THE LEGAL AND POLICY CONSIDERATIONS MILITATING AGAINST LIMITATIONS ON THE HUMAN RIGHTS JURISDICTION OF THE SADC TRIBUNAL

I. INTRODUCTION AND FACTUAL BACKGROUND

1. Introduction

This document is the submission of the above stated organisations regarding the legal and policy appropriateness of adopting the “Proposed Amended SADC Tribunal Protocol” (the Proposed Protocol), contained in document SADC/MJ/2/2012/4, prepared for the consideration of the various SADC institutions involved in the review of the SADC Tribunal Protocol. Below we outline our objections to the adoption of the Proposed Protocol, particularly in as far as it seeks to limit access to the Tribunal by natural and legal persons in respect of human rights matters.

The legal objections to limitations on the human rights jurisdiction of the SADC Tribunal are based on the provisions of the SADC Treaty, other treaty obligations within the African Union framework, and the general principles of international law. Below we deal with these under three broad grounds of objection. In Part II we argue that the limitation is a breach of the provisions of the SADC Treaty and the Treaty Establishing the African Economic Community. The second set of grounds is dealt with under the broad principle of legality, and is contained in Part III of this submission. Part IV argues that the decision to limit the SADC Tribunal’s human rights jurisdiction is an affront to the rule of law, as it extinguishes an existing remedy for human rights infringements.

In conclusion we argue that the decision to limit the SADC Tribunal’s jurisdiction is against both international law and African regional law, and is most likely to be reproached by the higher institutions and organs within the African Union framework. Furthermore we draw to the Summit’s attention all the courses of action that are likely to be pursued by civil society groups and other interested parties in order to
RESIST IMPLEMENTATION OF THE LIMITATIONS SHOULD THEY BE ADOPTED AT THE UPTCOMING SUMMIT MEETING.

2. **The SADC Protocol Review Process**

Currently the review process is at the stage where the Summit is considering adopting the Proposed Protocol at its annual meeting to be held in Maputo on 09 August 2012. The issues discussed below refer to the latest version of the Proposed Protocol, contained in document: SADC/MJ/2/2012/4.

3. **The Effect of the “Proposed Amended SADC Tribunal Protocol” on the Nature and Scope of the SADC Tribunal's Human Rights Jurisdiction**

3.1 **The Meaning and Scope of the Proposed Article 37**

In its current form, as provided for in document SADC/MJ/2/2012/4, the proposed amendment to Article 15 of the SADC Tribunal Protocol provides as follows:

**Article 37 Personal Jurisdiction**

1. The Tribunal shall have jurisdiction over disputes between natural or legal persons and Member States arising from Protocols concluded by Member States, except that the Tribunal shall exercise jurisdiction in human rights matters as shall be provided for in a protocol on human rights to be concluded by Member States.

2. Subject to paragraph 1, no natural or legal person shall bring an action against a Member State unless he or she has an interest of a legal nature in the subject matter of the dispute and:
   (i) has exhausted all available domestic remedies; or
   (ii) is unable to proceed under the domestic jurisdiction.

3. Where a dispute is referred to the Tribunal by any party the consent of other parties to the dispute shall not be required.

[emphasis added]

Of relevance to this submission is the following effect flowing from the wording of Article 37:

The limitation of the jurisdiction of the SADC Tribunal in respect of human rights matters referred to it by natural or legal persons against States to those which shall be provided for in a future human rights protocol yet to be adopted by the Member States;

3.2 **The Effect of Proposed Article 37 on Human Rights Matters Brought by Natural or Legal Persons Against Member States**

For purposes of this submission we assume that Article 37 will have and is intended to have the following implications:
(a) The SADC Tribunal is barred from considering disputes concerning human rights matters referred to it by natural or legal persons against States until such time as a human rights protocol has been adopted by the Member States, irrespective of the source of the human rights claimed e.g. SADC Treaty;
(b) Human rights matters refers to matters in which there is an alleged infringement of a generally recognized fundamental human right or freedom as recognized in international human rights law, particularly as it could be interpreted to be provided for in Article 4(c) of the SADC Treaty; and furthermore refers to matters raised under the Protocols and Resolutions of the Summit which are capable of being construed so as to confer human rights on natural and legal persons.

II INFRINGEMENT OF THE SADC TREATY AND OBLIGATIONS FLOWING FROM THE AEC ESTABLISHMENT PROCESS

1. Introduction

In this part two broad grounds are advanced for why the proposed amendment is a breach of international law. Firstly we argue that it breaches the SADC Treaty, specifically Articles 6(1) and 23(1). Secondly it breaches the obligations flowing from the Treaty Establishing the African Economic Community.

2. The Limitation is an Infringement of Article 6 of the SADC Treaty

Here we deal with the argument that the intended limitation is a breach of Article 6 of the SADC Treaty, in that it prohibits the adoption of measures which are likely to jeopardise the sustenance of the principles, attainment of the objectives and the implementation of the provisions of the Treaty of SADC. Article 6(1) of the SADC Treaty provides as follows:

1. 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.

[emphasis added]

As appears clearly from the above provision the principle applies explicitly to the principles and objectives of SADC as stated in the SADC Treaty. At the outset it must be emphasised that Member States must adopt “adequate measures” to promote achievement of the objectives of SADC. Furthermore the threshold for determining infringement is whether the measure at hand is “likely to jeopardise the sustenance of its principles”. Below we maintain that the intended limitation is likely to jeopardise the principles, objectives and
implementation of the provisions of the Treaty. Each of them is taken in turn.

2.1 The Limitation is Likely to Jeopardise the Sustenance of the Principles of SADC

We argue here that the two principles in jeopardy are human rights and rule of law. It goes without saying that victims of human rights violations in most cases are natural persons. Furthermore it is trite that States are yet to espouse human rights cases on behalf of the nationals of other States before the SADC Tribunal. Moreover, “individual complaints mechanisms” form the core of the international human rights enforcement system.

A SADC without the capacity to entertain direct complaints of human rights violations against its Member States is severely limited in its ability to enforce its principles, which include human rights and the rule of law, and in its supervisory capacity over the domestic policies of Member States in observance of human rights and rule of law principles. Furthermore allowing for a situation where rights conferred by the SADC community law go without remedies leaves doubts as to ability to sustain the rule of law in domestic contexts, and at the supranational level. Furthermore it creates a potential for impunity to reign, as opposed to enforcement.

In the Campbell Case(Main Decision)\(^1\) the Tribunal held that an aspect of the rule of law is the protection of the right to a remedy for human rights infringements. Citing with approval the African Commission on Human and Peoples Rights in the communication of Zimbabwe Human Rights NGO Forum v Zimbabwe\(^2\) when it said, “To fulfil the rights means that any person whose rights are violated would have an effective remedy as rights without remedies have little value”, it found that Article 4(c) had been breached, which led to a finding of a violation of Article 6(1). By depriving natural persons access to the Tribunal the Summit is allowing the possibility that Member States can flout the rule of law without any sanction.

The rule of law encompasses legal certainty and stability of the legal system. By withdrawing the pre-existing right of access to the SADC Tribunal of natural and legal persons the Summit is in breach of the rule of law principle. Furthermore this measure undermines and is likely to jeopardise the rule of law within SADC as it creates a precedent for the Member States to reverse earlier rights-promoting undertakings.

\(^1\) Mike Campbell (Pvt) Ltd & Others v Zimbabwe Case No. SADC (T) 02/2007 available on the website of the SADC Tribunal at address: http://www.sadc-tribunal.org/pages/decisions.htm.

2.2 The Limitation is Likely to Jeopardise the Achievement of the Objectives of SADC

Below we argue that two categories of objectives are likely to be jeopardised by the limitation on the exercise of human rights jurisdiction by the SADC Tribunal. Firstly, the effectiveness of institutions; and secondly objectives entailing the promotion and protection of human rights.

(A) Jeopardy of an Ineffective SADC Tribunal

Article 5(1)(b) envisages that institutions shall be the agent for the transmission of common political values, systems and other shared values. It goes without saying that the prime institutions destined to fulfil this role are the SADC institutions, one of which is the SADC Tribunal. In summary we argue that the SADC Tribunal will be rendered ineffective for the following reasons:

(A) due to the fact that only natural and legal persons have been referring matters to the SADC Tribunal, which have in the most related to human rights matters, the SADC Tribunal will be in limbo should the limitation be implemented;

(B) the SADC Tribunal will have limited ability to correct deviation from SADC community law, and thus limited effectiveness in fulfilment of its competence as stated in Article 16(1);

(C) the limitation serves to undermine the principle of judicial independence, serving to underscore the prevalence of political considerations in the SADC Tribunal’s landscape.;

(D) if implemented the limitation is likely to be perceived as a sanction against the SADC Tribunal, and diplomats, lawyers, academics, jurists and civil society groups are unlikely to view the newly constituted Tribunal as a legitimate judicial organ; and

(E) the limitation cannot be said to in any way enhance the attainment of the objectives nor the effectiveness of the SADC Tribunal.

(B) Jeopardy for the Promotion of Socioeconomic Development

Article 5(1)(a) contains the following objective:

Promote sustainable and equitable economic growth and socioeconomic development that will ensure poverty alleviation with the ultimate

3 The SADC Tribunal has dealt with human rights and rule of law matters in the following cases: The Campbell Cases (Cases Nos. SADC(T) 2/07 (Interim and Main Judgments), 11/2008, 03/2009 ); Luke Tembani Cases (Cases No. SADC (T) 07/2008 (Interim and Main Judgment); Gondo and Others v Zimbabwe (Case no. SADC (T) 05/2008); United Republic of Tanzania v Cimexplan (Mauritius) Ltd and Another (Case No. SADC (T) 12/2008) and Bach’s Transport (Pty) Ltd v Democratic Republic of Congo (Case No. SADC (T) 14/2008). These cases are available on official website of the SADC Tribunal at address: http://www.sadc-tribunal.org/pages/decisions.htm.
OBJECTIVE OF ITS ERADICATION, ENHANCE THE STANDARD AND QUALITY OF LIFE OF THE
PEOPLE OF SOUTHERN AFRICA AND SUPPORT THE SOCIALLY DISADVANTAGED THROUGH
REGIONAL INTEGRATION.

IT IS BEYOND QUESTION THAT INHERENT IN THIS OBJECTIVE OF THE SADC IS THE
FURTHERANCE OF THE WELL-BEING OF THE INDIVIDUAL HUMAN BEING, PARTICULARLY HIS ENJOYMENT AND EXERCISE OF FUNDAMENTAL HUMAN RIGHTS
AND FREEDOMS, ESPECIALLY ECONOMIC AND SOCIAL RIGHTS. LEAVING THE
IMPLEMENTATION OF SOCIOECONOMIC DEVELOPMENT POLICIES AT THE EXCLUSIVE
DISCRETION AND WHIM OF THE POLITICAL ORGANS, WITHOUT JUDICIAL CHECKS AND
BALANCES, CREATES THE LIKELIHOOD THAT VIOLATIONS AND OMISSIONS WILL GO
WITHOUT REDRESS.

AS THE CASE OF CAMPBELL ILLUSTRATES A BROAD-BASED LAND REDISTRIBUTION
PROGRAM CAN BE ABUSED TO ENRICH ONLY THE FEW, AT THE PRICE OF THE RULE
OF LAW AND INDIVIDUAL HUMAN RIGHTS. FURTHERMORE STATES MAY NEGLECT
OR IGNORE THE PLAGUE OF THE SOCIOECONOMICALLY DISADVANTAGED. THE ABILITY TO HAVE
RECURSE TO THE SADC TRIBUNAL IN SUCH A CASE WILL SERVE AS A USEFUL
BULWARK AGAINST THE POTENTIAL OF SUCH NEGLECT.

IN ARTICLE 5(2)(b) AMONG SOME OF THE MEASURES MANDATED IN ACHIEVEMENT
OF THE OBJECTIVES IS ENCOURAGEMENT OF “... THE PEOPLE OF THE REGION AND
THEIR INSTITUTIONS TO TAKE INITIATIVES TO DEVELOP ECONOMIC, SOCIAL AND
CULTURAL TIES ACROSS THE REGION, AND TO PARTICIPATE FULLY IN THE
IMPLEMENTATION OF THE PROGRAMMES AND PROJECTS OF SADC”. PARTICIPATION
IN IMPLEMENTATION OF PROGRAMMES AND PROJECTS ENTAILS THAT NATURAL AND
LEGAL PERSONS BE AFFORDED AN OPPORTUNITY TO TAKE UP THE QUESTION OF
WHETHER AND IF STATES ARE HONOURING THEIR TREATY OBLIGATIONS AND TO
FURTHER ENGAGE WITH WHETHER THE MEASURES BEING ADOPTED ARE
PURPOSEFULLY DESIGNED TO ATTAIN THE SADC COMMON AGENDA, AT LEAST BY
ACCESSING THE SADC’S JUDICIAL ORGAN. LIMITATION ON ACCESS PARTLY LIMITS
THIS RIGHT OF PARTICIPATION.

2.3 THE LIMITATION IS LIKELY TO JEOPARDISE THE IMPLEMENTATION OF THE
SADC TREATY

IT IS A WELL-SETTLED PRACTICE IN INTERNATIONAL RELATIONS THAT DISPUTE
SETTLEMENT PROCEDURES ARE ESTABLISHED TO MONITOR IMPLEMENTATION OF
TREATIES, AND FURTHERMORE THAT INDIVIDUALS ARE GRANTED ACCESS TO
SPECIALLY TAILORED JUDICIAL MECHANISMS FOR ENFORCEMENT OF RIGHTS
CONFERRED ON THEM BY TREATIES. THE ROLE OF JUDICIAL MECHANISMS IS TO
SAFEGUARD THE RESPECTIVE RIGHTS OF THE PARTIES TO TREATIES. Whilst
INDIVIDUALS ARE NOT DIRECT PARTIES TO THE TREATIES AT HAND, THEY ARE
NONETHELESS THE PRIME BENEFICIARIES OF THEIR PROVISIONS, HENCE
INDIRECTLY PARTIES WITH INTERESTS IN THEIR PROPER INTERPRETATION,
APPLICATION AND IMPLEMENTATION.

WITHDRAWAL OF THE SADC TRIBUNAL’S HUMAN RIGHTS MANDATE UNTIL SUCH
TIME AS STATES PARTIES HAVE CONCLUDED A PROTOCOL TO THIS END IS LIKELY TO
jeopardise the implementation of the SADC Treaty, central to which is the observance and protection of human rights.

3. **The Limitation is a Breach of the Obligations Flowing from the AEC Establishment Process**

As one of the Regional Economic Communities (RECs) involved in the African Economic Community (AEC) establishment process, SADC is under an obligation to incrementally implement processes leading to the establishment of the African Common Market, and then eventually to the African Economic Community. The process leading up to the establishment of the AEC is outlined in the Treaty Establishing the African Economic Community (AEC Treaty). The relationship between individual RECs and the AEC Institutions is governed by two treaties: the Protocol on Relations Between the African Economic Community and the Regional Economic Communities, 1998 (AEC/RECs Protocol) and the Protocol on Relations Between the African Union and the Regional Economic Communities, 2008 (AU/RECs Protocol).

Central to this framework are the common provisions of Articles 21(1) and 22(1) of the AEC/RECs and AU/RECs Protocols respectively. Here we cite the provisions of the latter Protocol:

In compliance with articles 10(2) and 13(2) of the Treaty, the Union shall take measures, through its principal policy organs, against a regional economic community whose policies, measures and programmes are incompatible with the objectives of the Treaty...

Furthermore Article 5(1) of the AEC Treaty provides as follows:

**General Undertakings**

1. Member States undertake to create favourable conditions for the development of the Community and the attainment of its objectives, particularly by harmonising their strategies and policies. They shall refrain from any unilateral action that may hinder the attainment of the said objectives.

Effectively these provisions hold that the constituent RECs of the AEC are under an obligation similar to the one discussed above in respect of Article 6(1) of the SADC Treaty, i.e. not to adopt measures which impedes attainment of the objectives.

Among the principles of the AEC, in respect of which Member States declare their adherence, is that contained in Article 3(g) of the AEC Treaty, which provides as follows:

Recognition, promotion and protection of human and peoples' rights in accordance with the provisions of the African Charter on Human and Peoples' Rights;...

It is submitted that the relationship which the principles bear to the objectives is that in attainment of the objectives the role-players (Member States and RECs) must adhere to the principles.4 Furthermore

---

4 The principles of AEC are contained in Article 3, whereas the objectives are contained in Article 4.
THE PRINCIPLES ARE INTEGRAL TO ATTAINMENT OF THE OBJECTIVES. AMONG SOME OF THE OBJECTIVES IN ARTICLE 4 IN RESPECT OF WHICH ADHERENCE TO THE HUMAN RIGHTS PRINCIPLE IS CENTRAL IS THAT IN ARTICLE 4(C) WHICH PROVIDES AS FOLLOWS:

To promote co-operation in all fields of human endeavour in order to raise the standard of living of African peoples, and maintain and enhance economic stability, foster close and peaceful relations among Member States and contribute to the progress, development and the economic integration of the Continent; ...

In extinguishing an existing remedy for the “protection of human and peoples’ rights” the SADC is firstly in breach of Article 3(g) of AEC Treaty. Secondly it is failing to “create favourable conditions” for attainment of the objectives, by not recognising the competence of its judicial organ to adjudicate human rights matters referred by natural or legal persons against States. The SADC is thus in breach of the general obligation to further the objectives of the AEC.

III THE LEGALITY OF THE LIMITATION

1. Introduction and Overview

In this part we address the concerns relating to the legality of the limitation on the jurisdiction of the SADC Tribunal. Legality as a principle of international law demands that the actions of international organizations, not infringe on the general principles and rules of international law, their constitutions (or constituent instruments) and the international agreements to which they are party. In the Advisory Opinion Concerning Interpretation of the Agreement of 25 March 1951 Between the World Health Organisation and Egypt⁵, Judge El-Erian elaborates on this principle in the following manner:

It is imperative for international organisations to base their actions on valid and solid legal grounds and take their decisions in full awareness of their legal implications and guided by an authoritative interpretation of their constitutions. The overriding objective should be the observance of the principles of the organization and the fulfilment of its purposes. The common interest of the Member States of the organization can be adequately assured not through the excessive influence of political considerations which are of a transient character but on the basis of respect for legal safeguards and constraints.⁶

As demonstrated below, the intention to limit the jurisdiction of the SADC Tribunal is a breach of the doctrine of ultra vires.

The matter at hand cannot be merely characterised as an “amendment” of the SADC Tribunal Protocol. At the core lie far more contentious issues of principle which concern the nature, object and principles of SADC as an international organisation, and the competences of the various organs involved in the process. Furthermore the proposed

⁵ 62 ILR .
⁶ Ibid at p. 549.
AMENDMENTS GO TO THE HEART OF INSTITUTIONAL SEPARATION OF POWERS BETWEEN THE POLICY AND JUDICIAL ORGANS OF THE SADC.

2. Ultra Vires Actions of the Summit

2.1 The Doctrine of Ultra Vires in the Law of International Institutions

In the law of international organisations the doctrine of ultra vires operates to circumscribe the bounds of the acts of international organisations. It is generally accepted that international organisations have explicit, implicit and incidental powers stemming from their nature, objects and purposes. Primarily international law requires that international organisations only perform acts which are within their competence, i.e. perform actions in respect of which they have been specifically authorised by their constituent instruments. This first rule is supplemented and qualified by a second one, which requires that in performing their acts they not exceed the objects and purposes for which they have been established. Furthermore the principle of detournement de pouvoir requires that international organisations not exercise their competences for an improper motive. The competence of international organisations is furthermore constrained by the rule of compétence d’attribution which means that they only have the competence attributed to them by the Member States.

The doctrine of ultra vires as applied to international organisations has been termed: the principle of speciality and the principle of institutional effectiveness. The principle of speciality means that international organisations are created for a special purpose, and this purpose serves to either broaden the scope and nature of the legal acts which they may perform and furthermore to constrain or restrict those acts. The principle of institutional effectiveness demands that the actions of the institution be directed toward achieving the purposes of the organisation, hence it results in implied and incidental powers.

The International Court of Justice (hereinafter the “ICJ”) has had occasion to expound upon and apply the doctrine of ultra vires in a significant number of cases. Among these cases are the Advisory Opinion on Reparations for Injuries Suffered in the Service of the

---

7 See Cassese, Antonio International Law 135-6 quoting the Advisory Opinion on the Legality of Use of Nuclear Weapons in Armed Conflict: “the powers, the limits of which are a function of the common interests whose promotion those States entrust to them.”

8 See Brownlie, Ian Principles of Public International Law 688 relying on the Advisory Opinion on Reparations for Injuries Suffered in the Service of the United Nations where the court said: “Under international law, the Organization must be deemed to have those powers which, though not expressly provided in the Charter, are conferred upon it by necessary implication as being essential to the performance of its duties.”

In the Advisory Opinion on the Legality of the Use By A State of Nuclear Weapons in Armed Conflict, in holding that the World Health Organisation (WHO) had no competence to seek an advisory opinion from the ICJ on the legality of the use of nuclear weapons, the ICJ specifically relied on the fact that the WHO had not been granted such power in its Constitution. The Court said the following:

"International organisations are governed by the 'principle of speciality' that is to say, they are invested by the States which create them with powers, the limits of which are a function of the common interests whose promotion those States entrust to them."

In the Advisory Opinion on Certain Expenses, the court effectively authorised the expenditure the General Assembly incurred for purposes of peacekeeping though same were not specifically authorised by the provisions of the UN Charter by placing reliance on the fact that the UN General Assembly was pursuing one of its objectives viz the maintenance of international peace and security. In the process the ICJ made the following dicta:

"But when an organisation takes action which warrants the assertion that it was appropriate for the fulfilment of one of the stated purposes of the United Nations, the presumption is that such action is not ultra vires the Organisation." [at para. 168]

As illustrated below we assert that all four of the principles flowing from the doctrine of ultra vires will be infringed, jointly and/or severally, by the limitation on the SADC Tribunal’s jurisdiction.

9 16 ILR.
10 34 ILR.
11 23 ILR.
12 21 ILR 310-347.
13 62 ILR.
14 110 ILR.
15 17 ILR.
16 54 ILR.
17 Supra fn. 15.
18 110 ILR at para. 25.
19 Supra fn. 11.
2.2 The Limitation of the Jurisdiction of the SADC Tribunal is Ultra Vires the Summit

(A) The Nature and Competence of the SADC Tribunal

(i) The Competence of the SADC Tribunal

It is our submission that the institutional scheme provided for in the SADC Treaty accords the SADC Tribunal an autonomous role, which effectively makes it the judicial organ of the SADC. Article 16(1) of the SADC Treaty stipulates that the purpose of the SADC Tribunal is two-fold: to ensure adherence to and proper interpretation of the Treaty and subsidiary instruments; and to adjudicate upon such disputes as may be referred to it. Furthermore Article 32 accords the SADC Tribunal the role of “final arbiter” in respect of the following matters: any disputes concerning the interpretation and application of the SADC Treaty; and any dispute concerning the interpretation, application and validity of the Protocols or other subsidiary instruments.

Even without reference to the terms of the SADC Tribunal Protocol, the SADC Tribunal has competence, per the terms of Article 16 and 32, to adjudicate on disputes referred to it by natural and legal persons, and more specifically those which allege breach of human rights obligations. As illustrated above the primary human rights jurisdiction of the SADC Tribunal derives from the SADC Treaty, which it is specifically authorized to apply.

(ii) The Nature of the SADC Tribunal

The following factors further serve to buttress the autonomous role of the SADC Tribunal:

- The fact that the Tribunal is one of the initial institutions established by Article 9;
- Its competence to adjudicate disputes in which the Community is a respondent;
- The fact that once adopted the SADC Tribunal Protocol became an integral part of the SADC Treaty.

Furthermore, the SADC Tribunal’s human rights jurisdiction over disputes referred to it by natural and legal persons is part of its “core and inviolable sphere”. All judicial tribunals are vested with the so-called “compétence de la compétence” to judge its own jurisdiction. By this we mean that exercise of human rights competence in respect of disputes involving natural or legal persons and States is intrinsic to fulfilment of its purpose as an institution of the SADC, and as a judicial institution. As elaborated upon below this “core and
INVOLABLE SPHERE” IS BEYOND INTERFERENCE BY THE POLITICAL AND POLICY ORGANS OF THE SADC.

IN THE ADVISORY OPINION ON THE LEGAL CONSEQUENCES FOR STATES OF THE CONTINUED PRESENCE OF SOUTH AFRICA IN SOUTH WEST AFRICA\(^{20}\) THE ICJ MADE REMARKS REGARDING THE INDEPENDENT AND AUTONOMOUS NATURE OF THE ICJ AS THE PRINCIPAL JUDICIAL ORGAN OF THE UN. THE FOLLOWING IS A LIST OF PASSAGES FROM THAT DECISION:

The Court is wholly independent of the other organs of the UN. ... its function is to decide in accordance with international law.\(^{21}\)

The Court retains the elevated dignity deriving from its constitutional status and independence. Its authority may never be compared to that of a legal consultant or advisor – it must remain faithful to its judicial character.\(^{22}\)

FURTHERMORE IT WAS SAID THAT NO LIMITATIONS CAN BE PLACED ON “THE LOGICAL PROCESSES” IT EMPLOYS TO ANSWER LEGAL QUESTIONS. THE COURT ALSO MAINTAINED THAT THE GENERAL ASSEMBLY AND THE SECURITY COUNCIL CANNOT DECLARE THE COURT’S JUDGMENTS TO BE INVALID.\(^{23}\) IT IS CONTENTED HERE THAT THE POSITION OF THE ICJ VIS-A-VIS THE SECURITY COUNCIL AND THE GENERAL ASSEMBLY IS ANALOGOUS TO THE POSITION OF THE SUMMIT IN RELATION TO THE SADC TRIBUNAL. THE SEPARATION OF ARMS MUST BE STRICTLY MAINTAINED.

\(\textbf{B) THE SUMMIT’S SCOPE OF COMPETENCE}\)

THE SUMMIT’S COMPETENCES ARE DEALT WITH IN ARTICLE 10 OF THE SADC TREATY. SUB-ARTICLE (3) THEREOF GRANTS THE SUMMIT THE POWER TO ADOPT LEGAL INSTRUMENTS. FURTHERMORE IN RESPECT OF THE SADC TRIBUNAL ARTICLE 16(2) ACCORDED THE SUMMIT THE ROLE OF ADOPTING THE SADC TRIBUNAL PROTOCOL. ARTICLE 16(2) PROVIDES AS FOLLOWS: “THE COMPOSITION, POWERS, FUNCTIONS, PROCEDURES AND OTHER RELATED MATTERS GOVERNING THE TRIBUNAL SHALL BE PRESCRIBED IN A PROTOCOL, WHICH SHALL, NOTWITHSTANDING THE PROVISIONS OF ARTICLE 22 OF THIS TREATY, FORM AN INTEGRAL PART OF THIS TREATY, ADOPTED BY THE SUMMIT”.

GENERALLY THE DISSOLUTION OF THE INSTITUTIONS OF THE SADC IS PROVIDED FOR IN ARTICLE 35 OF THE SADC TREATY. Whilst conceivable that the Summit may dissolve the SADC Tribunal, it is a possibility which would render redundant the institutional scheme of the SADC for the reason that it undermines its purposes, and furthermore weakens its effectiveness.\(^{24}\) IN THE ADVISORY OPINION ON VOTING PROCEDURE ON

\(^{20}\) 49 ILR.

\(^{21}\) \textit{Ibid} at p. 133.

\(^{22}\) \textit{Ibid} at p. 163.

\(^{23}\) \textit{Ibid} at p. 170.

\(^{24}\) It is not part of the objective of this submission to deal with the legal and policy considerations flowing from the suspension of the Tribunal.
Questions Relating to Reports and Petitions Concerning the Territory of South West Africa[^25] the ICJ stated the following in respect of the UN General Assembly: “It is from the Charter that the General Assembly derives its competence to exercise its supervisory functions; and it is within the framework of the Charter that the General Assembly must find rules governing the making of its decisions in connection with those functions.” [emphasis added]. By analogy: it is with the framework of the SADC Treaty that the Summit must find rules governing the making of its decisions in connection with its functions.

Furthermore the Summit is accorded a specific role by the SADC Tribunal Protocol in respect of amendments to it. In terms of Article 37 the Summit must adopt an amendment to the SADC Tribunal Protocol by a vote of three quarters of its members. Article 16(2) of the SADC Treaty conferred on the Summit and Member States the power to deal with *inter alia* the powers of the SADC Tribunal in a protocol. We take as a starting point that the word “powers” in Article 16(2) includes jurisdiction.

(c) The Summit Does Not Have Unlimited Competence to Circumscribe the Tribunal’s Jurisdiction (Powers)

The effect of the application of the doctrine of *ultra vires* is that neither the Summit nor any of its agents *viz* the Council of Ministers and the Committee of Ministers of Justice/Attorney-Generals have competence to limit or alter the human rights jurisdiction of the SADC Tribunal by restricting access thereto by natural and legal persons. The following factors compel recognition of this position:

(a) the SADC Tribunal’s human rights jurisdiction in cases involving natural or legal persons and States is part of its inherent jurisdiction;
(b) the Summit has not been vested with unrestricted powers to circumscribe the SADC Tribunal’s jurisdiction; or
(c) Furthermore, the Summit’s competence to amend the SADC Tribunal Protocol is subject to review by the SADC Tribunal.

Each of these is now taken in turn to illustrate how their application leads to the conclusion that the limitation of the SADC Tribunal’s jurisdiction is *ultra vires* the Summit.

(i) The SADC Tribunal has Inherent Jurisdiction to Adjudicate Human Rights Disputes involving Natural or Legal Persons and States

The SADC Treaty’s institutional scheme clearly circumscribes the various roles that each of the institutions that it creates must play in furthering the ends of the community. The SADC Tribunal can be characterised as the judicial organ of the SADC. In Article 16(1) the SADC Tribunal is granted the competence to “ensure adherence to and

[^25]: (ICJ) 22 ILR 658.
the proper interpretation of the provisions of this Treaty and subsidiary instruments and to adjudicate upon such disputes as may be referred to it”.

This competence contains an “inherent jurisdiction” for the SADC Tribunal, both personal and material. The material jurisdiction extends to ensuring adherence and interpretation of what can be conveniently termed “SADC Community law”, comprising of the SADC Treaty, Protocols and subsidiary instruments. The personal jurisdiction is not explicitly indicated, but we argue that it follows the material jurisdiction. Thus to the extent that the “SADC Community law” creates rights in favour of natural and legal persons, the SADC Tribunal’s jurisdiction in respect of persons includes natural and legal persons. Furthermore a consideration of Article 16(4) suggests that non-reference to a specific class of persons who may refer disputes to the Tribunal is not accidental. Therein, in respect of advisory opinions, the drafters have indicated that only the Summit and the Council may seize the Tribunal for advisory opinions. It accords with the letter and spirit of the SADC Treaty to imply that it envisages access to the Tribunal by natural and legal persons as essential to the integration process.

Furthermore this is buttressed by Article 32 of the SADC Treaty which provides:

> **Any dispute arising from the interpretation or application of this Treaty, the interpretation, application or validity of Protocols or other subsidiary instruments made under this Treaty, which cannot be settled amicably, shall be referred to the Tribunal.** [emphasis added]

In this regard it must be highlighted that the words “Any dispute” indicate quite clearly that there is no restriction on the source of the dispute.

(ii) **The Summit Has Not Been Vested with Unrestricted Competence to Circumscribe the SADC Tribunal’s Jurisdiction**

The wording of Article 16(2) must be considered in light of the other provisions of the Treaty touching on the competences of the SADC Tribunal. These substantive provisions have been provided above in III-2.2(a)(i). In essence we argue that the naked inherent jurisdiction of the SADC Tribunal is dealt with in the SADC Treaty. Article 16(2) did not give the Summit unrestricted power to circumscribe the SADC Tribunal’s “powers”. Logically it could not for example do away completely with the SADC’s jurisdiction as reflected in the wording of Articles 16(1) and 32. More narrowly it could not and cannot now limit the rights of the SADC Tribunal to exercise jurisdiction in matters which involve natural or legal persons and States. On the other extreme it could not provide that natural and legal persons can be cited as Respondents before the SADC Tribunal. Exercise of the power in Article 16(2) is subject to the inherent powers in Articles 16(1) and
32. They mark the boundary in respect of which the Summit’s discretion may not exceed. To limit natural and legal persons’ access to the SADC Tribunal is an excessive encroachment on the Tribunal’s Article 16(1) and 32 competences.

The SADC normative framework vests human rights in favour of natural and legal persons. The institutional framework envisages that natural and legal persons shall make use of the SADC Tribunal to vindicate their human rights, through according them participation rights. We emphasise again that the advancement of human rights is a fundamental principle of the SADC.

(iii) Furthermore, the Summit’s Power of Amendment is Subject to Review by the SADC Tribunal

Article 32 grants the SADC Tribunal the competence to deal with any dispute in which the validity of a Protocol adopted under the auspices of the SADC is at stake. This competence is subject only to the qualification that there first be an attempt to resolve such a dispute amicably. It is clear that whatever amendments to a Protocol there may be, they can and should be subjected to a test, by the SADC Tribunal, to establish whether their substantive provisions are “valid”. In determining validity some of the questions to be investigated jurisprudentially are inter alia compatibility with the general principles of international law, procedural propriety, and more importantly conformity with the SADC Treaty and obligations flowing from the AEC establishment framework.

2.3 The Limitation is a Breach of the Principle of Détournerment de Pouvoir

(A) The Principle of Détournerment de Pouvoir as part of Ultra Vires

This aspect of the ultra vires doctrine deals with the motives behind the exercise of competence. The predecessor to the European Court of Justice, the Court of Justice of the European Coal and Steel Community, stated that the principle of détournerment de pouvoir ensures that authorized power is not exercised to achieve some purpose other than the one for which the power was given. However the principle is qualified by the fact that the major or dominant reason must be improper.26

(B) The Summit’s Motives for Limiting the SADC Tribunal’s Jurisdiction are Improper

---

26 Government of the Italian Republic v The High Authority 22 ILR 737-750. See also Government of the Kingdom of the Netherlands v The High Authority 22 ILR 750-756 and French Republic v The High Authority 21 ILR 309-10.
Where no cogent reasons have been put forward by the political organs for the sudden decision to limit the judicial organs’ competence the burden falls on the political organs to show that they are exercising their competence with proper reason. It can hardly be said that the Summit’s decision to temporarily suspend the SADC Tribunal’s human rights competence is proper given that it follows upon exercise by the SADC Tribunal of human rights jurisdiction against a number of the Member States. It seems to be a form of sanction against the Tribunal for having made findings against Member States. We doubt it has been explained, and indeed if it can be explained, how the limitation furthers the objects and purposes of the SADC.

Clearly if there is an intention to broaden the human rights jurisdiction by the adoption of a “human rights protocol” that intention is more compatible with maintaining such human rights jurisdiction in the interim period. Furthermore it appears as if the Summit is resolute in maintaining the “effective dissolution” of the Tribunal, and seems to be implying that limitation of the Tribunal’s human rights competence is a precondition for its reinstatement.

2.4 The Limitation is Beyond the Summit’s Competence d’Attribution

Furthermore we submit that even if it were to be argued that the Summit has the power to restrict the jurisdiction of the SADC Tribunal in the manner in which proposed Article 37 seeks to do, the principle of competence d’attribution mitigates this power. Generally the principle demands that international organisations exercise their powers in furtherance of objects and purposes of the organisation. In WHO Headquarters Advisory Opinion Judge Gros stated the following in his separate opinion:

International organisations have only such competence as States have attributed to the organisation. ... Anything outside that competence and not calculated to further the performance of the task assigned lies outside the powers of the organisation, and would be an act ultra vires, which must be regarded as without legal effect.

To date, no argument has even been advanced nor could it, that removal of the Tribunal’s human rights jurisdiction is consistent, let alone furthers, the tasks assigned the Summit or that it will further attainment of SADC’s objectives.

IV Application of the Principle of Rule of Law

1. The Rule of Law Principle in International Law

1.1 The Nature, Scope and Implications of the Rule of Law Principle
The rule of law is considered as one of the “universal and indivisible core values and principles of the United Nations”. In simple terms it means literally rule by law, as opposed to caprice, arbitrariness and whim. As a legal concept it finds application in various contexts whereby it serves to circumscribe the contours of exercise of public power. Hereunder we argue that the aspect of the rule of law that will be breached by the limitation is that which demands the creation of remedies for rights.

1.2 **Sources of the Obligation to Respect the Rule of Law**

Prime among the international legal instruments recognising the principle of rule of law is the SADC Treaty, which as indicated above states that the rule of law is one of the fundamental principles of the SADC. A similar provision is found in the African Union’s Constitutive Act, Article 4(m). Furthermore the following United Nations General Assembly Resolutions have dealt with the rule of law at national and international levels: A/RES/61/39, A/RES/62/70, A/RES/63/128, and A/RES/60/1. All these resolutions confirm that the rule of law is a core and indivisible principle of the United Nations.

2. **The Obligation to Create Remedies for Breach of Treaty Obligations, Specifically Human Rights Treaty Obligations**

2.1 **Basis for the Obligation**

Primarily the obligation to provide a remedy in the event of human rights violations is established in the major international human rights treaties. Admittedly the majority of these instruments confine this right to domestic remedies. However an important exception is Article 2(3)(a) of the International Covenant on Civil and Political Rights which provides as follows:

3. Each State Party to the present Covenant undertakes:
(a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity;...

Article 25 of the Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa (hereinafter “African Women’s Protocol”) provides for a right to judicial remedies which is not qualified by being confined to the domestic jurisdiction. The article provides as follows:

**Article 25 Remedies**

---

27 Common preamble clause to all the UN General Assembly Resolutions entitled “The Rule of Law at the National and International Levels” providing: “Reaffirming that human rights, the rule of law and democracy are interlinked and mutually reinforcing and that they belong to the universal and indivisible core values and principles of the United Nations,”.
States Parties shall undertake to:

(a) provide for appropriate remedies to any woman whose rights or freedoms, as herein recognised, have been violated;

(b) ensure that such remedies are determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by law.

Principle 14 of the Basic Principles and Guidelines on the Right to a Remedy and Reparations for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law (hereinafter “Victims Basic Principles”) provides as follows:

14. An adequate, effective and prompt remedy for gross violations of international human rights law or serious violations of international humanitarian law should include all available and appropriate international processes in which a person may have legal standing and should be without prejudice to any other domestic remedies. [Emphasis added]

The human rights at issue are those conferred on natural and legal persons by the various protocols and subsidiary instruments adopted by SADC. Generally in international law breach of treaties is not actionable by individuals within their domestic legal systems. It is for this reason that enforcement of those treaty rights in favour of individuals should remain vested with the SADC Tribunal.

2.2 The Limitation Creates a Remedy Vacuum in respect of Treaty Obligations to Fulfil Human Rights Obligations

It is beyond doubt that the various protocols and resolutions adopted by the SADC contain provisions which uphold human rights norms. Should the current human rights jurisdiction of the SADC Tribunal in respect of natural and legal persons be withdrawn, even if temporarily, it will leave a protection/remedy vacuum in respect of those human rights. As illustrated above (II-2.1) the existence of remedies is fundamental to effective protection of human rights, such a vacuum renders the treaty obligations ineffective. We must presume that the intention was not to create ineffective treaties or treaty obligations.

Furthermore it is our submission that in respect of African women the SADC Member States have an obligation in terms of Article 25 of the African Women’s Protocol to ensure the establishment of effective judicial remedies. Particularly, they have an obligation not to limit or

28 See for example George E. Warren Corporation v United States (US 2nd Circuit Court of Appeals) 9 ILR 1-4 where the court said “... , the obligations of the US directly resulting from a treaty cannot be determined either by the Court of Claims or by the District Court sitting as a court of claims”. Further in Committee of US Citizens in Nicaragua v Reagan (US Court of Appeals) 85 ILR 248-273, at p. 255 stating that in US law there is no remedy domestically in case of breach by the President or Congress of either international treaty or customary international law norms. Save where the treaties are domesticated.
extinguish an existing remedy. This obligation must be further considered in light of the SADC Protocol on Gender and Development which is applicable inter alia through Article 21 of the SADC Treaty.

3. **The Obligation to Observe in Good Faith International Undertakings**

3.1 **Content and Scope of the Obligation to Observe in Good Faith International Undertakings**

The obligation to observe obligations in good faith is codified in Article 26 of the Vienna Convention on the Law of Treaties, 1969 as part of the principle of pacta sunt servanda. Furthermore Principle 7 of the Declaration on Principles of International Law Concerning Friendly Relations and Cooperation Among States in Accordance with the Charter of the United Nations enshrines the principle that States shall fulfil in good faith the obligations assumed by them in accordance with the Charter. In elaboration it is also stated that “Every State has the duty to fulfil in good faith its obligations under international agreements valid under the generally recognized principles and rules of international law”.

In the **Case Concerning the Territorial Dispute** Judge Ajibola quotes with approval the following statement made by Rosenne: “It is a cardinal principle of interpretation that a treaty should be interpreted in good faith and not lead to a result that would be manifestly absurd or unreasonable”.

In the **La Bretagne Arbitration** the arbitrator stated that the principle of good faith is a principal factor in performance of treaties, affording a sufficient guarantee against any risk of the parties exercising their rights abusively. Furthermore the parties must show restraint, moderation and reasonableness in the exercise of treaty rights. Breach of the good faith obligation engages international responsibility.

Applying the principle of good faith to the human rights context, the Inter-American Court of Human Rights stated the following in the **Advisory Opinion on Habeas Corpus in Emergency Situations (Articles 27(2), 25(1) and 7(6) of the American Convention on Human Rights)**:

---

29 Libya v Chad (ICJ) 100 ILR 1-114.
31 Dispute Concerning Filleting Within the Gulf of St. Lawrence (Canada v France) 82 ILR 814.
34 96 ILR 392-404.
Article 27(2) (Suspension of guarantees) must, therefore, be interpreted ‘in good faith’ and keeping in mind the object and purpose of the American Convention and the need to prevent a conclusion that could give rise to the suppression of the ‘enjoyment and exercise of the rights and freedoms recognized in this Convention or to restrict them to a greater extent than is provided for therein’.

It is our submission that this obligation places the following demands on States:

- Obligations and rights flowing from treaties are to be interpreted reasonably; and
- Rights accruing from a treaty are not to be exercised abusively, implying that there is an obligation not to adopt mala fide and frivolous amendments to treaties;
- The objects and purposes of the treaty should be kept in mind in its application.

3.2 The SADC Tribunal Review Process is a Breach of the Good Faith Obligation

(A) The Amendments are Unreasonable

To interpret the SADC Treaty as permitting sudden and multiple changes to a fundamental aspect of the framework, such as the competence of its judicial organs is absurd and unreasonable.

(B) The SADC Tribunal Review Process is Mala Fide and Frivoulos

The parties to treaties are under an obligation not to exercise their treaty rights abusively. We maintain that the right of the Member States to amend the treaty is being abused through the current review process. The process is being used as a sanction for the SADC Tribunal. Whilst we accept that natural and legal persons are not parties to the SADC Treaty nor Protocols, they are nonetheless the beneficiaries of the SADC integration process, and to that extent their concerns should not go unheeded in exercise by States of their sovereign rights.

The allegations of mala fides are made without prejudice and respectfully. The action of the Summit, in suspending the SADC Tribunal for a period of over two years, is evidence of breach of the principle of pacta sunt servanda and mala fides. Objectively, whilst the Summit has a qualified power to dissolve the Tribunal, the power to suspend the SADC Tribunal falls patently outside the Summit’s competence. The restoration followed by curtailment of the human rights jurisdiction suggests that both actions are an attempt to avoid human rights accountability by the Member States.

(C) The Limitation is Against the Objects and Purposes of the SADC
In an ends based cooperation framework, such as the SADC/AEC framework, Member States should desist from adopting retrogressive measures detrimental to attainment of the end objectives.

It goes without saying that the SADC Tribunal’s human rights jurisdiction is a progressive measure in human rights protection, a measure which has come to epitomise the role RECs must play in the African economic integration process. As the SADC integration framework is part of the larger AEC framework the ends of that organisation require concrete measures on a programmatic basis. It follows that best practices within that framework are not to be reversed or withdrawn.

V IMPLICATIONS FOR IMPLEMENTATION OF HUMAN RIGHTS

1. General Human Rights Implementation Obligations

International human rights treaties contain a general undertakings provision which stipulates the general obligations which States assume in terms thereof. Such obligations can generally be classified into two broad categories: obligations to adopt measures of implementation; and the obligation to engage in international cooperation and/or seek international assistance to fulfil the substantive obligations in the various instruments. Furthermore States have a general obligation to protect fundamental human rights and freedoms.

1.1 Measures of Implementation

The following provisions of international human rights instruments deal with the general implementation obligation: Article 2(2) ICCPR, Article 2(1) ICESCR, Article 2 CEDAW, Article 4 CRC. The following African Union instruments contain general implementation obligations: Article 3(h) of the Constitutive Act of the African Union, Article 1 of the African Charter on Human and Peoples’ Rights, Article 2(1) of the African Charter on the Rights and Welfare of the Child, Article 2(1) of the African Women’s Protocol.

In substance the implementation obligations obligate the States Parties to adopt appropriate and effective measures to implement the rights recognized in the respective instruments. Whilst States enjoy a measure of discretion as to the processes they adopt in implementing treaties, this discretion is not absolute, and the measures which States adopt should be “reasonably considered appropriate”. Furthermore the State’s measures should be “appropriate and adapted to the end object (of the treaty)”. It is our submission that this obligation entails inter alia the undertaking by States to recognise international

35 The wording is from *Victrawl Pty v AOTC Ltd* (Australian Federal Court) 100 ILR 487.

36 The wording here is from *Richardson v Forestry Commission* (Australian High Court) 77 ILR 111. The case concerned Australia’s implementation of the UNESCO Convention for the Protection of the World Cultural and Natural Heritage.
AND REGIONAL MECHANISMS GRANTING INDIVIDUALS ACCESS THERETO, AND AT A
MINIMUM THE OBLIGATION NOT TO LIMIT THE RIGHT OF INDIVIDUALS TO ACCESS
HUMAN RIGHTS PROTECTION MECHANISMS WITH A HUMAN RIGHTS COMPETENCE.37

1.2 INTERNATIONAL COOPERATION

This obligation is derived from the provisions of Article 55 of the UN
Charter read together with Article 56 thereof. In essence the Member
States to the UN Charter undertake to take joint and separate action
for the achievement of the purposes specified in Article 55, which
include “universal respect for, and observance of, human rights and
fundamental freedoms for all without distinction as to race, sex,
language, or religion.”

IT IS OUR CONTENTION THAT ONE OF THE FUNDAMENTAL PURPOSES OF
INTERNATIONAL COOPERATION IS THE COLLECTIVE PROTECTION BY STATES OF
FUNDAMENTAL HUMAN RIGHTS AND FREEDOMS. THE OBLIGATION UNDER
CONSIDERATION IS CAPABLE OF INTERPRETATION TO THE EXTENT THAT IT
MANDATES ADOPTION OF HUMAN RIGHTS PROTECTION MECHANISM AT THIS SUB-
REGIONAL LEVEL OF COOPERATION.

1.3 THE OBLIGATION TO PROTECT FUNDAMENTAL HUMAN RIGHTS AND
FREEDOMS

Generally in terms of international human rights law States have the
duty to protect human rights. This obligation entails States affording
a remedy in case of human rights violations. It is our contention that
the withdrawal of an existing effective remedy for violations of human
rights is a breach of the obligation to protect.

1.4 LIMITATION AND WITHDRAWAL OF THE SADC TRIBUNAL’S JURISDICTION
IS A VIOLATION OF THE IMPLEMENTATION OBLIGATIONS

The concern raised by the limitation of individual access to the SADC
Tribunal in human rights matters is that it is divestiture of existing
jurisdiction of the SADC Tribunal and of the right to a judicial remedy
for natural and legal persons. It is our submission that in
implementing human rights States should desist from taking
retrogressive steps.

IV CONCLUSION

37 In this context it should be borne in mind that the creation of courts is part of the
sovereign competence of States. In respect of the International Military Tribunals the
Nuremberg International Military Tribunal said the following in In Re Goering and Others 13
ILR 203-222, at p. 207: “The Signatory Powers created this Tribunal, defined the law it was
to administer, and made regulations for the proper conduct of the Trial. In doing so, they
have done together what any of them might have done singly; for it is not to be doubted
that any nation has the right thus to set up special courts to administer law.” [emphasis
added].
Above we have dealt with the reasons why we deem the intended amendment to the SADC Tribunal Protocol, to effectively limit access to it by natural and legal persons, to be a breach of international law. In summary we emphasise that this proposed measure does not further the objects and purposes of the SADC and the AEC; is likely to cause institutional ineffectiveness and endangers the protection of human rights in the Southern African region.

Furthermore the Assembly and Council of the AEC have the authority to issue directives sanctioning the adoption of any measures which are at odds with the objectives of the AEC Treaty. As argued above this measure is a breach of the objectives and principles of the AEC Treaty.

It seems likely that if the measure is adopted and implemented civil society groups and concerned individuals will pursue actions aimed at challenging the measure. It is worth noting that the following avenues for challenging the measure are available:

1. If and when the SADC Tribunal becomes operational, review proceedings alleging breach of both the SADC Treaty and challenging the validity of the new protocol; and/or
2. Submissions to the African Union institutions with supervisory mandate over the activities of SADC as an REC involved in the AEC integration process; and/or
3. Application to the African Court on Human Rights and Justice by the African Commission on Human and Peoples' Rights; and/or
4. Communications to the African Commission on Human and Peoples' Rights and other international human rights treaty bodies alleging that the measure is an infringement of human rights.

Far more importantly, however is the likely reaction of diplomats, academics, jurists, civil society activists and individuals across the sub-continent. The Summit should consider how this will affect their morale and expectations of the SADC institutions. People are unlikely to consider the SADC a legitimate institution seriously pursuing the development of Southern Africa particularly, and Africa generally. Furthermore international opinion is unlikely to be receptive to such a measure.