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The position of Judicial Independence within the SADC Institutional Framework

By *Ilyayambwa Mwanawina**

Abstract: *The advent of globalisation has led to the emergence of continental and regional communities such as the European Union, African Union and the Southern African Development Community. This new breed of cross border governance has had to establish its own judicial bodies and processes. The emerging SADC regional integration initiative has recently struggled with the meaning of judicial independence and eventually political strife within the regional body has led to the suspension of its judicial body, the SADC Tribunal. What is the meaning of judicial independence in regional or continental arrangements? What are the implications of the suspension of the SADC Tribunal to the concept of judicial independence and what should the ideal position be? These are the questions that this paper will seek solutions to and further establish the linkage between regional development and judicial independence.*

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A. Introduction

The advent of globalisation has led to the emergence of continental and regional communities such as the European Union, African Union and the Southern African Development Community. This new breed of cross border governance has had to establish its own judicial bodies and processes. The emerging SADC regional integration initiative has recently struggled with the meaning of judicial independence and eventually political strife within the regional body has led to the suspension of its judicial body, the SADC Tribunal. It will be argued in this work that the suspension of the Tribunal dealt a direct blow to the concept of judicial independence within the region and that the integration framework does not accommodate the independence of the judicial organ. However before we delve into the complexities of judicial

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independence and the SADC Tribunal, we should begin by understanding the SADC integration model.

According to *Moeti* and *Mukamunana*, regional integration is a process through which a group of nation states voluntarily, in various degrees, share each other's markets and establish mechanisms and techniques that minimize conflicts and maximize internal and external economic, political, social and cultural benefits of their interaction.[1]

The Southern African Development Co-ordination Conference [SADCC] was established in 1980 with an original objective to protect member states against the destabilizing tendencies of the apartheid regime in South Africa, while guaranteeing infrastructural assistance and policy co-ordination. The first SADCC conference, held in Arusha, Tanzania, in 1979, was attended by Angola, Botswana, Mozambique, Tanzania, and Zambia, the so-called "front-line states"—together with representatives from donor governments and international aid agencies. Lesotho, Swaziland, Malawi, and Zimbabwe joined the following year; and Namibia in 1990. In April 1980, SADCC's strategy for "economic liberation" was formalized in the Lusaka Declaration, outlining a programme of action which gave initial priority to integrating and improving regional transport links.[2]

By the late 1980 s, it became apparent that SADCC needed strengthening. The attainment of independence and sovereign nationhood by Namibia in 1990 formally ended the struggle against colonialism in the region. In Angola and Mozambique, concerted efforts to end internal conflicts and civil strife were bearing positive results. In South Africa, the process was underway to end the inhuman system of apartheid, and to bring about a constitutional dispensation acceptable to all the people of South Africa. These developments took the region out of an era of conflict and confrontation, to one of peace, security and stability, which remained pre-requisites for cooperation and development.[3] SADCC was later renamed in the 1992 Lusaka Declaration as the Southern Africa Development Community [SADC], when South Africa became a member.[4] The SADC Treaty is the primary guiding document of the organisation. It is through this document that the principles and objectives as well as the primary functioning of the organisation are outlined. Furthermore the inter-state relations of SADC states are managed through the Treaty.

1 *Kabelo Moeti* / *Rachel Mukamunana*, Challenges of regional integration in Africa: Policy and Administrative Implications, Journal of Public Administration: Conference Proceedings October 2005, p. 92.

2 See SADC, SADC Overview – History and Treaty, http://www.sadc.int/about-sadc/overview/history-and-treaty/ (last accessed on 14 August 2013).

3 SADC, Regional Indicative Strategic Development Plan, 1 March 2001, http://www.sadc.int/files/5713/5292/8372/Regional_Indicative_Strategic_Development_Plan.pdf (last accessed on 14 August 2013), p. 2.

4 The current membership of SADC is Angola, Botswana, Democratic Republic of the Congo, Lesotho, Malawi, Mauritius, Mozambique, Namibia, Swaziland, Tanzania, Zambia, Zimbabwe, South Africa, and Seychelles. Madagascar's membership currently suspended after the coup d'état led by the former mayor of Antananarivo Andry Rajoelina.

The vision and mission of SADC reach well beyond the harmonization of development within the region. It extends to fields that include political stability, peace building, the maintenance of security and justice as well as economic co-operation. The attainment of these goals requires well co-ordinated regional mechanisms; as such over the past decade member states have paid particular attention to the possibility of attaining these goals through regional integration.[5] The key SADC institutions as provided for in Chapter 5 of the SADC Treaty as amended are:

- the Summit of Heads of State or Government;
- the Organ on Politics, Defence and Security Co-operation;
- the Council of Ministers;
- the Integrated Committee of Ministers;
- the Standing Committee of Officials;
- the Secretariat;
- the Tribunal; and
- SADC National Committees.[6]

The SADC summit is the body responsible for the overall policy direction of the organisation.[7] The Summit is composed of Heads of States of member states to the organization. The Council of Ministers consists of Ministers from each member state, usually from the Ministries of Foreign Affairs and Economic Planning or Finance as recommended in the Treaty.[8] The Council is responsible for overseeing the functioning and development of SADC and ensuring that policies are properly implemented. The Integrated Committee of Ministers is a supplementary body to the Council of Ministers. It shall, with respect to its responsibilities under paragraph 2 of Article 12 of the SADC Treaty, have decision making powers to ensure rapid implementation of programmes that would otherwise wait for a formal meeting of the Council.[9]

The SADC member states, convinced that peace, security and strong political relations are critical factors in creating a conducive environment for regional cooperation and integration[10] promulgated the Protocol on Politics, Defence and Security Cooperation. The Protocol read in conjunction with Article 9(1) (b) of the SADC Treaty, establishes the Organ on Politics, Defence and Security Co-operation. The Standing Committee of officials consists of one permanent secretary or an official of equivalent rank from each Member State, preferably

5 The Treaty of the Southern African Development Community as amended, 1992 (SADC Treaty), 17 August 1992, www.sadc.int/files/8613/5292/8378/Declaration__Treaty_of_SADC.pdf (last accessed on 14 August 2013). See Art. 4 (Principles) and Art. 5 (Objectives).

6 Art. 9(1)(a)-(h) SADC Treaty.

7 Art. 10(2) SADC Treaty.

8 Art. 11(1) SADC Treaty.

9 Art. 12(3) SADC Treaty.

10 See SADC, Protocol on Politics, Defence and Security Cooperation, 14 August 2001, http://www.sadc.int/files/3613/5292/8367/Protocol_on_Politics_Defence_and_Security20001.pdf (last accessed on 14 August 2013), Preamble.

from a ministry responsible for economic planning or finance. The Committee is basically a technical advisory committee to the Council. Decision making within the committee is done by consensus. The Secretariat is the principal executive organ of SADC, responsible for strategic planning, co-ordination and management of SADC programmes. It is headed by an Executive Secretary and has its headquarters in Gaborone, Botswana.[11] The SADC National Committees co-ordinate their respective individual Member State interests relating to SADC at a National level, they are established in each member state.

The SADC Treaty under Article 6 (1)[12] and 6 (6)[13] imposes a positive legal obligation for national legal reforms so that national legal systems conform to the letter and spirit of the SADC Treaty. Article 6 (1) and 6 (5) read together further requires State Parties not to promulgate or act in a manner that will defeat the objectives of the organisation. The grey area is that: the Treaty does not expressly encapsulate a 'supremacy clause'. It is quite clear that from a principled international law perspective, SADC norms within the Community's area of competence constitute a higher law and where there is a conflict, SADC law and principles should take precedence.

B. The SADC Tribunal

The success of any regional integration project depends on the organization and synchronisation of its own internal bodies. For the purpose of this paper only the SADC Tribunal will be discussed to length.

In any organisation, there is a need to ensure that there is legal compliance. The SADC Tribunal is the judicial organ of the community with jurisdiction over contentious and non-contentious proceedings.[14] The Treaty explicitly provides for the Tribunal to be the institution mandated to ensure adherence to and the proper interpretation of the provisions of the SADC Treaty and subsidiary instruments and to adjudicate upon such disputes as may be referred to it.[15] A protocol expounding the composition, powers, functions and procedures of the Tribunal was adopted by the Summit which also provided for the Court to have its seat in Windhoek, Namibia.[16]

11 African Union, Profile: SADC, http://www.africa-union.org/recs/sadcprofile.pdf (last accessed on 14 August 2013).

12 "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.".

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

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

15 Art. 16 SADC Treaty.

16 SADC, Protocol on Tribunal and Rules of Procedure Thereof, 7 August 2000 [cited as: Protocol on Tribunal].

The Protocol establishing the Tribunal provides that the Tribunal comprises of not less than ten (10) judges from nationals of member states who possess the qualifications for appointment to the highest judicial offices in their respective states and are jurists of recognised competence.[17] According to the Protocol on the Tribunal, the Tribunal elects its president from the crop of judges whose term shall be for a period of three years.[18] The judges' terms and conditions of service, salaries and benefits are determined by the Council of Ministers.[19]

The Tribunal gives advisory opinions[20] on such matters as the Summit or the Council may refer to it.[21] Article 16(5) of the SADC Treaty provides that the decisions of the Tribunal are final and binding. The Protocol provides that the Tribunal has jurisdiction over disputes between member states, and between natural or legal persons and member states[22]; but no natural or legal person can bring an action against a member state unless he or she has exhausted all available remedies[23] or is unable to proceed under the domestic jurisdiction.[24] Finally the Tribunal has exclusive jurisdiction in disputes between organs of the community or between community personnel and the community.[25]

It is cardinal that Article 21(b) of the Protocol establishing the Tribunal be understood in the following context. It provides that the Tribunal is expected to develop its own jurisprudence as well as to have due regard to the general principles and rules of public international law and any rules and principles of the law of member states.[26] This provision then indicates that in addition to the SADC principles as articulated in Article 4(a-e)[27] of the SADC Treaty, the organisation has to observe other international law principles such as free consent, good

17 The Commercial Farmers' Union of Zimbabwe, Legal Opinion on implications on decision on SADC Tribunal, http://www.cfuzim.org/index.php?option=com_content&view=article&id=1069:legal-opinion-on-implications-on-decision-on-sadc-tribunal&catid=44:legal-cases&Itemid=91 (last accessed on 14 August 2013), p. 29.

18 Art. 7 Protocol on Tribunal.

19 Art. 10 Protocol on Tribunal.

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

21 Art. 16(4) SADC Treaty.

22 Art. 15(1) Protocol on Tribunal.

23 In fact, all major human rights instruments do provide for the rule on the exhaustion of local remedies: e.g. Art. 35(1) of the European Convention on Human Rights, 1950; Art. 46(1) of the American Convention on Human Rights, 1969; Art. 56(5) of the African Charter on People's and Human Rights, 1981; and Arts. 2 and 5(2)(b) of the Optional Protocol to the International Covenant on Civil and Political Rights, 1966. In regard to the Rome Statute of the International Criminal Court, the principle of exhaustion of domestic remedies is substituted by the complementarity principle as laid down in Art. 17(a) of the ICC Statute. This article makes it clear that the International Criminal Court will only accept a case where a state which has jurisdiction over it is unwilling or unable to genuinely carry out the investigation and/or prosecution.

24 Art. 15(2) Protocol on Tribunal.

25 Art. 18-19 Protocol on Tribunal.

26 Art. 21(b) Protocol on Tribunal.

27 Sovereign equality of all Member States; solidarity, peace and security; human rights, democracy and the rule of law; equity, balance and mutual benefit; and peaceful settlement of disputes.

faith, *pacta sunt servanda*, *rebus sic stantibus* and *favor contractus.* The provision then also permits the SADC institutions to observe and adapt progressive interpretations of the law as developed within the jurisdictions of its member states in order to resolve disputes at SADC level.

It is submitted that SADC, by correctly placing democracy, human rights and the rule of law as part of its Treaty principles[28] has subscribed to the notion of judicial independence and should be seen promoting such a principle in all its activities. In *S and Others v Van Rooyen and Others*,[29] the South African Constitutional Court observed that judicial independence and impartiality are also implicit in the rule of law which is foundational to the South African Constitution. This implies that the rule of law cannot exist without judicial independence therefore for SADC to uphold its Treaty principles, it should foster judicial independence.

C. Comprehending Judicial Independence

The SADC Treaty provides that member states shall act in accordance with the principles of human rights, democracy and the rule of law.[30] It is submitted that this provision also places an obligation upon the institutions of SADC to reciprocate such principles. *Raz* teaches that in order for the rule of law to flourish, it is required that the independence of the judiciary be guaranteed as well as courts having review powers over the implementation of the other principles.[31]

The principle that a court of law should be independent and impartial is firmly embedded in all legal systems and in all major international human rights instruments.[32] The notion of judicial independence derives from the doctrine of the separation of powers, as advocated by Montesquieu, the French jurist and philosopher. In L'Esprit des Lois (1748), Montesquieu cautioned that;

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

There is no prescribed definition of judicial independence. It can be stated that it is the ability of a judicial officer to decide a matter free from any pressures. It is also submitted that the judicial organ should be independent from any concentrations or influence of power. In an

28 See Art. 4 SADC Treaty.

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

30 Art. 4(c) SADC Treaty.

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

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

article by *Cannon* and *Wárlám,* they observed that judicial independence considers protection against outside pressures, such as the executive, governments, the press, media, public debate, and political parties. Another scholar made a similar assertion stating that "[t]he concept of independence relates to the duty of outsiders not to interfere with the judges."[33]

In ordinary language, independence essentially means "freedom from influence". This ordinary meaning is somehow underscored by the legal definition of judicial independence, namely "the lack of subordination to any other organ of the state, in particular to the executive". Specifically, judicial independence implies that judges are the authors of their own decisions, and that they should be free from any 'inappropriate' influence.[34]

Having said the above, it is worth noting that a judge need not be free of influence from all individuals. For instance, a judge may be influenced by submissions (either oral or written) made by parties to the dispute and their respective witnesses, or by any third party who may have an interest in the case being adjudicated. Such influence or persuasion may not be referred to as 'inappropriate' influence. Judicial Independence can further be compartmentalised into individual and institutional independence. Institutional independence refers to the existence of "structures and guarantees to protect courts and judicial officers from interference by other branches of government", while individual independence refers to judicial officers' acting independently and impartially.

The importance of judicial independence has been reflected in various documents such as the United Nations Basic Principles on the Independence of the Judiciary,[35] the International Bar Association Code of Minimum Standards of Judicial Independence approved in New Delhi in 1982, the Montreal Universal Declaration on the Independence of Justice (1983), the Beijing Statement of Principles of the Independence of the Judiciary in the LAWASIA Region (1995), and the Syracuse Principles (1981). The Montreal Declaration is especially significant in the present context; it is the only document that contains provisions aimed specifically at the international judiciary.[36] To highlight just a few of the provisions, one will realise that the

33 *Erica Cannon* / *Isabelle Wárlám*, The Judicial Independence of the International Labour Organisation Administrative Tribunal: Potential for Reform, April 2007, https://www.suepo.org/rights/public/archive/iloat.independence.ailc.final.02.06.07.pdf (last accessed on 14 August 2013), p. 14.

34 See *Stephen Burbank*, Judicial independence at the crossroads: An interdisciplinary approach, New York 2002, pp. 46–49.

35 Adopted by the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders in 1985 and endorsed by the General Assembly later that year.

36 International Law Association, Independence In The International Judiciary: General Overview Of The Issues, Working Draft, 24 January 2002, http://www.pict-pcti.org/activities/ILA_study_grp/ILA1.pdf (last accessed on 14 August 2013), p. 3.

importance of this notion is repeatedly emphasized in the UN Basic Principle 10[37] and 11,[38] the Beijing Principles 12[39] and 31[40] as well as the Montreal Declaration 1.11[41] and 1.14.[42]

A very cardinal provision in the international arena that relates to this paper is Article 1.2 of the Burgh House Principles[43] which provides that:

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

This is further echoed in an observation by the African Commission in which they noted that in all cases the independence of a court must be appreciated with regard to the degree of independence of the judiciary vis-à-vis the executive. This implies the consideration of the manner in which its members are appointed, the duration of their mandate, the existence of protection against external pressures and the issue of real or perceived independence.

It is also worth noting that the International Covenant on Civil and Political Rights (ICCPR) under General Comment 32 recognises that the substance of the requirements of independence under the ICCPR include, inter alia

37 "Persons selected for judicial office shall be individuals of integrity and ability with appropriate training or qualifications in law. Any method of judicial selection shall safeguard against judicial appointments for improper motives. In the selection of judges, there shall be no discrimination against a person on the grounds of race, colour, sex, religion, political or other opinion, national or social origin, property, birth or status, except that a requirement, that a candidate for judicial office must be a national of the country concerned, shall not be considered discriminatory.".

38 "The term of office of judges, their independence, security, adequate remuneration, conditions of service, pensions and the age of retirement shall be adequately secured by law.".

39 "The mode of appointment of judges must be such as will ensure the appointment of persons who are best qualified for judicial office. It must provide safeguards against improper influences being taken into account so that only persons of competence, integrity and independence are appointed.".

40 "Judges must receive adequate remuneration and be given appropriate terms and conditions of service. The remuneration and conditions of service of judges should not be altered to their disadvantage during their term of office, except as part of a uniform public economic measure to which the judges of a relevant court, or a majority of them, have agreed.".

41 "Judges shall be nominated and appointed, or elected in accordance with governing statutory provisions which shall, if possible, not confine the power of nomination to governments or make nomination subject to nationality.".

42 "The terms and compensation and pension of judges shall be established and maintained so as to assure their independence. Those terms shall take into account the recognized limits upon their professional pursuits both during and after their tenure of office.".

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

> *"...guarantees relating to [judges'] security of tenure ... the conditions governing promotion, transfer, suspension and cessation of their functions, and the actual independence of the judiciary from political interference by the executive branch and the legislature."*[44]

This has the effective interpretation that in the event a judicial body ceases to exist or its functions are circumscribed in any manner as a result of an improper resolution or decision of an executive body, then such judicial body is deemed not to be independent. The same sentiments were echoed in *Campbell and Fell v. United Kingdom* in which the Court observed that;

> *In determining whether a body can be considered to be "independent" – notably of the executive and of the parties to the case the Court has had regard to the manner of appointment of its members and the duration of their term of office ...*[45]

Having outlined the components of judicial independence, this work will in the paragraphs that follow illustrate how the events surrounding the SADC Tribunal are indicative of an absence of judicial independence.

D. The Miscarriage of Independence in SADC

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

> *In the present application there is a prima facie right that is sought to be protected, which involves the right to peaceful occupation and use of the land; and there is anticipated or threatened interference with that right; and the applicants do not appear to have any alternative remedy thereby tilting the balance of convenience in their favour. Accordingly, the Tribunal grants the application pending the determination of*

44 See e.g. González del Río v. Peru, 28 October 1992, Human Rights Committee Communication No. 263/1987, CCPR/C/46/D/263/1987.

45 Campbell and Fell v. United Kingdom, 28 June 1984, para. 78, 7 EHRR 165; see also Langborge v.Sweden, Application no. 11179/84, 22 June 1989, para. 32.

> *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 19.* [46]

The Zimbabwean government scoffed at the SADC Tribunal's order. President Mugabe described the decision as "absolute nonsense."[47] In April 2009, pro-Mugabe militants forcibly evicted Campbell.[48] The Tribunal would again find the Zimbabwean government in contempt of the first *Campbell* decision as well as being in breach of its obligations under the SADC Treaty.[49] At this point in time, the Tribunal had earned Zimbabwe's enmity. Due to Zimbabwe's persistent refusal to adhere to the Tribunal's orders, the Tribunal referred Zimbabwe to the SADC Council of Ministers for appropriate action. In terms of the SADC Treaty, the Ministers should have recommended sanctions or suspension, but instead of suspending Zimbabwe as it had done in the case of Madagascar, SADC apparently preferred to suspend the Tribunal, under the guise of a review process, at the request of the Zimbabwean government.[50] In August 2010, the Summit decided to limit the operations of the Tribunal, ostensibly to allow for time to consider this issue of a review. The review was eventually commissioned by SADC. The review was conducted by WTI Advisors Ltd, Geneva, an affiliate of the World Trade Institute and it recommended amongst others that;

- The SADC Tribunal had the legal authority to deal with individual human rights petitions.
- SADC Community law is supreme to domestic laws and constitutions.
- Decisions of the SADC Tribunal are binding and enforceable within the territories of all SADC member states.[51]

Despite these observations by the advisors, the SADC Extraordinary Summit of 20th May 2011[52] would then decide that the Tribunal was not to hear any further cases henceforth, whether pending or otherwise, and members of the Tribunal were not to be reappointed or

46 (2/07) [2007] SADCT 1 (13 December 2007).

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

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

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

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

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

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

replaced until August 2012. This decision effectively rendered the Tribunal inquorate and defunct. It is obvious that the SADC Summit were faced with recommendations that did not favour them and as such opted to cripple the Tribunal. This in itself was a calculated move by the Summit that could have been avoided if the Tribunal enjoyed a measure of institutional independence.

I. The Suspension of the Tribunal

The decision by the Summit is an indication of an absence of what is termed institutional independence since the Tribunal itself can cease to exist as a result of a pronouncement made outside the scope of acceptable norms of separation of powers and judicial independence by the Summit (executive). It should be noted that in an expert opinion submitted to the European Court of Human Rights, it was observed that the principle of judicial independence is a general principle of law recognised by the international community and that the importance of judicial independence has been recognised by many international courts and human rights supervisory mechanisms.[53] It should also be borne in mind that the Universal Declaration of Human Rights, in Article 10, and the International Convenant on Civil and Political Rights, in Article 14, guarantee judicial independence. These fundamental provisions of international treaty law, largely regarded as forming part of the *jus cogens*, guarantee judicial independence. It is therefore on the basis of this that it can be argued that even if anything in the SADC Treaty could be interpreted to imply that the Summit had such powers to suspend the activities of the Tribunal, such powers would be in breach of well established international norms of judicial independence would be quashed by Article 53 of the Vienna Convention[54] since judicial independence is accepted and recognized by the international community.

The suspension of the Tribunal has sent shock waves within the region signalling the analogy that the judicial body and its judges did not enjoy a measure of institutional independence. The protections surrounding that independence include transparent appointment procedures, security of tenure, and separation of powers, and freedom from any outside pressure or interference and appropriate social protection. An international court must be exemplary in this respect. It must both be, and be perceived to be, wholly independent of the

53 ECHR, Baltasar Garzón v Spain, Expert Opinion On International Legal Standards Regarding Judicial Independence, http://www.interights.org/userfiles/Annex_2_Judicial_Independence_filed.pdf (last accessed on 14 August 2013).

54 "A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purposes of the present Convention, a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.".

Contracting Parties, who may also be respondents before it.[55] In this instance we should realize that the Tribunal was empowered to pronounce on the validity of state actions and to give advisory opinions on various matters as well as the interpretation of the Treaty and other documents. It is submitted that in the event that a state is in breach of its obligations or is acting in a manner that defeats the regional agenda, the independence of the Tribunal, to pronounce on such is not guaranteed.

Razs' teachings require that the independence of the judiciary should be guaranteed as well as courts having review powers over the implementation of the other principles. We should note that prior to its suspension, the Tribunal has heard a number of cases. The most significant of these was when the Tribunal found that parts of the Zimbabwean government's fast tracked land reform were illegal and discriminatory. The Tribunal had handed down a judgment that was disregarded by the Republic of Zimbabwe.[56] It is submitted that the timing of the suspension has severely crippled the development of international law jurisprudence within the region as the Tribunal was only beginning to establish the hegemony of international law.

II. The "technical" dismissal of Judges

It is submitted that the suspension of the Tribunal also amounted to a dismissal or halting of the work of judicial officers. In principle, an independent judiciary will not be negatively affected by decisions of executive bodies unless such decisions have been empowered by a provision in law.[57]

In Amnesty International and Others v Sudan, the African Commission concluded that the dismissal of over 100 judges who were opposed to the formation of special courts and military tribunals is not contested by the government. To deprive courts of the personnel qualified to ensure that they operate impartially thus denies the right to individuals to have their case heard by such bodies. Such actions by the government against the judiciary constitute violations of Articles 7(1)(d) and 26 of the Charter.[58] It can therefore be submitted in the same light that the suspension of the Tribunal denies the people of Southern Africa their right to have their cases heard before an impartial and independent Tribunal.

55 Southern Africa Litigation Centre, SADC Tribunal. The Effective Suspension of the SADC Tribunal. A Legal opinion prepared by several NGOs, including SALC, addressing the implications of the decision to review the role, functions and terms of reference of the SADC Tribunal, http://www.southernafricalitigationcentre.org/news/2010/11/517 (last accessed on 7 October 2012).

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

57 See Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Council 1998 (2) SA 374 (CC): "There are no extra (outside) legal powers that the government may exercise. Any power of the government must derive from some other law. This may either be from the constitution or from another source of law, such as the common law. If the law does not empower government to exercise some power, then the exercise of that power will be invalid.".

58 (2000) AHRLR 297 (ACHPR 1999).

III. Insecure Tenure and Remuneration of Judicial Officers

In the Canadian case of *R v Valente,*[59] the argument was made that the degree of control exercised by the provincial Attorney General over the judges raised a reasonable apprehension that the judges would be biased in favour of the Crown. Judges were said to be subjected to the executive power by three factors: they had been appointed by the Attorney General; the Attorney General had the power to authorize leaves of absence and paid extra-judicial work; and judges' salaries were fixed by regulation, not by statute.

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

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

It is submitted that the facts in the *Valente* case are a direct reflection of the current SADC status quo. Articles 3(2),[60] 4(3),[61] as well as 12(3)[62] of the Protocol on the Tribunal and Rules thereof represent a very unfavourable position for the consolidation of judicial independence in SADC. The Council of Ministers is composed of persons who, in summary, can be described as second in command after the Heads of States at domestic level. The Council, by being involved in designation of judicial officers as well as the terms and conditions of service, salaries and benefits of the Registrar and other staff is an error in principle and indicates a lack of institutional insulation. This lack of insulation is also evident in the report below;

> *SADC Tribunal Rights Watch supports the action taken by four SADC Tribunal judges to demand compensation following the illegal and arbitrary decisions taken by the SADC Council of Ministers and Summit Heads of State and Government on 20 May*

59 [1985] 2 S.C.R. 673.

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

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

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

> *2011 not to reappoint them or allow them to remain in office pending a further review in August 2012.*[63]

What is reflected in this report is a clear indication of the insecure tenure and financial insecurity faced by the Tribunal, factors critical to the attainment of independence. In a similar light, the African Commission in its decision on Communication 87/93,[64] considered that special tribunals established under the Civil Disturbances Act[65] violated Article 7(1)(d)[66] of the African Charter, because their composition is at the discretion of the executive branch. This establishment can be closely inferred to the situation in the SADC Tribunal since the Council makes nominations as well as determines conditions of service, salaries and benefits of staff.

E. Conclusion

It has been observed by the International Law Association that independence of the international judiciary has been difficult to schematize for the same reason that international law has always resisted ambitious theoreticians: lacking a legislature and an executive, concepts developed in the domestic context cannot necessarily be imported into the international legal system,[67] however, it is submitted that the SADC Summit and Council of Ministers are executive bodies of SADC and therefore should not be seen encroaching upon the activities of the judicial arm of SADC, the SADC Tribunal.

It is submitted that the suspension of the Tribunal and the subsequent pleading for remuneration by members of the SADC Tribunal is an indication of the lack of institutional independence of the Tribunal within SADC. It is further submitted that the Council of Ministers or the Summit do not have the powers to suspend the Tribunal or infringe upon the security of tenures of the judges. It is therefore recommended that the SADC Treaty and the Protocol on the Tribunal reflect values of institutional autonomy and judicial independence as such it is recommended that the SADC Treaty as well as the Protocol on the Tribunal be re-calibrated to reflect the values of judicial independence.

Breytenbach has correctly observed that development under democratic conditions is more likely than under authoritarianism.[68] Having established the linkage between judicial independence, the rule of law and democracy, it can safely be submitted that until the regional

63 SW Radio Africa, SADC Tribunal judges call for compensation, 24 June 2011, http://www.swradioafrica.com/pages/sadctrib240611.htm (last accessed on 14 August 2013).

64 Constitutional Rights Project (in respect of Lekwot and Others) v Nigeria.

65 Act no 2 of 1987 (Nigeria).

66 The right to be tried within a reasonable time by an impartial court or tribunal.

67 International Law Association, note 36, p. 2.

68 *Willie Breytenbach*, Democracy in the SADC region – a comparative overview: essay, African Security Review 11 (2002), p. 90.

body has found solutions the absence of the rule of law and judicial independence, sustainable economic development in the region will for some time to come, remain a pipedream.