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African regional courts and the paradox of regional economic integration

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Introduction

The role of judicial institutions in international law keeps growing, with regard to regional as well as to thematic integration. This paper examines integration in Africa's Regional Economic Communities (RECs) through the lens of their judicial institutions.

The widespread dysfunctionality of regional economic integration in Africa and the resulting scarcity of legal disputes on that level could lead one to conclude that the regional judiciary is not a key factor for the achievement of the said regional integration. However, this paper argues that the opposite is actually the case: A functioning judiciary is not only needed in the long term, in order to durably enable and ensure regional economic integration and its necessary legal harmonization, but regional courts in Africa also play an important role in the burdensome process of realizing a more perfect integration in the first place.

Regional economic integration schemes are as old as the decolonization of the African continent. In some cases, they even predated the independent African states and were part of the development of colonial Africa, especially within the British and French colonial empires.[1] Other regional formations have been a real counter-reaction to the remainders of colonial government on the continent, namely the Southern African Development Community (SADC), with its 1980 predecessor Southern African Development Coordination Conference (SADCC). In any case, questions of regional governance have continuously been a main concern for the continent, not only since the successes of the European project after Maastricht (1992), or the accelerated liberalization of world trade after Marrakech (1994).

1 The French organized their Western and Central African colonies in two *gouvernements généraux* (*Afrique orientale francaise* and *Afrique équatoriale francaise*), while the British deepened integration of their Eastern African colonies in the East African High Commission (1948-1961), becoming after the independencies the East African Common Services Organisation, successor of today's East African Community (which, however, was defunct between 1977 and 2000).

Looking at sub-Saharan Africa today, there every country is – at least officially – part to some regional integration scheme.[2] Some of the respective organizations have gone quite far already, with the East African Community (EAC) having proclaimed a customs union and a common market, including an East African passport and the resulting free movement of all citizens within that region.

A large majority of Regional Economic Communities, however, seem to exist more on paper than for real.[3] This presentation will focus on the following regional organizations that have been actively engaged in economic integration in recent years, including the operation of a permanent judicial organ: Common Market for Eastern and Southern Africa (COMESA),[4] EAC,[5] Economic Community of West African States (ECOWAS),[6] SADC[7] and UEMOA (West African Economic and Monetary Union).[8] Yet, even the concerned regional Courts are only slowly receiving cases, which even more rarely concern issues of economic integration.

Far from concluding that there is no need for regional courts, this paper argues that the deficient functioning of the judiciary branches of sub-Saharan RECs might be one cause for the missing success of economic integration in Africa. A pragmatic, focalized intensification of the legal harmonization and integration by regional judges would be a major means of fostering economic development in Africa. First, such intensification must necessarily pass through the strengthening of institutions at the regional level, creating an independent, integration-friendly governance on the supranational level. Second, such improvement must pass through the systematic application of community law by national courts and tribunals, bringing regional integration to citizens and private companies in a decentralized manner.

For the realization of both of these priorities through the creation of a more more extensive, integration-related case law, the regional courts play a key role, but depend from the participation of private parties, institutional actors and domestic jurisdictions. In particular, cooperation by national judges is needed to harmonize the laws of member states in an effective and efficient manner. Therefore, the technique of preliminary questions, so far unused in African regional law, needs to be promoted as a major key to judicial economic integration.

I. The limited activity of the judiciary in sub-Saharan RECs

The existing regional courts in Africa have so far produced a rather scarce, anecdotical case law. Somewhat surprisingly, this is in particular true for genuine economic issues, which are supposed to be at the heart of adjudication in regional *economic* communities. A first reason for this inactivity is a manifest lack of disputes that the courts are able to adjudicate, for both economic and political reasons (**A**). In the same time, an underlying hesitation of member states to really pass on to a logic of regional integration, meaning the creation of a strong supranational framework, results in an ambiguous commitment to regional legislation and a permanent weakening of regional institutions (**B**).

2 This is in particular true for the African Union (AU), to which all African states except for Morocco (but including Western Sahara) are members. The present paper, however, will only deal with RECs below the continental AU-level, which other authors call the "sub-regional" level.

3 Organizations that have been hardly audible in economic matters in recent years are AMU, CEPGL, ECCAS, IGAD, MRU.

4 19 members from Libya and Egypt to Swaziland and Madagascar.

5 Its 5 members are Burundi, Kenya, Rwanda, Tanzania, Uganda.

6 Its 15 members are Benin, Burkina Faso, Cape Verde, Côte d'Ivoire, Gambia, Ghana, Guinea, Guinea-Bissau, Liberia, Mali, Niger, Nigeria, Senegal, Sierra Leone, Togo.

7 Its 15 members are Angola, Botswana, DR Congo, Lesotho, Madagascar, Malawi, Mauritius, Mozambique, Namibia, Seychelles, South Africa, Swaziland, Tanzania, Zambia, Zimbabwe.

8 Its 8 members are all simultaneously members of ECOWAS: Benin, Burkina Faso, Côte d'Ivoire, Guinea-Bissau, Mali, Niger, Senegal, Togo.

A. The lack of litigation in economic matters

Knowing that most regional jurisdictions have not been existing for a long time, and that their very functioning depends on insufficient human and financial resources, it still seems fair to say that they have dealt with a rather underwhelming amount of litigation. In the field of trade-related disputes there even is a quasi-total lack of litigation. The main reason of that lack seems to lie in the very nature of the economic situation on the continent. As it has often been described, the inner-African trade has remained very low-scale, even on the subregional levels.[9] African countries generally do not have large-scale manufacturing and services industries; their main income from the extraction of natural resources and the production of agricultural goods beyond local markets stems from exports to non-African countries; in the same vein, manufactured goods are mostly imported from outside the continent. While their are important foreign direct investments in many countries, legal disputes related to them are often solved outside state jurisdictions, e.g. through private arbitration.
Keeping this general lack of economic issues to be adjudicated by national and regional judges in mind, legal and political factors further aggravate the lack of litigation in economic matters. In order to examine the disinterest of parties to bring disputes to a REC court, four kinds of constellations can be distinguished: conflicts between member states (a.), legal actions of the regional administration against member states (b.), conflicts between community organs (c.), and direct actions by private persons or companies (d.).[10] Recognizing the limited use of all the related procedures for regional judicial integration, the need for animating preliminary question procedures becomes obvious.

a. Disputes between member states of a community

Virtually no inter-governmental disputes at all have been brought to the here examined regional courts. However, the lack of such disputes is hardly astonishing, since a similar tendency can be observed with the other regional organizations featuring an important element of judicial integration (e.g. the EU and the Council of Europe). In general, governments are reluctant to bring their disputes to court and prefer to resolve their disagreements through less compulsory channels, above all through negotiations on the diplomatic level. This phenomenon is even true for regional organizations that provide for alternative inter-state dispute resolution, notably through arbitration.
Somewhat an exception to the reluctance of governments towards judicial dispute settlement can be seen in the WTO, where member states have been making abundant use of the practically compelling jurisdiction of the DSB.

b. Legal actions of the regional administration against member states

A main scheme in the European Union to ensure the compliance of member states with European

9 In COMESA, the largest REC, the share of imports and exports in 2009 remaining within the borders of the organization was around 5 and 6 per cent respectively. With regard to the exports it needs to be added, however, that more than half of them were petroleum from Libya, Egypt and Sudan. Also, since most exported goods are commodities, the export balance may strongly change from year to year with changing commodity prices. The main products traded within the community were copper, tea, cement and sugar. For these and further exemplary details, see COMESA, *Report of the Twenty Ninth Meeting of the Council of Ministers*, Lusaka, Zambia, 6 december 2010.

10 On a side note, it should be added that REC Courts and Tribunals generally also fulfill the role of being the administrative tribunal of their respective organization, adjudicating disputes between staff or external contractors and the community administration. In the case of COMESA, this competence has been at the root of almost the entire case law that has been built in its short period of activity (2002/2003), provoking accusations that African RECs just adding another layer of governmental institutions and public servants that are mostly occupied by themselves and their privileges.

law have been direct actions by the EU Commission. The Commission is designed to be the "guardian of the treaties",[11] and has made ample use of this mission to successfully take action against member states in front of the European Court of Justice (ECJ).[12] While the statutes of most African RECs stipulate the same role and competence for their respective administrative organ,[13] the latter have generally been weak in assuming this function, and conflicts have not arisen in front of regional courts.

The main reason for this reluctance seems to be a prevailing inter-governmental mindset in the governance of African RECs. Their respective administrations have not been able to emerge as independent actors in the integration process. In particular, they have not been able to catalyze conflicts between member states and speak them out as an impartial organ on their behalf. This is in a stark contrast to the EU Commission, whose preemptive actions against members before the ECJ often make direct state-to-state disputes obsolete.

As we shall see at the end, the inability of a REC administration to emancipate herself from her member states' governments may somewhat be softened by the recourse to the advisory function that regional courts generally offer besides their judiciary function (see part II.B.2.).

c. Disputes between community organs

The weakness of the administrative organs of RECs as independent actors on a supranational level is often doubled by the absence of a true institutional competition between the different community organs. In fact, the regional administration being weak and dominated by the executive and legislative prevalence of regional summits and councils of ministers, the regional judiciary is likely to be the only actor to be politically independent, and to coherently follow a supranational logic of legal integration and harmonization.

The emancipation of the regional administration from summits and councils, dominated by member states, seems to remain impossible without political will and commitment of the latter, notably with regard to the necessary investments in the administrative structures, and with regard to a comprehensive realization of substantial policies on the regional level.

Meanwhile, an additional potential for animating the institutional competition on the level of regional governance could emanate from the parliamentary assemblies that most regional treaties provide for.[14] While in general those parliamentary assemblies have not become audible regional actors, the case of the EAC's East African Legislative Assembly (EALA) is different, it being the only REC parliament with a clear legislative mission. But even without having legislative competences, a parliament and its members, as independent actors with a right to take action before a regional court, are susceptible to be considerable counterweights to the inter-governmentally operating institutions of summit and council of ministers.

11 Art. 17 para. 1 of the EU Treaty notably determines that the Commission "shall oversee the application of Union law under the control of the Court of Justice of the European Union", and this practically happens through an action for failure to fulfill obligations under Art. 258 of the Treaty on the Functioning of the European Union.

12 In 2009 alone, the ECJ declared 134 infringements by states failing to fulfill their obligations under community law, while dismissing only 9 alleged infringements, cf. to "Statistics of the judicial activity of the Court of Justice" in ECJ, *Annual Report 2009*, p. 93; available online http://curia.europa.eu/jcms/jcms/P_63830/.

13 Art. 15 of the WAEMU Treaty stipulates the action for failure to fulfill obligations. In the CEMAC, Art. 35 of the revised Treaty of ... counts among the missions of the commission to ensure "the implementation of the present Treaty, of the conventions and the decisions of the Community". Art. 17 of the SADC Tribunal Protocol ("Disputes between States and Community") is more general, but clearly enables "every competent institution or organ of the community" to refer their disputes with member states to the Tribunal, who under Art. 16 para. 1 has the mission to to ensure adherence to and the proper interpretation of the provisions of this Treaty and subsidiary instruments and to adjudicate upon such disputes as may be referred to it". Art. 14 of the CEMAC Court Convention grants a comparable action to all Community organs.

14 Among the examined RECs, the founding Treaties of EAC, ECOWAS and UEMOA provide for a community parliament, unlike COMESA and SADC.

Thus, the EALA has already been subject to two major cases settled by the EAC Court of Justice (EACJ). In the 2006 *Mwatela* case, the very legislative function of the EALA was endorsed by the Court. Three EALA members successfully contested the validity of Sectoral Council decisions where member states were not represented on the ministerial level; the Court also followed the plaintiffs in judging that a draft bill that had already been introduced in the EALA could not be withdrawn later on without the consent of the Assembly.[15]
In its landmark 2007 *Anyang' Nyong'o* decision, the Court declared void the nomination of the Kenyan members of the EALA.[16] The outcome of the case created a sort of a scandal among member states governments, who were surprised by the clear condemnation of the Kenyan government for its nomination practices. As a sort of counter-reaction to enhance the control of the EACJ's decision-making, they amended the EAC Treaty, creating a First Instance Division and an Appellate Division within the Court. They also facilitated the removal of EACJ judges for misconduct, in particular by factually putting it in the hands of member states.[17]
The hectic 2007 Treaty reform lead to an action by the East Africa Law Society (EALS) against the member states for not having respected a number of procedural requirements in amending the EAC Treaty. While the EACJ agreed with the concerns of the EALS, it only declared a "prospective annulment", meaning that in future Treaty reforms the proper procedures would need to be respected.[18]

d. Legal actions by private individuals and enterprises

The sort of disputes that in the current situation of African RECs is the most likely to be brought to regional courts are disputes initiated by private parties, be they natural persons or companies. All relevant statutes provide for the necessary access, generally requiring the exhaustion of local remedies.[19] Regarding direct actions by individuals, African regional are more open than the ECJ, where individuals can take direct actions against community institutions only. In fact, most regional courts in Africa combine features of ECJ and European Court on Human Rights, where individuals take direct actions against member states. Yet, they have not at all been flooded by actions from private economic actors. To the contrary, such affairs have rather been scarce, and in most cases the private plaintiffs had no success.[20]

15 See *Calist Andrew Mwatela and Others v. East African Community*, Appl. No. 1/2005, judgment of 1 October 2006; limiting the practical consequence of his decision on the first issue, the Court declared only a prospective annulment of legislative decisions in the future.

16 See *Prof. Peter Anyang' Nyong'o and Others v. Attorney General of Kenya and Others*, Ref. No. 1/2006, judgment of 30 March 2007; Kenya did not organize an election in the sense of Art. 50 EAC Treaty. Previously, by a ruling of 27 November 2006, the Court had granted an interim injunction restraining the EAC from recognizing the nominees as duly elected members of the EALA.

17 In the new Art. 26, EACJ judges can be removed if they have been removed for misconduct or inability as judges in a domestic jurisdiction of a partner state (para. 1(b); judges may also be removed for misconduct upon decision of an *ad hoc* tribunal appointed by the EAC Summit. While these new dispositions seem quite threatening to the independence of the Court, it has to be noted that so far no removal procedures have been engaged against EACJ judges.

18 The Court notably deduced that "the infringement was not a conscious one" and was "not likely to recur"; see *East African Law Society and Others v Attorney General of the Republic of Kenya and Others*, Ref. N° 3/2007 (judgement of 1 September 2008).

19 The only exception to this principle exists within the jurisdiction of the ECOWAS Community Court of Justice, as confirmed by the Court in its case of *Hadijatou Mani Koraou v. The Republic of Niger*, Judgment No. ECW/CCJ/JUD/06/08 (27 October 2008), p. 5; the Court recalls that the only limitation to applications for human rights violations according to Art. 10(d)(ii) of the ECOWAS Court Protocol is that they must not be anonymous and that they must not have been simultaneously introduced to other international courts. By way of deduction it concludes that there is no previous requirement to exhaust local remedies.

20 The only case brought a company to the COMESA Court of Justice was dismissed by the First Instance Division for lack of competence due to an arbitration clause and because there was no sufficient prove that the principle of the

To the knowledge of the author, only one major case by a private person on economic issues has been effectively brought to the judiciary of an African REC – effectively in the sense that it did not already fail on formal grounds. It is the case of Mike Campbell and 78 other farmers in Zimbabwe, who have been fighting in front of courts against the expropriation of agricultural land by the government of President Mugabe, ultimately appearing before the SADC Tribunal. The case was covered extensively by journalists and activists[21] and lead to a clear condemnation of Zimbabwe by the Tribunal. The judges found that the plaintiffs had been discriminated on the grounds of race and that they had the right to a fair compensation for the expropriated lands.[22]

While the case was legally a success, it did not have the material consequences the plaintiffs had hoped for. Already, the government of Zimbabwe refused to recognize, let alone to implement the judgment. The judges therefore decided to report their findings according to Art. 32(5) SADC Treaty to the SADC Summit "for the latter to take the appropriate action".[23] However, the Summit did not see any need for action in the sense of the SADC Tribunal: it remained completely silent on the topic at its next meeting in Kinshasa.[24] At an extraordinary Summit in Windhoek on 20 May 2011 and after lasting efforts by the government of Zimbabwe, it was decided to amend the legal instruments of SADC, upon suggestions to be made by the Ministers of justice until August 2012 – meanwhile, the work of the Court was completely suspended, and its current members are being phased out.[25]

The *Campell* and the *Anyang' Nyong'o* cases, with the hostile reaction by member states to the rigorous jurisdictional activity of the Court, have thus become symbolic for a number of characteristics and challenges of regional adjudication in African RECs that shall be described in the following part.

B. The reluctance to pass from inter-governmental cooperation to supranational organization, and the phenomenon of overlapping memberships

On the positive side, the *Campbell* and the *Anyang' Nyong'o* cases show respectively that actions from individuals and from independent supranational institutions are susceptible to create decisive

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exhaustion of local remedies had been respected *(Intelsomac v. Rwanda Civil Aviation Authority*, 6 May 2010). The only case in front of the EAC Court of Justice, on customs management delays concerning perishable imports during the violence after the december 2007 elections, failed because the accused party, the Kenya Ports Authority of Mombasa, was not a possible respondent under Art. 30 of the EAC Treaty and the subject matter remained within Kenyan law (*Modern Holdings Ltd. v. Kenya Ports* Authority, 12 February 2009).

21 The story of Mike Campbell was notably made into the critically acclaimed movie "Mugabe and the White African". Campbell died in April 2011, reportedly in consequence of brain injuries sustained "in a June 2008 beating administered by thugs from President Mugabe's party to punish (him) for the case he had filed months earlier", see article by Celia W. Dugger, "Mike Campbell, Zimbabwean Farmer Who Fought Land Seizure, Dies at 78", *New York Times*, 14 April 2011, p. A25.

22 See *Mike Campbell (Pvt) Ltd. and Others v. Republic of Zimbabwe*, SADC (T) Case No. 2/2007 (28 November 2008), p. 58; in particular, the judges held that Zimbabwe and its expropriation law "Amendment 17" violated Art. 4(c) (community principles of democracy, human rights and the rule of law) and Art. 6(2) (non-discrimination rule) of the SADC Treaty.

23 See *Campbell and Another v Republic of Zimbabwe*, SADC (T) Case No. 03/2009 (5 June 2009), p. 3; in a rather illustrative manner, the Tribunal observed that President Mugabe "in the course of his birthday celebrations qualified the Tribunal's decision as 'nonsense' and 'of no consequence'".

24 See *Communiqué of the 29th Summit of SADC Heads of State and Government*, Kinshasa, 8 September 2009; in its only mentioning of Zimbabwe in para. 14, the Summit "noted the progress made in the implementation of the Global Political Agreement and called on the international community to remove all forms of sanctions against Zimbabwe".

25 See, for example, Konrad Adenauer Foundation, "SADC Tribunal Dissolved", http://www.kas.de/rspssa/en/publications/22940/, The Zimbabwean, "Tribunal suspension has major implications", http://www.thezimbabwean.co.uk/index.php?option=com_content&view=article&id=39944:tribunal-suspension-has-major-implications—rights-watch&catid=70:sunday-issue.

momentums for regional integration and legal harmonization in that they allow to clearly and legitimately expose national policies and governmental behavior that violate previously taken engagements on the regional level. The cases also prove that regional judges, i.e. those of SADC and EAC, are available to fulfill their mission to impartially, and rigorously apply regional law and regional legal standards. They thus have become the forerunners of taking regional integration in Africa seriously, and taking it from a loose configuration of mere inter-governmental cooperation to the development of genuine supranational governance.
On the negative side, however, the cases have also shown the systematic hindrances to an accelerated and deepened integration in African RECs. The *Campbell* case is the proof for a fundamental disregard for the implementation of regional judgments on both the national and the regional levels. While the *Anyang' Nyong'o* case has been rather positive in this regard (the judgement as such having been accepted by the Kenyan government), the political reactions to the condemnation – at least in the discourse of the Heads of State – have been to engage Treaty reforms weakening the role of the regional judiciary and subjecting the removal of its judges to the discretion of member states.

Quite in general, the hitherto existing practice of regional judicial integration in African RECs continuously clashes with a widespread incoherence of member states attitudes towards regional integration. An omnipresent symptom for the lack of coherence towards regional integration is the phenomenon of overlapping memberships. There are only very few sub-Saharan countries that are not members to two or more regional economic integration schemes. Different factors seem to favor this situation.
On the one hand, countries have an interest in being part of the same regional integration schemes than their neighbors, and to accumulate the respective benefits. Also, the activity of some organizations is unclear or irregular (e.g. CEMAC or COMESA), while other organizations focus on different thematic priorities (for most former French colonies of West-Africa, the UEMOA organizes a common currency, while their membership in ECOWAS plays an important role in addressing issues of peace and security). Parallel memberships can also re-assure countries against their fear of regional imbalances: Tanzania, often fearful of an overweight of the economically predominant Kenya within the EAC, is the only EAC member to be also a member of SADC.
On the other hand, however, RECs themselves seem to push for a steady extension of their membership, and may thus as well be blamed for the phenomenon of overlapping. The DRC, for example, has been admitted to SADC in 1997, and now there is also a movement to include the country in the EAC – however, in the case of both RECs the membership of the DRC might seriously hamper the feasibility of a deepened regional economic integration, including the supranational governance of a customs union, a common market and a single currency. It may be worth to discuss whether REC institutions themselves shouldn't rather press their organizations towards having a restrained membership, and simultaneously enhance cooperation among fellow RECs (such as the tripartite partnership between COMESA, EAC and SADC, or the cooperation between UEMOA and ECOWAS).
Interestingly, the phenomenon of overlapping memberships has so far not created remarkable difficulties on the judicial level. Such difficulties are also unlikely to arise in the future, since actions in front of regional courts generally relate to idiosyncracies of the specific constellations in which the jurisdiction exists. Also, regional courts are at the forefront when it comes to inter-jurisdictional cooperation. In exercising their jurisdiction, African REC judges tend to refer quite freely and extensively to their colleagues from other regional jurisdictions, in particular in Europe, and also to domestic African case law. On the organizational level, inter-jurisdictional cooperation exisists as well: For instance, SADC Tribunal and EACJ have been holding yearly reunions. In October 2010, a “Colloquium of African Human Rights Courts and Similar Institutions” reunited judges from EACJ, ECOWAS Community Court of Justice, SADC Tribunal, ICTR, as well as

African Commission and Court on Human and Peoples' Rights.[26]

Yet, the underlying implications of overlapping memberships remain cumbersome. A main motivation that seems to condition the promiscuous regional memberships of African countries are concerns about national sovereignty and engagements that go beyond mere inter-governmental cooperation. The underlying problem here seems to be the discrepancy between domestic and regional legal standards.
While the political-legal discourse might be the same on both the national and the regional levels, and while the material law on both levels might on the whole be compatible, the decisive difference in legal standards stems from the fact that as members to RECs, the concerned countries do not *control* the political-legal discourse on the regional level anymore. In this sense, the judiciary has a key position in regional economic integration: In a clear manner it prevents national governments from writing the narrative of legal-political events and how to interpret them. From the beginning, the regional courts have enjoyed much more independence than many national jurisdictions today. As the *Campbell* case and its most recent developments show, the harshest possible reaction to a concrete judgment by a regional court is inaction, or eventually destruction.
Another trend in curtailing the role of regional courts is the creation of parallel dispute settlement mechanisms in specialized areas. This is the case of SADC and EAC which have both arranged for a non-permanent dispute settlement by *ad hoc* panels for trade disputes.[27] While this should theoretically be seen as a considerable weakening of the respective regional courts (and while the usefulness of such specialized trade-panels outside the supervision of a regional court seems doubtful),[28] the practical consequences have so far been inexistent. No trade dispute has ever arisen in front of a REC jurisdiction, and the respective mechanisms of EAC and SADC have not even been constituted yet.

II. The leeway for regional judicial integration

Having seen the constraints under which regional judiciaries in sub-Saharan Africa have been working so far and the rather slow emergence of a regional case law on legal integration and harmonization, the question arises how the regional judiciaries can still contribute to the said integration and harmonization and thus enable its success.
Two ways of judicial integration appear: First, a vertical integration through the actions of private plaintiffs, often motivated by human rights-related concerns, but also and more fundamentally through an enhanced communication and cooperation between national and regional judiciaries (A.). Second, an enhanced horizontal integration, aiming at the emancipation of institutional actors on the regional level from member state governments, and a recourse to the non-judicial functions of regional jurisdiction as consultative organs (B.).

A. Vertical judicial integration

Actual case law stemming from judicial actions of private persons at the regional level has so far almost exclusively arisen in human rights matters. The resulting increased visibility of regional

26 See http://www.african-court.org/en/news/record/datum/2010/10/04/opening-of-the-colloquium-of-african-human-rights-courts-and-similar-institutions-4-6-october-20/.
27 See Annex VI to the SADC Trade Protocol.
28 For a detailed analysis of trade dispute settlement within SADC and suggestions for reform, see Johann Weusmann, Lambert Botha, "The Reform of SADC Dispute Settlement Mechanism – Observations and Lessons Learned from the Process", in Trudi Hartzenberg (ed.), *WTO Dispute Settlement in an African Perspective*, Cameron May, London 2008 (Chapter 6), who suggest a trade dispute settlement mechanism to be placed under the appellate review of the SADC Tribunal.

courts and continuing efforts by RECs to foster regional economic integration may however generate cases covering the whole breadth of community law in the future, especially in the here examined RECs[29] (1.). Yet, the ultimate goal needs to be the quest for the inclusion of preliminary questions into the bread-and-butter business of the Court, for the thus achievable, constructive cooperation between national and regional judiciaries is an indispensable means of legal integration and harmonization, both in terms of effectiveness and efficiency (2.).

1. Integration from below – individual actions and the pre-eminence of HR matters

The majority of the most remarkable pieces of case law in African RECs have eventually been human rights cases, indicating that justice on the regional level may in particular be sought for legal abuses by public actors on the national level, or for the failure of the domestic executive and judiciary to provide sufficient protection for the fundamental rights of their citizens. Notable cases have been decided by the ECOWAS and EAC Courts of Justice, and after all by the SADC Tribunal, whose above mentioned *Campbell* case turned out to be a human rights case, as much as it had an economic element.

Given a general competence for the adjudication of human rights abuses (Art. 10(d)(ii) ECOWAS COURT Protocol), the ECOWAS Court, in a groundbreaking decision of 2008, held Niger responsible for the enslavement during nine years of the plaintiff and awarded a compensation of 10.000.000 Francs CFA (about 15.000 Euros) to the letter, because the public authorities had failed to protect her sufficiently from the practice of slavery.[30]

Human rights cases have been more difficult to be brought to the EAC Court, since its Art. 27 of the EAC Treaty delegates a human rights jurisdiction of the Court to a future additional Protocol, which has so far not been adopted. However, in its landmark *Katabazi* decision of 2007, the Court has created a *de facto* human rights jurisdiction of its own. Arguing that Art. 6(d) of the Treaty incorporated the protection of human rights as formulated in the African Charter on Human and Peoples' Rights into the objectives of the Treaty, and that Art. 7 includes "rule of law" and "the maintenance of universally accepted standards of human rights" into the EAC's operational principles, the Court concluded that "While the Court will not assume jurisdiction to adjudicate on human rights disputes, it will not abdicate from exercising its jurisdiction (...) merely because the Reference includes allegation of human rights violation".

This ruling has widely been interpreted as an open door to human rights complaints at the EAC Court of Justice, and has resulted in a number of such cases being brought in.[31]

2. Preliminary questions – integration through cooperation between national and regional judiciaries

The most important, and yet most unexplored potential for regional judicial integration in Africa lays within the procedure of preliminary questions. Regional treaties give national judges the possibility – and in some cases even the obligation – to refer questions regarding the correct interpretation and application of community law to the regional judge, and to suspend their own proceedings until the latter has given the necessary instructions to pursue.

In the European Union, preliminary rulings by the ECJ constitute about half of its case law, and has

29 For instance, some mining companies have tried to oppose the above mentioned suspension of the SADC Tribunal in court and have requested to continue pending procedures involving them; Agência AngolaPress, "SADC Tribunal Suspension to Be Challenged", 8 May 2011.

30 *Hadijatou Mani Koraou v. The Republic of Niger*, Judgment No. ECW/CCJ/JUD/06/08 (27 October 2008).

31 An interesting case filed on 1 July 2010, is *Independent Medical Legal Unit v. Att. Gen. of Kenya and Others*, Ref. No. 3/2010 (on the so-called Mount Elgon killings).

become the main way of realizing legal integration and harmonization.[32] The technique of preliminary questions has proven to be very efficient and effective, since it encourages national courts to directly apply community law along the instructions of the regional Court, while leaving the decision on the concrete cases in their hands. Also, preliminary questions enable national judges to delegate sensible legal issues to the higher authority of the supranational judge.
Furthermore, the preliminary questions are often valuable precedents helping all national judges of member states to resolve typical legal problems that might arise upon the introduction of new community law. They thus are a pre-condition for judicial economy, with a decentralized adjudication of a maximum of cases by local courts. In this way, setting precedents through preliminary questions does not only prevent a regional court from being flooded by case law, but it also helps to realize the application of community law at all levels.
Seen from the perspective of the regional and national judiciaries themselves, the enhanced communication between both may help to sustainably improve the quality of the latter: National judges are encouraged to handle cases according to regional legal standards, and can count on the assistance of the regional judiciary to implement them.
In sum, it appears that the technique of preliminary questions is indispensable for a practical legal harmonisation and integration. Equally important, it seems to be a precondition for an efficient and effective individual access to, and enjoyment of community law: Regional courts are not designed to handle dispute settlement to the same extent than local courts, but are for reasons of both their material resources as well as the difficulty to access them bound to adjudicate exemplary, standard-setting cases. Having local courts communicating directly with the regional courts helps private persons to enjoy community law, without personally having to take their case to the regional court.

So far, however, a great lack of communication and cooperation between the national and regional judiciaries is omnipresent in African RECs – in fact, a judicial dialogue between the two judicial levels is virtually inexistent,[33] although the regional treaties would offer the necessary procedural tools.[34] A main reason for the absence of preliminary questions to regional courts may be the ignorance of regional law in member states, even by the legal fraternity.[35] Yet, even regional judges who have held office on the domestic level appear to have abstained in that second function from referring questions concerning the proper interpretation and application of community law to the regional judge.
It seems that beyond the certainly necessary awareness raising on the existence and functioning of regional adjudication and its preliminary consultation, a spell of non-communication needs to be

32 In 2009, 302 out of 561 new cases of the Court were preliminary questions, with tendency to rise; cf. to ECJ, *Annual Report 2009*, p. 82; available online http://curia.europa.eu/jcms/jcms/P_63830/.

33 To the knowledge of the author, however, there has so far been only one – unsuccessful – attempt to ask a preliminary question. Interestingly, the case in front of the UEMOA Court of Justice revealed yet another misunderstanding of the logics of regional integration. In the case *Air France v. Syndicat des Agents de Voyage et de Tourisme du Sénégal*, the Senegalese *Conseil d'Etat* (supreme administrative court) asked the regional court to designate the competent jurisdiction to adjudicate an action against a decision of the national competition comission (*Commission Nationale de la Concurrence du Sénégal*). Quite unexpectedly, the regional judges declared themselves incompetent to decide on the internal repartition of competences between national jurisdictions, highlighting that they are only there to assure the correct interpretation of community law; see *Compagnie Air France v. Syndicat des Agents de Voyage et de Tourisme du Sénégal*, Cour de justice de l'UEMOA, Arrêt n° 2/2005, 12 January 2005. It is quite astonishing that a national supreme court was ready to give a clear question of domestic jurisdictional organisation into the hands of a supranational court; the case could hence be seen as an indicator for a considerable potential openness of national judges towards regional adjudication.

34 Procedural dispositions for prejudicial questions are notably contained in Art. 34 EAC Treaty, Art. 12 of the UEMOA additional protocol n° 1 on the control organs of the UEMOA, Art. 16 SADC Tribunal Protocol, Art. 17 CEMAC Court of justice Convention. In most cases, the highest national courts are obliged to consult the regional judge if a question of the interpretation of community law arises, whereas the recourse is optional for lower courts.

35 Brian Bwesigye, *Finding Its Feet as an International Court: Challenges and Prospects of the East African Court of Justice*, Dissertation, Makerere University, Kampala, 2010.

broken – for this purpose, private parties to disputes could certainly contribute their share, by encouraging local judges to submit certain legal questions to a respective community court.
In the same time, the absence of demand for preliminary rulings may also be linked to the above described absence of economic disputes *tout court*, since prejudicial questions classically (in the EU) involve the interpretation of community legislation, of which there does not exist a lot in most African RECs. With the further development of legislation within RECs and an increased relevance of such community law in the reality of the concerned economies (e.g. with the realization of common markets) the inter-judicial dialogue might finally start running.

B. Horizontal judicial integration

For now and as far as seen in this paper, regional judiciaries remain the only independent actors in regional integration besides member state governments. They alone are hence creating a certain balancing of powers in questions of regional governance (a part from the balance of – national – interests on the inter-governmental level, which is not necessarily conducive to a more perfect integration). The absence of interstate disputes and the unlikelihood of trade disputes limit the possibilities of the judiciary to put its weight on the balance. Still, this weight may be considerable, even in the current institutional and political situation of African RECs.

1. Integration through institutional emancipation

Beyond the potential for vertical integration, described in the preceding part, an accelerated dynamic of integration could be facilitated by emancipated community organs, who – as opposed to member state governments – are the only public regional actors to credibly personate the aim for regional integration. While the regional judiciaries themselves as impartial adjudicators are not supposed to actively pursue politics of integration, they can offer a stage for other regional institutions to make integration and harmonization prevail before national interests and intergovernmental compromise.
However, as explained at the beginning of this paper, the regional administration themselves have had difficulties with emancipating themselves within the prevailing institutional dynamics. Seen from a judicial perspective, no legal action has so far been undertaken by a REC administration against a member state government – unlike the EU Commission.[36] While in the short term the political bondage of regional administrations to the member states' governments is unlikely to disappear, regional parliamentary assemblies, where they effectively exist, are more likely to take proper stances within the institutional setting. This has been most spectacularly shown by the *Anyang' Nyong'o* case, described above. Yet, most parliamentary assemblies of African RECs have hardly been audible, in part certainly due to a lack of prerogatives in the legislative processes. The enhancement of their democratic legitimation seems necessary to encourage them pursuing a proper political agenda.[37]

2. Integration through advisory opinions – a possibility for "soft emancipation"

A second, less conflictual avenue to legal integration and harmonization that involves the regional courts is their consultative role of providing advisory opinions. The treaties of African RECs often provide for such an advisory function of the regional judges, who can be asked by community

36 In 2009 alone, 142 out of 561 new cases of the ECJ were actions for failure to fulfill an obligation; ECJ, *Annual Report 2009*, p. 82, fn. 3; available online http://curia.europa.eu/jcms/jcms/P_63830/.

37 Without even holding regional parliamentary elections such as in Europe, a good deal of democratic legitimacy could already be gained by assuring that members of regional parliaments are not merely elected by the ruling parties on the national levels, but that they represent the distribution of seats in the respective national parliaments.

organs and member states to give their opinion on legal questions relating to community law. This function does not belong to the jurisdictional activity of regional courts, and the resulting advisory opinions do not unfold immediate legal effect on concrete issues at stake. Advisory opinions at times even interest member state governments: for instance in 2008, the EAC Council of Ministers asked two far reaching questions on the possibilities of variable geometry within regional integration and subsequent limitations to the requirement of consensus in decision-making.[38]
Ample use of the advisory role has been made in the UEMOA. Here, the advisory function has proven to be an interesting alternative for the UEMOA Commission to trigger legal integration by the regional court while avoiding the conflictual, confronting clash of genuine dispute settlement. In a way, the advisory function of the Court has thus provided for a sort of "soft emancipation" of community institutions from the domination by member state governments.[39] The UEMOA Court has even encouraged other "Union organs" to seek its legal advice, even though Art. 15 para. 7 of the UEMOA Court Rules of procedure grants the competence to demand advisory opinion to the Commission, the Council of Ministers and member states exclusively.[40] In a particularly interesting advisory opinion for the UEMOA Commission, the Court clearly stated that the competences of the member states may be limited in favor of the supranational level; in the concrete case of 2000, the Court confirmed the Community's exclusive legislative competence in competition law.[41]
Being used by Community organs independently without the previous consent of member states governments, the advisory opinions of regional courts may thus become the mouthpiece of the requesting institutions, preparing the grounds for an integration-friendly interpretation of community law, and further encouraging private persons and national judges to seek the jurisdiction of the Court for the good application of community law.

Conclusion

The emerging features of an effective and efficient practice of regional judicial integration are threefold: Individual access needs to be encouraged, as well as a true institutional competition within RECs, and both regional and national actors should work towards achieving a real communication and intertwinement of national and regional judiciaries through the mechanism of preliminary questions. Meanwhile, *de facto* human rights litigation and advisory opinions may stimulate the rule of law and the dissemination of community law – and increase the general visibility of RECs, contributing its share to the proliferation of economic integration.
In the same time, while a functioning regional judiciary may favor economic development, the need for a regional judiciary in economic matters remains negligible as long as substantial economic

38 *In the Matter of a Request by the Council of Ministers of the East African Community for an Advisory Opinion*, Application n° 1/2008, 24 April 2009; the Court stated that "the operational principle of Variable Geometry is in perfect harmony with the requirement of consensus in decision-making at the EAC" and that it "can and should be applied to guide the regional integration process, the requirement of consensus in decision-making notwithstanding"; the Court concluded that "consensus does not necessitate unanimity of the Partner States. In other words, no Partner State has a veto power when it comes to decision-making at the EAC".

39 See, for example, *Demande d'avis de la Commission de l'UEMOA relative à l'interprétation de l'Article 84 du Traité de l'UEMOA*, opinion n° 2/2000, 2 February 2000; *Demande d'avis de la Commission de l'UEMOA relative à l'interprétation des articles 88, 89 et 90 du Traité relatifs aux règles de concurrence dans l'Union*, opinion n° 3/2000, 27 June 2000; *Demande d'avis de la Commission de l'UEMOA relative á la création d'une Cour des Comptes au Mali*, opinion n° 1/2003, 18 March 2003.

40 *Demande d'avis de la BCEAO sur le projet d'Agrément unique pour les banques et les établissements financiers*, opinion n° 2/1996, 10 December 1996, in which the Court accepted a request for advisory opinion by the Central Bank of West African States (BCEAO) on the free movement of banking and financial services.

41 WAEMU Court of Justice, *Demande d'avis de la Commission de l'UEMOA relative à l'interprétation des articles 88, 89 et 90 du Traité relatifs aux règles de concurrence dans l'Union*, opinion n° 003/2000, 27 June 2000.

legislation on the regional level remains anecdotical. Efforts in recent years such as the proclamation of the EAC common market in 2010 are reasons for hope that the accompanying community legislation will boost the demand for legal integration and harmonization by courts on both the national and regional judicial levels.

The success of a prospering regional jurisdiction is closely interrelated with the parallel progress of integration in the executive and legislative fields, with all three branches of regional governance creating an actual polity on the supranational level. At every step towards the creation of such a regional polity, courts play an important role.