

## ABHANDLUNGEN / ARTICLES

### Regional Integration versus National Sovereignty: A Southern African Perspective

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#### A. Introduction

The 21<sup>st</sup> Century has presented a myriad of challenges to the world including terrorism, economic meltdown, poverty, unemployment and demands from the governed such as better living conditions and respect for human rights. These challenges have prompted a change in global governance trends. It has become evident that a state can no longer exist in isolation; there is a greater demand and advantage in entering into regional or international agreements in order to be able to survive in an increasingly interdependent world. However states are faced with a dilemma as to how far they have to shed their ability to control and dictate the internal affairs of their countries in favour of the international agreements that they have voluntarily entered into. This paper will bring into perspective the experience in Southern African Region and illustrate the conflict between municipal and international obligations, a conflict which can only be eradicated if a regional body has the constitutional prowess to influence domestic policy.

#### I. *Defining National Sovereignty*

As classically conceived, the doctrine has in the past been described as the supreme, absolute, and uncontrollable power by which an independent state is governed and from which all specific political powers are derived; the intentional independence of a state, combined with the right and power of regulating its internal affairs without foreign interference. Sovereignty is the power of a state to do everything necessary to govern itself, such as making, executing, and applying laws; imposing and collecting taxes; making war and peace; and entering into treaties or engaging in commerce with foreign nations.<sup>1</sup>

Scholars,<sup>2</sup> in their attempt to give an accurate definition of sovereignty, have looked to the Island of Palmas Case,<sup>3</sup> a case involving a territorial dispute over the Island of Palmas

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<sup>1</sup> Legal Dictionary: "National Sovereignty". <http://legaldictionary.thefreedictionary.com/National+sovereignty>. Accessed 2011-08-12

<sup>2</sup> *Dugard John*, *International Law a South African Perspective*, Cape Town, p. 126.

between the Netherlands and the United States which was heard by the Permanent Court of Arbitration.

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

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

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

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

Today, when international lawyers say that a state is sovereign, all that they really mean is that it is independent, that is, that it is not a dependency of some other state. The theory of sovereignty began as an attempt to analyse the internal structure of a state. Political

<sup>3</sup> Hague Court Reports 2d 83 (1932), (Perm. Ct. Arb. 1928), 2 U.N. Rep. Intl. Arb. Awards 829

philosophers<sup>4</sup> taught that there must be, within each state, some entity which possessed supreme legislative and or supreme political power. Then by a shift of meaning, the word came to be used to describe, not only the relationship of a superior to his inferiors within a state, but also the relationship of the ruler or of the state itself towards other states. But the word still carried its emotive overtones of unlimited power above the law, and this gave a totally misleading picture of international relations. The fact that a ruler can do what he likes to his own subjects does not mean that he can – either as a matter of law or as a matter of power politics – do what he likes to other states.<sup>5</sup>

## II. *Defining Regional Integration*

Regional integration refers to the unification of nation states into a larger whole. Regional integration can be described as a dynamic process that entails a country's willingness to share or unify into a larger whole. The degree to which it shares and what it shares determines the level of integration. There are different degrees of integration depending on predefined criteria.<sup>6</sup>

According to *Van Niekerk*<sup>7</sup> regional integration can be defined along three dimensions:

### 1. Geographic scope

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

### 2. Substantive coverage

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

<sup>4</sup> Scholars such as Socrates, Thomas Hobbes, Plato and Karl Popper

<sup>5</sup> *Peter Malanczuk and Michael Akehurst, A Modern Introduction to International Law, Routledge 1997, p. 15.*

<sup>6</sup> *June Soomer, Building Strong Economies Depends on You and Me, 2003. (<http://www.eccb-centralbank.org/PDF/newspaper3.pdf>) (accessed 2011-05-20)*

<sup>7</sup> *Lolette Kritzing-van Niekerk, Regional Integration: Concepts, Advantages, Disadvantages and Lessons of Experience, [http://www.sarpn.org.za/documents/d0001249/P1416-RI-concepts\\_May2005.pdf](http://www.sarpn.org.za/documents/d0001249/P1416-RI-concepts_May2005.pdf) (accessed 2011-05-20)*

### 3. Depth of Integration

The third dimension involves the intensity of the integration. Regional integration arrangements may be defined by the intensity of their character. Some regional arrangements are so deeply defined that they involve the sacrifice of state sovereignty, to some extent, for the benefit of the region. The depth of integration may be subdivided as follows:

- Co-operation

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

- Harmonization/co-ordination

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

- Integration

This implies a higher degree of lock-in and loss of sovereignty, and also tends to apply to a broader scope, although it could as well be limited to a specific market. It may imply a more united market for goods (FTA and custom unions), factors (common markets), and also a common currency such as in the European Union. A deepest form is a federated union such as the United-States, which includes political as well as economic integration, including in infrastructure-related services (telecom, air-transport). Typically, high degree of economic interactions – trade, investment, etc. – could make integration more cost-effective as opposed to simple harmonization/co-ordination, as the opportunity cost of exit rises. Also, the scope of integration and the concomitant complexity calls for countries to relinquish sovereignty to a supra-national agency, the purest form being a federal government.<sup>8</sup>

### *III. Regional Integration versus Regional Co-operation*

There is a vast difference between integration and co-operation. Co-operation may be the weakest and issue-focused arrangement. Countries may co-operate for a joint development project. They may also do so for facilitating exchange of information and best practices. They may also co-operate in the manner of the G7 on monetary and exchange rate policy issues. They retain full control of their domestic affairs and if needed, may opt-out of the arrangement with relative ease.

Except for narrow issues calling for joint development, co-operation signals the lowest level of multilateral commitment. It may be most effective for addressing many common causes that require regular exchange and consultation, but no supra-national body to make decision. “Sub-regional common goods” would typically be the subject of some form of joint development and management scheme (ex: River Basin Initiatives) or specific sub-

<sup>8</sup> *Kritzinger-van Niekerk*, note 7, p. 5

regional initiatives (ex: HIV, Malaria, Conflict Prevention and Resolution). This is also the case for issues related to governance, knowledge and best practice sharing, etc.<sup>9</sup>

## **B. The Southern African Experience**

The Southern African Development Community (SADC), formerly known as the Southern African Development Coordination Conference (SADCC), is an organization of Southern African states initially formed to reduce economic dependence on South Africa (then an Apartheid state) and to harmonize and coordinate development in the region.<sup>10</sup>

At their meeting in Windhoek in August 1992, the Heads of State and Government signed a Treaty transforming the "SADCC" from a Coordination Conference into SADC, the Community and re-defined the basis of co-operation among Member States from a loose association into a legally binding arrangement. The purpose of transforming SADCC into SADC was to promote deeper economic co-operation and integration to help address many of the factors that made it difficult to sustain economic growth and socio-economic development, such as continued dependence on the exports of a few primary commodities.<sup>11</sup> It had become an urgent necessity for SADC governments to urgently transform and restructure their economies. The small size of their individual markets, the inadequate socio-economic infrastructure and the high per capita cost of providing this infrastructure as well as their low-income base made it difficult for them individually to attract or maintain the necessary investments for their sustained development.<sup>12</sup>

The broad strategies of the SADC as contained in the Treaty are to:

- harmonise political and socio-economic policies and plans of Member States;
- encourage the peoples of the region and their institutions to take initiatives to develop economic, social and cultural ties across the region, and to participate fully in the implementation of the programmes and projects of SADC;
- create appropriate institutions and mechanisms for the mobilisation of requisite resources for the implementation of programmes and operations of SADC and its institutions;
- develop policies aimed at the progressive elimination of obstacles to the free movement of capital and labour, goods and services, and of the peoples of the region generally, among Member States;

<sup>9</sup> *Kritzinger-van Niekerk*, note 7, p. 5

<sup>10</sup> See The SADC Framework for Integration, available from <http://www.sadc.int/index/browse/page/107> and Profile: Southern African Development Community, available from <http://www.africa-union.org/recs/sadcprofile.pdf>

<sup>11</sup> Profile: Southern African Development Community, available from <http://www.africaunion.org/recs/sadcprofile.pdf>

<sup>12</sup> SADC Regional Indicative Strategic Development Plan, pg 3, [www.sadc.int/attachment/download/file/74](http://www.sadc.int/attachment/download/file/74). (Accessed 2011-02-27)

- promote the development, transfer and mastery of technology;
- improve economic management and performance through regional co-operation;
- promote the co-ordination and harmonisation of the international relations of Member States; and
- secure international understanding, co-operation and support, and mobilise the inflow of public and private resources into the region.<sup>13</sup>

The Southern African Region is considered the most likely on the African continent to develop a common market, promote co-operation and enhance trade. The Southern African Development Community (SADC), one of the building blocks for the integration process is viewed by some as one of the more promising African regional integration initiatives. It could become one of the world's top 20 regional economic blocs.<sup>14</sup>

The Treaty under Article 6 (1)<sup>15</sup> and 6 (5)<sup>16</sup> imposes a positive legal obligation for national legal reform so that national legal systems conform to the letter and spirit of the SADC Treaty. The articles, read together, further require State Parties not to promulgate or act in a manner that will defeat the objectives of the organisation. The grey area is this; the Treaty does not expressly encapsulate a 'supremacy clause'. It is quite clear that from a principled perspective, SADC norms within the Community's area of competence constitute a higher law and where there is a conflict with a member state's national law, SADC law should take precedence.

Through Article 16(1)<sup>17</sup> of the SADC Treaty the organisation established a Tribunal. This body acted as a court of law would do at a domestic level; however this being at a sub continental level, there were legal hurdles that should have been dealt with first such as the notion of state sovereignty which most states use as a defence even in the presence of gross violations of human rights.

### *I. The Confrontation between Municipal Law and International Obligations*

Often in international law, there is usually much contestation between the obligations that a state voluntarily binds itself to and the internal state machinery. The obligations at interna-

<sup>13</sup> The Treaty of the Southern African Development Community as amended in 2001

<sup>14</sup> Annual Report on Integration in Africa 2002 Overview, Addis Ababa, Economic Commission for Africa, March 2002.

<sup>15</sup> Member States undertake to adopt adequate measures to promote the achievement of the objectives of SADC, and shall refrain from taking any measure likely to jeopardise the sustenance of its principles, the achievement of its objectives and the implementation of the provisions of this Treaty.

<sup>16</sup> Member States shall co-operate with and assist institutions of SADC in the performance of their duties.

<sup>17</sup> The Tribunal shall be constituted to ensure adherence to and the proper interpretation of the provisions of this Treaty and subsidiary instruments and to adjudicate upon such disputes as may be referred to it.

tional level would require certain reforms to be effected by the state however this can be met by much resistance or inertia by internal state institutions. This resistance might be influenced by a difference in political ideologies, lack of capacity or a mere lack of political will.

An example that can be sited in Southern Africa is when the Republic of Zimbabwe refused to comply with the ruling of the *Mike Campbell (PVT) Limited and Another v Republic of Zimbabwe* three times, curiously arguing that the Tribunal rulings do not supersede the country's laws. Zimbabwe refused to comply with the SADC Tribunal's rulings and challenged its legitimacy on the grounds of procedure and content. The government's lawyers even stopped attending tribunal hearings deriding it as primordial institution without relevance to African nationalism. Zimbabwe has even declined to register the Tribunal's decision, saying it violates the country's Constitution.<sup>18</sup>

The lines between community law and domestic law are blurred. In the application for interim relief, *Mike Campbell (PVT) Limited and Another v Republic of Zimbabwe*,<sup>19</sup> the Tribunal ruled as follows;

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

What followed next was a complete defiance and disregard for international law as the family who initiated the proceedings would be harassed, assaulted and even kidnapped within Zimbabwean territory without the protection from Zimbabwean police.<sup>20</sup> Further the Tribunal would observe in an application for a declaration to the effect that the respondent is in breach and contempt of the orders of the Tribunal that;

We have considered the counter-affidavit<sup>21</sup> of the respondent, which is substantially to the effect that there is a state of lawlessness prevailing in the country and that the authorities have difficulty in addressing the problems of intimidation and violence committed by certain people.<sup>22</sup>

<sup>18</sup> Southern African Land and Agrarian Reform Network, SADC Land Tribunal: Sovereignty, Independence & Pan Africanism. Available from [http://www.ctdt.co.zw/attachments/053\\_SALARN%20News%20-%20Issue%203.pdf](http://www.ctdt.co.zw/attachments/053_SALARN%20News%20-%20Issue%203.pdf)

<sup>19</sup> SADCT: 2/07

<sup>20</sup> See "Farmer who exposed terror is kidnapped with family", *The Zimbabwe Situation*, June 30, 2008. [http://www.zimbabwesituation.com/jun30a\\_2008.html](http://www.zimbabwesituation.com/jun30a_2008.html).

<sup>21</sup> This is an extract from the affidavit, "*The provisional order of the SADC Tribunal cannot and has not suspended the Attorney General's Constitutional responsibility to prosecute violators of any of Zimbabwe's existing criminal laws such as section 3 of the GAZETTED LANDS (Consequen-*

It is submitted that this antagonistic interplay between International law and domestic law is unacceptable since while there is no consensus as to the position of international judgments in the SADC region, states will continue with gross human rights violations. There is a conflict of laws, norms and importantly, values such as constitutionalism, rule of law and the respect for human rights.

It is submitted that the SADC Treaty and other documents of international importance within the SADC Region are heavily pregnant with the principle of sovereignty. This is because the crafters of the documents, The Heads of States and Ministers, deliberately frame these documents in such a way to as to ensure that their political interests are not compromised. The Treaty, which was concluded in an era of emerging democracy and hopefulness, presents, under Article 4(a) the principle of sovereign equality of member states. The Organ of Politics, Defence and Security Co-operation Protocol, which was concluded in a period of inter- and intra-state conflict, includes the principles of strict respect for sovereignty, sovereign equality, political independence and non-interference in domestic affairs of member states.<sup>23</sup> The SADC Mutual Defence Pact, finalised in the midst of the Zimbabwe crisis, contains three substantive provisions on non-interference in domestic affairs<sup>24</sup>

It should be pointed out that Article 10(1) of the Treaty endows the Summit with supreme policy making powers and further under Article 10(2) and 10(3) the same body shall be responsible for policy direction, control and adoption of legal instruments, however states continue to disregard their obligations despite calls by the Summit, thus engendering a culture of impunity.

*tial Provisions) Act. As I stated in my previous minute to yourselves the Attorney-General's Office is proceeding with the prosecutions."*

<sup>22</sup> SADC (T) 11/08

<sup>23</sup> Protocol On Politics, Defence And Security Co-Operation, fourth preambular, *recognising and reaffirming the principles of strict respect for sovereignty, sovereign equality, territorial integrity, political independence, good neighbourliness, interdependence, non-aggression and non-interference in internal affairs of other States*; Available from <http://www.sadc.int/key-documents/protocols/protocol-on-politics-defence-and-security-cooperation/>

<sup>24</sup> SADC Mutual Defence Pact, Article 7(1) *Without prejudice to the provisions of Article 11 (2) of the Protocol on Politics, Defence and Security Cooperation, State Parties undertake to respect one another's territorial integrity and sovereignty and, in particular, observe the principle of non-interference in the internal affairs of one another. Article 12(1) State Parties undertake not to disclose any classified information obtained in the implementation of this Pact, or any other related agreements, other than to their own staff, to whom such disclosure is essential for purposes of giving effect to this Pact or such further agreements pursuant to this Pact, and in the Preamble recognising the sovereign equality of all States...*



Figure 1: Zimbabwe Electoral Legislation against the SADC Principles

SADC Standard	Statute in Breach	Policy in Breach
<p>Full participation of citizens in the political process<sup>25</sup></p> <p>Freedom of association<sup>26</sup></p>	<p>Public Order and Security Act (POSA) s 24 – requiring notice of intention to hold a public gathering</p>	<p>POSA s 24 – the common police practice of interpreting this provision to mean that no gathering, including closed private party planning meetings, can take place without police permission, wrongly extending the application of this law</p>
<p>Equal access to state media for all political parties<sup>27</sup></p>	<p>The Broadcasting Services Act s. 4 places control of appointments to the all-powerful Broadcasting Authority of Zimbabwe Board in the hands of the President and his minister. Effectively this gives total control of the state media and the power grant or refuse broadcast.</p>	<p>The opposition has been refused access to the state media consistently at all times, and independent media groups have been refused broadcasting licenses.</p>
<p>Equal opportunity to exercise the right to vote and be voted for<sup>28</sup></p>	<p>The restriction of postal ballots under s. 71 of the Electoral Act to members of the armed forces, diplomats (and spouses) effectively disenfranchises millions of Zimbabwean citizens living abroad.</p> <p>The effect of s. 17 as read with s. 51 of the Electoral Act is to empower the military to decide the number and location of polling stations.</p>	<p>The practice of requiring members of the armed forces serving abroad to vote in the presence of their commanding officers mitigates strongly against the right to make a free choice in the election.</p> <p>The number and location of polling stations has a bearing on the voters’ ability to exercise the right to vote freely. In the 2002 election very few polling stations were sited in urban areas, causing long queues and preventing hundreds of thousands from voting. In the rural areas the location of some polling stations (eg close to militia camps), was intimidating to opposition supporters. Giving authority to the military to make these decisions will only exacerbate this problem.</p>

25 Principle 2.1.1

26 Principle 2.1.2

27 Principle 2.1.5

28 Principle 2.1.6

SADC Standard	Statute in Breach	Policy in Breach
Independence of Judiciary and impartiality of electoral institutions <sup>29</sup>	The appointment of members to the Electoral Supervisory Commission (ESC) under s. 61 of the Constitution, of the Delimitation Commission under s. 59 of the Constitution, of the Zimbabwe Electoral Commission (ZEC), and of the Registrar-General are all done effectively by the President – thus compromising the independence and impartiality of all Zimbabwe’s electoral bodies.	The lack of independence and impartiality of the Judiciary was clearly demonstrated by the unreasonable delays in hearing election challenges for the 2000 parliamentary elections and 2002 presidential election.

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

The SADC Principles and Guidelines Governing Democratic Elections<sup>30</sup> provide a useful set of standards that attempt to secure the democratic resolve within SADC Member states, however these principles and guidelines seem to be dissolved by national legislation and as such the pursuit for a region governed by free and fairly elected representatives is dissolved, ultimately regional integration in the geo-political sense is quashed simply because of the absence of proper management of relations between the national and regional sphere. The above table illustrates the status quo in Zimbabwe as against the SADC Principles. Moreover the table illustrates that there is no consensus or reconciliation between the SADC principles and domestic law.

The Kingdom of Swaziland is another example which can be cited to have used and overstretched its sovereignty. The SADC Council of Non-Governmental Organisation has raised concern on the continued denial to the people of Swaziland of their inalienable right to participate in electoral and other democratic processes and has called upon SADC to ensure that the Kingdom of Swaziland establishes a constitutional democracy.<sup>31</sup>

Swaziland is ruled by King Mswati III, an absolute monarch, and his government who are intolerant of any political organization or political activity. The monarchy was consolidated through the usurpation of power and annulment of the constitution by royal decree in 1973. The immediate result of the decree was that judicial, executive and legislative powers

<sup>29</sup> Principle 2.1.7

<sup>30</sup> Adopted by the SADC Summit in Mauritius, August 2004.

<sup>31</sup> SADC-CNGO, FOCCISA, SATUCC and CNONGD, Civil Society Statement at the occasion of 5<sup>th</sup> SADC Civil Society Forum held in Kinshasa, Democratic Republic of Congo. Available from [http://sadcngo.org/resources/forum\\_communique.pdf](http://sadcngo.org/resources/forum_communique.pdf)

were all vested in the King, a situation that still exists today even though a new Constitution was adopted in 2005. The new Constitution did not repeal the 1973 decree, the King still appoints and controls the Judiciary and has the power to veto (or disregard) any bills passed by parliament.<sup>32</sup> The *States in Transition Observatory* published their report on the 2008 elections in Swaziland. It was reported, among other things, that the Elections Boundaries Commission was unilaterally appointed by King Mswati, it was accountable to him and it could not be challenged in court. Furthermore it was chaired by one Gija Dlamini who is a Chief and a brother to King Mswati. The Deputy Chairperson was the Deputy Attorney General who is also appointed by the King.<sup>33</sup> Given the above, the Independence of the EBC is clearly questionable and this situation goes against the spirit proposed by the SADC guidelines.<sup>34</sup>

Despite numerous calls by the international community and the existence of the SADC principles, the Kingdom of Swaziland seems adamant to maintain the status quo, one the underpinning reasons being its claim of sovereignty.

In *National Constitutional Assembly v. Prime Minister and Others*,<sup>35</sup> decided on 21 May 2009, Swaziland's highest court ruled that the Tinkhundla based electoral system which excludes political parties from the electoral process did not constitute a violation of freedom of association as guaranteed by Article 25<sup>36</sup> of the Swaziland Constitution. This judgement is definitely in violation of the SADC Principles and Guidelines Governing Democratic Elections.

## II. *The Suppression of a Regional Parliament*

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

<sup>32</sup> Institute for Democracy in Africa (IDASA), Swaziland Country Brief, [http://idasa.krazyboyz.co.za/our\\_products/resources/output/swaziland\\_country\\_brief\\_2/?pid=stats\\_in\\_transition](http://idasa.krazyboyz.co.za/our_products/resources/output/swaziland_country_brief_2/?pid=stats_in_transition) Accessed 2011-08-05

<sup>33</sup> Institute for Democracy in Africa (IDASA) <http://idasa.krazyboyz.co.za/media/uploads/outputs/files/Zim%20March%20SADC%20Guidelines.pdf> Accessed 2011-08-05

<sup>34</sup> SADC Principles and Guidelines Governing Democratic Elections

<sup>35</sup> A discussion of the Case is available from [http://swazilandsolidaritynetworkcanada.wikispaces.com/ICJ+++Statement+Regarding+the+Swaziland+Supreme+Court's+Ruling+in+the+Case+of+National+Constitutional+Assembly+\(NCA\)+v.+Prime+Ministe+%26+Others,+2009++June+4,+2009](http://swazilandsolidaritynetworkcanada.wikispaces.com/ICJ+++Statement+Regarding+the+Swaziland+Supreme+Court's+Ruling+in+the+Case+of+National+Constitutional+Assembly+(NCA)+v.+Prime+Ministe+%26+Others,+2009++June+4,+2009)

<sup>36</sup> Available from <http://www.ide.uniswa.sz/documents/resources/constitution2004.pdf>

involving parliamentarians, their parties and NGOs in SADC activities, promoting the principles of human rights and democracy and educating people on SADC.<sup>37</sup>

Despite the existence of the Forum, its principle and objectives, the attainment of regional integration is severely mutilated by the fact that SADC officials are deliberately reluctant to grant the forum the status it deserves. SADC is very reluctant to transform the Forum into a proper regional parliament with powers to hold the SADC Summit accountable. It seems as if the SADC members are not interested in having their decisions scrutinized and power circumscribed by a supra-national parliament. In fact, notwithstanding the non-evolution of the Forum into a parliament, the Forum has not even managed to establish a formal relationship with the Executive.<sup>38</sup>

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

- financial and resource (technical, human) constraints arising from the creation of the SADC Parliament and also sustaining the Pan-African Parliament;
- ceding of a degree of sovereignty by national parliaments and member states before the Parliament is empowered to legislate;
- current configuration of the geopolitical regions of the African Union (AU), which is the basis of organisation for PAP, excludes a significant number of SADC countries;
- the need to respect national policies in the context of a regional framework.<sup>39</sup>

For the purposes of this paper, attention in this instance is directed at the second and third reason not to establish the Parliament. It is submitted that these reasons simply encompass the attitudes of SADC Heads of State and their unwillingness to shed part of their sovereignty for the achievement of broader regional objectives that will benefit all. The United Nations Development Programme has also observed that although most African citizens are aware of the advantages of regional integration, political considerations hamper the process in most parts of the continent.<sup>40</sup>

This challenge is not only prevalent in Southern Africa. *Karuuombe* wrote that the transformation of the Pan-African Parliamentary Forum into a regional parliament should also be analysed in the context of the general executive-parliamentary relationships on the continent. The Forum which is supposed to be a continental parliamentary body was insti-

<sup>37</sup> International Democracy Watch, SADC Parliamentary Forum. Available from <http://idw.csfederalismo.it/index.php/sadc-parliament>

<sup>38</sup> International Democracy Watch, SADC Parliamentary Forum. Available from <http://idw.csfederalismo.it/index.php/sadc-parliament>

<sup>39</sup> *Barney Karuuombe*, The Role of Parliament in Regional Integration – The Missing Link. pg 18. TRALAC. Accessed 2011-07-30. Available from [http://www.tralac.org/cause\\_data/images/1694/MRI2008Chapter9Karuuombe.pdf](http://www.tralac.org/cause_data/images/1694/MRI2008Chapter9Karuuombe.pdf)

<sup>40</sup> United Nations Development Programme, Regional integration and Human development: A Pathway for Africa, pg 18. Available from [http://www.unesco.org/library/PDF/RegIntegAndHumanDev\\_Africa\\_web.pdf](http://www.unesco.org/library/PDF/RegIntegAndHumanDev_Africa_web.pdf)

tuted without legislative powers, and its assumption of such powers after the first five years is not automatic but will depend on executive assent... only the East African Legislative Assembly was given limited legislative powers whilst the ECOWAS Parliament has mere consultative and advisory powers. This brings us to the question of the willingness and readiness of the African executive to subject itself to regional and transnational parliamentary scrutiny and oversight.<sup>41</sup>

### C. The position in other Jurisdictions

The Vienna Convention on the Law of Treaties<sup>42</sup> codifies several cornerstones of contemporary international law. The five important principles are:

#### Free consent

According to the principle of free consent, international agreements are binding upon the parties. These parties cannot create either obligations or rights for third States without their consent. This is embodied in paragraph three of the Preamble as well as Article 34<sup>43</sup> of the Convention.

#### Good faith

As well as free consent, good faith is of fundamental importance to the conduct of international relations in general and is therefore recognized as an international principle according to the terms of the Vienna Convention. Article 31(1)<sup>44</sup> as well as Article 62(2)(b)<sup>45</sup> of the Convention reflect this spirit.

#### *Pacta sunt servanda*

In Paul Reuter's words, this principle can be translated by the following formula: treaties "are what the authors wanted them to be and only what they wanted them to be and because they wanted them to be the way they are".<sup>46</sup> The rule is based on good faith; this entitles states to require that obligations be respected and to rely upon the obligations being respected. This good faith basis of treaties implies that a party to the treaty cannot invoke provisions of its domestic law as justification for a failure to perform, its treaty obligations.

<sup>41</sup> *Karuombe*, note 39, p. 17

<sup>42</sup> Available from [http://untreaty.un.org/ilc/texts/instruments/english/conventions/1\\_1\\_1969.pdf](http://untreaty.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf)

<sup>43</sup> A treaty does not create either obligations or rights for a third State without its consent.

<sup>44</sup> A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

<sup>45</sup> A fundamental change of circumstances may not be invoked as a ground for terminating or withdrawing from a treaty: (b) if the fundamental change is the result of a breach by the party invoking it either of an obligation under the treaty or of any other international obligation owed to any other party to the treaty.

<sup>46</sup> <http://www.public-international-law.net/>

*Rebus sic stantibus*

According to this principle, extraordinary circumstances can lead to the termination of a treaty. These circumstances can consist either in a material breach of a given treaty by one of the States Parties,<sup>47</sup> in a permanent disappearance of an object indispensable for the execution of the treaty<sup>48</sup> or in a fundamental change of circumstances.<sup>49</sup>

*Favor contractus*

The principle of *favor contractus* means that when confronted with a situation in which the contract may either be fulfilled or terminated, it is preferable to fulfil the contract. However, it is common that African states will often prefer to opt out of their obligations when such obligations do not reap immediate benefits for them, than fulfil such obligations.

*I. The Permanent Court of International Justice*

The Wimbledon Case was an action concerning the Treaty of Versailles<sup>50</sup> and German sovereignty. The British ship, the S.S. Wimbledon (owned by a French company) attempted to carry munitions and supplies to Poland as they fought a war with Russia. Germany refused the boat passage through the Kiel Canal. The canal was in German territory. Germany was a neutral party in the war and it did not wish to support either side. The applicants submitted a request before the court on the grounds of wrongfulness by German authorities when they refused passage for the ship. The Neutrality Orders issued by Germany, were defined as inconsistent with Article 380<sup>51</sup> of the Treaty of Versailles.

The agent for Germany argued that Germany was sovereign over her own lands. The Article should not compromise her sovereignty or her sovereign right to neutrality. Boats could be refused access on many grounds, neutrality being one of them. The Permanent Court of International Justice opined that:<sup>52</sup>

<sup>47</sup> Article 60 (1) of the Vienna Convention provides that *A material breach of a bilateral treaty by one of the parties entitles the other to invoke the breach as a ground for terminating the treaty or suspending its operation in whole or in part.*

<sup>48</sup> Article 61 (1) of the Vienna Convention provides that *A party may invoke the impossibility of performing a treaty as a ground for terminating or withdrawing from it if the impossibility results from the permanent disappearance or destruction of an object indispensable for the execution of the treaty. If the impossibility is temporary, it may be invoked only as a ground for suspending the operation of the treaty.*

<sup>49</sup> Article 62 (1) (a) of the Vienna Convention provides that *A fundamental change of circumstances which has occurred with regard to those existing at the time of the conclusion of a treaty, and which was not foreseen by the parties, may not be invoked as a ground for terminating or withdrawing from the treaty.*

<sup>50</sup> 1919

<sup>51</sup> *The Kiel Canal and its approaches shall be maintained free and open to the vessels of commerce and war of all nations at peace with Germany on terms of entire equality.*

<sup>52</sup> 1923 P.C.I.J. (ser. A) No. 1 (Aug. 17)

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

The court in this instance drew a very clear line between interest at domestic level and obligations at international level. The spirit is thus the obligations of a state at international level cannot be set aside merely because a state is sovereign.

## II. *The European Court of Justice*

The European Court of Justice has in the case of *NV Algemene Transporten Expeditie Onderneming van Gend en Loos v Nederlandse Administratie der Belastingen*<sup>53</sup> gave the following interpretation:

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

It is submitted that this position, where Community law imposes obligations upon individuals as well as rights which can be enforced in domestic Courts, can only be reached if the SADC Parliamentary Forum transformed into a Parliament and is afforded the competence of “direct effect”. It is with foresight and inspiration from the European model that the forum would not be granted the legislative competence over all spheres.

## III. *The European Union*

The European Union has six exclusive competences. In these areas, the EU makes legislation and decisions in. The nation state takes no decisions and does not interfere with the competence for these matters given to the EU, for the Treaty has granted the commission power to issue decisions in these areas.<sup>54</sup>

The general rule of international law is that a state cannot plead a rule or gap in its own municipal law as a defence to a claim based on international law. In *Nold v. Commission*,<sup>55</sup> the European Court of Justice emphasized that measures incompatible with the fundamental

<sup>53</sup> 1963 ECR I (Case 26/62)

<sup>54</sup> These areas are the customs union, the economic and monetary policy, competition laws, international trade policy, the common fisheries policy and international agreements. For more information see [http://ec.europa.eu/ireland/about\\_the\\_eu/competences/index\\_en.htm](http://ec.europa.eu/ireland/about_the_eu/competences/index_en.htm)

<sup>55</sup> 1974 ECR 491, 407

rights recognised and protected by the constitutions of member states could not be upheld. It was also held that international treaties for the protection of human rights on which member states have collaborated, or of which they are signatories, could supply guidelines which should be followed within the framework of Community law. In the United States Court of Appeals, O'Connor, J in *Boos V Barry*<sup>56</sup> opined that as a general proposition, it is of course correct that the United States has a vital national interest in complying with international law.

These practices of observing international law are not only prevalent in legal systems that are far away from Southern Africa. It is submitted that though the Republic of Zimbabwe and South Africa are in close geographic proximity, there seems to be a vast difference in their international law jurisprudence.

#### IV. *The Republic of South Africa*

The willingness of South Africa to make good its international obligations can be identified at section 233 of the Constitution. It provides that

...When interpreting any legislation, every court must prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law...

In *S v Makwanyane*,<sup>57</sup> the Constitutional Court was to decide on the validity of the death penalty and in their findings they affirmed that their interpretation would still be guided by international norms. *Chaskalson P* opined that:<sup>58</sup>

International agreements and customary international law accordingly provide a framework within which Chapter 3 can be evaluated and understood, and for that purpose, decisions of tribunals dealing with comparable instruments, such as the United Nations Committee on Human Rights, the Inter-American Commission on Human Rights, the Inter-American Court of Human Rights, the European Commission on Human Rights, and the European Court of Human Rights and, in appropriate cases, reports of specialised agencies such as the International Labour Organisation, may provide guidance as to the correct interpretation of particular provisions of Chapter 3.

This indicates that a state court cannot ignore international law. A state cannot develop its own jurisprudence with exclusionary tendencies to well established international standards of law.

#### D. **Conclusions and Recommendations**

It is evident from the above discussion that within Southern Africa, regional integration is at the mercy of political will. The SADC Treaty outlines the regional body's objectives,

<sup>56</sup> 485 U.S. 312

<sup>57</sup> 1995 (3) SA 391 (CC)

<sup>58</sup> Note that this is in reference to Chapter 3 of the Interim Constitution of the Republic of South Africa Act 200 of 1993. Fundamental Rights.



however the attainment of these objectives is dependent on the willingness of member states who at times act in a manner that defeats the principles of the Treaty. Countries continually use sovereignty as an excuse not to domesticate their international obligations. This conduct is against the good standards of international law.

- The relationship between Municipal and International law should be transformative, and not confrontational. Shaw, in explaining the doctrine of transformation wrote that it is based upon the perception of two quite distinct systems of law, operating separately and maintains that before any rule or principle of International law can have effect within the domestic jurisdiction, it must be expressly and specifically “transformed” into municipal law by the use of appropriate constitutional machinery such as an Act of Parliament.<sup>59</sup> However, it is further submitted that this transformative approach would only be effective if the parliaments of the SADC member states were proactive and willing to transform their domestic legislation to be in harmony with the regional agenda.
- The pursuit of regional integration cannot be achieved whilst Southern African states are in the complete sovereign mode they are in. The regional body has to have supremacy over some matters such as human rights and their implementation. This will require a judicial body capable of pronouncing on violations at a regional level and well capable of enforcing its decisions. The situation however in SADC is worsened by the fact that the Summit has suspended the operations of the Tribunal and as such it is further recommended that the legal framework of the regional grouping be revisited so as to ensure the abidingness of its decisions and treaty obligations as well proper functioning of all the institutions of the organisation.
- There are instances in which diplomatic measures to ensure compliance with international law do not bear any fruits. In these instances regional organisation should use other mechanisms such economic sanctions. Recent developments have however proven that this can sometimes escalate into a scenario where military intervention is required therefore either the United Nations Security Council develops an interest in the Security Affairs of regional groupings or the regional groupings develop their own military forces.

The redefining of sovereignty should however be approached with caution. *Annan* observed that the genocide in Rwanda showed us how terrible the consequences of inaction can be in the face of mass murder. But the conflict in Kosovo raised equally important questions about the consequences of action without international consensus and clear legal authority. The answer lies in the tabulation of a concrete legal framework that is responsive and relevant to the needs of the region.<sup>60</sup>

<sup>59</sup> *Malcom Shaw*, *International Law*. New York 2008: p. 139

<sup>60</sup> *Kofi Annan*, Two concepts of sovereignty, *The Economist*, September 1999, p. 2

## ABSTRACTS

### **Regional Integration versus National Sovereignty: A Southern African Perspective**

By *Ilyayambwa Mwanawina*, Mafikeng

The 21st Century has presented a myriad of challenges to the world including terrorism, economic meltdown, poverty, unemployment and demands from the governed such as better living conditions and respect for human rights. These challenges have prompted a change in global governance trends. It has become evident that a state can no longer exist in isolation; there is a greater demand and advantage in entering into regional or international agreements in order to be able to survive in an increasingly interdependent world. However states are faced with a dilemma as to how far they have to shed their ability to control and dictate the internal affairs of their countries in favour of the international agreements that they have voluntarily entered into. This paper will bring into perspective the experience in Southern African Region and illustrate the conflict between municipal and international obligations, a conflict which can only be eradicated if a regional body has the constitutional prowess to influence domestic policy.

### **Pre-Commitment in contemporary constitution making? The South African and Kenyan Experiences reviewed**

By *Dan Juma*, Harvard

Constitution making remains one of the most important events in a country's history. The paradigmatic process of contemporary constitution making follows an extraordinary political event, and may entail several stages such as agenda setting, public mobilization, consultation, negotiation, deliberation, ratification and promulgation. As the axiom goes, the process of making a constitution is as important as its outcome. Yet, in reality, constitution making has often been fraught with the problems of self-dealing by political actors and elite groups, and even obstruction by incumbents.

This paper examines the problems of structuring constitution making in contemporary polities and explores the potential use of pre-commitments, that is, self-binding devices to constrain constitution makers. In deploying insights from pre-commitment theory, the paper reviews the application of constitutional pre-commitment as a means of dealing with some of the problems of constitution making in South Africa and Kenya. The paper's approach is more analytical and descriptive than normative, eschewing deeper normative issues which are beyond its scope. In its conclusion, the paper claims that although constitutional pre-commitment can be used as a check on the pathologies of fundamental constitutional change, it is beset by challenges such as partisan interests, limited public participation and