

TOWARDS A SUPRANATIONAL ORDER FOR SOUTHERN AFRICA

A Discussion of the Key Institutions of the Southern African
Development Community (SADC)



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Dedications

This work is dedicated to the people of Southern Africa.

Acronyms

AFRICOM	United States Africa Command
AEC	Africa Economic Community
ASEAN	Association of South East Asian Nations
AU	African Union
COMESA	Common Market for Eastern and Southern Africa
DRC	Democratic Republic of Congo
ECOWAS	Economic Community of West African States
EU	European Union
FLS	Frontline States
ICC	International Criminal Court
ICJ	International Court of Justice
ICM	Integrated Committee of Ministers
ISDSC	Interstate Defence and Security Committee
ISPDC	Interstate Politics and Diplomatic Committee
MC	Ministerial Committee
MOU	Memorandum of Understanding
OPDSC	Organ on Politics, Defence and Security Co-operation
REC	Regional Economic Community
SACCAR	Southern African Centre for Co-operation in Agricultural Research
SADC	Southern African Development Community
SADCBRIG	Southern African Community Brigade
SADCC	Southern African Development Co-ordination Conference

SADC PF	Southern Africa Development Community Parliamentary Forum
SATCC	Southern Africa Transport and Communications Centre
SCO	Standing Committee of Officials
SNC	SADC National Committee
UN	United Nations

CHAPTER ONE

1 Introduction

1.1 The Southern African Development Community (SADC) is a regional community formally established in 1980 currently comprising of fifteen Southern African states.¹ It has its genesis in the anticolonial movement which pervaded the region and the rest of Africa from the late 1960s which culminated in the attainment of majority rule in South Africa in 1994. The establishment of SADC was by no small means a monumental development given that Southern Africa is a region of diverse ethnic, political and economic configuration with an estimated population of 244 million people. Such tentative steps towards transnational regional co-operation is remarkable given that the people of the region were emerging from more than a century of oppression, brutalisation, displacement, a people whose civilisation was battered and bastardised and denied the basic tenets of humanity. Despite the diversity and the seemingly insurmountable odds averred to, the region has managed to reach a milestone which only a few regions of the world have managed to accomplish; to fashion and cobble a closely knit regional entity where co-operation and consensus decision-making is the norm with full and equal participation of all the member states.²

SADC was created to pursue quixotic goals which have two interlinked and intertwined strands; the promotion of economic growth and socio-economic development aimed at eventually eradicating poverty, and the promotion and maintenance of peace, security and

¹ SADC member states are Angola, Botswana, Democratic Republic of Congo, Lesotho, Madagascar, Malawi, Mauritius, Mozambique, Namibia, Seychelles, South Africa, Swaziland, Tanzania, Zambia and Zimbabwe

² Similar regional groupings include the European Union (EU) Economic Community of West African States (ECOWAS).

democracy through regional co-operation and integration³. The birth and development of SADC underwent through different and often disparate phases. The first phase was from the mid 1970s to 1980 where the organisation existed as an informal club of majority-ruled southern African states whose main thrust and was to mobilise and co-ordinate military resources and political support towards states of Southern Africa who were still under minority white rule. The period from 1980 onwards marked a shift in the direction of the organisation whose inclination was now on economic development and co-ordination as a counterpart to the political and military struggles. This was viewed as a prelude to a total economic and political emancipation of the region thereby creating a self sustaining and endogenous entity. Conspicuous at that juncture was some modicum of institutionalisation starting to be visible though fashioned in the most rudimentary form. The period from 1992 onwards has witnessed the establishment of a fully-fledged regional community order with a relatively well established legal and institutional framework.

Regional integration has been in vogue since the end of the Second World War hence it is not a phenomenon confined to Southern Africa only. It is a global trend and its manifestation in Southern Africa is only an indication that no region can possibly avoid its influence.⁴ Perhaps this is a timely realisation that the modern world has become intertwined and interrelated hence a gradual repudiation of preoccupation with statal politics with their emphasis on state sovereignty and absolutism on issues conceived to be within their exclusive jurisdiction. This is not to disregard and disdain the role of the state as the states' bureaucracies have always been the driving force behind any integration endeavour as evidenced by the EU's integration project. SADC's glide towards regional integration is a just a microcosm of the global-wise integration movement for which the EU project with its seemingly unstoppable slither towards a total economic and political union of Europe provides more than just a precedent in regional integration. Similar trends

³ Oosthuizen (2006) p.39

⁴ Mvungi E.A. Sengondo. Towards the Law of Southern African Development Community (SADC). In: Yearbook of African Law. Vol.7(1993) p.89-102

elsewhere include the Association of South East Asian Nations (ASEAN)⁵, the Southern Cone Common Market⁶. Integration initiatives elsewhere in Africa will be discussed below.

This thesis will therefore attempt to trace the genesis and development of the integration project in Southern Africa as epitomised by SADC. This will entail an analysis of the aims and objectives of SADC, its institutional and legal structure as well as its position with regards to the larger integration initiatives taking place in Africa. This work will further attempt to show how the SADC integration project is fundamentally altering the economic, social and political landscape in Southern Africa by arguing that Southern Africa is mutating towards a supranational order with a constitutional base. The challenges to the integration project will be critically examined and the apposite recommendations proffered.

1.1 Research Questions

The SADC integration project raises considerable constitutional and legal questions which would be the focus of research in this thesis. This research intends to answer the following questions:

1.1.1 What are the aims and objectives of the SADC integration project?

⁵ Comprises a membership of 10 states and its objectives include, inter alia, spurring economic growth, social progress and promotion of regional peace and stability in the region.

⁶ Commonly referred to as the Mercosur project- a regional intergration initiative in E.South America established in 1991 whose objectives include, inter alia, to increase economic co-operation among the countries of the region.

- 1.1.2 What is SADC's institutional set-up and the legal framework underpinning such institutions? What are the competencies of the institutions?
- 1.1.3 What are the challenges facing the relationship between SADC institutions and national institutions of member states institutions?

1.2 Objectives of the Study

The main objective of the study is to carry out a concerted analysis of the main institutions of the SADC with a view to discerning their powers and competencies. In that regard, an investigation will be made on the competencies of SADC institutions and the competencies of national institutions with a view to expose any possible areas of co-operation and conflict between the former and latter. The main thrust in the analysis of the above will be to interrogate the legal and constitutional implications of the SADC integration project. Such an investigation is very important in assessing the suitability of the institutional architecture in its mammoth integration project- in that regard any weaknesses that may be identified will receive the necessary attention to enable the necessary reform and retooling of such to be carried out. An analysis will further be carried out to highlight the position and significance of SADC as a regional building block in a larger African integration project and this will entail an analysis of the relationship between SADC and the African Union (AU).

1.3 Methodology and Sources

This study will adopt a historical approach. It is the most appropriate so as to give an overview of SADC and the development that has taken place from its inception to date.

Legal sources such as relevant SADC treaties and the various protocols made thereunder, textbooks, specialist and general journals will be reviewed. Newspaper articles and appropriate websites will be resorted to as well. Recourse will be had to relevant legal

literature on the EU integration project where necessary. In interpreting the various materials recourse will be had to the Vienna Convention On the Law of Treaties 1969 as well as article 103 of the United Nations Charter.

1.4 Delimitation of the Thesis

1.4.1 Delimitation

This study will limit itself to the a discussion of the key institutions of SADC established under the main SADC treaty as the scope of this work will not allow for an extended discussion of all the SADC bodies established under the various protocols. The discussion will further be curtailed to a legal and constitutional analysis of such bodies *vis a vis* the integration project hence aspects of a purely economic or commercial nature will only be referred to where expedient to advance a particular argument but that would be more of an exception than the norm. Reference will be made to some of the institutions of the EU by way of a comparative analysis but given the limited scope of this thesis, such reference will be more at a superficial level as it is not the intention of the author to carry out a comprehensive comparative analysis between the SADC and the EU.

1.4.2 Structure

Chapter one will be an introduction to this work, the research objectives, an identification of sources and the methodological approach to be utilised by the author as well as delimitation and an outline of the thesis structure. *Chapter two* will mainly deal with a historical background of SADC, its genesis and development over the years. *Chapter three* will undertake an analysis of the key institutions of SADC their powers and competencies. *Chapter four* will examine the legal and constitutional implications of the SADC integration project. *Chapter five* will focus on the relationship between SADC and the AU as well as a discussion of other integration projects elsewhere in Africa. *Chapter six* provides a conclusion to this study and makes some recommendations.

CHAPTER TWO

2. The Historical Development of SADC

The 1960s to the 1970s was a turning point for much of Africa as it marked the turning point in the various struggles for self determination of the people of Africa against the yoke of colonialism, apartheid and minority oppression. International solidarity, unity and a sense of a shared destiny started to pervade the whole of Africa which culminated in the launching of the Organisation on African Unity (the 'OAU')⁷ which was to become the forum for the mobilisation of military, political and diplomatic endeavours to untangle Africa from the shackles of political oppression. Such is captured in the timeless words of one of the founding fathers of African Renaissance, Kwameh Nkrumah who opined that '*Seek ye first the political kingdom and all other things shall be added unto you*'⁸. It is in this anti-colonial march for Africa's liberation that saw the birth of SADC. This chapter will endeavour to trace the historical origins of SADC as informal club devoid of any legal standing. It will be shown how the regional bureaucrats developed and institutionalised SADC into a fully a fully-fledged supranational order with a sound legal basis.

2.1 From Frontline States to the Lusaka Declaration

The aggressive response by the colonial and white settler regimes in Mozambique, Zimbabwe, Angola, Namibia and South Africa to the de-colonisation process led to long wars of liberation led by the liberation movements in these territories⁹. The majority ruled states in Southern Africa became a target for attacks particularly emanating from apartheid South Africa because of the former's support of liberation movements in the region. These

⁷ Organisation of African Unity established on 25th May 1963.

⁸ The Statesman(2007) p 15

⁹ Mvungi (1993) p.89

majority ruled states, led by their respective presidents founded the Frontline States (‘the FLS’), an informal political club with two main objectives, namely collective self defence for the majority-ruled states and secondly, coordination of military, political and diplomatic support for Southern Africa’s liberation movements.¹⁰ The turning point came when Portugal relinquished its two colonies in the region, in 1975, with Zimbabwe attaining its independence on 18th April 1980 leaving the apartheid regime, which had, for all intents and purposes, become *hostis human generis*, with apartheid ideology firmly entrenched in South Africa and its tentacles spread to Namibia in wilful defiance of the international community.¹¹

The FLS remained an informal political club with no legal standing nor institutionalisation of any sort. Leaders of the majority-led states and the leaders of the liberation movements met on *ad hoc* basis to strategise on the military, political and diplomatic support to be rendered to those countries in the region still languishing under the yoke of colonial domination. The main achievement was the independence of Zimbabwe¹² which left South Africa the only stumbling block towards the complete political liberation of Southern Africa.

2.2 The Lusaka Declaration

There was a realisation within the region that the positive experiences gained in working together in the FLS to advance the political emancipation of Southern Africa, had to be

¹⁰ The founders were the national leaders of Tanzania(Julius Nyerere), Zambia (Kenneth Kaunda), and Botswana) Seretse Khama –see Oosthuizen (2006) p53

¹¹ The United Nations responded by passing GA Res.1761/1962 which condemned apartheid as a threat to international peace and security, SC Res.181/1963 and 418/1977 which, inter alia, imposed embargoes on South Africa.

¹² Oosthuizen (2006) p.59

translated into broader co-operation of economic and social development¹³. The leaders of the nine majority ruled states in Southern Africa met on the 1st April 1980 in which the Southern African Development Co-ordination Conference (SADCC), the predecessor to SADC, was founded by what is euphemistically referred to as the Lusaka Declaration (the Declaration) whose theme was titled: *Southern Africa: Towards Economic Liberation*¹⁴. The adoption of the Declaration consequently the establishment of SADCC was a major achievement for Southern African states because at the same time apartheid South Africa was peddling its own blue print for Southern Africa integration dubbed ‘a Constellation of Southern African States’, which to its progenitor’s chagrin, did not get any buyer. Though the Declaration does not expressly refer to SADC, it paved the way for its formal establishment on 1st July 1981, and was the general framework within which co-operation within SADCC took place¹⁵.

The leaders articulated the following as their main objectives in the establishment of the new entity;

- To reduce member states’ economic dependence, particularly but not only on apartheid South Africa;
- To forge links to create a genuine and equitable regional integration;
- To mobilise member states’ resources, in the quest for collective self reliance, and
- To ensure international understanding and support;¹⁶

The objectives reflect a stark acknowledgement that the region was economically reliant on South Africa, the economic giant of the region. The Southern African bureaucrats identified the establishment of a regional transport and communications system less integrated with that of South Africa as the key to co-operation in other areas, especially for

¹³ www.sadc.int/abtsadc/history.php

¹⁴ The founder member states were Angola, Botswana, Lesotho, Malawi, Mozambique, Tanzania, Swaziland, Zambia and Zimbabwe.

¹⁵ Oosthuizen(2006) p59

¹⁶ http://www.sadc.int/abt_sadc/history.php

the landlocked states of the region¹⁷. An indication that the regional leaders were extremely anxious for the region to disengage itself from apartheid South Africa's economic dominance is aptly captured in the statement by the late Sir Sereste Khama on the occasion of the Lusaka Declaration who asserted that:

Our goal is to achieve economic liberation and to reduce our economic dependence on ... South Africa. We seek to overcome the fragmentation of our economies and by co-ordinating our national development efforts, to strengthen them. The basis of our co-operation, built on concrete projects and specific programmes rather than grandiose schemes and massive bureaucratic institutions must be assured mutual advantage of all participating states.¹⁸

It is significant to note that the Declaration was more of a quixotic aspiration with no legal status and was not legally binding on the member states¹⁹.

2.3 Memorandum of Understanding and the SADCC Institutional Framework

The SADCC heads of state and government signed a Memorandum of Understanding ('MOU') on 20th July 1981 in Harare, Zimbabwe establishing the institutions of SADCC and delineating their powers and competencies. The MOU further stated that SADCC was granted the legal capacity necessary for the exercise of its competencies²⁰. This no doubt put SADCC on a legal footing with the MOU legally binding on the member states.

¹⁷ Oosthuizen (2006) p61

¹⁸ Mhone (1991) p181(quoting from SADC Handbook page 3)

¹⁹ Segundo (1993) p93

²⁰ Provided for in the MOU.

2.3.1 SADCC Institutional Framework

The MOU created the Summit of Heads of State or Government (SADCC Summit), the supreme policy-making institution which met annually; the Council of Ministers (SADCC Council), comprising mainly ministers responsible for economic affairs; Sectorial Commissions, the Southern African Centre for Co-operation in Agricultural Research (SACCAR) and the Southern African Transport and Communications Centre (SATCC); the Standing Committee of Officials (SCOs) and the Secretariat-whose task was to liaise with other institutions and national SADCC structures²¹. The SADCC institutional structure was novel and pioneering as it manifested a departure from a traditional intergovernmental organisation in that it kept institutionalisation to the very minimum. It has also been pointed out that such innovation was moulded on the experience of the FLS²². SADCC's emphasis was more on the identification of areas of activities; only thereafter will institutions be set to co-ordinate activities in the identified areas rather than vice versa²³. The SADCC secretariat, which was international in character and based at the SADCC headquarters in Botswana, was very slim and streamlined and relatively weak. This state of affairs, it was argued by its progenitors, was in keeping with the uniqueness of the new regional order as it was said to be:

Deliberately businesslike approach, in which institutions follow achievement-surely promises greater dynamism rather than in a system in which member governments merely react to proposals put forward by technocrats lodged in a centralised bureaucracy²⁴.

²¹ Oosthuizen (2006)p60.

²² Ibid.

²³ The rationale for this, as one secretariat document explained was that 'SADCC has viewed institutions as facilitating and consequential rather than causative forces or ends in themselves. Therefore it has consistently sought to develop concrete areas of activity and to identify their actual servicing first, and then only to create institutional structures' (SADCC, Blantyre, Malawi, 1981 p.17).

²⁴ Masire in SADCC, Record of SADDCC Summit, Harare, 20th July 1981, pp19-20.

It is doubtful that the real motive for establishing such an institutional structure was solely motivated by the desire for efficiency. This is because the secretariat did not possess any meaningful powers and competencies to execute SADCC projects on its own initiative. The answer perhaps lies in the fact that most of the SADCC member states had at some point in time suffered under colonial domination, and for countries like Angola, Mozambique and newly independent Zimbabwe, such experiences were still fresh and naturally it was not uncommon for them to be inclined towards religiously guarding their newly acquired state sovereignty as their shibboleth rather than ceding their sovereign competencies to a supranational body. It is also significant to note that most of the member states' ideological outlook was premised on the Marxist ideology and its fixation with absolutism as the hallmark of statehood. Perhaps that explains the member-states' reluctance to devolve more powers and competencies to the secretariat as such devolution of powers would have, in their view, constituted a deleterious inroad in their sovereign competencies. The above observations are further buttressed by the degree to which the responsibility for carrying out the regional programs was carried out. Rather than being delegated to the intergovernmental body or a supranational institution they were actually being performed by national governments as will be shown below. It is submitted that such an institutional setup was in the interests of the member states in order to maintain an apposite equilibrium between the national and the intergovernmental institutions.

The primary responsibility for execution of SADCC projects was mandated to national governments in the co-ordination of SADCC activities. The determination to attenuate the secretariat's authority can be seen in the Lusaka summit's approval of a distribution of a scheme of sectoral responsibilities. The modus operandi was for member states to submit projects which are nationally based in specified sectors but which must also contribute towards regional objectives²⁵. Member states were thus allocated specific developmental sectors to coordinate in which they were perceived to have a particular national interest,

²⁵ Leysens Anthony Por J.(SADC: Challenges and Problems) pp 378-379

thus giving a state the impetus to develop and coordinate regional policies and strategies in its allocated sector²⁶. The Lusaka Summit also adopted a Program of Action which identified the strategic areas where it was deemed as requiring urgent action for functional co-ordination at the regional level. This eventually led to the allocation of the identified sectors and subsectors to the member states.²⁷

2.4 The Legal Status of SADCC

A notion has been advanced which in the author's view is quite erroneous that the SADCC MOU left SADCC on a non legal basis²⁸. Segundo²⁹ forcefully highlights the following as indicative of his faulty assessment that SADCC was 'a mere gentlemen's club which could not be said to constitute a regional arrangement', and that 'the institutional arrangement did not create any regional legal order'. He further argues that the SADCC MOU did not constitute a treaty as envisaged under the Vienna Convention on the Law of Treaties (VCLT)³⁰ simply because the MOU was signed but had no provision for ratification and submission to international arbitration³¹. He further points out that the failure to deposit the SADCC instruments with the Secretary General of the United Nations (UN) meant that parties 'were not eager to subject themselves to institutions of arbitration under the UN system.'³² Segundo therefore concludes, after a specious analysis of state practice, that the state parties did not intend to create legally binding obligations by signing the

²⁶ *ibid*

²⁷ The sectors were allocated as follows: Angola-Energy, Botswana-Livestock Production and Animal Disease Control, Lesotho-Tourism, Mozambique- Transport and Communications, Swaziland-Manpower Development, Tanzania-Industry and Trade, Zambia-Mining and Zimbabwe-Food Security.

²⁸ Segundo (1993) p.93

²⁹ *Ibid* pp94-98

³⁰ Vienna Convention on the Law of Treaties adopted May 23, 1969

³¹ Segundo (1993) p96-97

³² *Ibid* p.97

MOU hence SADCC as a regional integration arrangement did not create a legal regime under international law³³.

The flaws in the above reasoning are conspicuous. It is stating the obvious that binding international agreements can take disparate forms hence intent of the parties as to whether they had in mind creation of legally binding obligations and rights cannot be based solely on the form or nomenclature given to the treaty-like instrument. Formal provisions of treaty-like instruments are not necessarily reliable indicators that the parties intended the instrument to constitute a treaty, even though they may point in that direction.³⁴ The issue was clarified by the International Court of Justice (ICJ) in the Maritime Delimitation and Territorial Questions case.³⁵ The case dealt with whether the Doha-agreed minutes signed by the respective senior representatives from Qatar, Bahrain and Saudi Arabia could be regarded as a treaty instrument embodying binding legal rights and obligations for Qatar and Bahrain. The majority made a finding that the Doha Minutes constituted an international agreement embodying rights and obligations for the parties. It is submitted that it was not the form, but rather the content of the minutes which persuaded the majority to reach that conclusion. In a related finding in the Aegean Sea Continental Shelf case³⁶ the court toed the same line by affirming that there was no rule of international law determining that joint a communiqué may not become an internationally binding agreement. It is significant to note that the ICJ considered article 2(1)(a) of VCLT which gives a concise definition of a treaty as one of the guiding principles of international law in reaffirming its position.

It is therefore hardly controversial to come to the inexorable conclusion that by virtue of the MOU, the leaders established SADCC as a regional intergovernmental organisation, creating mutual rights and obligations binding on its creators *inter se*. What the MOU did

³³ Ibid p.99

³⁴ Klabbers (1997) p748

³⁵ Qatar v Bahrain

³⁶ Greece v Turkey

was to create a self-contained regional legal order which clearly delineated the member's responsibilities as well as providing for a dispute resolution mechanism.

The MOU further provided for a dispute resolution in the form of negotiation and conciliation, a position consistent with the UN Charter³⁷, and further provided for the Summit to have the final decision in the event of impasse between the disputing parties³⁸. A further indication that the founders intended to create a regional legal regime is established beyond doubt by a provision specifically stating that the member states' obligations assumed under the MOU shall survive the termination of membership of such state.³⁹ This clearly shows that SADCC was neither an informal organisation nor a 'gentlemen's club' but an intergovernmental organisation based on a sound legal order which created mutual rights and obligations for the member states with a sound and clear dispute settlement system. It is further to be noted that the UN, in a General Assembly resolution passed way back in 1982 titled Co-operation between the UN and the Southern Africa Development Co-ordination Conference⁴⁰ formally recognised SADCC as a 'subregional organisation whose work is consistent with the objectives and principles enshrined in the Charter of the United Nations'⁴¹ and that SADCC has been 'mandated by states concerned to co-ordinate projects and programmes within its competence'⁴². The UN General Assembly passed another resolution in 1983 urging the international community and UN agencies to forge links and co-operation agreements with SADCC⁴³.

³⁷ See Article 33(1) of the Charter of the United Nations adopted on June 26, 1945

³⁸ See Article XV of the MOU on the Institutions of SADCC

³⁹ Article XVI of the MOU on the institutions of SADCC

⁴⁰ United Nations General Assembly Resolution 37/248 of 21st December 1982

⁴¹ *ibid*

⁴² *ibid*

⁴³ United Nations General Assembly Resolution 38/160 of 15 December 1983.

2.5 SADCC to SADC: From Development Conference to a Community Order

On the 17th August 1992, at Windhoek, Namibia, Heads of State and Government of 10 SADCC states⁴⁴ under the theme document; *SADCC: Towards Economic Integration*, signed the Declaration (Windhoek Declaration) and the Treaty of the SADC (the Treaty)⁴⁵ which replaced the SADCC MOU. This development marked the transformation of SADCC from a development conference as established under the SADCC MOU to a fully-fledged regional community order as encapsulated in the Treaty, the Southern African Development Community (SADC). There has been a plethora of explanations and interpretations as to the *raison d'être* for this organisational metamorphosis though the limited scope of this thesis will not permit an exhaustive interrogation of such. The Windhoek Declaration postulated, *inter alia*, the following as the factors driving the transformation process: Namibia's independence (21st March 1990), the approaching demise of the apartheid regime in South Africa (which became independent in 1994), peace prospects in Angola and Mozambique (the two countries had fallen into the throws of civil war with the South African apartheid regime heavily involved in those wars as part of its destabilisation program in Southern Africa), the need to reform the region's economic policies, the worldwide trend to form regional economic co-operation and integration blocks and the emphasis of perceiving regional economic communities as building blocks towards a continental economic community⁴⁶.

Some authors have pointed out that SADCC was neither a great failure nor a great success in meeting its four goals, firstly adumbrated in the Lusaka Declaration and affirmed at Harare in 1981⁴⁷. It has been pointed out that the SADCC member states were still dependent on South Africa at the adoption of the Windhoek Declaration and the Treaty in

⁴⁴ Namibia became the 10th SADCC member upon its attaining independence in 1990

⁴⁵ Treaty of the SADC signed at Windhoek on 17th August 1992 and entered into force on 30th September 1993

⁴⁶ SADCC Windhoek Declaration: SADCC: Towards Economic Integration

⁴⁷ Oosthuizen (2006) p69

1992 than they had envisaged⁴⁸. It is further pointed out that regional integration was a stated objective in the Lusaka Declaration but in truth the same declaration and SADCC's policies did not really envisage much more than the co-ordination of some activities in certain functional areas hence the need to revitalise the regional entity⁴⁹. It is submitted that one of the motivating factors in transforming SADCC to SADC was the need to shift the focus of the organisation from co-ordination of development projects to a more complex task of integrating the economies of member states and that the Treaty was to be a blueprint for building a Community of Southern African States⁵⁰-an affirmation that pursuit of statal interests had hitherto taken precedence over a genuine quest for regional objectives-a lodestar the founding fathers had when they launched the integration project.

2.6 Amended Declaration and SADC Treaty

On the 14th August 2001 the SADC leaders signed an agreement amending the original Treaty of 1992 ('Amended Treaty' or 'Treaty' or 'SADC Treaty') as well as numerous protocols on Politics, Defence and Security Co-operation, firearms, information and communications technology among others. This was a culmination of a concerted process which involved a surgery of the institutional structure of SADC as encapsulated through two major reports; the 1993 report titled –A Framework and Strategy For Building and Strategy as well as the 1997 report titled-Review and Rationalisation of SADC Programme of Action⁵¹. Among some of the recommendations to be discerned from the aforementioned reports was a call for a transformation of SADC institutions to facilitate deeper integration as it was poignantly noted that:

⁴⁸ Ibid –states that in 1986, 30% of South Africa's exports headed to SADC while it sourced only 7% of its imports from them.

⁴⁹ Ibid

⁵⁰ http://www.sadc.int/abt_sadc/history.php

⁵¹ See Oosthuizen (2006) pp 99-102

integration implies that some decisions previously taken by states alone, are taken collectively in regional institutions and that decisions taken nationally give due consideration to regional positions and circumstances⁵².

The statement clearly entrenches an acknowledgement that for deeper integration to take place, there was a need for unequivocal commitment to supranationalism, that is for member states to cede some of their sovereign competencies to SADC. Some of the recommendations entailed strengthening of the Secretariat, push for the Organ on Politics and Defence Co-operation to be subsumed within the SADC institutional structure, a new equitable formula for membership contributions to be found and a call to enhance greater participation of non-state actors in the regional integration project such as the private sector, civil society, workers and employers' organisations among others⁵³. The bulk of the recommendations were by and large incorporated in the amended SADC Treaty and were fully reflected in the new institutional architecture of the regional community as will be shown below.

⁵² See Oosthuizen (2006) p102

⁵³ op cit

CHAPTER THREE

3. The Key Institutions of SADC

Chapter five of the SADC Treaty sets out the eight key institutions of the regional entity. It must be noted that institutional development in any integration initiative elsewhere shows that institutions are an integral part of a successful development and integration initiative. This chapter will endeavour to highlight the SADC institutional architecture to assess its suitability to drive the integration project in Southern Africa. Reference will be made to the EU with a view to enhance the former to learn from the successes and avoid the mistakes of the latter. A descriptive approach will be adopted in order to lay the basis for a comprehensive analysis of such institutional structure to be carried out in Chapter 4 with a view to assess whether or not they reflect strides towards supranationalism by the regional entity.

3.1 The Summit of Heads of State or Government

The Summit of Heads of State or Government ('the Summit') is the supreme policy making institution of SADC and its various powers and competencies are fully enumerated in the Treaty⁵⁴. It is constituted by the heads of state or government of all the member states and is chaired and co-chaired by a Chairperson and a Deputy Chairperson elected from among its members for one year on a rotational basis⁵⁵. It is the body mandated with setting the SADC agenda as it sets the overall policy direction and control of the functions of SADC⁵⁶. The Summit is mandated with a number of executive functions which include the admission of new members to SADC, as well as determining the procedures for the

⁵⁴ Ibid Article 10

⁵⁵ Ibid.

⁵⁶ ibid

admission of new members⁵⁷, appointment of the Executive Secretary and his/her Deputy as well as judges of the SADC's judicial organ, the Tribunal. It is also mandated to take enforcement action against any delinquent member through the imposition of sanctions⁵⁸. The Summit is also imbued with legislative functions which include the adoption of the various instruments of implementation of the provisions of the Treaty, that is protocols in SADC parlance, amendment of the SADC Treaty or any other treaty or protocol made under the rubric of SADC⁵⁹. It also has powers 'to create committees, other institutions and organs as it may deem necessary'⁶⁰. The above clearly shows that the powers of the summit are enormous. The Treaty also makes it clear that the Summit shall be responsible for 'control of the functions of SADC'⁶¹. There is no doubt that the pace and direction of the SADC integration project will be mainly determined by the heads of state or government acting through the Summit. This is particularly pronounced by the fact that the Summit is the only community institution with powers to legislate within SADC's areas of integration⁶². Other institutions can only do so as delegates of the Summit⁶³. This, as will be shown in the next chapter, puts SADC on an unhealthy footing institutionally. This is exacerbated by the fact that the Treaty does not explicitly provide for any judicial review of the Summit decisions. In most of the member states' national jurisdictions, it is not uncommon for the acts of the head of state to be subject to parliamentary scrutiny or judicial oversight.

It is significant to emphasise that decisions of the Summit are binding on all the SADC institutions and member states. Such decisions are taken by consensus though there are some key exceptions which require unanimity such as the admission of a new member,⁶⁴ or

⁵⁷ Ibid Article 8

⁵⁸ SADC Treaty- Article 33

⁵⁹ Ibid-Article 22(2)

⁶⁰ Op cit

⁶¹ SADC Treaty-Article 10(2)

⁶² Ibid-Article 10(3)

⁶³ Ibid

⁶⁴ SADC treaty-Article 8(4)

those requiring assent from three quarters of the Summit's membership for adoption, for example amendment of the Treaty and/or the dissolution of SADC or any of its institutions⁶⁵.

A slight similarity can be observed between the Summit of the SADC and the European Council whose role is affirmed in the Treaty on the European Union (the Maastricht Treaty)⁶⁶. The Maastricht Treaty provides that the European Council shall provide the Union with the necessary impetus and shall define the general guidelines thereof⁶⁷. Similarly with the Summit, the European Council is composed of the Heads of State or Government and the President of the European Commission⁶⁸. In contradistinction to the Summit, it must be noted that the European Council is not a formal institution of the European Union (EU) and has no formal executive or legislative powers. Although it defines the EU policy agenda and thus been considered to dictate speed of European integration, it does so without explicit powers save the influence it has of being composed of national leaders. The SADC institutional structure, particularly the enormous legislative and executive powers repositied in the Summit greatly reflects 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 intergovernmentalism and its preoccupation with statism. But as will be noted below, SADC is a region in a flux and indeed other community institutions are playing a fundamental role in the integration project.

⁶⁵ Ibid-Article 35

⁶⁶ See Article 4 Treaty on the European Union signed on the 7th February 1992 at Maastricht.

⁶⁷ *ibid*

⁶⁸ *ibid*

3.2 The Council of Ministers

The Council of Ministers ('COM' or 'Council') is composed of one minister from each member state and in most cases ministers responsible for foreign relations⁶⁹, a departure from SADCC and the original SADC Treaty where the COM was composed of ministers responsible for financial or economic affairs. This marks a shift towards deeper integration permeating the economic, social and political space of the region. Whereas the Summit, as alluded to above, controls the functions of SADC, the Treaty states that the Council shall have the responsibility to 'oversee the functioning and development of SADC'⁷⁰.

At any point the Council is headed by a chairperson and a deputy chairperson who are appointed by the state holding the positions of chairperson and deputy chairperson of the Summit respectively.⁷¹ The COM's mandate includes approval of SADC policies, strategies and work programmes, development of its common agenda and strategic priorities, overseeing the functioning and development of SADC, implementation of its policies and proper execution of such identified programmes⁷². The COM is also involved in personnel functions as it recommends to the Summit persons for appointment as Executive Secretary and Deputy Executive Secretary of SADC⁷³. The COM is also responsible for compiling and submitting a list of potential judges for appointment to the Tribunal which it recommends to the Summit⁷⁴ as well as designating members who shall sit regularly on the Tribunal⁷⁵ as well as determining the conditions of service of the judges, the registrar as well as the Tribunal's other staff members⁷⁶. The Council is also imbued with financial responsibilities which include the identification of supplementary sources to

⁶⁹ See SADC Treaty- Article 11

⁷⁰ Ibid-Article 11(2)(a)

⁷¹ Ibid

⁷² ibid

⁷³ ibid

⁷⁴ See Protocol and the Rules of Procedure thereof- Article 4(4)

⁷⁵ Ibid –Article 3(2)

⁷⁶ Ibid-Article 12(3)

fund the SADC budget, it approves the SADC's budget and approves the annual statements of accounts for the Secretariat and financial regulations submitted by the Executive Secretary⁷⁷. The COM's mandate also transcends to institutional development where it has the powers to create its own committees, recommends to the Summit for the establishment of new SADC institutions and bodies⁷⁸. The Council also performs advisory functions to the Summit on matters of overall policy⁷⁹ as well as consideration and recommendation to the Summit of applications for SADC membership⁸⁰.

It is noteworthy that the Treaty does not provide for flexible membership in the COM seeing that its mandate is very broad and more often it will be called to deal with disparate issues. This is a potential area of reform which shall be fully discussed in the following chapter. The mandate of the COM is also too broad and extensive to be left to organ. As has been shown below, this body has broad executive functions as it is involved in the admission of new members to SADC, the appointment of judges of the SADC Tribunal and appointment of the personnel of the Secretariat. The COM also has broad financial oversight over the SADC finances as has been alluded to above. This would not have been a problem if the membership of the COM is not fixed but varies depending on the subject matter under discussion. This therefore means that the regional body's foreign ministers find themselves dangling with legal, economic, financial, personnel and political affairs of SADC. As will be shown below, there is a need for the COM membership to be flexible whereby its composition at any point in time would be determined by the subject matter under discussion. There is a further need for SADC to expressly adopt the principle of subsidiarity and entrench it into the Treaty. This will make sure that decisions are made at the micro level thereby enhancing efficiency. One wonders why the COM should be responsible for the staffing of the Secretariat when such duties can be carried out by the Executive Secretary, the head of the Secretariat. It is submitted that there is a need to visit

⁷⁷ See Oosthuizen (2006) p192

⁷⁸ See SADC Treaty-Article 11(2).

⁷⁹ *ibid*

⁸⁰ *ibid*

this unhealthy state of affairs with a view to giving more powers to the Executive Secretary on the appointment of SADC staff with the exception of appointments to the positions of Executive Secretary and Deputy Executive Secretary as well as the appointment of the judges of the Tribunal. Such will resonate well with the supranationalisation of the SADC polity currently in vogue.

3.3 The Organ on Politics, Defence and Security Co-operation

The Organ on Politics, Defence and Security (the 'OPDSC) is one of the SADC institutions also established under the Treaty⁸¹. Its structure, composition, objectives, powers and competencies are fully elaborated in the Protocol on Politics, Defence and Security Co-operation (the 'OPDSC Protocol'⁸². It appears that the need to establish a regional mutual defence and collective security mechanism as envisaged under Chapter III of the UN Charter⁸³ may have been the main motivation behind the establishment of this institution. It is instructive to note that the preamble to the OPDSC Protocol makes reference to Chapter III of the United Nations which:

recognises the role of regional arrangements in dealing with such matters relating to the maintenance of international peace and security as are appropriate for regional action⁸⁴.

The preamble further states that 'The Organ constitutes an appropriate institutional framework by which member states can co-ordinate policies and activities in the area of politics, defence and security'⁸⁵.

⁸¹ See SADC Treaty-Article 9

⁸² See the Protocol on Politics, Defence and Security Co-operation adopted on 14th August 2001.

⁸³ See Article 52(1) of the UN Charter which provides that 'Nothing in the present Charter precludes the existence of regional arrangements or agencies for dealing with such matters relating to the maintenance of international peace and security as are appropriate for regional action, provided that such arrangements or agencies and their activities are consistent with the Purposes and Principles of the United Nations.

⁸⁴ See Article 52 of the Charter of the United Nations

⁸⁵ Ibid

3.3.1 Institutional Structure of the OPDSC

The OPDSC is chaired by a chairperson who is also a member of the Summit (ie a head of State or Government) and it operates a unique system decision-making system called the ‘Troika’-a system which vests decision-making powers in the incumbent chairperson of the institution in question, the incoming chairperson who would be the deputy chairperson at the time and the immediate previous chairperson in between the meetings of the OPDSC. The idea of such a system, which must be lauded as a dynamic innovation, is to enable expeditious decision-making and implementation and provision of policy directions in between meetings of the SADC institutions⁸⁶. The Troika of the OPDSC is composed of the sitting Chairperson, a Deputy Chairperson (who is also a head of State or Government as well as the incoming chairperson) and the outgoing chairperson⁸⁷ who are elected by the Summit for a duration of one year⁸⁸. The OPDSC protocol also provides for a Ministerial Committee (‘the MC’) as an integral organ of the OPDSC⁸⁹. The MC is composed of respective ministers of defence, foreign affairs, public security and state security from each member state. The ODPSC Protocol further provides that the MC shall be chaired by a minister from the same member state as the chairperson of the OPDSC⁹⁰. Two further bodies complete the current institutional structure of the OPDSC, an Inter-State Politics and Diplomatic Committee (‘the ISPDC’)⁹¹ and an Interstate Defence and Security Committee (the ‘ISDSC’)⁹². The ISPDC is composed of ministers responsible for foreign affairs from

⁸⁶ SADC Treaty-Article 9A(6)

⁸⁷ See Protocol on Politics, Defence and Security Co-operation- Article 3(3)

⁸⁸ Ibid Article 4(1) and (2)

⁸⁹ Ibid-Article 5

⁹⁰ Ibid –Article 5(4)

⁹¹ See Ibid-Article 6

⁹² Ibid-Article 7

the member states whereas the member states' ministers responsible for defence, public security and state security constitute the ISDSC although the SADC secretariat provides secretariat services to the OPDSC as a whole. It is also significant to point that the ISPDC and the ISDSC are both chaired by respective ministers who must be from the same member state as the chairperson of the OPDSC⁹³. The practical implications of this arrangement is that at any point in time the OPDSC, the MC, the ISPDC and the ISDSC will be chaired by nationals from the same state. The two latter bodies, which are for all intents and purposes subsidiaries of the MC report to the latter.

3.3.2 Objectives and Competencies of the OPDS

The objectives of the OPDSC, which are clearly stipulated in the OPDSC Protocol include the promotion of peace and security in the region, safeguarding the region against instability arising from the breakdown of law and order as a result of inter-state, intra-state conflict and aggression as well as the resolution of such conflicts by pacific means with a possibility of a consideration of enforcement action in accordance with international law as a matter of last resort where peaceful means have failed⁹⁴. The OPDS 's remit also includes the promotion of political co-operation among state parties and the promotion of common political values and institutions, security, defence, the development of a common foreign and security policy approaches on issues of mutual concern and advance such policy on the international fora. The OPDSC's mandate also extends to the promotion of development of democratic institutions and practices within the territories of state parties and to encourage the observance of human rights, the development of collective security capacity and mutual defence pact to respond to external threats and cross border crime, co-ordination of participation of the state parties in international and regional peace-keeping operations and the co-ordination of international humanitarian assistance⁹⁵. The OPDSC protocol also

⁹³ Ibid- Article 6(4) and 7(4).

⁹⁴ Ibid-Article 2(2)(a) to (k)

⁹⁵ ibid

provides that the OPDSC may enter into international agreements with other international entities subject to approval by the Summit⁹⁶.

The OPDSC is without doubt the defence and security organ of SADC as reflected in its constituent instrument which has been extensively referenced above. It must however be noted that the OPDSC is not independent from the Summit. If anything, it is a 'department' within SADC given the fact that like the Summit, it is chaired and co-chaired by a head of state or government. It is virtually impossible to see the OPDSC taking a decision which is not supportable by the Summit. The OPDSC's relevance was tested recently following the debacle arising from the elections in Zimbabwe held on 29 March 2008. Despite the concrete proof of heinous human rights abuses mainly committed by state functionaries against ordinary civilians, the OPDSC responded by holding fruitless meetings, often shunned by other member states which culminated in a meek and innocuous communiqué being released to the media by the OPDSC Troika⁹⁷. This was despite the fact that the situation in Zimbabwe was characterised by state sponsored massive violations of human rights involving extra-judicial killings, beatings, intimidation, forced disappearances and widespread torture⁹⁸. There is therefore an imperative need to wean the OPDSC from the clutches of the Summit so it can execute its Treaty mandate⁹⁹ without being circumscribed. The OPDSC's surprising impotence in the face of the Zimbabwean crisis despite the fact that such fell within its treaty mandate clearly calls for its overhaul.

⁹⁶ Article 10 of the Protocol on Politics, Defence and Security

⁹⁷ See Communiqué issued by the SADC Troika on OPDSC 25 June 2008 at Lozitha Palace, Kingdom of Swaziland on www.sadc.int (visited 17 July 2008)

⁹⁸ See June 2008 Human Rights Watch Report on Zimbabwe titled 'Bullets for Each of You' State Sponsored Violence since Zimbabwe's March 29 Elections available at www.hrw.org (visited on 17 July 2008).

⁹⁹ See Article 5(4) on the Organ on Politics, Defence and Security Co-operation

3.4 Integrated Committee of Ministers

This is an institution whose composition comprises two ministers from each member state¹⁰⁰. It appears that the ministers in question need not be necessarily be from a specified portfolio from their member states as the Treaty is silent on that. The Integrated Committee of Ministers (ICM) is chaired by a minister and deputy minister who shall be appointed from the member states holding the chairpersonship and deputy chairpersonship of the COM¹⁰¹. The Treaty provides that ICM has to meet at least twice a year, shall report to the COM and decision-making shall be by way of consensus though no provision is made as to the procedure where consensus cannot be attained¹⁰².

3.4.1 Functions and Competencies of the ICM

The ICM has an oversight on SADC's integration activities such as trade, finance and investment, agriculture and natural resources, social and human development among others¹⁰³. It also has a monitoring role in the implementation of the Regional Indicative Strategic Development Plan, SADC's blue print for economic development and integration of the region. The ICM is also imbued with rendering policy guidance to the Secretariat and managing the work of the directorates in the Secretariat.¹⁰⁴ The ICM is endowed with specific powers to make decisions on matters pertaining to such directorates as well as creation of permanent and ad hoc subcommittees as may be necessary to cater for any cross-cutting sectors¹⁰⁵.

¹⁰⁰ See SADC Treaty –Article 12(1)

¹⁰¹ Ibid –Article 12(4)

¹⁰² Ibid-Article 12(5) to (7)

¹⁰³ Ibid –Article 12(2)

¹⁰⁴ *ibid*

¹⁰⁵ *ibid*

It is noteworthy that since the Treaty provides that the ICM shall have at least two ministers from each member state as pointed above, meaning that, as SADC is currently constituted, that body will not have less than thirty ministers. It makes it even more bizarre when one notes that the ICM reports to the COM, another body composed of ministers of foreign affairs from the member states as alluded to above. One wonders how effective such an institutional structure is when one has to report to and is accountable to his peer as is the case here. The sheer number of the ministers constituting the ICM also raises eyebrows. Such is likely to impact on the decision making process by making decision long drawn-out and tedious. The very idea of having ministers constituting the ICM should be revisited. As has been shown above, this body has an oversight over SADC's integration activities¹⁰⁶, it will be advisable to have such a body composed by technocrats in the respective areas of integration.

3.5 The Standing Committee of Officials

The Standing Committee of Officials ('the SCO') is composed of one permanent secretary or an official of equivalent position from each member state who must come from the ministry that is the SADC National Contact Point¹⁰⁷. The SCO chairperson and Deputy Chairperson are appointed from the member states holding the chairmanship and deputy chairmanship of the COM¹⁰⁸. The SCO is a technical advisory committee to the COM and processes documentation from the ICM to COM. It also reports to the COM, must meet at least four times a year and decision-making is by consensus¹⁰⁹.

¹⁰⁶ SADC Treaty-see Article 12

¹⁰⁷ SADC Treaty-Article 13(1)

¹⁰⁸ Ibid-Article 13(5)

¹⁰⁹ Ibid-Article 13(4), (6) and (7)

3.6 The Secretariat

The Secretariat is the principal executive institution of SADC whose mandate spans across a range of activities and such are specifically enumerated in the Treaty¹¹⁰. The Secretariat is headed by the Executive Secretary whose duties are also specifically enumerated in the Treaty¹¹¹.

3.6.1 Functions of the Secretariat

The Secretariat is responsible for planning and managing SADC's programmes, coordination and harmonisation of the policies and strategies of member states, monitoring and evaluation of regional policies and programmes, gender mainstreaming in all SADC programmes, implementation of decisions of the various SADC institutions as well as organisation and management of SADC meetings¹¹². The Secretariat is also responsible for financial and general administration of SADC projects, devising appropriate strategies for self financing and income generating activities and investments, development of capacity, infrastructure and maintenance of intra-regional information communication technology and undertaking research on Community building and the integration processes¹¹³. The Secretariat also has a responsibility to prepare and submit to the COM for approval, administrative regulations, standing orders and rules of management of SADC affairs¹¹⁴. The secretariat's mandate also permeates into the diplomatic realm by having the responsibility of representation and promotion of SADC on the international fora.¹¹⁵

¹¹⁰ SADC Treaty- Article 14

¹¹¹ Ibid –Article 14(3)

¹¹² Ibid –Article 14(1)

¹¹³ *ibid*

¹¹⁴ *ibid*

¹¹⁵ *ibid*

It is noteworthy that the SADC secretariat is typical of many an international organisation as its room for manoeuvre is severely circumscribed. The SADC Secretariat is a weak institution and it appears that the Executive Secretary cannot take any concrete decisions and act on them without approval from the COM. The Treaty however on the other hand confirms the supranationality aspect of SADC by explicitly stating that the member states shall respect the international character and responsibilities of SADC, the Executive Secretary and other staff of SADC and shall not seek to influence them in the discharge of their functions¹¹⁶.

It is also worthwhile to point out that the members of the SADC Tribunal, who are for all intents and purposes, despite the nomenclature, in fact judges of that court, the Executive Secretary and the other staff of SADC are enjoined to be committed to the international character of SADC and shall not seek or receive instructions from any member states or from any authority external to SADC¹¹⁷. It cannot be gainsaid that this is a positive development in SADC's integration project as it is crystal clear that unlike the other institutions discussed above, the Secretariat is a truly supranational institution within SADC whose emphasis is on SADC development and not on advancing national interests. Perhaps this explains the approach taken by member states, through the Treaty, to make sure that the Secretariat remains a weak institution. One might surmise that such an institutional set-up might have been occasioned by the member states' unwillingness to lose control of the SADC integration project. Doubtlessly, any cession of more powers to the Secretariat will be coupled with concomitant loss of sovereign competencies in certain areas. It is to be regretted that the Secretariat remains an exceedingly weak institution despite the fact that it is one of the few truly apolitical institutions in the regional body's institutional milieu. Proposals for institutional reformation will be fully addressed in the final chapter of this work and it needs no emphasis that the SADC secretariat will be a leading contender for such reformation if the goal of true integration is to be attained.

¹¹⁶ SADC Treaty-Article 17(1)

¹¹⁷ Ibid-Article 17(2)

3.7 The SADC Tribunal

The SADC Tribunal ('the Tribunal') is the judicial organ of the community with jurisdiction over contentious and non contentious proceedings. 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 it¹¹⁸. It is further provided that the Tribunal shall also give advisory opinions on any matter submitted to it by the Summit and the Council and that the decisions of the Tribunal shall be final and binding¹¹⁹ though it is not fully elaborated on whom such decisions binding but one can only surmise that decisions of that Court shall be binding upon the parties to the adjudication proceedings and in respect of the matter under consideration. It is submitted that other member states and institutions are enjoined to take account of the legal principles enunciated by the Tribunal as such will constitute persuasive authority. A protocol expounding the composition, powers, functions and procedures of the Tribunal ('the Tribunal Protocol')¹²⁰ was adopted by the Summit which also provided for the Court to have its seat in Windhoek, Namibia.

3.7.1 Composition and Jurisdiction of the Tribunal

The Tribunal protocol provides that the Tribunal shall be composed of not less than 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 competence¹²¹. The Tribunal protocol further provides that the Council shall designate five judges who shall sit regularly on the Tribunal and the additional five judges shall

¹¹⁸ Article 16 of the SADC Treaty

¹¹⁹ Ibid

¹²⁰ See Protocol on Tribunal and Rules of Procedure Thereof adopted on 7th August 2000

¹²¹ Ibid –Article 3

constitute a pool from which the president may invite a judge to sit on the Tribunal whenever a regular judge is temporarily unavailable to carry out his/her functions¹²². The Tribunal elects its president from the crop of judges whose term shall be for a period of three years¹²³. The judges' terms and conditions of service, salaries and benefits are determined by the COM¹²⁴.

The Tribunal Protocol specifically provides that the Tribunal shall have jurisdiction in the interpretation and application of the Treaty, protocols and all subsidiary instruments adopted within SADC as well as acts of SADC institutions¹²⁵. The Tribunal is further specifically mandated to adjudicate matters specifically provided for in any other agreements that member states may conclude among themselves or within the community and which confer jurisdiction on the Tribunal¹²⁶. It specifically states that any dispute over the interpretation or application of the agreement or supplementary agreements between the two parties that could not be settled otherwise shall be referred to the Tribunal for an advisory opinion¹²⁷. The Tribunal has jurisdiction over disputes between natural or legal persons and states though a natural or legal person can only litigate at the Tribunal after having exhausted all available remedies **or** (*emphasis added*) is unable to proceed under the domestic jurisdiction¹²⁸.

The Tribunal has jurisdiction between member states and SADC or any of its institutions,¹²⁹ exclusive jurisdiction over disputes between non state entities and SADC or any of its institutions¹³⁰, exclusive jurisdiction over disputes between SADC and its

¹²² Ibid- At the time of writing this thesis the Judges had already been appointed as of August 2005.

¹²³ Protocol on Tribunal –see Article 7

¹²⁴ See *ibid* –Article 10

¹²⁵ *Ibid*-Article 14

¹²⁶ *Ibid*

¹²⁷ See Osthuizen (2006) p.209

¹²⁸ See Protocol on Tribunal –Article 15

¹²⁹ See Protocol on Tribunal –Article 17

¹³⁰ *Ibid*-Article 18

staff¹³¹ as well as the rendering of advisory opinions at the request of the Summit or the Council¹³². It is to be further noted that the consent of either party to be subject to the Tribunal's jurisdiction shall not be required¹³³. It is also worthwhile to note from the above that the non-state litigant is not required to exhaust domestic remedies where the non-state actor is unable to proceed under the domestic jurisdiction. The ingenuity with which the provision providing for exhaustion of local remedies was drafted merits further comment for its dynamism. The provision stipulates that the non-state actor shall have exhausted all available remedies- before litigating at the Tribunal. It is quite clear that the non state litigant is *not* entitled to exhaust all domestic remedies within the national jurisdiction but is entitled to exhaust available remedies. It is submitted that availability of domestic remedies is interlinked with effectiveness and this is consistent with the approach taken by international tribunals elsewhere. In a seminal judgement on the issue the Inter American Court of Human Rights¹³⁴ held that for a remedy to be held to be available entails that it must be effective-that is capable of producing the result for which it was designed. The court further stated that when it is shown that remedies are denied for trivial reasons or without examination of the merits, or if there is proof of the existence of a practice or policy ordered or tolerated by the government, the effect of which is to impede certain persons from invoking internal remedies that would normally be available to others-resort to those remedies becomes a senseless formality¹³⁵. The tenor of such a finding is that ineffective remedies are as good as being unavailable and in such circumstances a litigant is not obliged to engage in a senseless formality by pursuing ineffective internal remedies as such are unavailable and such a position is consistent with the Tribunal Protocol¹³⁶.

¹³¹ Ibid-Article 18

¹³² Ibid-Article 20

¹³³ Ibid-Article 15

¹³⁴ Valesquez Rodriguez case –Inter Am Crt of HR(No.4 of 1988)

¹³⁵ Ibid

¹³⁶ See Protocol on Tribunal –Article 15(2)

To ensure an effective and uniform application of SADC law within the region, national courts of member states may turn to the Tribunal to give preliminary rulings on any issue before the national court or national tribunal relating to SADC law. As for the applicable law the Tribunal Protocol states that the Tribunal shall apply the Treaty, the Protocols and all subsidiary instruments adopted by the Summit, by the Council or other institutions or organs of the SADC pursuant to the SADC Treaty or any of its protocols¹³⁷. The Tribunal Protocol further provides that the Tribunal shall develop its own community jurisprudence having regard to applicable treaties, general principles and rules of public international law and any rules and principles of the law of States¹³⁸. The Tribunal Protocol further states that the decisions and rulings of the Tribunal shall be final and binding¹³⁹ as indicated above.

It must be noted from the foregoing that the Tribunal is a truly supranational institution of SADC apart from the Secretariat and such a development is reflective of the constitutionalism taking place in SADC. Despite the nomenclature of referring to judges as members in the tribunals and the use of the noun 'tribunal' rather than court- which may have been a tactical ploy to make the entity acceptable to the member states- the SADC Tribunal is a court of justice for all intents and purposes and one can be forgiven for daring to say that it is now the highest court in the SADC region, at least when it relates to SADC law. It must also be noted that the judges of the Tribunal enjoy immunity from legal proceedings in respect of anything said or done in their judicial capacity¹⁴⁰ and they are also enjoined to execute their judicial duties in an independent and impartial manner¹⁴¹. The judges are also enjoined to refrain from actions which compromise their positions as international staff responsible only to SADC and shall not seek nor receive instructions

¹³⁷ See Protocol on Tribunal –Article 21

¹³⁸ *ibid*

¹³⁹ See Protocol on Tribunal –Article 24

¹⁴⁰ *Ibid* –Article 10

¹⁴¹ *Ibid*-Article 5

from any member states or any authority external to SADC¹⁴². It must also be noted that the Tribunal Protocol forms an integral part of the Treaty hence upon being a SADC member, a state is automatically bound by the Tribunal Protocol without any need for ratification- a sure sign of the constitutionalisation taking place in SADC!

One hopes that member states courts will utilise the reference procedure and refer cases to the tribunal for guidance on issue relating to SADC law. This will help in building a symbiotic and complementary relationship between the national courts and the community court. Such a co-operative and complementary procedure will help in the development of uniform norms and values for the regional community to which the people of the region can have recourse to.

3.8 SADC National Committees

3.8.1 Composition and Functions

The treaty provides that each member state shall create a SADC National Committee (SNC) which shall consist of key stakeholders¹⁴³ and these are stated as the government, private sector, civil society, non governmental organisations and workers and employer's organisations. National steering committees and subcommittees to be chaired by duly elected chairpersons are envisaged to be created under the rubric of the SNCs¹⁴⁴. Member states are enjoined to create national secretariats to facilitate the operation of SNCs and each SNC secretariat is enjoined to produce periodic reports to the SADC Secretariat. It is to be observed that establishment of SNCs is pursuant to a solemn undertaking within the SADC Treaty-in particular the objectives of the Treaty "which, *inter alia*, seeks to involve the people of the Region in the process of regional integration as a way of fostering closer

¹⁴² See SADC Treaty-Article 17

¹⁴³ Ibid –Article 16A

¹⁴⁴ *ibid*

relations among the communities, associations and people of the region¹⁴⁵. The Treaty further states that the composition of the SNC shall reflect the core areas of integration¹⁴⁶.

The SNCs have the responsibility to provide the input at the national level in the formulation of SADC policies, strategies and programs of action, co-ordination and overseeing at the national level the implementation of SADC programmes of action. The SNC is mandated to meet at least four times a year¹⁴⁷.

It is clear that the *raison d'être* for the creation of SNCs is to facilitate the citizenry's participation in the SADC integration project. It will need colossal effort from SADC to convince the SADC citizenry that it is committed towards engaging it. There is nothing on the ground to be enthusiastic about. There is a need for SADC to show that it is not just an elite pact of the regional bureaucracy by encouraging transnational engagement of the people of the region. Sight should however not be lost of the fact that the Treaty makes it hortatory that each member state 'shall create a SADC National Committee'¹⁴⁸ and that the SNC 'shall consist of key stakeholders'.¹⁴⁹ This doubtlessly creates a legal obligation for the member states to do so. It is hoped that the regional bureaucracy will not only involve but also genuinely listen to the stakeholders- that way SADC will have a resonance with the people of the region.

3.9 THE SADC Parliamentary Forum

The SADC Parliamentary Forum (SADC-PF) is not recognised treaty institution though its role towards the integration project in the region cannot be overemphasised. The Summit

¹⁴⁵ Ibid –Article 23

¹⁴⁶ Ibid-Article 12(2)

¹⁴⁷ Ibid-Article 16A

¹⁴⁸ *ibid*

¹⁴⁹ *Ibid.*

approved the formation of the SADC-PF as an autonomous institution of SADC under the Treaty¹⁵⁰ though it is not clear where the SADF-PF falls in the SADC institutional configuration given the Treaty's silence on it. The constitution of the SADC-PF stipulates that it is a Parliamentary Consultative Assembly meant to develop into a regional parliamentary structure and that it is an international organisation in its own right, and that it may dissolve itself by a resolution supported by three quarters of its members¹⁵¹. The SADC-PF is composed of parliamentarians from national parliaments of member states and at present, thirteen parliaments from SADC states are represented by four parliamentarians from each member state.¹⁵²

3.9.1 Objectives of SADC-PF

The SADC-PF has identified its objectives as strengthening the implementation capacity of SADC by involving parliamentarians in SADC activities, facilitation of the effective implementation of SADC policies and projects, the promotion of principles of human rights, gender equality, and democracy within the SADC region¹⁵³. It is also the SADC-PF's objectives to familiarise the people of SADC countries with the aims and objectives of SADC, to inform SADC of popular views on development and other issues affecting SADC countries, to provide a forum for discussion of common interests to SADC and the promotion of peace, democracy, gender equality, stability and security on the basis of collective responsibility by supporting the development of permanent conflict resolution mechanisms in the SADC region¹⁵⁴.

It must be noted that due to its vague institutional status with regards to the main SADC institutions the SADC-PF is rendered toothless and finds itself more alienated from SADC

¹⁵⁰ See Article 9(2)

¹⁵¹ See Oosthuizen (2006) p.189

¹⁵² See www.sadcpf.org (at the time of writing only Madagascar was not represented in the SADC-PF)

¹⁵³ See www.sadcpf.org

¹⁵⁴ Ibid

activities. This is mainly because of its tense relationship with the Summit as a result of its stance on the need for SADC member states to uphold the rule of law, respect human rights and the imperative need to uphold democratic standards ensuring free and fair elections, a development which culminated in it not being invited to monitor the Zimbabwe elections in March 2005 and March 2008 after having acerbically criticised the elections held in that country in 2000 and 2002¹⁵⁵.

3.10 Decision-making in SADC Institutions

The SADC Treaty affirms the pre-eminence of consensus decision-making in the adoption of institutional acts by the bulk of SADC's institutions¹⁵⁶. This approach is in contradistinction to the absolutist conception of state sovereignty which dominated much of the 19th century which entailed as a consequence the general application of the rule of unanimity¹⁵⁷. The consensus approach thus forecloses the potential paralysation of an organisation's decision making process associated with the rule of unanimity, which requires the affirmative votes of all the member states. The SADC Treaty provides for the various institutions of SADC to take decisions by consensus, which has become the tradition in SADC from its inception in 1980¹⁵⁸. The Treaty provides that the Summit, which is the highest organ of the Community, shall make binding decisions by consensus unless there is a provision to the contrary¹⁵⁹. Consensus decision-making is also entrenched in the Treaty in respect of the OPDS¹⁶⁰, the Council¹⁶¹, the ICM¹⁶² and the SCO¹⁶³. The Treaty has strangely taken it for granted regarding the need for an alternative procedure in

¹⁵⁵ See Oosthuizen (2006) p.189

¹⁵⁶ Ibid-Article 19

¹⁵⁷ Sands(2001)p263

¹⁵⁹ See SADC Treaty-Article 10 (9).

¹⁶⁰ Ibid-Article 10A(7)

¹⁶¹ Ibid-Article 11(6)

¹⁶² Ibid-Article 12(7)

¹⁶³ Ibid-Article 13(7)

the case of lack of consensus as it does not specifically provide for a procedure to be adopted should there be no consensus. One can surmise that logically the issue has to be put to vote but again, without an explicit provision that creates its own problems as to whether the act should be adopted by a simple majority or by way of a qualified majority.

The Treaty does exclude the resort to decision-making by consensus in certain circumstances. Unanimity is required where it relates to the admission of a new member by the Summit¹⁶⁴, majority requirement is required for Judges of the Tribunal adjudicating over a specific case¹⁶⁵ and three-quarters assent from the entire SADC membership is required to pass a resolution dissolving SADC¹⁶⁶ as well as amendment of the Treaty¹⁶⁷.

¹⁶⁴ Ibid-Article 8(4)

¹⁶⁵ See Article 24 (2) of the Tribunal Protocol

¹⁶⁶ See SADC Treaty-Article 35(1)

¹⁶⁷ Ibid –Article 36(1)

CHAPTER FOUR

4. The Legal and Constitutional Issues Arising From SADC Integration

The SADC integration project, like other regional communitarisation endeavours invariably raises a plethora of issues and varied interpretations of the real nature of the relationship between SADC institutions and the national institutions. It would even be a futile exercise to try delineating the proper boundaries of the supranational entity as the Treaty is deliberately vague and incomplete in other areas and most significantly the regional entity is in a state of flux with rapid changes constantly taking place some of which have fundamentally altered its character thereby defying any attempt to classify SADC as a classic international organisation. This chapter will focus on an analysis of the relationship between the SADC institutions and the national institutions, the legal aspects arising from such an institutional set-up, the constitutionalisation of SADC currently in vogue and the issues spawned by such developments.

4.1 Legal Status of SADC

The SADC treaty provides that 'SADC shall be an international organisation, and shall have legal personality with capacity and power to enter into contract, acquire...property... sue and be sued'¹⁶⁸. It is further provided that in the territory of each member state, the regional organisation shall have the apposite legal competencies as is necessary in the proper exercise of its functions¹⁶⁹. The preamble to the treaty also states that the affairs of the organisation shall be conducted bearing in mind the principles of public international law, which principles are elaborated in Article 4 of the Treaty which states, *inter alia*, that SADC and its member states shall act in accordance to the principles of sovereign equality of all member states, solidarity peace and security, equity, balance and mutual benefit,

¹⁶⁸ See SADC Treaty-Article 3.

¹⁶⁹ Ibid.

peaceful settlements of disputes and most curiously human rights, democracy and the rule of law. Despite the aforementioned declaration, which predictably may have been inserted to ally the concerns of some member states of losing control of some of their sovereign competencies, it is submitted that SADC is not an ordinary intergovernmental organisation in the traditional sense of the word. I will endeavour to show below that in as much as it retains some basic features of an intergovernmental organisation in some areas, SADC has, on the other hand, mutated beyond the classical strictures of intergovernmentalism in certain areas, which in my opinion makes it eligible to be classified as a *sui generis* entity as will be shown below.

4.2 Freedom of Movement

It is clearly stipulated in its constitutive instrument that one of the key objectives of SADC is the development of policies aimed at the progressive elimination of obstacles to the free movement of capital and labour, goods and services and of the people of the region¹⁷⁰. It is noted that in pursuance of the above SADC adopted a protocol (the 'Freedom of Movement Protocol')¹⁷¹ to facilitate the free movement of persons within the region. Although it is not yet operational pending ratification by two thirds of the SADC membership¹⁷², it is the statement of intent that is fundamental - the symbolism encapsulated by such endeavours.

The Freedom of Movement protocol states in its preamble that:

Full popular participation in building the Region into a *Community* is only possible where the *citizens of the community* enjoy freedom of movement, namely; visa free entry, residence and establishment in the territories of the member states. (the emphasis is mine)¹⁷³.

The Protocol enjoins member states to harmonise their relevant national laws with its provisions, in particular that states must enact the apposite legislative, judicial, administrative and other measures necessary for the implementation and effective

¹⁷⁰ See SADC Treaty-Article 5(2)(d).

¹⁷¹ Protocol on the Facilitation of Movement of Persons signed on 18th August 2005

¹⁷² Ibid-see Article 36.

¹⁷³ See Preamble to the Protocol on the Facilitation of Movement of Persons

achievement of its objectives,¹⁷⁴ and the standardisation of immigration procedures, grant of residence, abolition of visas for a ninety-day stay in the territory of another state among others¹⁷⁵. Although the protocol has stirred a hornet's nest with some member states fearful of the grim prospect of an influx of large groups of persons who may overwhelm their infrastructure, it is noteworthy that the protocol was signed by half of the SADC membership at its adoption, a not insignificant number given its controversial nature. The Protocol states in no nebulous terms that the *raison d'être* of the integration project is the 'building of a community'¹⁷⁶ and daringly envisages 'citizens of the community'¹⁷⁷ moving freely within the community. The very limited scope of this work will not allow for a fuller exposition of the complex concept of community citizenship but it is worthy stating that rather than creating a classical international organisation where intergovernmentalism is the order of the day, it is beyond doubt, particularly with the consecration of the concept of freedom of movement of persons and the banding around of citizenship talk, that SADC is mutating into a sui generis legal entity which defies pigeonholing as a classical international organisation.

4.3 Common Foreign and Security Policy

It is to be further noted that in order to achieve its objectives, SADC has also undertaken to promote the co-ordination and harmonisation of the international relations of its member states¹⁷⁸. What can be discerned of late in SADC is that the member states are now speaking with one voice on issues of international concern and examples abound in that respect. At the Rome Conference for the adoption of the Rome Statute establishing the International Criminal Court ('ICC')¹⁷⁹, SADC member states did not participate

¹⁷⁴ Ibid –Article 10.

¹⁷⁵ Ibid-Article 13.

¹⁷⁶ Ibid.

¹⁷⁷ Ibid.

¹⁷⁸ See SADC Treaty-Article 5(2)(d).

¹⁷⁹ Statute of the International Criminal Court adopted on 17th July 1998.

individually but participated as a group with a common position and South Africa was mandated to address the delegates on behalf of the entire membership of the regional grouping¹⁸⁰. SADC further spoke with one voice in its unequivocal rejection of AFRICOM, a United States Military Command envisaged to be set up on the continent. SADC member states interpreted such a development as a concerted move by the United States to spread its hegemonic tentacles. The regional community has further established a military force, called SADC BRIG, to be dispatched to any hot spot, be it within the region or elsewhere in Africa for peace-keeping purposes and handling of emergencies and disasters.¹⁸¹

It must also be remarked from the above observation, that membership in SADC in many ways circumscribes the state's room of manoeuvre, particularly in its international intercourse - a position which may prima facie be perceived as an affront of such hallowed principles enshrined in the Charter of the UN such as sovereign equality of all member states,¹⁸² which is the hallmark of intergovernmentalism. That the member states' sovereignty prerogatives have been invaded in some areas in favour of the Community is aptly captured by the Treaty which states that:

Member states ...may enter into agreements with other states, regional and international organisations whose objectives are *compatible with the objectives of SADC and the objectives of this Treaty*.¹⁸³ (emphasis added)

This is because member states of the regional entity have undertaken to develop common foreign approaches on issues of mutual concern.¹⁸⁴ It is noteworthy that the OPDSC Protocol even envisages the use of force to rein a delinquent member should pacific means

¹⁸⁰ See The International Criminal Court, The Making of the Rome Statute (1999) p.622.

¹⁸¹ SADC BRIG was launched in August 2007-see www.sadc-int/news.

¹⁸² See Article 2(1) of the UN Charter.

¹⁸³ See SADC Treaty-Article 24

¹⁸⁴ See Article 2(2)(f) of the OPDS Protocol.

of resolving the dispute fail.¹⁸⁵ Member states are further enjoined to develop democratic institutions and practices within their territories and encourage the observance of human rights¹⁸⁶. It is beyond doubt that member states have derogated from their classical prerogatives in the conduct of their affairs, both internally and extraterritorially. In other words they have to abide by a new norm- the SADC *aqui* to which they have voluntarily bound themselves in the spirit of the time-honoured principle of *pacta sunt servanda*- which is enshrined in the VCLT¹⁸⁷. The Treaty further states, though with some vagueness, that member states have agreed to co-operate in such areas as food security, land and agriculture, trade, science and technology, natural resources and environment, social welfare, politics, diplomacy, international relations, peace and security among others¹⁸⁸. It is noteworthy that the COM has the powers to determine further areas of co-operation¹⁸⁹. SADC therefore replicates what the ECJ said forty-five years ago within the context of the then EEC when it controversially but correctly proclaimed in the famous case of *van Gend & Loos* that the Community ‘constitutes a new legal order of international law for the benefit of which states have limited their sovereign rights, albeit in limited fields’¹⁹⁰. The above historic words are spot on with regards to the current developments in SADC.

The above enumerated developments within SADC doubtlessly deprive the regional entity of that badge of intergovernmentalism, the key feature of classical international organisations. What can also be discerned is SADC’s move towards the empowering of the individuals though still at a rudimentary level but nevertheless a symbolic development which will in the foreseeable future prove of great significance in the integration project. This is manifestly reflected as pointed out above, in the jurisdiction of the SADC tribunal which is empowered not only to entertain claims from member states but also natural and

¹⁸⁵ Ibid-Article 2(2)(f).

¹⁸⁶ Ibid-Article 2(2)(g).

¹⁸⁷ See Article 26 of the Vienna Convention on the Law of Treaties adopted on 23 May 1969.

¹⁸⁸ See SADC Treaty-Article 21

¹⁸⁹ Ibid.

¹⁹⁰ Van Gend en Loos v Nederlandse Administratie der Belastingen(1963)ECJ 1

legal persons from the territories of the member states- hardly a feature consistent with traditional international organisations where the states are the main and more often than not, the sole players. Such developments within SADC have resulted in the removal of what that celebrated legal scholar Weiler referred to as:

the central legal artefact of international law: the notion of exclusive state responsibility with the concomitant principles of reciprocity and countermeasures....a truly contained legal regime with no recourse to the mechanism of state responsibility, at least as traditionally understood and therefore no reciprocity and countermeasures...without these features so central to the classic international legal order, the community truly becomes something new¹⁹¹.

Although still at its rudimentary stage in comparison with the EU, it is not wholly ambitious to gaze with such legal spectacles at the regional metamorphosis currently obtaining in SADC. These factors, taken cumulatively do quite clearly put SADC on a *sui generis* footing.

4.4 Criteria for Admission into SADC

The Treaty specifically provides that the Summit has the discretion of admitting any new member by a unanimous decision after recommendations from the COM¹⁹². The Summit is enjoined to determine the criteria and procedures for admission of such new members though membership of SADC shall be subject to no reservations¹⁹³. Admission to SADC is currently governed by the admission criteria approved by the Summit in August 2003 and augmented in August 2004¹⁹⁴. The criteria provides, *inter alia*, that the applicant state should be ‘well versed with and share SADC’s ideals and aspirations¹⁹⁵’, set out in the SADC Treaty, and curiously, that there must be a commonality of political, economic, social and cultural systems of the applicant state with the SADC region, as well as the

¹⁹¹ Weiler(1999)p29

¹⁹² See SADC Treaty-Article 8.

¹⁹³ Ibid.

¹⁹⁴ Oosthuizen (2006)p135-136

¹⁹⁵ Ibid.

observance of the principles of democracy, human rights, good governance and the rule of law in accordance with the African Charter of Human and People's Rights¹⁹⁶, that the applicant should have a good track record and ability to honour its obligations and to participate effectively and efficiently in the SADC Programme of Action (SPA) for the benefit of the Community, that the applicant should not be at war and should not be involved or engaged in subversive and destabilisation activities, nor have any territorial ambitions against SADC, any of its member states or any member states of the African Union.¹⁹⁷ It is further provided that the applicant should have levels of macroeconomic indicators in line with targets set in the Regional Indicative Strategic Development Plan (RISDP), SADC's blue print for economic development, and that former SADC members may only be readmitted after settling out any outstanding arrears¹⁹⁸.

It is noteworthy that one of the admission criteria postulated is the need for observance of the principles of democracy, human rights, good governance and the rule of law. Such a development represents an avant-garde as member states will be precluded from raising state sovereignty or act of state when challenged on the treatment of their own nationals. The Southern African political landscape ranges from strong democracies to autocracies and indeed almost a quarter of SADC members have Freedom House¹⁹⁹'s lowest score possible (that of 7). One is therefore left with a paradoxical situation where most of the SADC members, especially the gross violators of human rights were there at its launching, did not have to apply for membership and did not have to meet any criterion besides being in southern Africa and have continued with their undemocratic practices. This makes it a pipe dream to fathom '...common political values, systems and other shared values which are transmitted through institutions which are democratic...' ²⁰⁰ in the foreseeable future.

¹⁹⁶ Ibid.

¹⁹⁷ Ibid.

¹⁹⁸ Ibid.

¹⁹⁹ Freedom House scores both political rights and civil liberties on a 1 to 7 scale, 1 being the most free and 7 being the least free.

²⁰⁰ See SADC Treaty-Article 5(1)(b)

The situation is even worsened by the fact that the regional body tends to take a condescending and lukewarm approach rather than calling undemocratic regimes to account and its so-called policy of ‘quiet diplomacy’ to the governance crisis in Zimbabwe is a poignant point. Be that as it may, it must however be noted that despite the pessimism expressed above, what we are seeing in southern Africa is a gradual move towards a uniform application of SADC norms throughout its legal space and it takes no particular insight to suggest that the region is slowly slithering towards a supranational order with a constitutional base.

4.5 Relationship between SADC Law and National Law

Member states are enjoined to take all necessary steps to accord the SADC Treaty the force of national law and to ensure its uniform application in their domestic jurisdictions.²⁰¹ The states are further prohibited from taking any measures likely to jeopardise the sustenance of SADC’s principles, the achievement of its objectives and the implementation of the provisions of the Treaty²⁰². Although the Treaty does not expressly encapsulate a ‘supremacy clause’ it is quite clear that 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, it is respectfully submitted that SADC law will trump national law. This is because the SADC Treaty expressly prohibits member states from taking any measures (including the passing of legislation) which jeopardises the implementation of SADC treaties²⁰³. This appears to be an express statement that as long as SADC has legislated in a specific area, member states may not partake of any measures whose effect will be to derogate from such. It will have been helpful though for the SADC Treaty to state expressly as to the relationship between national law and SADC law as such will be of assistance should there be a divergence between the national law and SADC law.

²⁰¹ See SADC Treaty-Article 6

²⁰² Ibid.

²⁰³ See SADC Treaty-Article 6(1)

It is worthwhile to make reference to the SADC Court's inaugural case which is currently pending at the time of writing of this thesis, in which both a legal and natural persons have filed a petition against the government of Zimbabwe for alleged violation of SADC norms such as respect for human rights, democracy and the rule of law in respect of the latter's land reform program²⁰⁴. In granting a temporary reprieve to the applicants, the Tribunal had this to say:

.....SADC as a collectivity and as individual member states are under a legal obligation to respect and protect human rights of SADC citizens. They also have to ensure that there is democracy and the rule of law within the region²⁰⁵.

The applicant was challenging a constitutional provision enshrined in the constitution of Zimbabwe which ousted the jurisdiction of the Zimbabwean courts from adjudicating in matters concerning land acquisition. The SADC Court's jurisprudence in its inaugural case quite clearly settles the point that SADC law reigns supreme over conflicting national law. It is therefore submitted that being the law of the land SADC norms may be invoked by individuals in their national courts, which are duty bound to grant the appropriate remedy as if they were enacted by the national legislature.

4.6 Non-ratification and Direct Effect

The Treaty provides that a Protocol (SADC instruments of implementation) shall be binding only on the member states that are party to the Protocol in question²⁰⁶. The approach taken by SADC of implementing its programs by way of protocols which must be subject to ratification raises considerable legal and constitutional issues and potentially may prove to be a *cul de sac* in its integration drive. This is because even if a member state has signed the relevant protocol bestowing rights to the individuals within its jurisdiction but fails to ratify it, it is highly unlikely that the SADC tribunal will hold the state in question

²⁰⁴ See Mike Campbell and Anor v Republic of Zimbabwe.

²⁰⁵ Ibid.

²⁰⁶ See SADC Treaty-Article 22(9)

to be in violation of SADC *aqui* even though the protocol in question may have entered into force in respect of other members. This is because the Treaty, at least by implication seems to implicitly cater for variable geometry. It will be interesting to see how the SADC tribunal will adjudicate such cases particularly where it is alleged that a member state has violated a fundamental norm of SADC provided in a protocol which the state in question has not ratified. It is noteworthy that it was the ECJ, in an act of unprecedented judicial activism, coined the judicial doctrine of direct effect in 1963 in *Van Gend en Loos*²⁰⁷ and developed subsequently, postulated that where Community legal norms are clear, precise, and self-sufficient must be regarded as the law of the land in the domain of application of Community law. If genuine integration has to be achieved, it will be important for the SADC tribunal to take a leaf from the ECJ which has been credited as being the engine behind European integration agenda. It is thus important that the SADC Tribunal makes an explicit pronouncement on direct effect of SADC law as long as such legislation meets the threshold cited above, that is clear, precise and self sufficient-and that way can the Court play a cardinal role in the promotion of common political values and respect for human rights and the rule of law, progressive elimination of obstacles to the free movement of capital, labour, goods, services and the people of SADC.

4.7 SADC and Human Rights

There is an organic relationship between human rights and integration and it is not possible to build sustainable integration without human rights guarantees²⁰⁸. The SADC Treaty seems to be alive to that imperative need as it specifically states in its Preamble that the guarantee of democratic rights, observance of human rights and the rule of law, *inter alia*,

²⁰⁷ *Van Gend en Loos v Nederlandse Administratie der Belastingen*

²⁰⁸ Chidi A. Odinkala (Unpublished paper presented at a Conference of East and Southern African States on the Protocol Establishing the African Court on Human and People's Rights, Gaborone, Botswana, 9-10 December titled 'Complementarity, Competition or Contradiction: The relationship between the African Court on Human and People's Rights and Regional Economic Courts in East and Southern Africa'.

are central to the integration process²⁰⁹. Article 4 of the Treaty makes it crystal clear that one of the principles which member states shall abide to in their activities is respect for human rights, democracy and rule of law. This is further augmented elsewhere where it is stated that the objectives of SADC shall be to promote common political values, systems and other shared values which are transmitted through institutions that are democratic, legitimate and effective and member states are enjoined not to discriminate against any person on ground of gender, religion, political ties, race, ethnic origin, culture, ill health, disability or such other ground as may be determined by the Summit²¹⁰. Article 2 of the OPDSC unequivocally states that one of the objectives of that entity is to promote the development of democratic institutions and practices within the territories of the member states and encourage observance of universal human rights as provided for in the Charter of the UN and the Convention of the African Union²¹¹. The SADC Tribunal in its first case referred to above stated that SADC as a collectivity and as individual member states are under a legal obligation to respect and protect human rights of SADC citizens and ensure that there is democracy and rule of law within member states²¹².

The above normative framework does point to a drift towards constitutionalisation of the SADC polity, which can only come to fruition through the establishment of constitutional norms which would prove as the bulwark against violation of the rights of citizenry by the member states or the Community. It must however be noted that the Treaty does not contain a Bill of Rights against which the SADC citizenry can enforce their human rights. The argument could be that the SADC Tribunal can always take note of fundamental rights as enshrined in the respective constitutions of the member states and constitutional traditions common to all member states and the human rights conventions to which the member states are parties to. It must be pointed out that some member states have draconian legislation such as Zimbabwe with its harsh media and security laws which

²⁰⁹ See SADC Treaty Preamble-paragraph 11.

²¹⁰ Ibid-Article 6.

²¹¹ See Article 2 of the Protocol on OPDS

²¹² See Mike Campbell and Anor v Republic of Zimbabwe

cannot pass any constitutional test but have only survived thus far at the mercy of an extremely compliant and compromised judiciary. It must further be noted that some of the SADC states such as Namibia, Botswana, Mauritius and South Africa have a well established constitutional tradition to which the SADC Court can refer to and that clearly creates tension with well known violators of human rights with their perverse human rights records who may feel that ‘alien’ legal norms are being imposed on them. A further complication is that some of the states are not parties to the major human rights instruments, for instance a state like Zimbabwe which has a well chronicled history of massive violations of human rights is not party to such important human rights instruments as the Torture Convention.²¹³

It is therefore a matter of urgent necessity that SADC adopts a justiciable Bill of Human Rights and Fundamental Freedoms of the individual as the linchpin of the new regional order as without such guarantees there is no way the SADC integration project can cobble up a free market economy in which factors of production can flow unencumbered within the supranational entity. Member states must further be compelled to guarantee such human rights at the national level which must be consonant with the rights provided for at the regional level to ensure uniformity of application of norms in the region as well as legal certainty – a process which will by far advance the integration project on a credible basis and guarantee its acceptance by the people of southern Africa.

4.8 Institutional Balance

The metamorphosis of SADC over the years in its integration agenda has led to an increasingly labyrinthine institutional configuration. Perhaps such is reflective of the inherent tension between intergovernmentalism and supranationalism. The result has been a

²¹³ Convention Against Torture and Other Cruel, inhuman or Degrading Treatment or Punishment adopted on 10th December 1984.

confusing, less coherent, opaque and ambiguous institutional architecture which does not augur well for the future.

The Summit of the SADC is endowed with executive functions when it dictates the overall direction and control and functions of SADC²¹⁴ as well as appointing the Executive Secretary of SADC and appointment of judges of the Tribunal and admission of new members. The same institution also possesses legislative functions through its adoption of protocols for the implementation of various provisions of the Treaty²¹⁵ as well as any amendments to the Treaty²¹⁶. The Summit is also imbued with judicial functions as it is mandated by the Treaty to determine any sanctions which may be imposed on any member which persistently fails to fulfil its obligations under the Treaty²¹⁷. It must be noted that the powers exercised by the Summit are essentially political although couched in the language of objectivity. The above unsatisfactory state of affairs is compounded by the veil of secrecy which is notorious with SADC summits. The fundamental problem with this state of affairs is that the Summit is composed of Heads of States or Government as alluded to elsewhere, who, more often than not, have no legislative powers under their own national laws. Even in the event that they have such legislative powers under their municipal systems, such legislation would be in most cases under the microscopic gazes of their national parliaments as well as the national judiciary to which such legislation may be subjected to judicial oversight should there be a reasonable basis to do so. Of course the argument could be that most of the protocols are subject to ratification by national parliaments hence that provides a safeguard. It must be noted though that not all of them have to be ratified by each member state before they can be operational, chief amongst of them being the Protocol on the Tribunal²¹⁸ and the Tourism Protocol, and with respect to

²¹⁴ See SADC Treaty-Article 10

²¹⁵ Ibid-Article 22.

²¹⁶ Ibid-Article 36.

²¹⁷ Ibid-Article 33.

²¹⁸ SADC Protocol on Tourism signed by the Heads of State and Government at Mauritius on 14th September 1998.

the latter it is provided that it shall form an integral part of the SADC Treaty upon its entry into force upon ratification by two thirds of the membership²¹⁹. The legal implication is that those members who have not ratified it through their national and constitutional processes will nevertheless be bound once it enters into force.

The COM is also not exempted from a bizarre institutional setup. It must be remembered that the COM is composed of Ministers responsible for foreign or external affairs yet its remit includes overseeing the implementation and execution of SADC affairs, advising the Summit on issues of policy, recommending persons for appointment to the position of Executive Secretary and Deputy Executive Secretary of SADC and other personnel functions²²⁰, as well as the responsibility the selecting and recommending the Summit for appointment the judges of the SADC Tribunal²²¹. It is to be noted that unlike the Council of the EU whose composition changes depending on the subject matter under discussion, in SADC you will have an extremely curious situation where the foreign ministers of member states will be responsible for formulating policies on agricultural issues, economic affairs, justice issues, health related concerns, fishing policies as well as personnel and budgetary duties. Oosthuizen has rightly lamented that the entire SADC institutional device is composed by ministers of some sort at the expense of national officers which results in what he refers to as a top heavy, ministerial micro management, which in his view, is not the cheapest or most effective and expeditious way of going about SADC business²²². The above analysis clearly exposes an unprecedented level of institutional imbalance with the Summit and COM having enormous powers which by and large remain unchecked. This is even more worrisome given that the constitutive treaties, both of SADC and its Tribunal do not expressly grant the latter inherent powers to review the executive, administrative or any community actions exercised by any of the SADC institutions which gives a lot of leeway for abuse of power by the bureaucrats.

²¹⁹ Ibid-Article 2.

²²⁰ See SADC Treaty-Article 11

²²¹ See Article 5 of the Tribunal Protocol

²²² See Oosthuizen(2006) p322

4.8.1 Case for a Directly Elected Parliament?

The SADC institutional architecture as outlined above clearly calls for the adoption of necessary community measures to counterbalance and monitor the executive (Summit and COM) while providing democratic legitimacy to SADC. It is submitted that this can only be achieved through the adoption of a protocol and the amendment of the Treaty to establish a directly elected SADC parliament which will be the highest legislative body of the regional entity with greater control of community legislation. It is only through such a measure that SADC can be more responsive to the needs of the region's peoples and ensure transparency and accountability to the integration process. The current institutional structure reflects a deep tension, a concerted need by the member states to have a stranglehold on SADC which reflects itself in a single institution exercising a myriad of responsibilities-executive, judicial and legislative - something which runs counter to separation of powers-a cardinal principle governing any democratic system.

The case for a SADC parliament directly elected by universal suffrage is even made compelling given the fact that the current SADC-PF, as elucidated in the previous chapter, is not a formal SADC institution and in any case it is just an assembly of individual legislators from national parliaments and to all intents and purposes, is a very weak institution with a strained relationship with the Summit. This has resulted in it being totally overlooked in the SADC integration process. Even though there is a requirement for ratification of SADC instruments by the constitutional processes of the member states (at least the majority of them), it is my submission that such is not a guarantee for the involvement of the SADC citizens neither does it lend legitimacy to an integration process where almost all SADC member states but a few are *de facto* one party states with almost half of them having demonstrated their inability or lack of capacity or gratuitous unwillingness to hold genuine, transparent, legitimate and credible elections which can be regarded as reflective of the will of the people. For the foregoing reasons, an integration process endorsed by national parliamentarians who are themselves not the *bona fide* representatives of the people of the region but a clique of electoral fraudsters does not lend

any legitimacy to the integration process. A directly elected SADC parliament can go a long way to guaranteeing that the integration project is a people-driven one as well as lending institutional balance to the current skewed structure.

CHAPTER FIVE

5. An Overview of The Relationship Between SADC and the African Union

The SADC Treaty provides that member states may enter into other forms of co-operation and agreements with other states, regional and international organisations whose objectives are compatible with that of SADC and the provisions of the Treaty²²³. The preamble to the Treaty further makes reference to the Lagos Plan of Action and the Final Act of Lagos of 1980, the Treaty establishing the African Economic Community and the Constitutive Act of the AU as some of its guiding principles²²⁴. This chapter will discuss the relationship between the SADC and the African Union (AU) and how the former fits in the latter's cherished scheme for the creation of an African supranational entity.

5.1 Relationship between SADC and the AU

The AU, the predecessor to the Organisation for African Unity (OAU) was established in 2000 by the Constitutive Act of the African Union (the 'AU Treaty')²²⁵ which entered into force on 26th May 2001. The AU Treaty states in its preamble on the need to accelerate the process of implementing the Treaty establishing the African Economic Community (AEC) in order to promote the socio-economic development of Africa and to face more effectively the challenges posed by globalisation²²⁶. Among the declared objectives of the continental body include, *inter alia*, the achievement of greater unity and solidarity amongst the African countries and the people of Africa, acceleration of socio-economic integration of the continent, promotion of democratic principles and institutions and the coordination and

²²³ See SADC Treaty-Article 24

²²⁴ See para 11 of Preamble to the SADC Treaty.

²²⁵ Constitutive Act of the African Union signed at Lome, Togo on 11th July 2000.

²²⁶ *Ibid.* Para 6 of the preamble.

harmonisation of the policies between the existing and future Regional Economic Communities (RECs) in the gradual attainment of the objectives of the Union²²⁷.

The African leaders, working under the auspices of the OAU adopted in April 1980 the Lagos Plan of Action and the Lagos Final Act²²⁸. The leaders, through the aforesaid instruments expressed their unwavering commitment to the promotion of Africa's economic integration in order to facilitate and reinforce economic and social development and integration of its economies and for the achievement of that, establishment of national, regional and sub regional institutions leading to an interdependent African economic community²²⁹. It was within the framework of the Lagos Plan of Action and the Lagos Final Act that the African Heads of State and Government, at a summit of the OAU in 1991, signed the Treaty establishing the African Economic Community (the 'Treaty of Abuja')²³⁰. It must be noted that within the scheme of the AEC, the RECs as SADC are building blocks towards the creation of a fully integrated and self sustaining and endogenous continental economic community to be established in six stages up to 2035. The AEC, although it was established more than a decade after SADC, sees the RECs as vital towards a total African union and has thus set, *inter alia*, the following as its objectives; strengthening of RECs and creation of new communities where necessary, stabilisation of tariffs, customs duties and other barriers to intra-community trade, establishment of a free trade area, establishment of an African Customs Union, establishment of an African Common Market leading to an African Monetary Union and an African Central Bank as well as the consolidation of the African Common Market through the free movement of people, goods, capital and services²³¹. The integration process envisaged is all encompassing and transcends political, social and cultural sectors and

²²⁷ Ibid-see Article 3.

²²⁸ Kouassi(2007) p3

²²⁹ Ibid pp4-5.

²³⁰ Treaty Establishing the African Economic Community signed by the OAU Heads of State or Government signed at Abuja, Nigeria on 3 June 1991.

²³¹ Ibid.

visualises the total political and economic unification of Africa as reflected in the Constitutive Treaty of the AU.

It is also noteworthy that all the African regions have an integration process of some sort which as mentioned heretofore constitutes the building blocks for and lay the basis for total unification of Africa and these are SADC (southern Africa), Common Market of Eastern and Southern Africa (COMESA)-encompassing states from east and southern Africa, the East African Community (EAC)-(east Africa), the Economic Community of Central African States (ECCAS)-(central Africa), the Economic Community of West African States (ECOWAS) (west Africa), the Community of Sahel-Saharan States(CEN-SAD) (north Africa), the Intergovernmental Authority for Development (IGAD) and the Arab Maghreb Union (AMU) (north Africa)²³².

It must be remarked however that Africa is a continent of great variation in democratisation and as noted by one prominent scholar, such will prevent any serious economic and political union in Africa based on shared normative values unless African leaders commit themselves through walking the talk and embracing democratic values and it is only through such that institutions like SADC will give any real meaning to the people of southern Africa²³³.

²³² See Oosthuizen (2006) p98.

²³³ Siaroff-Paper presented at the Biennial Congress of the European Union Studies Association, Montreal, Quebec, Canada, May 2007 p-10.

CHAPTER SIX

6. Conclusion and Recommendations

The SADC integration agenda epitomises an historic economic and transnational co-operation in Southern Africa into a transnational entity geared towards uniting the people of Southern Africa. The transformation has also witnessed a surgery and reconfiguration of SADC's institutional structure to facilitate deeper integration and constitutionalisation of the SADC polity.

The integration project has meant the cession of sovereign competencies by member states to the supranational bodies. The process has not been smooth though- there are still intractable challenges to be faced. There is obvious reluctance by the member states to subject themselves to oversight from supranational institutions. SADC's slither towards deeper integration of the region is strewn with countless challenges, chief of which will be a friction between misguided statism on one hand and supranationalism on the other. The empty-chair crisis faced by the EU in its formative years and leading to the Luxembourg Accord²³⁴ is a testimony of such tension and SADC should expect the same as it trudges towards a supranational order.

There is however an imperative need for a rationalisation of the SADC institutional structure with view curtailing excessive overloading of executive, judicial and legislative powers in the Summit and the Council. The composition of the COM should be a revolving one depending on the subject nature under discussion rather than the current state of affairs where it is composed of a fixed membership. Institutional balance is crucial for SADC's integration process and it is important to effect the necessary amendment to the Treaty to accord the SADC-PF the necessary recognition as an institution composed of directly

²³⁴ Gilbert(2003) 104

elected parliamentarians to enact necessary community legislation and bring balance to the institutional architecture. It is also important that the SADC Secretariat should be strengthened and be legislatively enabled to exercise general oversight over all SADC member states and institutions to ensure that they abide by the Treaty provisions and making sure measures taken by SADC are being properly implemented. It is also recommended that the Secretariat should be granted the right of initiative to draw proposals for SADC legislation. The SADC Tribunal should also be granted express powers to review any legislative, administrative or judicial acts of member states or of a SADC institution falling within the realm of the Community's jurisdiction to make sure such acts are compatible with the Treaty and SADC's objectives.

The system of decision-making in SADC affirms the pre-eminence of consensus decision-making in the adoption of institutional acts. It is however important for the SADC Treaty to provide an alternative voting procedure should there be failure of consensus. Qualified majority voting is more appealing on substantive issues and simple majority on procedural issues.

SADC's admission criteria also marks an audacious endeavour to empower SADC citizens in the integration process and signals a break with intergovernmentalism as observance of the principles of democracy and the rule of law in accordance with the African Charter on Human and People's Rights is given pride of place and a member state involved in egregious violations of human rights of its people is precluded from raising sovereignty or act of state to shield itself from such wayward behaviour. It has been pointed out in this thesis that member states of the regional entity are enjoined to accord SADC the force of national law and the conclusion to be derived is that SADC norms within its area of competence constitutes a higher law and where there is a conflict with the member state's national law, SADC law prevails. However it is important for the SADC Tribunal to give clarity on the supremacy of SADC law to forestall any potential recalcitrance by member states' national institutions. In that regard it is imperative for SADC to add to its normative framework on human rights by adopting a regionally justiciable Bill of Human Rights

against which member states' treatment of their citizens will be measured. It is also satisfactory to note that normative developments within SADC do point to a drift towards constitutionalism of the SADC polity- a development which can only come through to fuller realisation through the adoption of human rights norms which will constitute a bulwark against violation of the rights of the citizenry of the Community.

It has also been noted that southern Africa is a region in a flux. The movement towards supranationalism by SADC represents to a greater extent a readjustment and modification of the basic concepts, norms and classical strictures of intergovernmentalism. Challenges lie ahead and as the EU integration project will illustrate, political diversity and macroeconomic disequilibria will impair consensus and there will always be reluctance by member states to surrender sovereign prerogatives. It must be emphasised that for any meaningful integration arrangement to succeed, member states must be prepared to surrender their sovereign prerogatives to SADC, the need to uphold the primacy of the SADC law not only in areas of SADC's exclusive jurisdiction but also in areas of concurrent jurisdiction, the imperative need to empower SADC citizens, development of uniform institutions, political values, respect for the rule of law and human rights of the citizenry must be respected, protected and guaranteed anywhere in the region with robust judicial remedies for any encroachment. Not heeding to the above will relegate SADC's infantile trudge towards a supranational order to a mirage, a mere forum for talk shows by the regional bureaucrats but with no meaning or resonance with the SADC citizenry.

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