From Brussels to Addis Ababa: A Contextual and Comparative Analysis of Access to Justice Under Private International Law in Africa

Abstract

Several private international legal frameworks have been developed in Europe, which has a long history of international legal cooperation through the European Union and its predecessors. The legislative experience and success of the European Union are exemplified by the Brussels legal regime on the recognition and enforcement of foreign judgments. Africa has not been as successful as Europe in developing legal frameworks that are applicable and effective on a continental basis.

Using the Brussels regime (the EU legal framework for regulating jurisdiction in civil and commercial maters) as a comparative context especially considering the free movement of foreign judgments, this chapter explores the suitability of African regional courts in facilitating the growth of private international law in Africa. There is an investigation into the apparent inability or reluctance of the African Union to develop any effective private international legal framework that can work on a continental basis. This chapter considers the African Union, South African Development Community and Economic Community of West African States legal regimes with a view to ascertaining whether two issues have any impact on the growth of private international law in Africa. First, these regional courts' practical emphasis on human rights enforcement. Second, the exposure of the courts' judgments to political or legal manoeuvrings of Member States. This chapter then draws conclusions on whether the African Union or regional organisations best serve the interests of litigants in the context of private international law.

I Introduction

The establishment of the African Union (AU)[1] mirrors that of the European Union (EU),[2] although the goals that led to their creation are significantly different.[3] There has been a clear development of relations between the EU and the AU generally which has, however, not translated to the jurisprudential growth of private international law in Africa.[4] The growth of private international law in Africa is critical for three reasons. First, the nature of private international law makes private litigants the major beneficiaries of a successful conflict of laws resolution, although legal frameworks and the courts are fundamental. Second, it is difficult to control how individuals interact across borders and, therefore, individuals can

[1] The capital of which is in Addis Ababa, Ethiopia, as stated in the title.
[2] The capital of the EU is in Brussels, Belgium.
[3] This will be discussed shortly.
[4] https://au.int/en/pressreleases/20180523/eu-and-african-union-commissions-step-their-cooperation-support-young-people (accessed 21 July 2018).

cause the interaction of two or more States' laws. Third, the apparent efforts to model the AU on the EU's legal and institutional frameworks necessitate a comparative analysis to determine if the experiment is working and, if not, why or what can be done. As this chapter demonstrates, appropriate institutional support is critical to drive the 'internationalisation of private international law'.[5] Such support should be anchored in relevant jurisprudence. In any case, the viability or sustainability of imitation is generally predicated on adapting the original design to current and contextual realities.[6] One of these realities is the emergence and proliferation of international courts.[7] In Africa, such courts (hereinafter: 'regional courts')[8] include the ECOWAS Community Court of Justice, the South African Development Community Tribunal, and the East African Court of Justice,[9] and the OHADA Court of Justice and Arbitration.[10] The ECOWAS Court and the SADC Tribunal (hereinafter: 'courts' where there is a common reference) are selected because their regional communities are pioneers in Africa. Also, these courts demonstrate two trends that are of underlying importance in this chapter. First, the emphasis on human rights matters and, second, the political burden or legal manoeuvring when enforcement of judgments from those courts are sought. The focus on human rights and the political burden prevent the growth of other areas (including private international law). This is partly because the opposition to judgments emanating from these courts also undermines the perception of the courts concerning access to justice. As at the end of the first quarter in 2018, Member States had enforced only about a third of enforceable decisions emanating from the ECOWAS Court since the obligation to enforce was introduced.[11]

There is a need to be cautious about relying on judicial activism or an expansionist interpretative approach in the context of treaties if there is to be any sustainable, certain and clear growth of private international law in Africa. Such an approach may have its appeal with

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[5] A Mills, 'Variable Geometry, Peer Governance, and the Public International Law Perspective on Private International Law' (Sciences Po Workshop on Private International Law as Global Governance, March 2012) 19 available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2025616 (accessed 13 July 2018).

[6] M Mendelson, '*De Oratore* and the Development of *Controversia*' in M Mendelson, *Many Sides: A Protagorean Approach to the Theory, Practice and Pedagogy of Argument* (Kluwer 2002) 168. See also RO Brooks (ed), *Cicero and Modern Law* (Routledge 2009) 156.

[7] See generally: O Uraz and F Makhzoum, 'The Uncoordinated Proliferation of International Courts and Tribunals in the Context of Complexity Theory' (2014) Chaos, Complexity and Leadership 313; T Buergenthal, 'Proliferation of International Courts and Tribunals: Is It Good or Bad?' (2001) 14 Leiden Journal of International Law 267; B Kingsbury, 'Foreward: Is the Proliferation of International Courts and Tribunals a Systemic Problem?' (1999) 31 International Law and Politics 679.

[8] Some scholars refer to such courts as 'sub-regional'. E.g. LR Helfer, 'Sub-regional Courts in Africa: Litigating the Hybrid Right to Freedom of Movement' iCourts (The Danish National Research Foundation's Centre of Excellence for International Courts) Working Paper Series (University of Copenhagen 2015) https://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=6208&context=faculty_scholarship (accessed 21 July 2018).

[9] For a more extensive list of regional economic communities, see generally R Tavares and V Tang, 'Regional Economic Integration in Africa: Impediments to Progress?' (2011)18 South African Journal of International Affairs 217.

[10] Organisation for the Harmonisation of Business Law in Africa.

[11] Pursuant to art 24(3) of the Supplementary Protocol. 22 out of 64 judgments were enforced. http://www.courtecowas.org/site2012/index.php?option=com_content&view=article&id=425:chief-registrar-calls-for-the-review-of-the-enforcement-mechanism-for-decisions-of-ecowas-court (accessed 21 July 2018). A detailed discussion is provided later in this chapter.

respect to human rights in the regional courts.[12] However, there should not be an asymmetry of approaches concerning access to justice between the regional courts and the national courts, otherwise the growth of private international law will be elusive. It will provide no benefit for judgment creditors if the regional courts interpret laws in an expansive or progressive manner, but the judgments cannot be enforced because the local courts are restrictive in their approaches.

The development of private international law in Africa is essential if the continent is to cope with the challenges presented by increasing and inevitable interactions with the rest of the world.[13] A systematic development of private international law has not emerged at the continental level in Africa. This reality is reflected in the regions where, essentially, incremental efforts to develop private international law have been driven by scholars and courts in African States. In Africa, there is no clear continental direction concerning the approximation of States' laws.[14] This is true generally but particularly so for private international law. It is critical to determine if there is an intention to promote the approximation of States' laws and in what areas of law such an approximation should take place. The prospects of achieving such an approximation may vary with whether it concerns public law or private law.[15] In this context, the Convention on the Settlement of Investment Disputes (ICSID) is illustrative. Under the ICSID Convention, Member States are obligated to enforce decisions that result from relevant disputes.[16] In principle at least, Member States must enforce such decisions as if they were decisions of their national courts. Nevertheless, the ICSID Convention is a global one and any success with respect to African Member States is not anchored to the AU or any other (sub)regional organisation.[17] This does not mean that intervention by the AU in such issues will be a panacea for all challenges including those that concern treaty interpretation.[18] However, as the EU's experience demonstrates, such intervention within an appropriate legal framework can indicate a clear inclination to shape the attitude of EU Member States to investment dispute resolution.

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[12] LR Helfer and KJ Alter, 'Legitimacy and Lawmaking: A Tale of Three National Courts' (2013) 14 Theoretical Inquiries in Law (2013) 14 Theoretical Inquiries in Law 479, 488-489.

[13] RF Oppong, 'The Hague Conference and the Development of Private International Law in Africa: A Plea for Cooperation' (2006) 8 Yearbook of Private International Law 189, 209-210.

[14] This chapter is not concerned with any distinction between 'approximation' and 'harmonisation' partly because it considers the laws that led to the EU and the AU. See U Ćemalović, 'Framework for the Approximation of National Legal Systems with the European Union's Acquis: From Vague Definition to Jurisprudential Implementation' (2015) 11 Croatian Yearbook of European Law and Policy 241, 242.

[15] J Ziller, 'Public Law' in JM Smits (ed), *Elgar Encyclopedia of Comparative Law* (Edward Elgar 2006) 2006 603, 607.

[16] Art 54 of the 1965 ICSID Convention.

[17] Cf. the European Union which acquired competence in foreign direct investment matters, when the Lisbon Treaty entered into force in 2009. On the EU's 'exclusive competence in treaty-making with third States as to direct investment', see G Carducci, 'A State's Capacity and the EU's Competence to Conclude a Treaty, Invalidate, Terminate – and "Preclude" in *Achmea* – a Treaty of BIT Member States, a State's Consent to be Bound by a Treaty or to Arbitration, under the Law of Treaties and EU Law, and the CJEU's Decisions on EUSFTA and *Achmea*. Their Roles and Interactions in Treaty and Investment Arbitration (2018) 33(2) ICSID Review 528, 608. On the Lisbon Treaty see note 43.

[18] For the argument that the scope of the EU's investment competence is unclear, see D Moskvan, 'The European Union's Competence on Foreign Investment: "New and Improved" '? (2017) 18(2) San Diego International Law Journal 241, 262.

While the European Union private international law system has its challenges,[19] the sharp increase of private international law regulations has reduced legal uncertainty.[20] Two notable examples concern jurisdiction and the enforcement of foreign judgments in two major areas of private international law. One is the area of civil and commercial matters.[21] The other is the area of matrimonial matters.[22] The outcomes of efforts to enforce the judgments of regional courts provide insights into the correlation between access to justice and the prospects of African private international law.

Finally, considering recent developments in the SADC and ECOWAS, an analytical basis will be provided with a view to considering if there can be greater international cooperation anchored in legal frameworks that are applicable on a continental basis. There is an argument that African regional courts will not promote the growth of African private international law if such courts oppose community judgments. The political burden and legal manoeuvrings of Member States will be greatly reduced if there is a more deliberate and clear articulation of a roadmap to ensure the growth of private international law in Africa.

II Relevant History of the African Union

The AU evolved from the Organisation of African Unity (OAU) which was formed in 1963.[23] Most of the purposes that the OAU sought to achieve concerned the protection of territorial sovereignty and the promotion of African solidarity.[24] This emphasis reflects the dominant political and international relations themes of the era when African States were preoccupied with attaining political independence.[25] Thus, it is perhaps not surprising that there was no consideration of legal harmonisation or cooperation at the time,[26] and any focus on private international law was most unlikely.[27] The OAU Charter provided for a 'Commission of Mediation, Conciliation and Arbitration' to settle disputes among Member States which was

[19] See for example, D Weidmann, 'Convergence and Divergence in the EU's Judicial Cooperation in Civil Matters: Pleading for a Consolidation through a Uniform European Conflict's Codification' Max Planck Private Law Research Paper No. 15/14 p 175, as published in EV de Sequeira and G de Almeida Ribeiro (eds), Católica Graduate Legal Research Conference 2014 – Conference Proceedings, Lisbon 2015 175-198.

[20] TK Graziano, 'Codifying European Union Private International Law: The Swiss Private International Law Act – a Model for a Comprehensive EU Private International Law Legislation (2015) 11(3) Journal of Private International Law 585. The Hague Conference on Private International Law has also tried to promote a 'progressive unification' of private international law rules. https://www.hcch.net/en/home (accessed 21 July 2018).

[21] Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters.

[22] Council Regulation (EC) No 2201/2003. A recast was proposed in 2016. See the Proposal for a Council Regulation on Jurisdiction, the Recognition and Enforcement of Decisions in Matrimonial Matters of Parental Responsibility, and on International Child Abduction (Recast) https://ec.europa.eu/transparency/regdoc/rep/1/2016/EN/1-2016-411-EN-F1-1.PDF (accessed 21 July 2018).

[23] OAU Charter of 25th May 1963.

[24] Ibid art II (1) (a) (c) (d). see also the 'Principles' in art II.

[25] Up to 26 African States gained independence within half a decade: 1960 to 1965.

[26] The coordination intent closest to international commercial litigation or private international law generally, was in the context of 'economic cooperation' See the art II (2) (b) of the OAU Charter.

[27] Nearly half a century later, private international law was still considerably understudied in Africa. See RF Oppong, 'Private International Law and the African Economic Community: A Plea for Greater Attention' (2006) 55 International and Comparative Law Quarterly 911.

inapplicable to private international law.[28] Although laws do not feature prominently as a major cause for the decline of the OAU, there is an increasing consideration of how law could be a tool to increase the functionality of such an African platform.[29]

The formation of the AU was partly based on the need to consolidate the successes against imperialism during the OAU regime and further promote political stability in Africa.[30] However, more attention was given to African economic integration considering the global economy and its implications.[31] While there was a general policy for harmonising 'general policies' in various fields including 'economic cooperation' under the OAU,[32] the AU Charter reflected a more ambitious attempt to promote integration in Africa. One of the objectives stated in the AU Charter is the coordination and harmonisation of policies between 'existing and future Regional Economic Communities for the gradual attainment of the objectives of the Union'.[33] This objective has at least two implications. First, the Charter recognises the various Regional Economic Communities in Africa. Second, such Regional Economic Communities may be driven by policies that are not compatible with those of the AU and such policies should be harmonised. The need to promote common policies concerning trade and strengthen African negotiating power was stated in an amendment of the AU Charter.[34] In this context, the Executive Council of the AU was established to coordinate policies in several 'areas of common interest to the Member States' such as foreign trade.[35] The Specialised Technical Committee on Trade, Customs and Migration was also established and responsible to the Executive Council.[36] Although these provisions indicate more attention to international trade, it is not clear what implications such provisions have for private international law or even international commercial law generally. The only reference to law in the AU Charter is in the context of 'the rule of law'.[37] In Europe however, as will be discussed shortly, there was an early and clear articulation of the need to have an appropriate legal framework that would be supported by the laws of Member States of what would later become the European Union. A historical context of legal developments concerning the European Union will help to provide a proper perspective and create a firm foundation for comparative analysis.

[28] OAU Charter art XIX.

[29] ME Olivier, 'The Role of African Union Law in Integrating Africa' (2015) 22(4) South African Journal of International Affairs 513.

[30] Constitutive Act of the African Union of 11th July 2000 art 3 (a) – (h) on relevant objectives. See generally art 4 on 'principles'.

[31] Art 3(i) of the AU Charter. See also the 6th recital on the need to tackle 'challenges posed by globalization' and implement the Treaty establishing the African Economic Community.

[32] Art II (2)(b) of the OAU Charter.

[33] Art 3(l) of the AU Charter.

[34] Art 3 (p) of the Protocol on Amendments to the Constitutive Act of the African Union (adopted by the first Extraordinary Session of the Assembly of the Union in Addis Ababa on 3rd February 2003, and by the second Ordinary Session of the Assembly of the Union in Maputo on 11th July 2003.

[35] Art 13(1)(a) of the AU Charter.

[36] Art 14(1)(c) of the AU Charter.

[37] Recital 10 of the AU Charter.

III Relevant History and Developments of the European Union

There was significant cooperation among European countries even before economic considerations emerged, especially as the Second World War compelled strategic alliances. From 1950 when the European Coal and Steel Community was formed by six countries,[38] however, there was a clear gravitation towards seeking economic benefits and trade generally.[39] This does not imply that political considerations could be extricated from a clearer focus on the economy. For example, there is a school of thought that France was concerned about post-war Germany possibly using its industrial resurgence as an economic and security threat.[40] This difficulty in detaching commercial interests from the politics underlying Regional Economic Communities will provide an important comparative context later in this paper, especially with respect to the attitude of Member States' courts to judgments from certain regional courts.

The European Economic Community (EEC) was formed in 1957. Beyond the usual economic reasons given for its formation, various reasons have been suggested for the formation of the EEC. For example, it has been argued that only certain 'ideas' rather than objective structural imperatives inspired the formation of the EEC.[41] The variety of such reasons is important in understanding how political considerations continued to influence economic interests in much the same manner as they shaped approaches to legal issues concerning the Community. For example, there were strong reservations regarding how an admission of Francoist Spain into the EEC could undermine EEC Member States' constitutional values.[42] Indeed, the imperative to treat non-Member States in light of Member States' constitutional values was a much later consideration.[43] Historically, therefore, the EEC progressively evolved into a regional organisation that was driven by several communal interests, only one of which was economic integration.

The core purpose underlying the formation of the EEC was 'to promote throughout the Community a harmonious development of economic activities, a continuous and balanced expansion, an increase in stability, an accelerated raising of the standard of living and closer relations between the States belonging to it.'[44] This purpose was to be attained by establishing a common market and 'progressively approximating the economic policies of Member States'.[45] Both the preamble and the objectives stated in the Treaty on European

[38] The founding countries: Belgium, France, Germany, Italy, Luxembourg and the Netherlands. Glockner and Rittberger described the ECSC as 'the first supranational treaty organisation in history'. See I Glockner and B Rittberger, 'The European Coal and Steel Community (ECSC) AND European Defence Community (EDC) Treaties' in F Laursen, *Designing the European Union: from Paris to Lisbon* (Palgrave Macmillan UK 2012) 16.

[39] The Treaty ceased to be valid on 23/7/02. https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:11951K/TXT (accessed 21 July 2018).

[40] Glockner and Rittberger (n 38) 16.

[41] For an enquiry into under what conditions ideas should matter most, see C Parson, 'Showing Ideas as Causes: The Origins of the European Union' (2002) 56(1) International Organisation 47, 79.

[42] Also, for reactions against how Greece's 'descent into dictatorship under the Colonels went hand in hand with decolonization wars and conflicts in Algeria, New Guinea and elsewhere', see R Janse, 'The Evolution of the Political Criteria for Accession to the European Community' (2017) 24 European Law Journal 57, 76.

[43] See Art 3(5) of the Lisbon Treaty of 2007 (entered into force in 2009).

[44] Art 2 of the Treaty establishing the European Economic Community [1957] (Treaty of Rome) Rome.

[45] Art 2 of the Rome Treaty of 1957.

Union (TEU) of 1992/consolidated version of the TEU indicate a determination to achieve 'economic and social progress' by several means including the removal of internal borders and strengthening of economic and social cohesion.[46]

The EEC became the EU (pursuant to the Maastricht Treaty) in 1993 and was one of the 'pillars' on which the EU rested. Several developments since then,[47] have underscored the contention that the EU has not thrived solely on economic considerations.[48] There is much depth in the argument that 'the idea that the European Union was originally and properly a purely functional and economic organization is nostalgia for a past that never was'.[49] This perspective is important because recent developments in the EU (most notably, Brexit) have demonstrated the multiplicity of interests that shape the trajectory of Europe.

One significant difference in the legal development and histories of the AU and the EU is an early inclusion of a common legal framework in the case of the latter in a specific respect. The 1957 Treaty provided for the 'approximation of the laws of Member States' as far as necessary for the proper functioning of the Common Market.[50] The core foundations of the Common Market concerned four freedoms: the free movement of goods, persons, services, and capital. There are detailed provisions with respect to the approximation of Member States' laws with a view to facilitating the four freedoms.[51] These freedoms underpin private international law and international commercial law generally. For example, obtaining a foreign judgment potentially is a vehicle for the movement of goods, services and capital. Assets may be attached with a view to enforcing the foreign judgment and the judgment creditor can decide on if he wants to convert the proceeds to the purchase of goods and services or plough them back into capital.

As already noted, the disparity between the AU and the EU is reflected in the early articulation of the need for an overarching law or an approximation of Member States' laws as far as the Community is concerned. More practically, this disparity is highlighted by an enquiry into how such a harmonised approach has generally been achieved in the EU and how it can be achieved in the AU. A fundamental question is where such communal laws should come from and who should make them.

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[46] See the first objective in art B of the Treaty on European Union [1992] OJ C191/1 (Maastricht Treaty); art 3(1)(k) of the Treaty establishing the European Community (Nice consolidated version) [2002] OJ C 325/33.

[47] E.g. the creation of the European Union's area of freedom, security and justice. This was initiated by the European Council in Tampere in 1999. Kennet argued that the Tampere summit indicated a 'real political commitment to the development of a "European Judicial Area" '.But this does not discount the clear intent to promote freedom and security. See W Kennett, *The Enforcement of Judgments in Europe* (Oxford University Press 2000) 20.

[48] The Rome Treaty (EEC) has been further amended by the Amsterdam Treaty (1997) and the Nice Treaty (2001). In 2009, the Lisbon Treaty amending the Treaty on European Union and the Treaty establishing the European Community signed at Lisbon, 13 December 2007 enabled the European Union to become the legal successor of the European Community.

[49] Janse (n 42) 76.

[50] Art 3(h) of the 1957 Treaty; art 3(h) of the Consolidated version of the Treaty establishing the European Community. Ćemalović observed that 'the adoption of the Lisbon Treaty has not made any significant changes regarding the substantive provisions conferring competence for law approximation'. See Ćemalović (n 14) 246.

[51] Arts 94-95. See chapter 3 of the 1992 consolidated version of the Treaty establishing the European Community.

IV The Power to Legislate: Laws with Communal Effects or Communal Laws?

The Treaty of Amsterdam was a basis to redefine the question of legislative powers in the European Community with respect to private international law.[52] Under this Treaty, the Community acquired competence in certain parts of private international law. Thus, the Council could adopt measures concerning judicial cooperation in civil matters.[53] There is a growing consensus that the European Union has exclusive competence in private international law.[54] There is much to recommend in the argument that the exclusive competence is expansive even though case law has evolved in the context of certain subject matters. In this context, for example, an interpretation of art 3(2) of the Treaty on the Functioning of the EU vis-à-vis the 1980 Child abduction Convention has implications for exclusive external competence in other aspects of private international law.[55] The implications of exercising such external competence are particularly relevant where an international agreement could affect Community rules. The dynamics or interface between external competence and Community rules can be illustrated through the recognition and enforcement of foreign judgments, an important aspect of private international law that has had a resurgence at the Hague.[56]

Since 1968 when the European Community sought to promote the free movement of foreign judgments,[57] there has been a clear gravitation towards removing impediments to the recognition and enforcement of foreign judgments in Europe. This trend culminated in the abolition of the *exequatur*.[58] In other words, the recognition and enforcement of foreign judgments has become automatic because Member States are required to recognise and enforce judgments (in the regulated areas i.e. civil and commercial matters) emanating from other Member States. This requirement is not dependent on whether the foreign court exercised jurisdiction based on EU rules or based on residual national rules of jurisdiction. An important consequence of this requirement is that 'national rules of jurisdiction of each Member State directly affect the "scope" of obligations of each Member State'.[59] In other words, Member States cannot take legislative or policy actions that will curtail their obligation

[52] Treaty of Amsterdam amending the Treaty on European Union of 1999. This was signed on 2/10/1997 and entered into force on 1 May 1999, making substantial changes to the Treaty of Maastricht of 1992 (Treaty on European Union).

[53] i.e. as provided for in art 65. See art 61 of the Treaty of Amsterdam.

[54] i.e. with respect to areas where the EU has legislated. Opinion 1/13 Grand Chamber decision of 14 October 2014 and ECJ Opinion 1/03. See A Mills, 'Private International Law and EU External Relations: Think Local Act Global, or Think Global Act Local?' (2016) 65 International and Comparative Law Quarterly 541, 543-544. See also 'internal rules' or 'unexercised Treaty powers' vis-à-vis the '*AETR* doctrine' https://publications.parliament.uk/pa/ld200203/ldselect/ldeucom/92/9214.htm (accessed 21 July 2018).

[55] Opinion 1/13.

[56] Work resumed in 2012 https://www.hcch.net/en/projects/legislative-projects/judgments (accessed 21 July 2018).

[57] This was during the ear of the European Economic Community. See the 1968 Brussels Convention on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters.

[58] i.e. no 'declaration of enforceability' is required. See art 39 of the Brussels 1 Recast Regulation of 2012 (n 21). See also LJ Timmer, 'Abolition of Exequatur under the Brussels I Regulation: Ill Conceived and Premature?' (2003) 9(1) Journal of Private International Law 129, 139-140.

[59] Mills (n 54) 546.

to recognise and enforce foreign judgments emanating from other EU Member States.[60] Foreign judgments enforcement is a notable and practical example of the approximation of Member States' laws. This mechanism for ensuring a consistency of overarching EU law vis-à-vis Member States' laws is lacking in the AU. In this regard, the SADC and ECOWAS regional courts have struggled to ensure such consistency as their judgments have not circulated freely in their Member States.

The African Union Charter and the Treaty Establishing the African Economic Community (TEAEC) do not contain provisions on the approximation of Member States' laws. In this context, the principle that Member States should observe 'the legal system of the Community'[61] is incipient or merely aspirational because the first task is to determine whether there is a supranational legal system.[62] It is difficult to ascertain if 'the legal system of the Community' implies communal law or the laws of Member States with intended communal effects. It is also difficult to determine whether there was any clear intent by the legislator in this regard. For example, none of the 'Specialized Technical Committees' concerns law.[63] The African Union Commission on International Law (AUCIL) was established as an independent advisory organ only in 2009, pursuant to an omnibus and discretionary power of the African Union Assembly (to establish 'other organs that the Assembly may decide')[64] nearly a decade after the Constitutive Act of the AU.[65] Notably, South Africa has been a member of the Hague Conference on Private International Law since 2002 and another member of the AU had been a member nearly half a century earlier.[66] There is some potential, or even legitimacy, to use the AUCIL as a platform to promote the unification of private international law in Africa.[67] Subsuming private international law under the general

[60] This is subject to very narrow public policy considerations in the Member State where enforcement is sought.
[61] Art 3(e) of the TEAEC. Cf art 18(1) which provides that the Court of Justice shall ensure 'the adherence to law in the interpretation and application of this Treaty and shall decide on disputes submitted thereto pursuant to this Treaty'. It is not clear what this law is or means. Also, cf art 19 which provides that the decisions of the Court of Justice shall be binding on Member States and organs of the Community'.
[62] On the Member States 'legislative (and judicial) powers to the supranational entity' in the context of the EU, see R Goode, H Kronke, and E McKendrick, *Transnational Commercial Law: Text, Cases and Materials* (2nd edn, Oxford University Press) para 6.04.
[63] This is so although there is a Committee on Trade, Customs and Immigration Matters. For all the committees established and responsible to the Executive Council, see art 17 of the Constitutive Act of the AU. See also art 25 of the Treaty establishing the AEC.
[64] Cf https://au.int/en/organs/legal (accessed 21 July 2018).
[65] The AUCIL was established pursuant to art 5(2) of the Constitutive Act of the African Union. Also see the AU Assembly Decision: AU/Dec.209(XII). The history of the AUCIL clearly developed in the context of public international law, even though one of the objectives of the AUCIL is to 'conduct studies on legal matters of interest to the Union and its Member States'. https://au.int/en/aucil/about (accessed 21 July 2018). This is underscored by the international humanitarian law focus of the 6th Forum on International Law and African Union Law (30 November-12 December 2017). https://au.int/en/newsevents/20171201/sixth-forum-international-law-and-african-union-law (accessed 21 July 2018).
[66] https://www.hcch.net/en/states/hcch-members/details1/?sid=68 (accessed 21 July 2018). Egypt became a member in 1961 https://www.hcch.net/en/states/hcch-members/details1/?sid=33 (accessed 21 July 2018).
[67] Oppong argued that the AUCIL could handle many legal issues. Cf, however, text to n 75 below on policy interface between the AU and Regional Economic Communities. See RF Oppong, *Legal Aspects of Economic Integration in Africa* (Cambridge University Press 2011) 113-114.

policies that drive economic integration is not ideal. This is especially so because there is a focus on public international law in the AU.[68]

One possible interpretation of the unclarity concerning legislative intent is that an approximation of Member States' laws was not contemplated in the formative documents and processes of the African Union. Even though there is a committee on trade (customs and migration), there is no reference to any legal framework vis-à-vis approximation of Member States' laws or any legal framework.[69] Arguably, in this context, the express mention of many other matters demonstrates the exclusion of legal harmonisation which is a highly specialised area.[70] For example, Member States are required to harmonise 'legal texts regulating existing stock exchanges with a view to making them more effective'.[71] Member States are also required to harmonise their 'rules and regulations relating to transport and communications'.[72] Such provisions demonstrate that the legislator was capable of specifying, and did specify, if there was any intent to promote an approximation of Member States' laws in any area. Nevertheless, legal integration has gained significant traction in certain areas, especially commercial law. There has been considerable progress since the early 1990s when there was a more pressing need for harmonised approaches to international commercial matters in Africa.[73] OHADA is illustrative in this regard. The unresolved issue is whether such (sub)regional efforts are adequate for a continental approach that can support private litigants.[74]

The TEAEC contains a negative legal commitment on the part of Member States in the context of intra-community trade. Section 33(4) of the TEAEC provides for an undertaking by Member States 'not to adopt legislation implying direct or indirect discrimination against identical or similar products originating from another Member State'. This specifically refers to customs duties regarding goods that originate from one Member State and are imported into another Member State. In the absence of any clear articulation on an approximation of Member States' laws, it is helpful to consider to what extent such an approximation may be extrapolated from other legal provisions.

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[68] For the intersections of AUCIL work and regional integration, see https://au.int/en/pressreleases/31723/principles-international-law-are-intimately-linked-wellbeing-nations-african (accessed 21 July 2018).

[69] There was a tangential sub-theme on the harmonisation of business and investment laws in Africa vis-à-vis OHADA. See Concept Note ('The Role of Africa in Developing International Law') para 14(v)- 5th Forum of the African Union Commission on International Law 5-6 December 2016. https://au.int/sites/default/files/newsevents/conceptnotes/32073-cn-concept_note_aucil_e_original.pdf (accessed 21 July 2018).

[70] I van Damme, 'Jurisdiction, Applicable Law, and Interpretation' in D Bethlehem et al, *The Oxford Handbook of International Trade Law* (Oxford University Press 2009) 298, 318.

[71] Art 4(2)(d) of the TEACC.

[72] Art 61(1)(c) of the TEACC.

[73] See M Ndulo, 'Harmonisation of Trade Laws in the African Economic Community' (1993) 42 International and Commercial Law Quarterly 101.

[74] For the argument that such an approach is inadequate, see B Fagbayibo, 'Towards the Harmonisation of Laws in Africa: Is OHADA the Way to Go?' (2009) 42(3) Comparative International Law Journal of Southern Africa 309. See also notes 10, 69 and 173 on OHADA.

There are several provisions concerning harmonisation. One of the objectives listed in the AU Charter provides the coordination and harmonisation of 'policies between the existing and future Regional Economic Communities' with a view to attaining the aspiration of the Union.[75] The Assembly is empowered to determine the 'common policies' of the Union,[76] the Executive Council is also empowered to 'coordinate and take decisions on areas of common interest' to Member States such as foreign trade.[77] Each Specialised Technical Committee is required to ensure the coordination and harmonisation of 'projects and programmes of the Union' within its sphere of competence.[78] The TEAEC also contains several provisions concerning harmonisation. For example, the TEAEC provides that Member States should adhere to the principle of 'inter-State cooperation, harmonization of policies and integration of programmes'.[79] There is hardly any justification to assume that harmonisation of policies extends to approximation of Member States' laws or even harmonisation of law generally. The exigencies of international politics or relations may make an interchangeable use of 'law' and 'policy' have its appeal,[80] but the foundations for such a conflation are uncertain and that application cannot be justified in the context of the AU. This is so notwithstanding the imposition of sanctions on Member States that do not comply with decisions and policies of the Union.[81] Indeed, this imposition does not necessarily imply that the existence or absence of national laws on any matter can be separated from mandatory law or public policy. In other words, the imprecision with respect to 'policy' may imply the imposition of sanctions on Member States for democratic self-governance. A harmonised approach to legal issues should not be predicated on undermining national laws including national rules of public policy, except specifically agreed by the Member States.[82] In this regard, vague or omnibus legal provisions are not good enough. Relying on such legal provisions could also undermine the core principle of non-interference in the internal affairs of Member States.[83] Nevertheless, a strict adherence to a supranational law, if such a law clearly existed, may not guarantee access to justice.[84] A robust jurisprudence concerning the whole process of a conflict of laws resolution should serve to inspire confidence in litigants rather than a surrender to supranational law. As earlier noted, and will be further argued later, a liberal judicial approach

[75] Art 3(l) of the Charter. For a very similar provision, see art 4(1)(1)(d) of the TEAEC.
[76] Art 9 of the Constitutive Act.
[77] Art 13 (a) of the Constitutive Act.
[78] Art 15 (c).
[79] Art 3 (C)of the TEAEC. See also art 3(e). For other similar provisions on harmonisation of national or regional policies, see art 4(1)(b),(f), (h),(o); on tariff systems art 6(2), monetary and fiscal policies art 6(2) (d); art 6(2)(d); harmonisation of policies in 'other fields' art 77; 'harmonisation and progressive integration of the activities of regional economic communities' and their sub-regional organisations art 88(1)-(3); art 93(2); 'adopt a common position' where necessary art 93(2).
[80] Lowi argued that the distinction between law and policy had been 'obliterated'. See TJ Lowi, 'Law vs Public Policy: A Critical Exploration' (2003) 12(3) Cornell Journal of Law and Policy 493, 497-498.
[81] Art 23 (2) of the Constitutive Act.
[82] HC Gutteridge, *Comparative Law: An Introduction to the Comparative Method of Legal Study and Research* (Cambridge University Press 1949) 173-5; Goode, Kronke, and McKendrick (n 62) paras 7.01 and 7.06-7.07.
[83] Art 4(g) of the Constitutive Act. See also art 4(a) and (b) on 'sovereign equality' and 'respect of borders' respectively.
[84] In the context of the EU, see R Fentiman, 'National Law and the European Jurisdiction Regime' in A Nuyts and N Watté, *International Civil Litigation in Europe and Relations with Third States* (Bruylant 2005) 83, 127.

by the regional court and a restrictive approach by the court where enforcement is sought impedes the free movement of judgments.

The EU preliminary reference procedure is an institutionalised mechanism that illustrates how regional courts can relate with national courts. For example, the Court of Justice of the EU (CJEU) is competent to give preliminary rulings on the interpretation of treaties. The national courts of Member States request such preliminary rulings.[85] Preliminary rulings have been requested in many private international law cases in the EU. Such cases include: the recognition and enforcement of provisional and protective measures,[86] the recognition and enforcement of judgments in civil and commercial matters,[87] and the recognition and enforcement of judgments in matrimonial matters/parental responsibility.[88] Although the CJEU does not solve the underlying dispute per se, its interpretation of EU law helps Member States' courts to apply EU law in a uniform manner. In such cases, the CJEU interpreted relevant and specific EU regulations,[89] but such specificity is lacking in the African context. This, as will be discussed shortly, further highlights the challenges associated with a non-contextual approach to the development of private international law in Africa. Legal specificity is important in accessing justice: it is difficult for litigants to access justice if there is an absence of relevant and specific laws.

V The AU vs. Regional Economic Communities

The question whether there is statutory support for private international law in Africa is complicated by the special focus of the TEACC on regional (and sub-regional) economic communities. The AU Charter also validates this focus because one of the objectives contained in the Charter is the coordination and harmonisation of policies 'between the existing and future Regional Economic Communities' with a view to attaining the aspirations of the AU.[90] Indeed, the Member States are required to not only strengthen existing regional economic communities, but also establish new communities. [91] This raises the issue of how compatible this focus is with respect to any possible harmonised approach to private international law.

As earlier noted, the EU private international law framework benefits from overarching approaches in several aspects of law.[92] For example, regulations (which constitute the 'core tool for EU private international law legislation')[93] is entirely binding and directly applicable

[85] Art 267 of the Treaty on the Functioning of the EU.
[86] Case C-70/15 *Lebek v Domino* ECLI:EU:C: 2016: 524.
[87] Case C-559/14 *Meroni v Recoletos* ECLI:EU:C: 2016: 349.
[88] Case C-455/15 *P v Q* ECLI:EU:C:2015: 763.
[89] Council Regulations (EC) No 44/2001 and No 2201/2003.
[90] Art 3(l) of the Constitutive Act. The AU Charter supersedes any inconsistent or contrary provisions of the TEACC. See art 33(2) of the TEACC.
[91] Art 28(2) of the TEACC.
[92] See Goode, Kronke and McKendrick (n 62) para 6.04.
[93] PR Beaumont and PE McEleavy, *Private International Law* (3rd edn, W Green 2001) para 3.28.

in all EU Member States.[94] Generally, at least two components are critical to the success of any regional private international law instrument. The first is a deliberate effort to create a relevant overarching legal framework and its clear articulation. This component has already been discussed. The second is the uniform interpretation of such instruments by Member States.[95] The initial haphazard judicial approach to interpretation of the 1980 Hague Child Abduction Convention is a good example of the importance of uniform interpretation. It took a United States Supreme Court decision to correct a trend that encouraged child abduction.[96]

The TEAEC provides for the establishment of the Court of Justice.[97] The Court is required to ensure an 'adherence to law' concerning the interpretation and application of the TEAEC, as well as adjudicate disputes submitted to the Court pursuant to the TEAEC.[98] Such decisions are binding on Member States and organs of the Community.[99] Theoretically, this may seem to imply that the Court can entertain matters concerning private international law. Before the establishment of the AUCIL, such an exercise of jurisdiction would be contestable, and it does remain debatable but to a lesser degree. Courts should derive their jurisdiction from specific enabling law – it is a dangerous precedent to adjudicate specific specialised matters based on vague or omnibus legislative clauses partly because such an approach is susceptible to abuse. Beyond the possible use of commissions to develop private international law, there should be a careful consideration of how Member States' resistance has undermined the efficacy of such courts and their perception. Such rejection of judgments emanating from regional courts, including based on regional arguments, would caution that considerable specificity in the context of private international law is necessary. The foundation for such specificity is arguably better served through a clear articulation of the approximation of Member States' laws. A clear articulation will help to check Member States' opposition to regional courts.

Regional courts exist to resolve disputes and deliver judgments. Therefore, the raison d'être of such courts is undermined if their judgments are not enforced. The Protocol of the Court of Justice of the African Union, in light of the establishment of the Act under the TEAEC, provides more details regarding jurisdiction. In addition to the powers under the TEAEC,[100] the Court is competent to decide on the validity and interpretation of subsidiary legal instruments in the AU,[101] the breach of obligations owed to Member States,[102] and the reparation to be made where an obligation is breached.[103] The Court's competence, as

[94] Art 288 of the TFEU. This provision also explains the weight attached to directives, decisions, recommendations, and opinions.

[95] On the importance of the Court of Justice in harmonisation, see J Basedow, 'The Gradual Emergence of European Private Law' in T Einhorn and K Siehr, *Intercontinental Cooperation through Private International Law* (T.M.C. Asser press 2004) 1, 13.

[96] Beaumont and McEleavy (n 93) para 3.31; *Abbott v Abbott* 130 S.Ct. 1983 (2010).

[97] Art 18(1) of the TEAEC.

[98] Art 18(2) of the TEAEC.

[99] Art 19 of the TEACC. See also art 37 of the Protocol of the Court of Justice of the African Union – adopted by the 2nd Ordinary Session of the Assembly of the Union 11th July 2003.

[100] See art 18 of the TEAEC.

[101] Art 19(1)(b) of the Protocol.

[102] Art 1(f) of the Protocol.

[103] Art 19(1)(g) of the Protocol.

provided in the Protocol, is directed towards public international law.[104] The Court's inclination to public international law and public law generally is arguably highlighted by its increased focus on international criminal justice and human rights.[105] This is not to say that human rights should be extricated from private international law – on the contrary, human rights is becoming increasingly important in the field.[106] However, the focus on such aspects has served impliedly to characterise regional courts as unconcerned with resolving private international law disputes. Using human rights to promote regional integration in Africa is an ingenuous analytical pathway,[107] but it is also necessary to consider the extensive references to coordination and harmonisation in general.[108]

The international law/ human rights trajectory has practical implications for the regional communities. These are areas where international politics is more likely to impede the free flow of foreign judgments and such interference can undermine efficient dispensation of justice.[109] There is much to recommend in the argument that the success of the CJEU is partly due to a significant avoidance of divisive issues with a political undertone.[110] This argument also has a historical basis.[111] The CJEU has rather focused on proceedings against Member States for violations of internal market freedoms.[112] This paper relies on the ECOWAS and SADC for illustrations in the context of foreign judgments as a platform for considering implications of private international law in Africa generally. Both Regional Economic Communities will provide a platform to analyse how the growth of private international law adjudication is impeded by the practical focus of such Regional Economic Communities as well as external influences.

[104] See especially art 1(c), (e), and (f) of the Protocol.

[105] See generally, FA Agwu, 'The African Court of Justice and Human Rights: the Future of International Criminal Justice in Africa' (2014) 6(1) Africa Review 30.

[106] See JJ Fawcett and S Shah, *Human Rights and Private International Law* (Oxford University Press 2016). See also C Fenton-Glynn, 'Human Rights and Private International Law: Regulating International Surrogacy' (2014) 10(1) Journal of Private International Law 157.

[107] A Possi, 'The East African Court of Justice: Towards Effective Protection of Human Rights in the East African Community' (2013) 17 Max Planck Yearbook of United Nations Law 1, 7

[108] See notes 34 to 76.

[109] Possi (n 107) 13-14.

[110] The Regional Economic Courts 'trigger backlash when they rule directly upon divisive issues'. S Caserta and P Cebulak, 'The Limits of International Adjudication: Authority and Resistance of Regional Economic Courts in Times of Crisis' (2018) 14 The International Journal of Law in Context 275,276. Cf CJEU, C-288/12 *European Commission v Hungary* ECLI: EU:C: 2014: 237; C-286/12 *European Commission v Hungary* ECLI:C:2012:687.

[111] In the context of 'politically sensitive matters' and the EC Treaty, see T Kruger *Civil Jurisdiction Rules of the EU and their Impact on Third States* (Oxford University Press 2008) para 1.16.

[112] Caserta and Cebulak (n 110) 277.

VI The South African Development Community

SADC was established in 1992,[113] the year after the TEAEC was signed.[114] Its predecessor, the South African Development Co-ordination Conference, was established in 1980.[115] A major focus of the SADC is to promote sustainable economic growth and socio-economic development.[116] Essentially, this focus should be achieved through the harmonisation of Member States' political and socio-economic policies.[117] The SADC Treaty provides that the Court should interpret the Treaty and ensure Member States' adherence to its provisions.[118] The Court's decisions are final and binding.[119] The Court was officially established in August 2005 and inaugurated in November 2005.[120] Also, the Court was vested with jurisdiction to determine disputes between States and between natural or legal persons and States, subject to the exhaustion of local remedies.[121]

Fick, a Constitutional Court case decided in 2013, concerned the most significant judgment of the SADC.[122] This is partly because the case had implications for private international law[123] and public international law generally.[124] *Fick* had implications for private international law to the extent that private individuals obtained a costs order which required enforcement under a Member State's legal regime on the recognition and enforcement of foreign judgments.[125] A summary of *Fick* will provide a helpful context. In 2007, the Zimbabwean government expropriated the respondent farmers' lands without compensation. The Tribunal gave judgment in favour of the farmers in *Mike Campbell (Pvt) Ltd. v The Republic of Zimbabwe*.[126] The registration of the costs order was frustrated in Zimbabwe and the judgment creditors successfully sought registration and enforcement in South Africa, thus leading to the attachment of Zimbabwean property on application to the North Gauteng High Court.[127] Zimbabwe's appeals were dismissed in the South African Supreme Court of Appeal

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[113] See art 2 of the Treaty of the Southern African Development Community of 1992. The Treaty, which came into force in 1993, has been amended several times. For the chronology of amendments, see the Consolidated Text of the Treaty of the Southern African Development Community of 21 October 2015.

[114] The TEAEC was signed in 1991.

[115] See the Memorandum of Understanding on the Institutions of the Southern African Development Coordination Conference of 20th July 1981. And before then, relevant consultations were undertaken by the 'Frontline States'.

[116] Art 5(1)(a).

[117] Art 5(2)(a). on provisions concerning harmonisation, see art 14(1)(f), (g), (h).

[118] Art 16(1) of the Treaty.

[119] Art 16(5) of the Treaty.

[120] https://www.sadc.int/about-sadc/sadc-institutions/tribun/ (accessed 21 July 2018).

[121] Art 15(1)-(2) of the Protocol on the Tribunal in the South African Development Community of 7th August 2000. https://www.sadc.int/files/1413/5292/8369/Protocol_on_the_Tribunal_and_Rules_thereof2000.pdf (accessed 21 July 2018).

[122] *The Government of the Republic of Zimbabwe v Fick* 2013 (5) SA 325 (CC).

[123] RF Oppong, *Private International Law in Commonwealth Africa* (Cambridge University Press 2013) 315.

[124] E de Wet, 'The Reception of International Law in the South African Legal Order: An Introduction' 23, 44 and 'The Status and Effect of International Judicial Decisions in the South African legal Order' in E de Wet, H Hestermeyer and R Wolfrum, *The Implementation of International Law in Germany and South Africa* (Pretoria University Law Press 2015) 519, 521-525.

[125] See art 32(1)-(2) of the Protocol. See also *Fick* (n 117) para 33.

[126] [2008] SADCT 2 (28 November 2008) (Tribunal ruling).

[127] *Fick* (n 122) para 3.

and the Constitutional Court. The primary private international law import of *Fick* is reflected in the registration of the judgment itself. Prior to *Fick*, the South African common law had been developed to facilitate the enforcement of foreign judgments emanating from the domestic courts of foreign States.[128] The novelty of *Fick* lay in its liberal interpretation of the South African common law regime on foreign judgments. The Constitutional Court expanded the meaning of 'foreign judgment or order' to include 'judgments and orders of international courts or tribunals, based on international agreements that are binding on South Africa'.[129] In doing so, the Court found support in the leading South African foreign judgments enforcement case of *Richman v Ben-Tovim*[130] considering the need to prevent judgment debtors from escaping legal accountability.[131] Thus the SADC judgment was enforced in South Africa. This ground-breaking case is a double-edged sword for two reasons. First, the Constitutional Court demonstrated a pragmatic approach to the enforcement of foreign judgments. Secondly, however, equating such a judgment to a domestic judgment under the rules of private international law implies that the judgment would be subject to national public policy especially if raised in court.[132] Thus, the peremptory effect of public international law could be undermined by a recourse to public policy,[133] a favourite ground of objection by judgment creditors.[134]

The enforced judgment for farmers whose rights to property and access to justice were violated was appropriate in the circumstances of the case because the interpretation of the Protocol was credible. Apart from enabling a reliance on the 'civil procedure for the enforcement of foreign judgments' in the Member States' enforcement regimes,[135] such States have general powers to 'take forthwith all measures necessary to ensure execution' of the Tribunal's decisions.[136] The judgment against Zimbabwe, its resistance and eventual attachment of its assets in South Africa mirror the challenges which the SADC has faced. *Fick* has since become a notable illustration, even paradigmatic, of Zimbabwean resistance to the SADC and the influence of international politics on the Court.

The Summit of Heads of State or Government of the SADC suspended the Court shortly after the South African High Court attached Zimbabwean property to enforce the SADC judgment. The underlying reason for the suspension was largely political. Expropriation of land had long been a major political and economic issue, but the Zimbabwean government was clearly using its political might to drive that process. Furthermore, the political burden on the SADC has been essentially expressed in human rights terms and the unwillingness of SADC Member States to transfer sovereignty to regional institutions.[137] In fact, the political burden on the

[128] *Fick* (n 122) para 53.
[129] *Fick* (n 122) para 53-54.
[130] 2007 (2) SA 283 (SA).
[131] *Fick* (n 122) para 55.
[132] de Wet 'The Reception of International Law in the South African Legal Order: An Introduction' (n 124) 524-525.
[133] ibid 524-525.
[134] See for example, the leading case of *Jones v Krok* 1995 (1) SA 677 (AD).
[135] Art 32(1) of the Protocol.
[136] Art 32(2) of the Protocol.
[137] See generally, L Nathan, 'The Disbanding of the SADC Tribunal: A Cautionary Tale' (2013) 35(4) Human Rights Quarterly 870.

Tribunal was perceived as so entrenched that when nine States signed the revised Protocol on the Tribunal,[138] there was a clear restriction of its mandate to the adjudication of disputes between Member States in the context of the SADC Treaty and its protocols.[139] The focus on human rights was removed.

The political burden and its implications for the Court were further highlighted by a recent decision of the Gauteng High Court in the South African case of *Law Society of South Africa v President of the Republic of South Africa*.[140] The applicants contested two presidential decisions. First, the President supported a resolution suspending the operation of the Tribunal in 2011. Secondly, the President signed the Protocol that limited the Tribunal's material jurisdiction to disputes between States with the effect of excluding private parties.[141] The High Court decided that the South African President's role in suspending the SADC Tribunal and his subsequent signing of the 2014 Protocol on the SADC Tribunal was 'unlawful, irrational and thus, unconstitutional'.[142] At least two reasons for this decision are relevant to this paper. First, the High Court decided that 'any act which detracted from the SADC Tribunal's exercise of human rights jurisdiction, at the instance of individuals, was inconsistent with the SADC Treaty itself, and violated the Rule of Law'.[143] This resonates with the argument in this chapter that the special focus on human rights has somewhat characterised the Tribunal in a human rights context. Secondly, the South African presidential role in suspending the SADC Tribunal not only violated the South African Constitution[144] and subverted the will of the South African people,[145] but also impeded 'access to justice'.[146] A restriction of individual access to justice is at the core of private international law as the latter cannot thrive if individuals are unable to access justice. The High Court's decision in *Law Society of South Africa v President of the Republic of South Africa* was referred to the Constitutional Court for confirmation and that decision will be final.[147] Regardless of the appellate decision, however, other Member States were involved in the suspension of the Tribunal and the South African courts cannot have extraterritorial jurisdiction in this regard. Such challenges thus linger for the foreseeable future not only because most of the SADC judgments concerned Zimbabwe,[148] but also

[138] Notably, one of the signatories was the then Zimbabwean President, Robert Mugabe.

[139] On material jurisdiction, see art 33 of the revised Protocol on the Tribunal in the Southern African Development Community (18 August 2014) https://ijrcenter.org/wp-content/uploads/2016/11/New-SADC-Tribunal-Protocol-Signed.pdf (accessed 21 July 2018).

[140] [2018] 2 All SA 806 (GP).

[141] *Law Society of South Africa* (n 140) para 1.

[142] ibid para 72.

[143] ibid para 64.

[144] Ibid para 70.

[145] There was no public consultation vis-à-vis the withdrawal from a binding international treaty concerning individual access to justice. See para 17 to 23 of Law Society. See also *Doctors for Life International v Speaker of the National Assembly* 2006 (6) SA 416.

[146] *Law Society of South Africa* (n 140) para 70.

[147] Pursuant to s 172(2)(a) of the South African Constitution.

[148] The SADC Tribunal website was 'under construction' while this paper was written perhaps due to its suspension. However, de Wet noted that 'at the time of its suspension, the SADC Tribunal had handed down 19 decisions of which 11 concerned Zimbabwe'. See E de Wet, 'Reactions to the Backlash: Trying to Revive the SADC Tribunal through Litigation' https://www.ejiltalk.org/reactions-to-the-backlash-trying-to-revive-the-sadc-tribunal-through-litigation/ (accessed 21 July 2018). Cf http://www.saflii.org/sa/cases/SADCT/toc-S.html (accessed 21 July 2018).

because the policy of expropriation without compensation has re-emerged in the region.[149] The challenges encountered in SADC, in the context of using national rules of private international law to enforce Community judgments, provide a relevant background to comparing the ECOWAS.

VII The Economic Community of West African States

The initial ECOWAS Treaty was signed in 1975 and revised in 1993.[150] Some of the major aims of ECOWAS include the promotion of co-operation and integration, maintain economic stability and foster relations among Member States.[151] To achieve such aims, the Community is required to ensure the harmonisation and co-ordination of national policies and the promotion of integration programmes in several areas including trade and legal matters.[152] The Community is also required to ensure an enabling legal environment.[153] Judgments of the Court of Justice are binding on all Member States, Institutions of the Community, individuals and corporate bodies.[154] The Revised Treaty specifically requires Member States to 'co-operate in judicial and legal matters with a view to harmonising their judicial and legal systems'.[155] This requirement is relatively progressive considering earlier arguments for a clear articulation of a roadmap on approximation of Member States' laws. It is a different matter altogether if this provision has been exploited to promote the development of private international law.[156] Apart from the important enabling powers with respect to the approximation of Member States' laws, the aims and fundamental principles concern several areas. It is thus difficult to understand why disputes before the Court have focused on the enforcement of human rights. In any case, enforcement of the Court's decisions has been poor.[157]

In *Manneh v the Gambia*,[158] the claimant sought a declaration that his arrest and prolonged detention by the Gambian National Intelligence Agency was illegal.[159] The Court delivered judgment in favour of the of the claimant and awarded damages of USD100,000 damages against the defendant.[160] Technically, there is merit in the argument that there was a 'failed backlash' from the Gambian executive after *Manneh v The Gambia*.[161] This is essentially

[149] https://www.biznews.com/sa-investing/2018/07/25/land-expropriation-risks-breaching-international-law (accessed 21 July 2018).
[150] See the Revised Treaty signed 24th July 1993.
[151] Art 3(1)
[152] Art 3(2)(a).
[153] Art 3(2)(h).
[154] Art 15(4). An Arbitration Tribunal is also established by art 16(1).
[155] Art 57(1).
[156] The specifics pursuant to art 57(1) are to be contained in a Protocol. See art 57(2).
[157] Nearly 2 years after an ECOWAS judgment, a former Nigerian National Security Adviser has remained in detention http://dailypost.ng/2018/07/06/dasuki-inches-closer-freedom-sureties-perfect-bail-conditions/ (accessed 21 July 2018).
[158] *Manneh v The Gambia* (2008) AHRLR 171 (ECOWAS 2008).
[159] In violation of arts 6-7 of the African Charter on Human and People's Rights. See *Manneh* ibid para 3.
[160] See *Manneh* ibid para 44.
[161] KJ Alter et al, 'Backlash against International Courts in West, East and Southern Africa: Causes and Consequences' (2016) 27(2) The European Journal of International Law 293, 296.

because President Jammeh's proposal of a revision concerning the 2005 Supplementary Protocol, a major part of which sought restricted jurisdiction in respect of human rights and access to justice, did not succeed.[162] However, it should be recalled that the Gambia's international political influence was relatively minor even under the tyrannical regime of President Jammeh. It would be more tasking to assess how much weight his proposal would have had if it was supported by an influential Member State. This issue will be returned to shortly. More importantly, the Gambian government did not comply with the judgment by the ECOWAS Court even about a decade after the judgment.[163] Therefore, post-judgment proceedings could have mirrored the South African case of *Fick* especially if the Gambia's assets were attached in another Member State to help the judgment creditor realise his judgment. Furthermore, there would have been a question as to how the ECOWAS judgment would be registered in that Member State. What legal framework would have applied in such a case? *Fick* would arguably suggest the legal regime on the recognition and enforcement of foreign judgments. It is a different matter altogether to what extent a Member State's court would be ingenuous enough to use such a legal framework to recognise and enforce the judgment of the regional court.

There was an opportunity to consider the application of a Member State's legal regime on the recognition and enforcement of foreign judgments to enforce an ECOWAS Court judgment in *Mba v the Republic of Ghana*.[164] The applicant, a Nigerian, instituted an action against the Republic of Ghana with respect to the breach of his fundamental rights. The ECOWAS Court awarded damages of $800,000 USD in favour of the applicant.[165] Since the defendant refused to comply with the judgment, the applicant made an application to enforce the ECOWAS judgment. Under the Supplementary Protocol, article 24 of the Protocol of the Court of Justice provides that 'judgments of the Court that have financial implications for nationals of Member States or Members are binding'.[166] The execution of such judgments should be done according to individual Member States' rules of civil procedure.[167] Even before the Supplementary Protocol came into force, the initial Protocol provided that Member States should 'take immediately all necessary measures to ensure execution of the decision of the Court'.[168] There is no doubt that Ghana signed the Revised Treaty which established the Court

[162] Alter et al ibid 298-299.

[163] https://www.ifex.org/the_gambia/2016/06/06/denied_justice/ (accessed 21 July 2018). In the context of judgments resisted by the Gambia, see the similar human rights case of *Saidykhan v Republic of The Gambia* EWC/CCJ/APP/11/07, 16 December 2010 para 47.

[164] *In the Matter of Chude Mba v the Republic of Ghana* Suit No. HRCM/376/15. See the ruling of Suurbaareh JA (Additional High Court Judge) 1 (Unreported).

[165] ibid p 1. See *Mba v the Republic of Ghana* EWC/CCJ/APP/01/13; ECW/CCJ/jud/10/13.

[166] See art 6 of the 19 January 2015 Supplementary Protocol A/AP.1/01/05 Amending the Preamble and Articles 1,2,9 and 30 of the Protocol A/P.1/7/91 Relating to the Community Court of Justice and Article 4 Paragraph 1 of the English Version of the Said Protocol. See also the new art 24 (1)-(2) of the amended Protocol on the 'method of implementation of judgments of the Court'. http://www.courtecowas.org/site2012/pdf_files/supplementary_protocol.pdf (accessed 21 July 2018).

[167] ibid

[168] Art 22(3) of the Protocol A/P.I/7/91 on the Community Court of Justice.

of Justice of the Community,[169] and that the decisions of the Court are final.[170] The main issue was whether the High Court or any other Ghanaian court could recognise and enforce judgments by the ECOWAS Court.[171]

The Ghanaian Court decided that the Protocols had not been domesticated and therefore the ECOWAS judgment could not be enforced in Ghana.[172] There is a question as to whether such a Protocol would have suffered the same fate if the Treaty itself had been domesticated in Ghana.[173] A related question is what should be the best means of giving effect to post-Treaty matters.[174] The High Court conceded that the Protocols of the ECOWAS Court had been ratified by the Ghanaian Parliament. The High Court, however, also observed that there was no domestic legislation specifically incorporating the ECOWAS legal regime to make ECOWAS judgments enforceable by Ghanaian courts.[175] The argument that it would be unconstitutional to enforce the ECOWAS judgment without a domestication of relevant Treaty provisions has its appeal,[176] although this causes tension between State sovereignty and *pacta sunt servanda* or international obligations.[177] There is some evidence the Ghanaian judiciary had given this conflict some significant thought long before *Mba*, especially where the judgment creditor would suffer a grave miscarriage of justice.[178] However, the inability of a judgment creditor to enforce an ECOWAS judgment due to non-domestication more than two decades after the Ghanaian President signed the Revised Treaty underscores the ambivalence regarding the transfer of sovereignty. This is especially so as the judgment concerned reliefs relating to the enforcement of fundamental human rights. There is no reason to be optimistic that the Court will perform better concerning issues of private international law generally. An ECOWAS judgment against the Ghanaian government apparently made it even more difficult for the Ghanaian court to adopt any interpretative approach that would result in an enforcement of the judgment. Furthermore, the Court could

[169] Art 15(1) of the Revised Treaty signed on 24 July 1993. It was signed by the then Ghanaian President, Jerry Rawlings.
[170] ibid art 76(2) of the Revised Treaty.
[171] *Mba* (n 164) p 6.
[172] For a different view on this, see the ECOWAS decision in *Aminu v Government of Jigawa* ECW/CCJ/APP/02/11. Cf *Saidykhan v Republic of The Gambia* (n 163).
[173] For the argument that Francophone countries tend to be more liberal in this regard as ratification would generally suffice, see KO Kufuor, The Institutional Transformation of the Economic Community of west African states (Ashgate 2006) 100. In the context of OHADA, Dickerson argues that 'no other IC [international court] is in the same way an integral part of its member states' national judicial systems…the CJJA [Common Court of Justice and Arbitration] functions as the highest national court of its member states'. See CM Dickerson, 'The OHADA Common Court of Justice and Arbitration: Exogenous Forces Contributing to its Influence' (2016) 79 Law and Contemporary Problems 63.
[174] See text to notes 20 and 93 on the effective use of regulations in the EU.
[175] *Mba* (n 164) p 7. The Court referred to s 81 of the Courts Act 1993 (Act 459).
[176] See, for example, Oppong, 'The High Court of Ghana Declines to Enforce an ECOWAS Court Judgment' (Case Note) (2017) 25(1) African Journal of International and Comparative Law 127, 128-129.
[177] CN Okeke, 'The Use of International Law in the Domestic Courts of Ghana and Nigeria' (2015) 32(2) Arizona Journal of International and Comparative Law 371, 399.
[178] See New Patriotic Party v Inspector General of Police (1993-94) 2G.L.R 459, 466. On 'creeping monism', see MA Walters, 'Creeping Monism: The Judicial Trend Toward Interpretative Incorporation of Human Rights Treaties 2007(3) Columbia Law Review 628. Okeke ibid 400. The High Court however relied on a Supreme Court authority: *The Republic v High Court* (Commercial Division) Accra (Civil Motion No J5/10/2013) delivered on 20 June 2013. See *Mba* (n 164) p 7-8.

not enforce the ECOWAS judgment under its rules of private international law (of which its foreign judgments enforcement regime is based on reciprocity) because the ECOWAS Court was not listed as one of the applicable courts.[179] This argument is not as strong as the non-domestication argument because a domestication would have confirmed an articulation of the will of the Ghanaian people as expressed through Parliament. It would then be more difficult to frustrate a purposive interpretation since the Treaty itself provides that the ECOWAS Court's decisions are final and binding. The peremptory nature of the Treaty would be pointless if the ECOWAS Court's judgments cannot be enforced by any means necessary, a reality which should not be the concern of judgment creditors as they are interested in realising their judgments. Since the Treaty already provides that decisions of the ECOWAS Court of Justice are binding, a focus on domesticating the Treaty should help to promote access to justice generally.

Mba and *Manneh* are two sides of a problem. In *Mba*, the Ghanaian Court prevented an enforcement of the ECOWAS judgment based on non-domestication. In *Manneh*, the Gambian government refused to comply with the judgment of the ECOWAS Court but without any concern about legal sophistication or even sophistry. Indeed, *Manneh* demonstrates that the non-domestication argument is only one of the challenges concerning the regional courts.[180] There is a forceful argument that there should be national laws specifically enacted to enforce judgments of the regional courts.[181] This perspective is important and could help if such an approach is considered with respect to the political burden on courts in Africa generally unlike their counterparts in Europe. However, the question as to whether we need communal laws or national laws with communal effects arises as earlier noted. European Union law is not plagued with uncertainties as to enabling powers for the approximation of Member States' laws. This is considerably different from a default reliance on overarching aims of coordination and harmonisation of policies generally. The ' "coordinating" solution' itself has limits.[182] Furthermore, at least two important realities remain. First, the applications to enforce such community judgments invariably come to the same courts that have been undermined due to the political intrigues generated in light of human rights judgments usually against Member States. Except a further argument would be to create special courts, the legal provisions in the ECOWAS Treaty and Protocols are clear and even like the SADC Treaty under which *Fick* was decided with the resultant attachment of Zimbabwean property in South Africa.[183] It is instructive that in the latter case, the Zimbabwean government refused to comply with the SADC judgment and, like *Manneh*, without any concern about legal arguments. Secondly, the possibility of special courts should meet with divided opinion. This

[179] The Ghanaian legislation lists individual countries. See the Foreign Judgments and Maintenance Orders (Reciprocal Enforcement) Instrument 1993 LI 1575.

[180] For the argument that the incorporation of treaties and community laws into national law are critical, see Oppong *Legal Aspects of Economic Integration in Africa* (n 67)130.

[181] Oppong *Legal Aspects of Economic Integration in Africa* (n 67) 130-131.

[182] Regarding the resolution of normative conflicts, see M Koskenniemi, 'Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law' (UN General Assembly Report of the Study Group of the International Law Commission 2006) para 42.

[183] Even so, there is a potential cost effectiveness argument in this regard – there could be a slippery slope with respect to how many courts should be created with respect to relevant regional/international courts.

possibility is undermined by the merger of courts at the African Union level. The African Court on Human and People's Rights[184] and the Court of Justice of the African Union[185] were merged into a single court: The African Court of Justice and Human Rights.[186] The separation of the European Court on Human Rights and the Court of Justice of the EU are based on different legislative frameworks,[187] but their different memberships suggest that political and economic considerations coexist with considerable tension.[188]

The emphasis of the ECOWAS Court on human rights may also begin to manifest in other ways that can increase that focus.[189] For example, claimants may choose to characterise contractual claims as human rights matters. In the recent case of *Finance Investment & Development Corporation v Republic of Liberia*,[190] the applicant argued that the respondent's failure to pay the judgment debt of $15,900,000 constituted an infringement of the applicant's right to property under the African Charter on Human and People's Rights.[191] The dispute emanated from a sale agreement concerning iron ore.[192] Such ingenuous arguments would only serve to increase the jurisprudence concerning human rights but further circumscribe the growth of private international law generally. Any perceived need to approach the ECOWAS Court to enforce contractual claims by characterising them as human rights matters should inspire a meditative pause concerning the road map for private international law in Africa.

The cases analysed focus on South Africa and Nigeria because of their clear influence on their regions, but as already noted, the effect of opposition to regional court judgments by other countries cannot be discounted. Whether by the Member State's court as in the case of Ghana, or the Executive as in the case of Sierra Leone,[193] opposition to the ECOWAS Court's decisions has a clear impact on such courts regardless of the arguments involved. While the Nigerian courts have sometimes delivered judgments that inhibited the growth of private international law,[194] there is evidence to consider that they could exhibit pragmatism where necessary. In the recent case of *Conoil v Vitol S.A.*,[195] for example, the Nigerian Supreme Court

[184] Established by the Protocol to the African Charter on Human and People's Rights. Adopted on 10 June 1998 and entered into force on 25 January 2004.
[185] Established by the Protocol of the Court of Justice of the African Union. Adopted on 11 July 2003.
[186] Art 2 of the Protocol on the Statute of the African Court of Justice and Human Rights.
[187] The Council of Europe.
[188] On 14 July 2015, the Russian Constitutional Court prevented a compliance with a decision of the ECtHR http://www.ksrf.ru/ru/News/Pages/ViewItem.aspx?ParamId=3244 (accessed 21 July 2018). In 2014, Putin took the view that the ECtHR 'does not protect rights, but simply performs some kind of political function'. http://tass.ru/politika/1380242 (accessed 21 July 2018). See also https://www.rcmediafreedom.eu/Tools/Legal-Resources/Russia-versus-the-European-Court-of-Human-Rights-bad-news-for-online-freedom-of-expression (accessed 21 July 2018).
[189] See for example, ECOWAS judgments between 2016 and 2018.
[190] ECW/CCJ/JUD/23/18. Cf *Ezin v Commission de la CEDEAO* EWC/CCJ/JUD/18/18 and *Akotegnon v Commission de la CEDEAO* ECW/CCJ/JUD/19/18.
[191] *FIDC v Republic of Liberia* (n 190) p 7.
[192] Ibid p 2.
[193] See Press Release of 27 November 2017 by the Government of Sierra Leone on the rejection of the Sumana judgment. https://snradio.net/ecowas-court-lacks-competence-and-jurisdiction-says-attorney-general/ (accessed 21 July 2018).
[194] E.g. *Access Bank plc v Akingbola* Suit No. M/563/2013 delivered 18 January 2014 (Unreported).
[195] [2018] 9NWLR (Pt 1625)463.

rejected the argument that the foreign judgment should not be enforced based on subject-matter jurisdiction.[196] There is potential for such pragmatism to be extended to cases like *Fick*. However, legal uncertainty does not inspire confidence in judgment creditors within or outside Africa. Lack of legal clarity at the AU or regional levels further complicates the intersections between regional courts such as the SADC or ECOWAS and national courts.

VIII Conclusions

Relevant institutions for economic integration exist,[197] but the question is whether such institutions and legal framework can support the sustainable growth of private international law in Africa.[198] Member States' opposition to the judgments of regional courts, as illustrated through the case studies of the SADC and ECOWAS, do not support any extensive reliance on such courts. The overarching legal framework of the African Union should be adapted to attain a clear roadmap for private international law. The African Union can be strategically placed to leverage its preeminent legal and institutional position by considering options that will promote access to justice.

Treaties should promote an essentially uniform approach to legal regimes.[199] Any approach that does not prioritise the enforcement of foreign judgments is an index of how far private international law can develop in that jurisdiction. Judicial activism is not a sustainable means of developing private international law, especially where there is no clear legal regime as in the case of the African Union and regional organisations such as the SADC and ECOWAS. The African Union needs to decide whether private international law should come within its remit. If so, the African Union should also decide on an appropriate method to adopt. For example, harmonisation of private international law through uniform legislation,[200] or through international conventions.[201] Indeed, uniform legislation could be combined with the treaty method.[202] In Europe, conventions have become established as instruments of international

[196] Ibid 492-495. See also, PN Okoli, 'Subject Matter Jurisdiction: The Recognition and Enforcement of English Judgments in Nigeria and the Need for a Universal Standpoint' (2016) 17 Yearbook of Private International Law 507.

[197] Oppong argued that the 'requisite' institutions existed 'at least on paper'. See Oppong, *Legal Aspects of Economic Integration in Africa* (n 67) 114.

[198] See text to n 14.

[199] In the context of international conventions, see L Collins (ed*), Dicey, Morris & Collins on The Conflict of Laws* (15th edn, Sweet and Maxwell 2012) para1-030. Ndulo argued that model laws could facilitate 'substantial uniformity. See Ndulo (n 73) 110.

[200] In the context of foreign judgments in the British Commonwealth, see HE Read, *Recognition and Enforcement of Foreign Judgments in the Common Law Units of the British Commonwealth* (Harvard University Press 1938).

[201] For both possibilities, see KH Nadelmann, Conflict of Laws: International and Interstate (Martinus Nijhoff 1972) 89. For the influence of the Hague Conventions vis-à-vis foreign judgments enforcement in France, see H Gaudemet-Tallon, 'The Influence of the Hague Conventions on Private International Law in France' in T.M.C. Asser Instituut (The Hague), *The Influence of the Hague Conference of Private International Law: Selected Essays to Celebrate the 100th Anniversary of the Hague Conference on Private International Law (Martinus Nijhoff Publishers* (1993) 31, 45.

[202] To further understand this in the context of foreign judgments, see KH Nadelmann, *Conflict of Laws: International and Interstate* (Martinus Nijhoff 1972) 89. See also KH Nadelmann, 'Reprisals Against American Judgments?' (1952) 65 Harvard Law Review 1184, 1190.

harmonisation.[203] Model laws described as 'a second traditional technique that is particularly suited to suggest harmonized domestic law reform' may be considered as well.[204] The potential of Africa to forge a new path should not be discounted, especially if there is a clear focus on a sustainable growth of private international law. For example, a foreign (African or non-African) judgment creditor's interest primarily lies in an enforcement of the foreign judgment in a predictable manner. The preliminary reference procedure (as applied in the EU context) will not work if the courts African countries resist judgments that emanate from regional courts.[205] Interaction between African Member States' courts and the regional courts even before the award of local judgments could help to reduce the tension.[206] In any case, it is necessary to have relevant and specific laws. On a practical note, it is critical to ensure relevant treaties are domesticated.

Current African aspirations to attain 'pooled sovereignty' on continental and global issues suggest that African States need to develop the mutual trust required to facilitate the growth of private international law.[207] The SADC and ECOWAS examples demonstrate why African States should not mistake hope for achievement.[208] Any sustainable growth of African private international law requires deliberate design and proper articulation in relevant laws. In this manner, there will be less pressure on Member States' courts to engage in judicial activism with respect to issues that should be anchored in legal certainty and predictability – including the enforcement of foreign judgments.

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[203] Since art 220 of the EC Treaty. See Kennett, *The Enforcement of Judgments in Europe* (n 47) 5.
[204] Goode, Kronke and McKendrick (n 62) para 6.07.
[205] Cf dissimilar 'interpretation provisions'/advisory opinions that concern African regional courts. See art 26 of the Constitutive Act of the AU and art 10(3)(h) of the Revised ECOWAS Treaty.
[206] See text to notes 80-84.
[207] See Agenda 2063 of the African Union, paras 72(n) and 74(f).
[208] Attributed to Kofi Annan in his reaction to the Durban Summit that formally set up the AU. See A Sesay, 'The African Union: Forward March or About Face-Turn?' Claude Ake Memorial Papers No 3 Uppsala University 2008 p 7.