the SADC Summit grant it undesirable dominance in decision-making, for instance, the power to determine sanctions, the power to elect the Chair and Deputy Chairperson of SADC as well as that of the Organ on Politics and Defence Co-operation including the Executive Secretary and Deputy Executive Secretary of SADC and the responsibility for overall policy direction of SADC. The previous chapters have illustrated how this blurs and dilutes the principle of separation of powers. It is therefore recommended that the Treaty be re-looked at with a view to reconfiguring the Summit's role bearing in mind the above;
- article 28(2) of the SADC Treaty, granting the Summit the power to determine financial pledges is a role that would be better executed by the SADC Secretariat since this is the main liaison body within SADC that deals with the day to day functions of SADC and would therefore be in a better position to determine how much is needed to fuel the activities of the organisation. This would also eliminate the budgetary challenges highlighted in the Chapter 3;

- it is a well established principle that any community or prospective community requires a dispute settlement body. It is recommended that the suspension of the SADC Tribunal be uplifted;
- it has been observed in Chapter 3 that the suspension of the Tribunal and the subsequent pleading for remuneration by members of the SADC Tribunal was an indication of the lack of institutional independence of the Tribunal within SADC. It is submitted that the Council of Ministers or the Summit should not have the powers to suspend the Tribunal or infringe upon the security of tenures of the judges. It is therefore recommended that the SADC Treaty and the Protocol on the Tribunal reflect values of institutional autonomy and judicial independence;
- the concept of judicial independence has been discussed in Chapter 3. It is submitted that the SADC Treaty as well as the Protocol on the Tribunal be recalibrated to reflect the values of judicial independence. The appointment of judicial officers should not be the responsibility of the Council of Ministers but rather be left to the Judicial body itself, an approach similar to that of the European Court as indicated in Chapter 4. The practice in the EU is that a panel composed of members of the judiciary pronounce on the suitability of candidates nominated by governments. The SADC practice, however, does not include the Tribunal at any of the stages of appointment;
- it is recommended that the SADC Parliamentary Forum should be given legitimacy and recognition within the SADC processes. These roles should be

entrenched within the SADC Treaty thereby ensuring that the parliamentary body is not sidelined in the future;

- the SADC Parliamentary Forum should be main legislative body within SADC, with the ability to enact new legislation and suggest changes to the current legislative framework. It should also have the ability to reject proposals from the Summit and hold the Summit accountable;
- the SADC Parliamentary Forum should have the ability to play an oversight role, that is, ensure that member states and SADC institutions play their roles and execute their obligations in accordance with SADC Treaties and protocols. In the event the SADC PF observes otherwise, these observations will be communicated to the Tribunal for judicial determination and sanctions or recommendation as determined by the Tribunal have to be followed. This will also aid in eliminating the inertia and lack of political will since there will be a regional body overseeing the follow-through of decision makers;
- the framework of SADC should allow the Forum to interact with national parliaments and ensure that they effect legislative and constitutional reforms as agreed upon at the regional level. In the event the observations of the SADC Parliamentary Forum are such that a member state is slow or unwilling to reform, the case should be submitted to the Tribunal for judicial determination. In addition the Treaty should delineate between areas of national competence and areas of regional competence in order to eliminate

competitive decision-making and ensure that decisions at national level do not defeat the interests of the region;

- the SADC Treaty should, as a matter of principle, take a stronger stance against multiple memberships within the region. Chapter 3 of this work has illustrated how the issue of multiple memberships negatively affects the liberalisation of trade in the regional bloc. It has also indicated how the region becomes fragmented in trade negotiations as a result of the multiple memberships and as such it is recommended that SADC seriously consider cleansing its member states of competing memberships. If SADC is to progress effectively in the area of trade, it is imperative that multiple memberships within the region be eliminated;
- this study work has established a link between democracy and development. It is recommended that in order to achieve an appreciable measure of democracy, the SADC region should adopt a strong human rights instrument that is based on the common human rights values of the member states; and
- the SADC membership requirements should be reconsidered. It would have been desirable that prior to admission to the regional bloc, the applicant be made to go through a similar process to that of the *Copenhagen criteria* as indicated in Chapter 3, however it is now recommended that SADC promulgate a criteria that will apply in retrospect since members have already been admitted to membership.

5.5 Future Research Agenda

In conducting this work, it has become evident that integration cannot be realized successfully unless some institution is vested with a measure of supra-nationality over the member states. There has not been much research done in the areas of supra-nationality in the African context and therefore it would be worthwhile to explore this field.

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