Report on the conference "Regional Integration in Africa", Gießen, Nov. 7 – 9, 2008

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Since the early years of independence, African leaders were convinced that Africa's strength was rooted in Pan-African cooperation. But while the intentions behind these early efforts to promote regional integration may have been genuine, the impact of Africa's first regional economic communities was limited. The optimism, which had accompanied the waves of democratisation spreading over the continent in the early 1990s, however, brought about a resurgence of regionalisation, starting 1991 with the Abuja Treaty. Facing the opportunities and challenges of the new paradigm "global economy," nations were moving to combine their economies into sub-regional markets that would ultimately form one Africa-wide economic union and enhance the continent's competitiveness, thereby setting the stage for unlocking Sub-Saharan Africa's growth potential. Despite the gains made so far, there are still a number of challenges facing the integration process.

Starting with a reflection on the achievements, problems and perspectives, the papers presented at the conference on "Regional Integration in Africa" in Gießen, dealt with crucial questions of integration concerning such aspects as regional security, human rights and the possibilities and limits of the harmonisation of laws. [1]

I. Introduction: General Issues

In the first block of the conference, Prof. Dr. *Helmut Asche* of the University of Leipzig and Prof. Dr. *Thilo Marauhn* of the Justus-Liebig-University of Gießen each gave an introductory speech and assessment of regional integration in Africa, covering economic and legal aspects, respectively. This was followed by a panel discussion about the question if, and in what ways, regional integration could provide solutions for domestic problems in Africa. In the first presentation, Prof. Dr. Helmut Asche pointed out that regional economic

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1 From November 7 to 9, 2008, the conference "Regional Integration in Africa", a joint conference of the African Law Association, the Franz von Liszt Institute for International and Comparative Law and the Centre for International Development and Environmental Research, was held at Justus-Liebig-University, Gießen, Germany.

communities (RECs) were mushrooming in Africa, every African state being a member of four RECs on the average, of a total of approximately 200 regional organisms on the continent. Proponents of a positive view, he said, perceived a "New Regionalism" in Africa especially after 1989 and understood regional integration as a precursor of multilateralism. Regional integration in Africa, he explained, was a major focus for international development aid, nurtured by a positive continental European stereotype that "they should do as we did." While there were high hopes and some successes in non-economic fields like security, human rights, democracy and environmental issues, he observed that intra-regional trade was generally low, often accounting for less than ten percent of a regional bloc's total merchandise exports. Focusing on the example of the Southern African Development Community (SADC), he concluded that in light of the many bilateral trade preference agreements between member countries, as well as cases of autonomous liberalisation, it was difficult to attribute economic liberalisation policies to SADC. A lack of effective compensation mechanisms (like the EU regional funds) for small and poor economies, as well as inefficient trade diversion and the small market size of even the biggest RECs, were reasons to be sceptical of present ways to undertake economic integration, Prof. Asche said. He characterised the Economic Partnership Agreements (EPAs) between African regions and the EU, which strive to deepen and fast-track integration, as essentially forced trade liberalisation with little in return. Their effect on African regionalism was hotly debated, he said, and trade integration with the EU could actually slow down African initiatives. In his view, the positive misreading of "New Regionalism" after 1989 was partly due to a "legal illusion" of measures formally taken, but not materialised on the ground. Nevertheless, in spite of currently shallow economic integration, Prof. Asche ascertained that RECs were economically needed in Africa, and in conclusion pleaded clearly in favour of regional integration, for reasons of dynamic efficiency.

In the next presentation, Prof. Dr. *Thilo Marauhn* considered the legal side of African regional integration, asking in particular how regional integration could contribute to the development of municipal and international law. He pointed out that while international law constitutes the framework for regional integration (for example, WTO law and UN security law), from a bottom-up perspective, regional developments are also integral building blocks of international law. The traditional perspective, he said perceived modern international law to be rooted in Europe, with some contributions of individual African states, as well as continental, pan-African contributions. However, this perspective should be revised so as to take Africa as the starting point. Such a new perspective should try to understand the history of international relations between African entities as well as local and customary rules in Africa, taking the relativity of statehood seriously. Prof. Marauhn stressed that Europe was not a model for regional integration in Africa, since the success of European integration did not reflect the success of a particular economic or political theory. Instead, European integration could be explained by particular historical circumstances, one of them being a long history of rule-based societies in Europe. Whenever politics had failed to promote integration in Europe, Prof. Marauhn observed, the courts had been pro-

gressive and pushed integration further. In contrast, he suggested that African integration was perhaps simply better understood by seeing that it was not so much rule-based integration. Analysing continental as well as sub-regional integration in Africa and Europe, he stated that while the African Union was more or less a continental organisation, the EU had always been a sub-regional one, to which the AU could not be compared. Furthermore, he noted that a multitude of overlapping regional organisations was no African peculiarity, but existed in Europe, too. He concluded that fruitful functional and regional splits were needed, and that the debate should focus on the historical contingencies of regional integration, instead of abstract models. Regarding the question of regional developments as precursors of public international law, he said that more research was needed, for instance on predecessors of humanitarian rules in Africa.

The initial issue of the panel discussion was an assessment of "regional integration as a fact." The panel found that the level of integration is highly dependent on the respective areas, and is, therefore, divergent. The discussion then focused on the relation between nation building, statehood and regional integration in the African context, considering whether regional integration could compensate the weakness of national states or if rather nation building had to come first. Another point of debate was the corollary question of the adequate scope and time for external development support to integration.

II. Regional Security and Integration

The second block of the conference addressed the question of regional security through integration, with a focus on the East African Community (EAC) and the AU, as well as comparisons to SADC. *Wilman Kapenjama* of the Friedrich-Ebert-Foundation in Dar es Salaam, Tanzania, gave a talk on "Promoting Security by Cooperation: Experiences from the East African Community." Employing a broad understanding of security as human security which includes economic, social and environmental aspects, he pointed out that maintaining peace and security was one of the main objectives of the new EAC. In his view, major security threats in the region were a risk of ethnic conflicts, for instance, in Kenya, Ruanda and Burundi, the proliferation of small arms, organised crime, and a lack of good governance, as well as the abject poverty among the majority of EAC citizens. Arguing that the new EAC was still in an infant stage, he drew a comparison with SADC which he said had been successful in dealing with security threats. Positive examples he named here were the existence of the SADC Inter-State Defense and Security Committee (ISDSC) as an important confidence building vehicle, the intervention of SADC forces in internal conflicts, for instance in the Democratic Republic of Congo, SADC operations against small arms and light weapons proliferation, and SADC intervention in Lesotho in 1998 to resolve election related unrest. In contrast, he diagnosed shortcomings in the role of the EAC as an election observer, pointing out that it had not offered a clear position on the results of the disputed 2007 elections in Kenya, and that despite irregularities and a lack of transparency, the EAC had called the Zanzibar elections in 2005 free and fair. He also

diagnosed a lack of political will towards regional integration among leaders in the EAC, mistrust between governments, and fears of land conflicts resulting from open borders, as well as fears of adverse effects of economic openness. He noted that rather than regional security cooperation, there was bilateral cooperation, for example, between the Kenyan and the Tanzanian police. Asking how political will for integration could be built, Kapenjama suggested that efforts for good personal rapport between leaders could help to build confidence, as well as good military relations between EAC countries, including joint military exercises. He concluded that an effective interplay between foreign and security policy was indispensable for regional integration, protecting national security interests while setting the agenda for regional cooperation.

Prof. Dr. *Ademola Abass* from Brunel University, West London took the question of regional security through integration further by presenting the African Peace and Security Architecture (APSA) focusing on the relationship between the AU and the RECs. Starting with the beginnings of the AU and its post-colonial objectives and pan-African ideals, he briefly reviewed the evolution of the AU into a security actor. He started from the early stages of ECOWAS[2]'actions in response to Liberia in the early 1990s as the first interventions of regional security, mentioned previous collective interventions, for instance in Zaire in 1963, in the Nigerian Biafran-war 1967-1970 and in Chad in 1981 to then highlight how the 1993 Cairo African summit had led to the APSA envisaged by the constitutive act of the AU and the protocol relating to the establishment of the Peace and Security Council (PSC). He pointed out that the African Union had set itself ambitious aims to develop a ground-breaking continental security superstructure and that nothing of the sort existed in any other region. Besides other components, APSA comprises the African Stand-by Force (ASF) based on five regional brigades to be maintained by each of the sub-regional organisations (ECOWAS, SADC, IGAD[3], ECCAS[4], and UMA[5]). Since the most important elements of APSA were thus the AU and the RECs, Prof. Abass spelled out the nature of the relationship between the AU und the RECs within APSA. He presented a recently adopted Memorandum of Understanding (MoU) concerning this matter. Introducing some important provisions of the MoU, he illustrated that it contained many innovative ideas that clearly distinguish it from other regional collective security systems, as well as the UN, concerning, for example, mechanisms of information exchange. However, he said that questions would arise as to the feasibility of their operationalisation. By analysing general principles as the adherence to the principles of subsidiarity, complementarity and comparative advantage in Art IV par (iv) MoU, Prof. Abass considered, for example, whether the AU has the competence to authorise RECs to intervene in conflicts in general, or authorise

2 Economic Community of West African States.

3 The Intergovernmental Authority on Development.

4 The Economic Community of Central African States.

5 Union du Maghreb Arabe/Arab Maghreb Union (AMU).

RECs from one region to intervene in conflicts occurring in another region. He concluded by stating that within APSA many questions as to the competency and jurisdiction over conflicts have not yet been clarified.

III. Legal Integration

The following sequence of presentations looked at legal aspects of integration, in particular at the harmonisation of laws within OHADA and SADC. Dr. *Irene Asanga,* University of Douala, Cameroon considered to what extent the objectives of the AU have been attained within the context of economic and legal integration by examining the contribution of the Organisation for the Harmonisation of Business Law in Africa, commonly known by its French acronym OHADA. Dr. Asanga initially stressed the importance of a secure legal and commercial environment to protect private property and a strong independent judicial system to ensure proper application of laws and efficient settlement of disputes. After having presented OHADA organs and procedures, she assessed the scope of harmonisation of business law carried out so far by presenting several Uniform Acts, for example, the Uniform Act relating to insolvency and bankruptcy. She then approached shortcomings and challenges of the organisation, looking in particular at the predominating difficulty of harmonisation of the anglophone and francophone systems. Article 53 of the OHADA Constitutive Act presents the treaty as "open to membership of any member state of the OAU that is not a signatory to the Treaty" and even "to any non-member state of the OAU invited to accede by agreement of all the States Parties." However, the majority of OHADA member states are currently francophone states, thus the organisation is *de facto* restricted to the Franc CFA Zone. Accordingly, OHADA began with French as its sole working language. Furthermore, all member states have a civil law tradition, the only exception being the English-speaking provinces of Cameroon, where the common law legal system is adopted. To conclude Dr. Asanga reflected on the efficiency of OHADA in performing its role as a harmonisation project. She pointed out that so far OHADA is working for the Franc CFA Zone, yet the matter of language is intimately linked to its harmonisation objectives, since the Treaty refers to the member states' determination to reach out to other regions. Given the strong influence of the civil law system, a continent wide perspective of OHADA is mostly viewed with scepticism even though talks now include four official working languages for OHADA, Dr. Asanga explained. However, the experience of Cameroon with its dual judicial system might serve as a precursor for new member states with a different linguistic or legal background. Dr. *Oliver Ruppel,* University of Namibia, gave a presentation on the SADC Tribunal and its role in regional integration. In a general introduction to the Tribunal, which only became operational in 2005, Dr. Ruppel explained its organisational structure as well as the applicable law and its jurisdiction, pointing out that the Tribunal could handle disputes between states as well as disputes between natural or legal persons, and highlighted that human rights, democracy and the rule of law were fundamental principles of Art. 4 of the SADC Treaty. He then discussed the Tribunal's first

cases, focusing in particular on the case of *Mike Campbell (Pvt) Limited and Another v Republic of Zimbabwe*[6]. The main issue of this case was the acquisition of agricultural land in Zimbabwe according to the Constitution of Zimbabwe Amendment (No. 17) Act, 2005, which allowed the Government of Zimbabwe to seize farmland without compensation, and barred courts from hearing appeals from dispossessed white farmers. Campbell, a farmer threatened by eviction, argued that the Zimbabwean land acquisition process was "racist and illegal" by virtue of the SADC treaty and the African Union Charter. While the Tribunal had ruled in December 2007 that Campbell should remain on his expropriated farm pending the determination of the main case, the Zimbabwean government had affirmed in January 2008 that it would seize the farm, and Campbell and members of his family were brutally beaten before the scheduled case hearing at the SADC Tribunal.[7] In Dr. Ruppel's view, the fact that the first cases before the SADC Tribunal dealt with human rights issues contained a particular message. It pointed to a neglect of internal rule of law in particular in SADC member states and the absence of more effective inter-state mechanisms for protecting human rights. He stated that *ad hoc* the SADC Tribunal would not be able to heal domestic failures in human rights matters, because such matters were not the general aim of the institution. However, he concluded that the Tribunal had the potential of becoming a regional motor of integration if it showed sharp teeth and acquired regional credibility. Issues for further discussion, he said, were *inter alia* pertaining to national sovereignty, the lack of a higher instance of appeal within SADC, the problem of concurrent jurisdictions in the case of overlapping memberships in different regional bodies, enforcement and the lack of coercive measures in the case of non-compliance with the Tribunal's rulings.

Prof. Dr. *Werner Scholtz,* Northwest University South Africa looked at legal integration in the context of reconciling conflicting interests of trade and the protection of the environment. Introductorily, he pointed out that in regard to the "competition of systems" paradigm harmonisation of environmental standards is viewed as one of the appropriate responses to concerns about market access and competitiveness. However, harmonisation between states with different levels of economic development, with a general trend to harmonise upwards, would bear great challenges, he explained. Poorer states would not have the capacity, technical and financial resources to participate in the development and implementation of standards, so they were encumbered with an uneven burden. The problem of asymmetry between unequal states that Prof. Scholtz identified could even be perceived as a form of imperialism and/or protectionism, he said. Prof. Scholtz used the example of SADC to illustrate the problem of asymmetry, since SADC comprises some of the poorest states in the world with South Africa overshadowing the other member states due to its

6 SADC Tribunal, case no. SADCT 2/07, interim order granted, 13 December 2007.

7 The case was still pending at the time of the conference. On November 28, 2008, Campbell together with 78 other claimants won their case before the SADC Tribunal. Cf. *Oliver Ruppel*, Das SADC-Tribunal: Eine juristische Zwischenbilanz, Allgemeine Zeitung Windhoek, Namibia, 05.02.2009.

higher degree of development. He briefly introduced SADC and its history and then reflected on the issue of environmental harmonisation between SADC member states. To do so he considered references related to the aim of harmonising environmental legislation and policies in the SADC region, which can be found in various provisions regarding SADC objectives, the areas of cooperation and focus as well as the organisation's strategies and instruments. Drawing attention to the fact that South Africa's pre-eminence within SADC could impair harmonisation, Prof. Scholtz sought to generate proposals in order to address the problems. In reshaping the pursuit of self-interest and connecting it with the principle of solidarity incorporated in Art 4 (b) of the SADC treaty he found a possible answer to facilitate change. In his view, given the interdependence in ecological matters, the realisation that interests are entwined should result in convergence of interest. Thus, states still pursued self-interest, but this was defined by regional interests. Furthermore, differential treatment in how to meet obligations could be regarded as the practical application of solidarity, Prof. Scholtz expounded. In conclusion, he looked at SADC solutions, in particular the idea of developmental integration as promoted by the SADC predecessor (SADCC[8]) that conceives of regional interdependence as an instrument for regional equality. The strategy that he proposed consisted of a multi-tier and differential approach to harmonisation on the basis of solidarity. In theory this could enhance domestic and regional welfare pursuant to sustainable southern African development, Prof. Scholtz concluded, bearing in mind the barriers that could in reality impair the harmonisation process.

IV. Integration and Human Rights

The final block of the conference looked at the process of regional integration from a human rights perspective. Dr. *Faustin Z. Ntoubandi,* Justus-Liebig University, Gießen opened the final block of the conference with his presentation on the African Court of Justice and Human Rights (ACJHR). He explained that the newly established ACJHR was the outcome of an extraordinary experience that had started at the Lagos conference on the Rule of Law in 1961, where the idea of creating a continental human rights tribunal was first debated. Characteristic for integration processes, the path towards establishing such a tribunal had been punctuated with a series of normative and institutional moves that witnessed, successively, the adoption and creation of various organs and instruments, Dr. Ntoubandi stated. He therefore presented the genesis of the Court, listing such milestones as the African Charter, the African Commission and the African Court on Human and People's Rights (ACHR), the establishment of the AU and the African Court of Justice (ACJ) and finally the Protocol on the Statute of the African Court of Justice and Human Rights in July 2008, merging the ACHR with the ACJ. Explaining that this merger had established a new single entity, the ACJHR, as the main judicial organ of the AU with a contentious as well as an advisory jurisdiction, he further assessed the outstanding features

8 Southern African Development Coordination Conference.

of the Court. Dr. Ntoubandi introduced the two sections the Court comprises, a "General Section" and a "Human Rights Section," the Court's organs as well as procedures and then discussed the terms of access to the Court. States, international organizations, non-governmental organisations and individuals could submit a case before it, he explained. Dr. Ntoubandi pointed out that the statute of the Court had corrected many deficiencies inherent to the previous African system of human rights protection. However, he ascertained that some issues such as the free access to court by individual victims of human rights violations would still need to be addressed. Finishing his presentation he asked if the Court could fulfil its drafter's expectations of efficiency and effectiveness in the fulfilment of its mandate. He found that it actually could, if the court is made the central organ for the protection of human and people's rights with individual access and if there is a clear distinction between the court and other relevant organs of the AU. In Dr. Ntoubandi's view it will last but surely not least depend on the African governments to be ready to embrace the culture of human rights and the precepts of the rule of law.

Prof. Dr. *Frans Viljoen,* University of Pretoria, South Africa assessed the evolution of human rights in the process of regional integration in Africa. Initially he gave an overview of human rights at the African regional (continental) level. Prof. Viljoen illustrated that due to the post-colonial context, the promotion and protection of human rights as an objective or imperative was not yet mentioned in the OAU Charter, but was only found in international cooperation. He listed the 1969 Convention on the Specific Aspects of Refugee Problems in Africa, of course the 1981 African Charter on Human and People's Rights (the African Charter) as the first document including justiciable socio-economic rights and the right to development, the 2001 AU Constitutive Act, NEPAD[9] and APRM[10]. He then focused on human rights at the sub-regional level. At first, he explained that RECs were not human rights bodies, but had rather come about as a result of the failure of the AU to achieve economic development and advance regional integration. He pointed out, however, that human rights were increasingly recognised explicitly as an integral part of the RECs' objectives. The African Charter had become accepted as a common human rights standard within REC treaties, and REC courts adjudicated the application and interpretation of REC treaty law. Allowing for individual access, the RECs' courts could serve as a vehicle to indirectly enforce human rights law, Prof. Viljoen highlighted. He then discussed three important human rights cases of REC courts, starting with the *Essien v The Gambia and Another*[11] case, in which he analysed the ECOWAS court's explicit human rights mandate *sui generis*. By subsequently presenting the case *Katabazi and Others v Secretary General of the EAC and Another*[12] as well as *Mike Campbell (Pvt) Limited and Another v Republic*

9 New Partnership for Africa's Development.

10 African Peer Review Mechanism.

11 ECOWAS Community Court of Justice, suit ECW/ CCJ/APP/05/05, 14 March 2007.

12 East African Court of Justice, reference 1 of 2007, 1 November 2007.

of Zimbabwe,[13] he illustrated how the EAC and the SADC court, without an explicit human rights mandate, have interpreted the principle of the rule of law expansively as part and parcel of the respective community's law. Prof. Viljoen then assessed various issues arising, such as the courts' relationship with national courts and with other REC courts, their relationship with the African Commission/ the ACHR, and the enforcement of court orders. He then had a final look at human rights at the national level. Concluding his presentation, Prof. Viljoen considered the REC courts as "building blocs" of the strengthened regional human rights systems and expressed hope that, even if not overnight, the increasing number of courts creating a judicial density at various levels, would lead to the realisation of implications, one of which is that binding decisions given on human rights need to be enforced.

The final discussion observed that many important issues had been raised during the three days in Gießen, and that with respect to the current state of regional integration in Africa, one could not decide if the glass was "half full or half empty." It was concluded that in any case, a long-term perspective was needed, and that positive, maybe unintended, side effects as seen, for example, in the presentations on human rights gave hope that regional integration could enhance domestic and regional welfare and in the long run foster sustainable African development.

[13] The case had been mentioned earlier by Dr. Oliver Ruppel, see above note 5.