# A Southern African Approach to the Permanent Sovereignty over Natural Resources and Common Resource Management Systems

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## Contents



**Abstract** The answer to the question about the possibility of moving 'towards the common resource management system' in the region of Southern Africa must be negative. Three main reasons for this can be highlighted. Firstly, the level of knowledge and dissemination of the contemporary developments in international law is low and relatively superficial. Secondly, the pursuit of the national interests of the States and their political elite requires the maintenance of a classical view of the sovereign powers granted to States as subjects of international law. And thirdly, the regional 'integration' pursued through regional SADC is organized in accordance with the standards of inter-governmental cooperation. This may be a disappointing response in view of the latest development of international law, as it is perceived in the Western world. This frustration should be tempered, however, by the standards of an effective understanding of multiculturalism and the diversity of

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M. Bungenberg, S. Hobe (eds.), *Permanent Sovereignty over Natural Resources*,
DOI 10.1007/978-3-319-15738-2_4

civilizations, in order for it to be acceptable that there are areas in which the African and Western *worldviews* do not coincide and can be reconciled only with difficulty.

## A. Introduction

At present any communication dealing with a regional approach regarding the hypothesis of creating a common resource management system in Southern Africa involves, first of all, the geographical delimitation of this analysis.

Two options are possible to give content to the term 'Southern Africa': (1) a narrow definition, corresponding to the geographical division used by the United Nations[1]; and (2) a broader definition, corresponding to the members of the Southern African Development Community (SADC).

(1) In the United Nations scheme of macro geographical (continental) regions and geographical sub-regions, Southern Africa is composed by five countries, namely Botswana, Lesotho, Namibia, South Africa and Swaziland, and is equivalent to the Southern African Customs Union (SACU)—established in 1910, with new agreements in 1969 and 2002.[2]
(2) The Southern African Development Community, established in 1992, is composed of 15 countries, namely Angola, Botswana, The Democratic Republic of the Congo (DRC), Lesotho, Madagascar, Malawi, Mauritius, Mozambique,

[1] United Nations Statistics Division, *Composition of macro geographical (continental) regions, geographical sub-regions, and selected economic and other groupings,* available at http://unstats.un.org/unsd/methods/m49/m49regin.htm. In the United Nations geographic classification Madagascar, Malawi, Mauritius, Mozambique, Tanzania, Zambia and Zimbabwe belong to Eastern Africa, and Angola and the Democratic Republic of the Congo belong to Middle Africa. Angola, the Democratic Republic of the Congo, Lesotho, Madagascar, Malawi, Mozambique, the Tanzania and Zambia belong to the 'least developed countries'. Botswana, Lesotho, Malawi, Swaziland, Zambia and Zimbabwe belong to the 'landlocked developing countries'. Mauritius and Seychelles belong to the 'small island developing States'. According to the United Nations Statistics Division '[i]n international trade statistics, the Southern African Customs Union is (. . .) treated as a developed region'.

[2] According to Article 2 of the 2002 Southern African Customs Union Agreement, the objectives of SACU are: '(a) to facilitate the cross-border movement of goods between the territories of the Member States; (b) to create effective, transparent and democratic institutions which will ensure equitable trade benefits to Member States; (c) to promote conditions of fair competition in the Commons Customs Area; (d) to substantially increase investment opportunities in the Common Customs Area; (e) to enhance the economic development, diversification, industrialization and competitiveness of Member States; (f) to promote the integration of Member States into the global economy through enhanced trade and investment; (g) to facilitate the equitable sharing of revenue arising from customs, excise and additional duties levied by Member States; and (h) to facilitate the development of common policies and strategies' (the text of the 2002 Agreement is available at http://www.sacu.int).

Namibia, Seychelles, South Africa, Swaziland, Tanzania, Zambia and Zimbabwe.

The choice of the second alternative has, at its base, a dual purpose. On the one hand, it allows for the presentation of a more genuinely African approach to the principle of permanent sovereignty over natural resources. And, on the other hand, it uses the geographical space of SADC as an experience of regional 'integration' to demonstrate the dangers of the attempts to transpose legal concepts between realities which are not equal.

Talking about matters of international law and the management and exploitation of natural resources in Africa, or, rather, the more restricted space of Southern Africa, implies the need to take into account the specificities of the *different worldviews* that can be found in this geographical area. Although this starting point is absolutely essential for an understanding of the exercise of power in Africa, the presentation of these particularities is not easily demonstrable, firstly because of the lack of research on the subject.

The problem in presenting what is specifically an African vision is, first of all, about the choice of the perspective that is adopted to achieve this objective. If one starts from the premise that there are in Africa conditions for an understanding and application of international law such as this is understood in the Western world, the situation is close to a catastrophe. It is like 'being in love with Africa' because someone has spent a holiday season in a tourist resort in an African country, completely ignoring what the living conditions are of the overwhelming majority of people of the African States.

The results are not much more enlightening if the starting point is going to be the traditional views of management and the exploitation of natural resources. On the one hand this is so because of the multiplicity and diversity of these traditional schemes and the scarcity of the materials available for their systematic appraisal. And, on the other hand, because we are not dealing with communities who have achieved an international legal status as such.

The transmission of what is an African approach achieves contours much more accurate and appropriate if the analysis takes into consideration the State, in the classic perspective of a sovereign subject of international law, and seeks to understand the actions of members of African political elites in relation to their strategies of power conservation, including the holding of elections in accordance with the assumptions of the Western democracies.

This paper will seek to develop three main ideas. The first is the need to consider a simplified understanding of international law and of its current developments in the geographical area of Southern Africa when seeking to appreciate the evolution of the content of the principle of permanent sovereignty over natural resources. The second, resulting from a combination of legal and political considerations, the persistence of a classical view of sovereignty in assessing the principle of permanent sovereignty over natural resources in the geographical space of Southern Africa. And finally, the third, a reminder that the experience of intergovernmental

cooperation within SADC is unable to sustain the creation of internationalized schemes of management and the exploitation of natural resources.

## B. The Need for an African Perspective Relative to the Principle of Permanent Sovereignty over Natural Resources to Be Taken into Consideration

On 19 December 2005, the International Court of Justice (ICJ) in the case *Concerning Armed Activities on the Territory of the Congo* (*Democratic Republic of the Congo v. Uganda*) declared that the principle of permanent sovereignty over natural resources is a 'principle of customary international law' (para. 244).[3]

The ICJ held that the actions of Uganda regarding the exploitation of natural resources in the territory of the Congo violated the law of war and the powers of occupying powers, but did not explicitly discuss the issue of the content of the principle of permanent sovereignty over natural resources.

In accordance with the ICJ, the Ugandan military 'acted in violation of the *jus in bello*, which prohibits the commission of such acts by a foreign army in the territory where it is present' (para. 245), particularly when 'failing to comply with its obligations under Article 43 of the *Hague Regulations of 1907* as an occupying power in respect of all acts of looting, plundering and exploitation of natural resources in the occupied territory' (para. 250).

In 1997, *Nico Schrijver* published the monograph that is the fundamental work on the principle of sovereignty over natural resources: *Sovereignty over natural resources. Balancing rights and duties*.[4]

In accordance with the thinking presented in that work, understanding the concept of permanent sovereignty over natural resources was the result of a combination of a set of rights and duties. On the side of the rights it was necessary to consider: (1) the right to dispose freely of natural resources; (2) the right to

[3] According to the International Court of Justice (para. 244), '[t]he Court finds that it cannot uphold the contention of the DRC that Uganda violated the principle of the DRC's sovereignty over its natural resources (. . .). The Court recalls that the principle of permanent sovereignty over natural resources is expressed in General Assembly resolution 1803 (XVII) of 14 December 1962 and further elaborated in the Declaration on the Establishment of a New International Economic Order (General Assembly resolution 3201 (S.VI) of 1 May 1974) and the Charter of Economic Rights and Duties of States (General Assembly resolution 3281 (XXIX) of 12 December 1974). While recognizing the importance of this principle, which is a principle of customary international law, the Court notes that there is nothing in these General Assembly resolutions which suggests that they are applicable to the specific situation of looting, pillage and exploitation of certain natural resources by members of the army of a State militarily intervening in another State, which is the subject-matter of the DRC's third submission. The Court does not believe that this principle is applicable to this type of situation.' (Text available http://www.icj-cij.org/docket/files/116/10455.pdf).

[4] The book was reprinted by Cambridge University Press in 2008.

explore and exploit natural resources freely; (3) the right to regain effective control and to compensation for damage; (4) the right to use natural resources for national development; (5) the right to manage natural resources pursuant to national environmental policy; (6) the right to an equitable share in benefits of transboundary natural resources; (7) the right to regulate foreign investment; (8) the right to expropriate or nationalize foreign investment; and (9) the right to settle disputes on the basis of national law. On the side of duties, in turn, the following should be borne in mind: (1) the exercise of permanent sovereignty for national development and the well-being of the people; (2) respect for the rights and interests of indigenous peoples; (3) the duty to co-operate for international development; (4) the conservation and sustainable use of natural wealth and resources; (5) the equitable sharing of transboundary natural resources; (6) respect for international law and fair treatment of foreign investors; and (7) obligations related to the right to take foreign property.

A set of resolutions of the General Assembly of the United Nations, notably: (1) the Resolution 626 (VII), *Right to exploit freely natural wealth and resources*, of 21 December 1952; (2) the Resolution 1803 (XVII), *Permanent sovereignty over natural resources*, of 14 December 1962; (3) the Resolution 3016 (XXVII), *Permanent sovereignty over natural resources of developing countries*, of 18 December 1972; (4) Resolution 3201 (S.VI), *the Declaration on the Establishment of a New International Economic Order,* of 1 May 1974; and (5) Resolution 3281 (XXIX), *the Charter of Economic Rights and Duties of States*, of 12 December 1974, provided the basis for the above-mention decision of the ICJ and the theoretical analysis of *Schrijver*.[5]

The principle of permanent sovereignty over natural resources, contained in Resolution 1803 of 1962, was later given conventional wording in the 1966 pacts on human rights (Article 1(2) of the *International Covenant on Civil and Political Rights,*[6] of 16 December 1966 and Article 1(2) of the *International Covenant on Economic, Social and Cultural Rights*, of 16 December 1966).

[5] Schrijver's thought was synthesized, in 2010, in the article on 'Permanent Sovereignty over Natural Resources', for the Max Planck Encyclopedia of Public International Law, as follows (para. 24): '[s]everal successive chapters of international law have had a profound impact on the interpretation of the principle of sovereignty over natural resources, including human rights, international investment law and the law of the sea. Recently, the rapid developments of international environmental law and the concept of sustainable development made the principle take new directions. Hence, permanent sovereignty serves no longer as the source of every State's freedom to manage its natural resources, but also as the source of corresponding international responsibilities requiring careful management and imposing accountability on national as well as international levels, taking into account international law on sustainable development including the interests of future generations. Moreover, in this interdependent world international regimes emerge for the management of natural resources (see also Interdependence), building on notions as "shared resources", "common heritage" and "common concern of humankind" (see also Community Interest)'.

[6] Paragraph 2 of the Article 1 of the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights, has a similar wording: 'All

So, from having initially been enshrined in non-binding documents of international law, the principle of permanent sovereignty over natural resources was subsequently transformed into a principle of customary international law. But what is the content of that customary principle?

The question may seem impertinent given the fact that we are in Siegen, Germany, in Europe, or, for that matter, anywhere else integrated into the 'first world'. The question, however, has a completely different meaning if we are located in a different geographical area, particularly in Africa, and especially in Southern Africa.

The question does not presuppose, or imply, a rejection of international law in force, but relates rather to the realization of the difficulties that the other subjects of international law, particularly in Africa, have in understanding the concepts of international law as if they have been developed in the 'first world' and by 'first world' (where we must necessarily include the system of the international organizations of universal scope, especially the international organizations integrated into the UN system).

Indeed, the statement made in the 1960s of the last century that the newly-independent States would have sovereignty over their natural resources was based on a concept of self-organization that was particularly simple to understand and use. Accordingly, the fifth paragraph of Resolution 1803 expressly stated that '[t]he free and beneficial exercise of the sovereignty of peoples and nations over their natural resources must be furthered by the mutual respect of States based on their sovereign equality'.

The evolution of the initial statement of the principle incorporated an environmental dimension of the exploitation of natural resources from the beginning of the 1980s of the last century. Accordingly, in 1982, Article 193 of the *United Nations Convention on the Law of the Sea,* provided that, 'States have the sovereign right to exploit their natural resources pursuant to their environmental policies and in accordance with their duty to protect and preserve the marine environment'. A decade later, in 1992, Article 3 of the *Convention on Biological Diversity*, provided an identical formula to determine that 'States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction'.

This means that, currently, in terms very different from the 1960s of the last century, there is a tension between conservation and the exploitation of natural resources, which requires much more complex and sophisticated thinking in the

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peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence'.

realm of international law, especially when it involves the internationalization of the management and the exploitation of natural resources.[7]

The question that guides this panel has, as its basis, an assumption in favour of the internationalization of the management of natural resources, given that is asking whether we are heading 'Towards a Common Resource Management System?'.

From a strictly African perspective, the issue of the internationalization of natural resource management cannot be addressed on the basis of an 'universal' system if this 'universal' approach is a system strictly based on Western assumptions.

## C. The Need to Try to Fix the Contours of International Law to Which African States Actually Consider Themselves Bound

It is important to recall that the elaboration of the models of internationalization of the management of natural resources within the territory is subject to the sovereignty and jurisdiction of States, whether on the land territory or in maritime space, which do not take into consideration the will of all the States involved is in flagrant contradiction of the basic principles of the international law in force.

The difficulties in understanding the exact contours of the existing international law to which African States are obliged find their justification in three areas.

The first area is the relatively marginal status that is given to international law in the sources of law of the legal systems of African States. The second area is the inertia and the reluctance to incorporate international law into the legal systems of African States. And finally, the third area is the subordinate position to which the study and research on matters of international law is relegated in African States.[8]

The second area deserves particular attention, as it is especially explanatory of the marginal nature that international law has within the system of the sources of law in African legal orders.

[7] On the question, in terms of the general framework, see Blanco and Razzaque (2011), pp. 5–25 and 33–84; Bothe (2007), pp. 435–460.

[8] This subordinate position is illuminated by the words of De Wet (2011), p. 592, in relation to South Africa, despite this country's being the most advanced State in this field in the whole of Southern Africa, 'South Africa's inconsistent approach may relate to the fact that expertise in the field of public international law—in contrast to expertise pertaining to international human rights law—is limited across the country. Most judges, litigators and law-makers are not well versed in public international law, partly due to the fact the subject matter has traditionally been neglected at universities. This in turn is a remnant of the country's years of isolation and hostile attitude towards international law before 1994. Although some progress has been made in overcoming this attitude, the capacity deficit at universities in this area of law is still significant'.

In 1999, *Tiyanjana Maluwa*, in the book *International Law in Post-Colonial Africa,*[9] presents an overview of the incorporation of international law into the legal orders of African States that is particularly illustrative of the situation of the almost complete irrelevance of the sources of international law and its contents in African States.

According to this author, 'altogether, only twenty-one national constitutions in the whole of Africa currently contain provisions which refer to international law, broadly speaking, or to treaties or international agreements, in particular. And (. . .) these provisions are largely concerned with the incorporation of international agreements into the corpus of the national law'.[10]

Regardless of specific updates that may be made to this summary, it should be noted that the majority of the constitutions of African States do not address the exact terms by which the various sources of international law are an integral part of their legal orders. The constitutional norms or references are usually confined to the written international commitments, almost completely ignoring other sources of international law, especially international custom and the legal acts of international organizations.

It follows that in practically all African States it is extraordinarily difficult to substantiate arguments relative to international law that have no support in written international commitments. The conclusion of treaties and international agreements emerge as a manifestation of sovereignty, while the general international customs and general principles of international law can be presented as impositions from outside powers and, in most cases, of no consequence to the African reality.[11]

Accordingly, following the British tradition, even the Constitutions of Namibia, Malawi, and South Africa, when dealing with the incorporation of international law into domestic legal order, do it in a way that explicitly safeguards the prevalence of internal sources of law.

In this sense the Namibian Constitution of 1990 stipulates in Article 144 that:

> Unless otherwise provided by this Constitution or Act of Parliament, the general rules of public international law and international agreements binding upon Namibia under this Constitution shall form part of the law of Namibia.

The 1995 Constitution of Malawi establishes, in similar terms, in its Section 211 that:

> (1) Any international agreement ratified by an Act of Parliament shall form part of the law of the Republic if so provided for in the Act of the Parliament ratifying the agreement.

[9] *Tiyanjana Maluwa* was on the occasion of the publication of the book Legal Counsel and Head of Legal Division, OAU, Ethiopia and Professor of Law, University of Cape Town, South Africa.

[10] Maluwa (1999), p. 32.

[11] From a different perspective, Pahuja (2012), pp. 407–408, states that the 'internationalisation' of the activities of developing States takes place through the imposition of development models of western origin.

(2) International agreements entered into before the commencement of this Constitution and binding on the Republic shall form part of the law of the Republic, unless Parliament subsequently provides otherwise or the agreement otherwise lapses.
(3) Customary international law, unless inconsistent with this Constitution or an Act of Parliament, shall have continued application.

The Constitution of South Africa 1996,[12] in turn, identically determines, in Paragraphs (2) through (4) of Section 231, that:

(2) An international agreement binds the Republic only after it has been approved by resolution in both the National Assembly and the National Council of Provinces, unless it is an agreement referred to in subsection (3).
(3) An international agreement of a technical, administrative or executive nature, or an agreement which does not require either ratification or accession, entered into by the national executive, binds the Republic without the approval by the National Assembly and the National Council of Provinces, but must be tabled in the Assembly and the Council within a reasonable time.
(4) Any international agreement becomes law in the Republic when it is enacted into law by national legislation; but a self-executing provision of an agreement that has been approved by the Parliament is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament.

The Constitution of Cape Verde in 1992, outside the region of Southern Africa, can be presented as an example of an African Constitution worried about the consequences of the participation in regional integration organizations, taking into account the effects in domestic law of the acts of international supranational organizations in which the State can participate. It should be noted that this is an absolutely exceptional text in this respect, even outside the African region.[13]

[12] About the relevance of international law in the legal system of South Africa, see the profound and updated analysis by Dugard (2011), pp. 49–80; De Wet (2011), pp. 567–593. According to Dugard (2011), p. 23, 'South Africa's new constitutional order, which requires courts to interpret all legislation, and particularly the Bill of Rights, to accord with international law, has led to a renaissance of international law in the jurisprudence of its courts' (reference to footnotes omitted), but De Wet draws attention to the fact that (p. 593) 'the courts are much more reluctant to resort to international law as an instrument of interpretation in areas outside human rights law'. The power given by the constitution to the courts in South Africa finds its basis in the first paragraph of Section 39 and Section 233. In accordance with these constitutional provisions: i) 'When interpreting the Bill of Rights, a court, tribunal or forum (a) must promote the values that underlie an open and democratic society based on human dignity, equality and freedom; (b) must consider international law; and (c) may consider foreign law' (Section 39(1)); and ii) 'When interpreting any legislation, every court must prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative that is inconsistent with international law' (Section 233).

[13] Paragraph 3 of Article 11 of the Constitution of Cape Verde provides that '[t]he legal acts emanated from the relevant organs of the supranational organizations of which Cape Verde is a member, shall enter directly into force in the domestic legal order, provided that is so established in the respective constitutive instruments'. It is possible to understand the wording of this Article only by recognising the influence that Portuguese constitutionalism, namely the Portuguese Constitution of 1976, has in the constitutionalism of Cape Verde. The system is inspired by the legal order of the European Union, having relevance in Cape Verde because of its participation in ECOWAS (Economic Community of West African States). The exceptional nature of the provision is demonstrated by the questions of Maluwa (1999), p. 40, particularly when he questions

## D. The Confrontation Between Three Visions About the Management and Exploration of Natural Resources in the States of Southern Africa

A superficial knowledge of the recent developments in international law would not preclude the acceptance of a contemporary view of the principle of permanent sovereignty over natural resources if it could be compatible with the maintenance of a classical approach of the State powers and did not require the acceptance of limits to the exercise of those powers.

Three levels of the assessment of the management models for the exploitation of natural resources in the geographic space of Southern Africa should, therefore, be distinguished.

Firstly, there is the model for the management and exploitation of natural resources that matches the current paradigm of international law, with its components of environmental sustainability and interdependence between the various subjects of international law.

Secondly, there is the model for the management and exploitation of natural resources based on a classical perspective of sovereignty, under which the evaluation of any activity in this area is a direct result of the pursuit of national interest, precisely as it is understood in each one of the States in accordance with their individual interests.

And thirdly, there are the traditional models for the management and exploitation of natural resources that can be found in African ethnic groups, with a range corresponding to the particular circumstances of each of the human communities and the natural environment in which they live.

Given the autonomy of these three levels, difficulties in reconciling conservation and the exploitation of natural resources in the States of Southern Africa should no longer be exclusively presented as a shallow understanding of the development models of Western origin, or merely as 'ignorance' in respect of the international law in force.

This is not, in fact, an accurate understanding of the problem, namely the assumption that the environmental constraints that characterize the current view of the principle of permanent sovereignty over natural resources, with their concerns for sustainability and solidarity between present and future generations, are recent, innovative, and are of Western origin.

This perspective is uniquely focused on the evolution in Western environmental thinking and it completely ignores the traditional views relative to the management and exploitation of natural resources that can be found in traditional African communities.

himself about the meaning of 'supranational organizations', despite using an English translation of paragraph 3 that is not appropriate (because the English translation used refers to 'judicial acts emanating from competent offices of supranational organizations'). About the Portuguese system of incorporation of international law into national law, see de Almeida (2011), pp. 500–516.

The difficulties in understanding these traditional models for the management and exploitation of natural resources are considerable, and they result primarily from the fact that the systems in question are different from the basic assumptions of Western rationality. The traditional approach is vividly expressed in the interrelationships among the different generations, past, present and future, based on a spiritual or religious perspective, and this has a decisive influence in the way land is used.[14]

As *George Ayittey* explains, in *Indigenous African Institutions,*[15] in relation to the indigenous economic system, 'in indigenous Africa, land was an important aspect of the social group and its use was governed by social relationships (kinship, ancestral descendancy) and religious beliefs. (...) the earth was regarded as possessing a spirit or power of its own, which was helpful if propitiated and harmful if offended or neglected. But the land was also regarded as belonging to the ancestors. It was from them that the living inherited the right to use it. The spirits of the ancestors constantly kept watch and saw to it that it was used properly and fairly. Thus, the land served as a link between the ancestors and the living descendants. The ancestors were the *original* founders of the settlement or the first settlers and therefore owners of the piece of land on which the village subsequently grew. Land was not treated as a commodity that could be bought and sold. It was sacred. However, it was a resource that one could exploit exclusively, but not own or sell'.

Respect for the traditional models of management and exploitation of natural resources is currently classified under the rights of indigenous peoples. Its relevance is, however, dependent on the position that will be taken on the issue by the State where the indigenous peoples live.

The views expressed on this matter vary considerably depending on whether those indigenous peoples are located in Europe, America, Oceania, or Africa[16,17,18]. In 2009, in the *Overview Report of the Research Project by the International Labour Organization and the African Commission on Human and Peoples' Rights*

[14] In this sense, for a distinct geographic area of Southern Africa, see Date-Bah (1998), p. 399, stating that 'in the traditional scheme of concepts, land was given a religious significance. In the often cited words of a famous Ghanian Chief, Nana Sir Ofori Atta I.: "Land belongs to a vast family of whom many are dead, a few are living and a countless host are still unborn"'.

[15] Ayittey (2006), p. 323.

[16] As a general assessment, see Barsh (2007), p. 851, who states that '[t]he international legal status of indigenous peoples continues to be a work in progress, with relatively little in the way of explicit rules in widely accepted conventions. (....) At this stage, their gains in standing and participation exceed their achievements in the field of substantive law, and their rights enjoy greater weight in practice than may appear from a survey of the provisions of the UN conventions'.

[17] On the issue, as a summary of the 'right to natural resources in regional courts', see Blanco and Razzaque (2011), pp. 145–148. About the Communication of the African Commission on Human and Peoples' Rights of 4 February 2010 (the Endorois case) in relation to Kenya see Beukes (2010), pp. 216–239.

[18] About alternatives to the State model inherited from the colonial period see Pahm (2008), pp. 183–204.

*on the legislative and constitutional protection of the rights of indigenous peoples in 24 African countries*, which was conducted by the Centre for Human Rights, University of Pretoria, one of the general conclusions reached was that 'with a few notable exceptions, such as elements in the Constitutions of South Africa and the draft legislation in the Congo, States have not formally accepted the legal existence of indigenous peoples. The specific reasons for this reluctance to acknowledge the existence of indigenous peoples vary from State to State, but almost uniformly relate to the goal of not undermining nation-building and of the maintaining national unity in multi-ethnic societies characterized by competition for limited resources. An important result of this denial is that governments' records, for example the national census, do not reflect the different ethnic groups and languages, including indigenous peoples, existing in the country'.[19]

The existence of indigenous peoples in the territory of any State and of traditional models for the management and exploitation of natural resources will not, however, determine the positions that the States of Southern Africa will take on these issues.[20]

The position of Angola is exemplary in this respect. The *2010 Constitution of the Republic of Angola* accepts the existence of legal pluralism and the existence of traditional authorities in Article 7 (Custom), paragraph 2 of Article 15 (Land) and Articles 223 (Recognition), 224 (Traditional authorities) and 225 (Attribution, competence and organization). Accordingly Article 223, integrated in Chapter III—dedicated to the traditional institutions of power—, in the section devoted to local power, provides that 'the State shall recognise the status, role and functions of the institutions of the traditional authorities founded in accordance with customary law which do not contradict the Constitution', while determining that 'recognition of the institutions of the traditional authorities oblige public and private entities to respect, in their relations with these institutions, the values and norms of customary law that are observed within traditional political and community organizations and do not conflict with the Constitution or with the dignity of the human person'. Notwithstanding the constitutional provisions, Angola has not yet ratified ILO (International Labour Organization) Convention 169, but ILO Convention 107 is still in force (since 4 June 1976) in that country, although its basic perspective is of the assimilation of the indigenous peoples into the mainstream model of social organization.[21]

[19] Thornberry and Viljoen (2009), p. vi.

[20] In this sense, from a strictly environmental perspective, the *Overview Report*, pp. viii and ix, even states that 'with the introduction of conservation measures for protected areas and environments, the role of indigenous peoples in conserving and managing such lands was undervalued'.

[21] On the comparison between the Convention 107 and 169 of the International Labour Organization see Brölmann and Zieck (1993), pp. 197–212.

It should be noted that the positions which will be assumed by the States in respect of the management and exploitation of natural resources will always be attributable to the State as a subject of international law.[22] It does not follow, however, that the evaluation of the 'national interest' always corresponds to the interests of the community as a whole. Indeed, on the contrary, in many cases it was, and still is, possible to witness situations where the interests of the ruling political elite are transformed into the 'national interests' of the State in question. Accordingly, the adoption of a classical view of sovereignty in relation to the principle of permanent sovereignty over natural resources will allow that the transposition of interests cannot effectively be challenged, neither internally nor internationally.

Furthermore, it should be noted that the issue now has particularly complex contours after the democratization of African regimes in the 1990s of the last century, to the extent that political elites in many of the States were able to add the democratic legitimacy of elections to the political legitimacy already held earlier as a result of their position as leaders of national liberation movements that had led their States to independence.[23]

From the previous comments it is clear that the model for the management and exploitation of natural resources which ultimately prevail in the States of Southern Africa is founded on a classical perspective of sovereignty, under which the national interest of the State (or the political elites from a different perspective) is the guiding criterion for political decisions.

## E. SADC as a Space of Intergovernmental Cooperation

The assessment of the national interest according to a primarily national criteria can be maintained owing to the relatively marginal status that is assigned to international law in the States of Southern Africa. In addition to that, when necessary, the persistence of a relatively superficial knowledge of the recent developments in international law lends itself to a convenient manipulation of its use by the interests intended to be pursued.

[22] In this sense, see Pogge (2012), pp. 385–389, when defending the argument that the international system leads to the maintenance in power of the political elites who promote their own interests by the '*borrowing privilege*' and the '*resource privilege*' to the extent that the debts incurred by any government will always be subject to payment and measures taken about available natural resources, even when taken by illegitimate governments, will always be 'protected and enforced by all other states' courts and police forces' (p. 387).

[23] The example of Angola is particularly significant, because *José Eduardo dos Santos*, being President of the Republic since September 21, 1979, was re-elected on 31 August 2012, currently under the Constitution of 2010, which ensures maintenance in power for two terms of 5 years (in the same elections of August 31, 2012, the MPLA [Popular Movement for the Liberation of Angola], in power since 1975, won 71.8 % of the votes).

The option for inter-governmental cooperation within Southern Africa through SADC, shows also the kind of commitment that States in the region are willing to take in terms of international cooperation. In this context the mere use of the term 'integration' in relation to the SADC generates a misconception about the nature of the organization which is rarely the subject of appropriate legal discourse.

European integration, under construction since the 1950s of the last century, has produced some remarkable economic and political results, the most important of which is the fostering of peace among Member States since the end of World War II. This fundamental objective of European integration, often taken as irrelevant in the face of changes in economic conditions, was recently recognized by the award of the Nobel Peace Prize. Whether the present European integration crisis represents another phase of the integration process or is the harbinger of its future dissolution is something that only the future will show. The truth is that over the past decades the model of European integration, despite uncertainty of nature of the contours of its final construction,[24] has exercised such a fascination in Africa that it has led to an attempt at its reproduction in totally different legal environments from those of Europe.

The most interesting examples of these attempts to reproduce the legal model of European integration can be found in West Africa, through ECOWAS and the WAEMU (West African Economic and Monetary Union), and the creation of legal integration in business law through OHBLA (Organization for the Harmonization of Business Law in Africa).

The legal systems of those regional integration organizations are based on the principles of primacy and the direct applicability of some of their rules. In accordance with these features, in the treaty creating ECOWAS, it is provided that '[t]he decisions of the Authority shall be binding on the Member States and institutions of the Community, (. . .), in accordance with paragraph 4 of Article 9 (Decisions)', and that 'the regulations of the Council shall be binding under its authority. They shall be binding on Member States after their adoption by the Authority. However, in the case of regulations made pursuant to a delegation of powers by the Authority (. . .) they shall be binding forthwith' under paragraph 3 of Article 12 (Regulations). Simultaneously, it is stipulated in the Treaty creating WAEMU, in particularly impressive terms, that '[t]he regulations have general application and are binding in their entirety and directly applicable in all Member States' under Article 43. The most significant rule, however, that can be found relating to this matter, and probably also the most unlikely given its scope of activity being the law of business, is that which can be found in Article 10 of the Treaty creating OHBLA when it expressly provides that 'Uniform Acts are directly applicable and overriding in the Contracting States, notwithstanding any conflict they may give rise to in respect of previous or subsequent enactment of municipal laws'.

The success and effectiveness of such legal acts are dependent on pre-existing consolidated legal orders and materially democratic systems where there is an

[24] On this issue see Bastos (2006), pp. 1009–1044.

effective respect for the rule of law, as it is conceived in the Western world and according to Western rationality. This description is not, however, an appropriate description of almost all African legal systems and the way power is exercised in African States. Neither is this model suitable in maintaining the classical view of sovereignty[25] that persists in the States of Southern Africa.

It is, therefore, worthy of note that the scheme of regional 'integration' that is being used by the States of Southern Africa is, in essence, the classical model of the inter-governmental international organization, with the production of the legal effects of their actions being subordinated to the will of the participating Member States.[26]

Accordingly, paragraphs 4 and 5 of Article 6 of the *Treaty of the Southern African Development Community*[27] provide respectively that 'Member States shall take all steps necessary to ensure the uniform application of this Treaty', and that 'Member States shall take all necessary steps to accord this Treaty the force of national law'. Paragraph 1 of Article 21 states that 'Member States Shall co-operate in all areas necessary to foster regional development and integration on the basis of balance, equity and mutual benefit'. Likewise, making use of the classic mechanisms of international law, Article 22[28] establishes in a detailed and precise manner that:

1 Member States shall conclude such Protocols as may be necessary in each area of co-operation, which shall spell our objectives and scope of, and institutional mechanisms for, co-operation and integration.
2 Each Protocol shall be approved by the Summit on the recommendation of this Council.
3 Each Protocol shall be open to signature and ratification.
4 Each Protocol shall enter into force thirty (30) days after the deposit of the instruments of ratification by two thirds of the Member States.
5 Once a Protocol has entered into force, a Member State may only become a party thereto by accession.

[25] About this question, see the opinions of Erasmus (2011), available at http://www.tralac.org.

[26] On the issue, see Clapham et al. (2006); Viljoen and Saurombe (2012), pp. 350–360; Cistac (2012), pp. 213–258.

[27] The initial version of the Treaty of the Southern African Development Community of 17 August 1982 was signed by Angola, Botswana, Lesotho, Malawi, Mozambique, Namibia, Swaziland, Tanzania, Zambia and Zimbabwe. The 1992 Treaty was subsequently amended by the following agreements: (1) Agreement Amending the Treaty of Southern African Development Community of 14 August 2001; (2) Agreement Amending Article 22 of the Treaty of the Southern African Development Community of 17 August 2007; (3) Agreement Amending the Treaty of the Southern African Development Community of 8 September 2009 (amending Articles 10, 11, 12, 14 and 15 of the Treaty); (4) Agreement Amending the Treaty of the Southern African Development Community of 8 September 2009 (amending Articles 10 and 14 the Treaty); and (5) *Agreement* Amending the Treaty of the Southern African Development Community of 8 September 2009 (amending Article 10A of the Treaty)—available at http://www.sadc.int.

[28] With the wording after the Agreement Amending the Treaty of Southern African Development Community 14 August 2001 and the Agreement Amending Article 22 of the Treaty of the Southern African Development Community 17 August 2007.

6 Each Protocol shall remain open to accession by any State subject to Article 8 of this Treaty.
7 The original texts of each Protocol and all instruments of ratification and accession shall be deposited with the Executive Secretary who shall transmit certified copies thereof to all Member States.
8 The Executive Secretary shall register each Protocol with the Secretariats of the United Nations and the Organization of African Unity.
9 Each Protocol shall be binding only on the Member States that are party to the Protocol in question.
10 Decisions concerning any Protocol that has entered into force shall be taken only by the Parties to the Protocol in question.
11 An amendment to any Protocol that has entered into force shall be adopted by a decision of three-quarters of the Member States that are Parties to the Protocol.
12 A proposal for the amendment of the Protocol shall be submitted to the Executive Secretary by any Member State that is party to the Protocol.
13 The Executive Secretary shall submit a proposal for amendment of the Protocol to Council after:
a) all Member States that are parties to the Protocol have been notified of the proposal; and
b) thirty days have elapsed since notification to the Member States that are parties to the Protocol.
14 No reservation shall be made to any Protocol.

The amendments made to Article 22, for its size and detail, show, in a clear and unequivocal manner, the terms according to which the States of Southern Africa intend to control their international cooperation.

## F. Some Concluding Considerations

The answer to the question being asked by this panel, specifically the possibility of moving 'towards the common resource management system' in the region of Southern Africa, must be negative as a result of the previous arguments. Three main reasons for this can be highlighted.

Firstly, the level of knowledge and dissemination of the contemporary developments in international law is low and relatively superficial.

Secondly, the pursuit of the national interests of the States and their political elite requires the maintenance of a classical view of the sovereign powers granted to States as subjects of international law.

And finally, thirdly, the regional 'integration' pursued through regional SADC is organized in accordance with the standards of inter-governmental cooperation.

This may be a disappointing response in view of the latest development of international law, as it is perceived in the Western world. This response may further contribute to strengthening the notion that African States are hopelessly doomed to marginalization and stagnation as a result of the maintenance of *worldviews* incompatible with progress and modernity (although it is increasingly difficult to

know what the current state of post modernity is and which provides the standard for measuring behaviours unquestionably 'modern').

This frustration should be tempered, however, by the standards of an effective understanding of multiculturalism and the diversity of civilizations, in order for it to be acceptable that there are areas in which the African and Western *worldviews* do not coincide and can be reconciled only with difficulty.

Besides that, because the moral superiority of all Western solutions is debatable, particularly when based on the 'fight against...', in the 'battle against...', and on 'victories over ....', this paper is going to end with a reference to a domain where traditional African solutions can provide some elements of inspiration to the Western conceptions, viz. the traditional African approach to conflict resolution.

Appealing once again to *George Ayittey,*[29] 'Africa's own indigenous conflict resolution mechanism (...) requires four parties: an arbiter, the two combating parties, and civil society, or those directly and indirectly affected by the conflict (the victims). For example, in traditional Africa, when two disputants cannot resolve their differences by themselves, the case is taken to a chief's court for adjudication. The court is open and anyone affected by the dispute can participate. The complainant makes his case, then the defendant. Next, anybody else who has something to say may do so. After all the arguments have been heard, the chief renders a decision. The guilty party may be fined, say, three goats. In default, his family is held liable.

The injured party receives one goat, the chief another goat for his services, and the remainder slaughtered for a village feast for all to enjoy. The latter social event is derived from the African belief that it takes a village, not only to raise a child, but also to heal frayed social relations. Thus, traditional African jurisprudence lays more emphasis on healing and restoring social harmony and peace than punishing the guilty. Further, the interests of the community supersede those of the disputants. If they adopt intransigent positions, they can be sidelined by the will of the community and fined, say, two goats each for disturbing social peace. In extreme cases, they can be expelled from the village. Thus, there is a price to be paid for intransigence and for wreaking social mayhem—a price exacted by the victims'.

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