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The Supranational Elements in the African Union Constitutive Act to Govern and Manage Natural Resources in Africa

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Abstract

The governance and management of natural resources in Africa have not contributed significantly to the socio-economic development of the people. This is in contrast to the established doctrine of Permanent Sovereignty Over Natural Resources (PSNR) and the African Charter on Human and Peoples' Rights (ACHPR). The states and the people share the inherent right to the use and enjoyment of natural resources. However, the state controls the sovereign authority and usurps the PSNR and ACHPR doctrine. The state mismanages natural resources, which depletes the socio-economic development prospects of the people. This article explores the conundrum and suggests that the European Coal and Steel Community (ECSC)/European Union (EU) supranational approach to natural resource management could be replicated in Africa, as outlined in the African Union Constitutive Act (AU CA). The article engages in a comparative analysis of AU and ECSC/EU supranational systems, examining the likely socio-economic development of the people from Africa's natural resources management.

Keywords: *natural resources, ownership, governance, Africa, socio-economic development, supranational.*

Introduction

There is a paradigm shift in the ownership and governance of natural resources,¹ prompted by UN Resolution 1803 on permanent sovereignty over natural resources (PSNR), which resonated in the African Charter on Human and Peoples Rights (ACHPR). It recognised the inherent right of the people and the state to the use and enjoyment of their natural resources for socio-economic development.² However, there are uncertainties in balancing the asymmetries in these shared rights.³

The sovereign authority of states restricts the application of this international law doctrine on natural resources, as outlined by the PSNR and ACHPR. The state appropriates and mismanages shared rights, thereby infringing upon the socio-economic development rights of the people.⁴ This article emphasises this dilemma and proposes an EU-style supranational arrangement for managing natural resources. The main argument is that African states, through the AU Constitutive Act, are capable of leading such a supranational arrangement on shared sovereignties aimed at the welfare of the peoples. The issue and inquiry highlighted require a comparative analysis that encompasses a

¹ Richard Bilder, 'International Law and Natural Resource Policies' (1980) 20 (3) *Natural Resource Journal* 451 at 451. See Milan Bulajic, *Principles of International Development Law* (Martinus Nijhoff Publishers 1993) at 266. See also Abiodun Osuntogun 'Peoples' Right to Natural Resources in Africa and State Sovereignty A Quest for Equilibrium' in Carol Chi Ngang and Serges Djoyou Kamga (eds) *Natural Resource Sovereignty and the Right to Development in Africa* (Routledge Taylor and Francis Group 2021) at 89.

² UN General Assembly Resolutions 626 (VII) and 1803 (XVII) Available at <https://digitallibrary.un.org/record/211441?ln=en. & https://www.ohchr.org/sites/default/files/Documents/ProfessionalInterest/resources.pdf>. accessed on 30 November 2022. See also, African Charter on Human and Peoples Rights Articles 21 and 22 Available at https://au.int/sites/default/files/treaties/36390-treaty-0011_african_charter_on_human_and_peoples_rights_e.pdf accessed on 20 March 2025. See also United Resolution 61/295 Article 26 of 2007 on the Rights of Indigenous People Available at https://www.un.org/development/desa/indigenouspeoples/wp-content/uploads/sites/19/2018/11/UNDRIP_E_web.pdf accessed on 20 March 2025.

³ *ibid.*

⁴ Sagay (n 1)

descriptive, exploratory, and contextual approach, as outlined in this article.

Conceptual Framework

The European Coal and Steel Community (ECSC) as Foundational Basis for Natural Resource Ownership and Control in the EU

The arrival of the European Coal and Steel Community (ECSC) prompted European collective governance of natural resources.⁵ ECSC was established on the harmonised principles of international treaties, outlining rules and obligations governing the relationships between states.⁶ The European multinational institutions merged their coal and steel resources into a common market for broad socio-economic development.⁷ Article 2 of the ECSC treaty⁸ validated the purpose of the ECSC by articulating the mission of the ECSC. It centred on the socio-economic development of citizens of the member states to create shared agreement in the general economy of the states.⁹

Article 3(d), (e) and (f) emphasised the socio-economic purpose expressed by the European countries through the ECSC, capturing the framework of the powers, responsibilities and common interest of the people. ECSC was positioned to maintain conditions that promote policy development and considerate utilisation of natural resources. This is to improve the socio-economic development of the people, the development of international trade and natural resource transactions.¹⁰

Thus, this innovative common ownership and control of Europe's key natural resources to achieve desired socio-economic development

⁵ Treaty establishing the European Coal and Steel Community, ECSC Treaty | EUR-Lex See Karen Alter and David Steinberg, 'The Theory and Reality of the European Coal and Steel Community' Working Paper No 07-001 2007 at 3 <https://faculty.wcas.northwestern.edu/kal438/KarenJAlter2/ECJsPolitical_Power_files/ECSCTheory&Reality.pdf> accessed 20 March 2025.

⁶ ibid.

⁷ ibid.

⁸ On 18 April 1951, representatives of six European governments comprising France, Germany (West Germany), Belgium, the Netherlands, Luxembourg and Italy signed the ECSC treaty. Subsequently, the treaty was duly ratified by these countries' parliaments.

⁹ See Article 2 of the Treaty Constituting the European Coal and Steel Community <<https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:11951K:EN:PDF>> accessed 20 March 2025.

¹⁰ Article 3 of the ECSC treaty.

became the basis for European unity. It was revolutionary, characterising an ownership and governance system that delegated power from member states to a supranational body.

The European natural resource governance framework is founded on supranationalism as a political and legal theory: it denotes an organisation that is competent to exercise delegated authority over its member states.¹¹ It distinguishes an organisation that functions at a progressive level than nation states.¹² Supranationalism aims to develop principles to resolve common and interconnected problems through impartial and specialised institutions.¹³ Weiler classifies supranationalism into decisional supranationalism and normative supranationalism.¹⁴ Normative supranationalism required relationships and a hierarchy between European Community policies and legal measures, on the one hand, and the competing policies and legal measures of member states, on the other.¹⁵ It explains the existence of three germane positions: if, in respect of general interests and competence, such policies and laws of the institution have a direct outcome in member states; if the laws of the institution are greater than those of the member states; and if member states are prevented from enacting conflicting laws.¹⁶ These qualities were characterised in the institutional arrangement of the European Community.¹⁷

Prescatore further advocates that there are three preconditions for supranationalism: the acknowledgement of shared values and interests; the establishment of effective authority; and the autonomy of these authorities.¹⁸ He argues that even in situations with clear recognition of common interest and values, the element of supranationality of common authority may be deficient, resulting only in international cooperation.¹⁹

¹¹ Babatunde Fagbayibo, 'Common Problems Affecting Supranational Attempts in Africa: An Analytical Overview' (2013) 16 Potchefstroom Electronic Law Journal 32 at 33 <<http://www.scielo.org.za/pdf/pelj/v16n1/04.pdf>> accessed 20 March 2025.

¹² *ibid.*

¹³ See Babatunde Fagbayibo, 'A politico-legal framework for integration in Africa: Exploring the attainability of a supranational African Union' (LLD thesis, University of Pretoria, 2010) at 138.

¹⁴ Joseph Weiler, 'The Community Systems: The Dual Character of Supranationalism' (1981) 1(1) *Yearbook of European Law* at 267– 306.

¹⁵ *ibid.*

¹⁶ *ibid.*

¹⁷ *ibid* at 276.

¹⁸ Pierre Pescatore, *The Law of Integration: Emergence of a New Phenomenon in International Relations, Based on the Experience of the European Communities* (AW Sijthoff 1974) at 50, 51.

¹⁹ *ibid* at 52.

Articles 8 and 9 of the ECSC treaty captured the positions by Weiler and Prescatore. It showed in the role and purpose of the High Authority in the governance of Europe's resources through supranationalism. Article 8 declared that the 'High Authority shall be responsible for assuring the fulfilment of the purpose stated in ... [the] treaty'. Article 9 further emphasised the independent and sacrosanct nature of supranationalism, stating that the functions of the High Authority shall be exercised independently of the peoples' interest and not receive or take instruction from the government.

It is instructive from the above that achieving significant socio-economic impact through natural resources depends on a protected decision-making body that makes binding decisions, supervises and operationalises such decisions. Supranationalism reinforced the creation of principles that galvanised the European states to create superior strategic plans for the governance of their natural resources.²⁰ The ECSC treaty agreement ceased in 2002, after 50 years, and its tasks were transferred to the European Union (EU).²¹

²⁰ Gerhard Bebr, 'The European Coal and Steel Community: A Political and Legal Innovation' (1953) 63(1) Yale Law Journal 1 at 1. See also Karen Alter, 'The Theory and Reality of the European Coal and Steel Community' (2007) Buffet Centre for International and Comparative Studies Working Paper Series at 4 <https://www.researchgate.net/publication/228187047_The_Theory_and_Reality_of_the_European_Coal_and_Steel_Community> accessed 9 September 2022. See Berthold Rittberer, 'The European Coal and Steel Community (ECSC) and European Defence Community (EDC) Treaties' at 1 https://www.researchgate.net/publication/30465062_1_The_European_Coal_and_Steel_Community_ECSC_and_European_Defence_Community_EDC_Treaties> accessed 20 March 2025. Rittberger submits that '[the ECSC] marks a milestone in international cooperation as it represents the first supranational treaty organisation ... National governments decided to delegate domestic decision-making authority ... to a new supranational organisation ... renouncing [a] portion of their national sovereignty.' See also Joseph Weiler, *The Political and Legal Culture of European Integration: An Exploratory Essay* (Oxford University Press 2011) at 687.

²¹ Benedetta Ubertazzi, 'The End of ECSC' (2004) European Integration Online Papers (EIOP) vol 8 at 1–4 <<http://eiop.or.at/eiop/pdf/2004-020.pdf>> accessed 20 March 2025.

The current legal and administrative framework

Presently, competition for natural resources is on the agenda of most countries, including EU countries.²² This increase in competition has generated a high-level demand for natural resources.²³ The EU has witnessed the adverse effects of this development on natural resources over the past few years.²⁴ The Treaty on the European Union (TEU) and the Treaty on the Functioning of the European Union (TFEU) have given renewed direction to the EU's capability regarding natural resource ownership and control upon expiry of the ECSC.²⁵

Article 3 of the TEU lists the aims of the EU.²⁶ Article 3(5) of the Lisbon Reformed Treaty²⁷ considers the aims of the EU to the wider world. The aims which are relevant to natural resources are described as follows: 'the sustainable development of the Earth', 'free and fair trade' and 'the protection of human rights as well as socio-economic development rights'.

Article 3 of the TEU is linked to Article 21 of the TEU. In the Lisbon Reformed Treaty, Article 21 is intended to enhance the EU's external actions. Article 21(2)(d), (e) and (f)²⁸ of the TEU contains a specific reference to the governance of natural resources for people's socio-economic advancement. This empowers the EU to pursue common policies and actions to promote sustainable economic, social and environmental development to eradicate poverty, encourage integration of countries into the world economy. Thus, eliminating restrictions and developing measures to improve sustainable management of natural resources, and stimulating the socio-economic development of people.

The encouragement for this section in the Lisbon Reformed Treaty arises from the need, as articulated in the PSNR provisions, to assist in the effective and sustainable management of natural resources. Another

²² Chris Koppe, 'Up Towards a Coherent and Inclusive EU Policy on Natural Resources: Treaty Amendment Proposals' in Z Jaap, L Martijn and M Abiola (eds), *Governance of Security Issues of the European Union: Challenges Ahead* (Asser Press 2016) at 308.

²³ *ibid.*

²⁴ *ibid.*

²⁵ *ibid* at 312.

²⁶ *ibid.*

²⁷ Lisbon Treaty, Third Edition 2007 at 16 <<http://en.euabc.com/upload/books/lisbon-treaty-3edition.pdf>> accessed 20 March 2025.

²⁸ *ibid* at 29.

significant treaty provision is Article 8 of the TEU,²⁹ which bestows competence on the EU to develop the European Neighbourhood Policy (ENP)³⁰ which contributes to securing access to natural resources for people in neighbouring countries.³¹

The EU's current plan on protecting natural resources is articulated in the Europe 2020 strategy.³² The commendation and adoption of this strategy devolves from the general competence of the European Commission,³³ stated in Article 17 of the TEU, and that of the European Council, stated in Article 15 of the TFEU.³⁴ The primary aim of the EU's strategy regarding natural resources is centred on sustainable socio-economic development use.³⁵

The African Union and natural resource ownership and control

Africa struggles to harness the full potential of its natural resource endowment for inclusive socio-economic development.³⁶ Natural resources extracted in Africa are mainly processed and used outside of Africa. The sector remains disconnected from the broader economies.³⁷ Rent from natural resources has provoked fierce contests between ruling elites and their factions in creating, capturing, allocating and distributing such rent. Thus, producing a network of patronage that unjustly seeks such rent, resulting in its inefficient and unproductive use.³⁸ This deprives citizens of natural resources and their socio-economic benefits, resulting in a narrow nationalistic agenda, ethnic and civil strife.³⁹ A

²⁹ *ibid* at 19.

³⁰ Koppe (n 24) at 313.

³¹ *ibid*.

³² See Europe 2020, 'A European Strategy for Smart, Sustainable and Inclusive Growth' at 3 <<http://ec.europa.eu/eu2020/pdf/COMPLET%20EN%20BARROSO%20%20%20007%20-%20Europe%202020%20-%20EN%20version.pdf>> accessed 20 March 2025.

³³ Koppe (n 24) at 313.

³⁴ Lisbon Treaty (n 29) at 22, 24.

³⁵ Koppe (n 24) at 313.

³⁶ Vanessa Ushie, 'From Aspiration to Reality Unpacking the African Mining Vision' (2017) Oxfam Briefing Paper at 4 <<https://wwwcdn.oxfam.org/s3fs-public/bp-africa-mining-vision-090317-en.pdf>> accessed 20 March 2025.

³⁷ *ibid*.

³⁸ African Development Bank Group Report (2023) 'African Economic Outlook 2023: Mobilising Private Sector Finance for Climate and Green Growth in Africa' (2023) at 147 <<https://www.afdb.org/en/documents/african-economic-outlook-2023>> accessed 20 March 2025.

³⁹ *ibid*.

report by Oxfam shows that a season of very high commodity prices, known as the commodity supercycle in Africa from 2000 to 2011, benefited only the extractive industries and political elites at the expense of the continent's citizens.⁴⁰

African heads of state adopted the African Mining Vision (AMV) at the AU Summit in 2009.⁴¹ It was intended to tackle the issue of Africa's mineral wealth existing alongside poverty. Perhaps, this was targeted at entrenching the socio-economic development template of the right to national development and well-being of the people as articulated in the PSNR doctrine. However, it failed to alleviate the situation.⁴² The AMV aims to integrate extractive industries in line with the desired broad-based socio-economic development policies at the local, national, and regional levels, ensuring that communities benefit from natural resource extraction.⁴³ Africa's efforts to attain socio-economic development through its natural resources since the early period of independence in the late 1960s have had minimal success.⁴⁴ Diverse ideologically driven efforts have been made by states in the ownership and control of their natural resources.⁴⁵

Firstly, states became involved in managing natural resources for self-determination and the control of national patrimony.⁴⁶ This culminated in the states' creation of state-owned enterprises to exploit their natural resources.⁴⁷ However, state-owned enterprises were ineffective because of their many complex ambitions, ranging from generating surplus funds to efficient internal management and well-articulated socio-economic development.⁴⁸

⁴⁰ Oxfam Report, 'Inequality in Nigeria Exploring the Drivers' Oxfam International (May 2017) <<https://www.oxfam.org/en/research/inequality-nigeria-exploring-drivers>> accessed 20 March 2025

⁴¹ African Mining Vision (2009) <http://www.africaminingvision.org/amv_resources/AMV/Africa_Mining_Vision_English.pdf> accessed 20 March 2025.

⁴² *ibid.*

⁴³ *ibid* at 13.

⁴⁴ Bebr (n 22) at 140. See also Fagbayibo (n 13) at 35.

⁴⁵ *ibid.*

⁴⁶ Kobena Hanson, Cristina D'Alessandro and Francis Owusu (eds), *Managing Africa's Natural Resources Capacities for Development* (Palgrave Macmillan 2014); Joseph Ayee, 'The Status of Natural Resource Management in Africa: Capacity Development Challenges and Opportunities' in Kobena Hanson, Cristina D'Alessandro and Francis Owusu (eds), *Managing Africa's Natural Resources Capacities for Development* (Palgrave Macmillan 2014) at 18.

⁴⁷ *ibid.*

⁴⁸ *ibid.*

Secondly, private corporations involved in exploiting natural resources were nationalised.⁴⁹ The state nationalisation intervention failed to yield the anticipated socio-economic dividends. Thirdly, the regulatory roles played by states in the face of the current dominance of multinational corporations (MNCs) have been unsatisfactory.⁵⁰ This followed the Washington Consensus, which advocated minimal state intervention in the market through privatisation, deregulation, and liberalisation in the 1980s.⁵¹

There are divergent scholarly opinions on the role of MNCs in Africa's economy regarding their natural resource exploitation activities.⁵² The issue dominating this debate is the balance of power between states and MNCs, which leaves the state hamstrung in the relationship.⁵³ Although MNCs' activities in exploring and exploiting Africa's natural resources date back to the colonial and postcolonial periods. The Washington Consensus of the 1980s triggered the idea of economic globalisation with continental colouration to the subject.⁵⁴ MNCs have resurged in Africa – mainly Chinese, Japanese, and Indian state-sponsored companies – and have offered new facets to Africa's natural resource exploration and exploitation.⁵⁵

The Pan-African movement influenced African autonomy and independence.⁵⁶ However, it achieved a new height when the Organisation of African Unity (OAU) was established in 1963, with the independence of many African countries.⁵⁷ The OAU's main objectives were to promote unity, cooperation, and anti-colonialist plans among African states.⁵⁸ Upon achieving these objectives in the 1960s and 1970s, Africa was faced with a socio-economic and political dilemma similar to

⁴⁹ *ibid.*

⁵⁰ *ibid* at 19.

⁵¹ *ibid.*

⁵² Peter Drucker, 'Multinational Corporations and Developing Countries: Myths and Realities' (1974) 53(1) *Foreign Affairs* 121–134. Bonaventure Ozoigbo and Comfort Chukuezi, 'The Impact of Multinational Corporations on the Nigerian Economy' (2011) 19(3) *European Journal of Social Sciences* 380–387.

⁵³ *ibid.*

⁵⁴ *ibid.*

⁵⁵ *ibid.*

⁵⁶ Dejo Olowu, 'Regional Integration, Development, and the Africa Union Agenda: Challenges, Gaps, and Opportunities' (2003) *Transnational Law and Contemporary Problems* 211 at 216.

⁵⁷ *ibid* at 217.

⁵⁸ *ibid.*

that of Europe.⁵⁹ Africa's configuration was predicated on the individual existence of states rather than on a continent-wide federation. It was therefore difficult for the OAU to promote or drive continent-wide socio-economic development amongst state entities. Members of the OAU decided to pursue broader political and socio-economic development by establishing the African Union (AU). The AU has features comparable to those of the EU, similar to how the EU evolved from the ECSC⁶⁰, as a cluster of socio-economic development alliances. It poses the question whether the structure of the AU and that of the EU are comparable with regard to socio-economic development, from the perspective of the ownership and governance of natural resources.⁶¹ Undeniably, the EU presents an enviable model for Africa and the AU.

The ACHPR confirmed and ratified the PSNR resolution⁶² thereby, entrenching the people's right as part of the sovereign right to participate in the ownership and use of their natural resources, bringing socio-economic freedom.⁶³ The resolution entrenched the right to PSNR to be exercised for national development and the well-being of people by the states.⁶⁴ Resolution 1803 (XVII) was recognised for its conventional outlook, creating certainty of international law's applicability to natural resource investment and its divestment.⁶⁵

⁵⁹ *ibid.*

⁶⁰ Karen Alter K, and David Steinberg, 'The Theory and Reality of the European Coal and Steel Community' Working paper No 07-001 2007 at 3 Available at https://faculty.wcas.northwestern.edu/kal438/KarenJAlter2/ECJsPolitical_Power_files/ECSTheory%26Reality.pdf accessed on 20 March 2025. The emergence and conglomeration of the European Coal and Steel Community (ECSC) exploitation triggered European efforts to own and govern natural resources.

⁶¹ On the 18th of April 1951, representatives of six European governments comprising France, Germany (West Germany), Belgium, the Netherlands, Luxembourg and Italy signed a detailed Treaty. Subsequently, the Treaty was duly ratified by these countries' Parliaments.

⁶² Richard Gittleman, 'The African Charter on Human and Peoples Rights: A Legal Analysis' (1982) 22(4) *Virginia Journal of International Law* 667 at 681. See <http://www.worldlii.org/int/other/UNGARsn/1962/59.pdf> Accessed 20 March 2025. "The concept of PSNR was recognised in 1962. Subsequently, on the 14 of December 1962, General Assembly resolution 1803 (XVII) "PSNR" was officially adopted".

⁶³ Chi Manjiao, 'Resource Sovereignty and WTO Dispute Settlement: Some Comments on China – Raw Materials and China – Rare Earths' (2015) 12 *Manchester Journal of International Economic Law* 2 at 3.

⁶⁴ Rudolf Dolzer, 'Permanent Sovereignty over Natural Resources and Economic Decolonization' (1986) 7 *Human Rights Law Journal* 217 at 219. See Aditi Garg, 'Permanent Sovereignty Over Natural Resources: An Analysis (2021) 4 (1) *International Journal of Law Management and Humanities* 624 at 627.

⁶⁵*ibid.*

The ACHPR adopted the concept of people in the African treaties on human rights. It merges and elevates this idea to an international human rights theory.⁶⁶ Article 19 guarantees that all people shall be able to enjoy equal rights. Article 20 further provides for the right to self-determination of the people. Article 21(1) declares that ‘all peoples shall freely dispose of their wealth and natural resources’. Article 21(3) declares that the ‘disposal of wealth and natural resources shall be exercised without prejudice to the obligation of promoting international economic cooperation ... equitable exchange and the principle of international law’. These provisions align with the provisions of Resolution 1803 of PSNR. The ACHPR’s use of the term ‘people’ is considered in light of political and economic self-determination. Thus, it refers to people living in a sovereign state who are simultaneously entitled to exercise their right to political and economic self-determination and socio-economic development from natural resources.⁶⁷

The African Union Constitutive Act and intentional supranationalism

Article 3(j), (i), and (l) of the AU Constitutive Act (CA) provide the need for member states to coordinate and harmonise their policies for socio-economic development cooperation.⁶⁸ This is intended to achieve the core purpose of the AU CA in the socio-economic advancement of states. Yet again, in the preamble to the treaty establishing the African Economic Community, it is clearly stated by African heads of state that they are ‘conscious of ... our duty to develop and utilise the human and natural resources of the continent for the general well-being of our peoples in all fields of human endeavour’.⁶⁹

⁶⁶ Aditi Garg, ‘Permanent Sovereignty over Natural Resources: An Analysis’ (2021) 4(1) International Journal of Law, Management and Humanities 624 at 630.

⁶⁷ See Garg (n 69) at 631: ‘The Charter has also been interpreted to include the rights of indigenous people.

⁶⁸ <https://au.int/sites/default/files/pages/34873-file-constitutiveact_en.pdf> Accessed 20 March 2025. See also Article II(2)(b) of the OAU Charter <https://au.int/sites/default/files/treaties/7759-file-oau_charter_1963.pdf> accessed 20 March 2025.

⁶⁹ Treaty Establishing the African Community <<https://au.int/en/treaties/treaty-establishing-african-economic-community>> accessed 20 March 2025.

Article 54(1) and (2)(a) and (e) of the Treaty establishing the African Economic Community states the need for member states to harmonise policies and agendas on energy and natural resources.

Article 56(a) and (d) further directs member states to exchange information regarding the prospection, production, and processing of natural resources to establish, promote cooperation and coordination in international negotiations on raw materials in the sector.

The AU CA allows AU member states to harmonise their natural resource policies and to stimulate self-sustainable and reliant socio-economic development.

However, the principle of sovereign and territorial integrity may discourage states from pooling their sovereignty or part of it without an institutional body that has the authority to harmonise collective sovereignty through supranationalism. Therefore, the next step of enquiry is to determine whether the AU, as a supranational institution, can pool sovereignty in the current arrangement. Similarly, whether the AU has been designed with the capability for collective sovereignty, given its institutional structure to support the idea of multilateral socio-economic advancement of natural resources. The existence of supranationalism in any organisational structure demands an enquiry to ascertain whether areas of common interest and competence in such organisation's laws and policies directly affect member states.⁷⁰ And to establish if the laws of the organisation are superior to the laws of the member state, which also prevents the member states from making any contradictory legislation. The EU position provides affirmative answers to the above questions. Nonetheless, this is not the case with the AU, as it has not attained the same level.⁷¹ This indicates that an appropriate legal and policy convergence by the AU states is very likely to make a positive difference.

Article 5 of the AU CA outlines the internal workings of the AU. The Assembly of the AU comprises 55 heads of state and government.⁷² It is the supreme governing body of the AU, which meets once a year in ordinary and extraordinary sessions summoned by a two-thirds majority. Its decisions and resolutions are made by a two-thirds majority. However, decision-making is by a simple majority.⁷³ The ministers are

⁷⁰ Babatunde Fagbayibo, 'Looking Back, Thinking Forward: Understanding the Feasibility of Normative Supranationalism in the African Union' (2013) 20(3) *South African Journal of International Affairs* 411 at 414, 415.

⁷¹ *ibid.*

⁷² Article 5 of the AU CA.

⁷³ Article 6 of the AU CA.

designated by member states in the Executive Council, usually ministers of foreign affairs. It holds its meetings twice yearly, and extraordinary sessions are held when possible.⁷⁴ Decisions on issues of common policies, such as foreign trade, transport, agriculture, and communication, are coordinated by this office.⁷⁵

The legislative body of the AU is the Pan-African Parliament (PAP).⁷⁶ It exercises only advisory and consultative powers, which are not yet permanent. The PAP comprises 265 members or representatives elected from the legislatures of the 55 AU states.⁷⁷

The Court of Justice merged with the African Court on Human and Peoples' Rights to become the African Court of Justice and Human Rights (ACJ&HR).⁷⁸ The latter comprises the General Affairs section with eight judges and the Human Rights section with eight judges.⁷⁹ In June 2014, at the AU summit in Malabo, Equatorial Guinea, the Malabo Protocol was adopted to amend the African Court of Justice and Human and Peoples' Rights statute.⁸⁰ However, this awaits ratification from states.⁸¹ The statute, as amended by the Annex to the Protocol, indicates that the Court has three sections.⁸² The General Affairs section hears all cases brought to it under Article 28 of the Protocol, except for cases allocated to the Human and Peoples' Rights section and the International Criminal Law section.⁸³ The Human and Peoples' Rights section hears cases relating to human and peoples' rights as described broadly in Article 28 in view of the interpretation and the application of the African Charter and Protocol. The International Criminal Law section is

⁷⁴ Article 10 of the AU CA.

⁷⁵ *ibid.*

⁷⁶ Article 17 of the AU CA.

⁷⁷ *ibid.*

⁷⁸ Article 18 of the AU CA.

⁷⁹ *ibid.*

⁸⁰ Gerhard Werle and Moritz Vormbaum, 'The Search for Alternatives: The "African Criminal Court" Commentary' 28 March 2017 at 1 <https://www.ispionline.it/sites/default/files/publicazioni/commentary_werle_wormbaum_28_03.2017.pdf> accessed 20 March 2022.

⁸¹ *ibid.*

⁸² See Article 16 of the Annex to the Malabor Protocol

<<https://www.refworld.org/pdfid/56a9ddcf4.pdf>> accessed 20 March 2025.

⁸³ Max du Plessis, 'Implication of the AU Decision to Give the African Court Jurisdiction over International Crimes' Institute for Security Studies Paper No. 235 (June 2012) at 5 <<https://issafrica.s3.amazonaws.com/site/uploads/Paper235-AfricaCourt.pdf>> accessed 20 March 2025.

competent to hear cases relating to the crimes as specified in the statute.⁸⁴

The AU Commission is the executive arm or secretariat of the AU.⁸⁵ Its mandate is to implement AU policies.⁸⁶ It comprises the Chairperson, Deputy Chairperson, and eight other commissioners dealing with various policy areas.⁸⁷ The Permanent Representative Committee comprises nominated permanent representatives from member states.⁸⁸ It prepares the work of the Executive Council and thus serves as its secretariat.⁸⁹ The Specialised Technical Committee prepares the background work on the common policy.⁹⁰ This is concerned with rural economy and agriculture, science and technology, energy, education, environment, health, transport, trade and natural resources.⁹¹ The Economic, Social and Cultural Council (ECOSOCC) is an advisory organ comprising civil society organisations on the continent.⁹² It aims to ensure the involvement of the people of Africa in the AU process.⁹³

The African Union's validation of supranationalism

Since the transfer or pooling of sovereignty may face limitations, an analysis of the AU CA suggests that there is room for collective sovereignty or that such an entity was intended to come into existence. The intention to create collective sovereignty through the AU is apparent from the preamble of the AU CA. It highlights the clear intention of the AU to decentralise authority, given the ability of the common institutions to carry out their mandate. This marks a clear departure from the sacrosanct principle of sovereignty and suggests the alternative of adopting the ECSC or EU supranational approach in dealing with the ownership and governance of natural resources in Africa.

The common institutions, as listed in Article 5 of the AU CA, were established to engage with specific issues, including socio-economic

⁸⁴ ibid.

⁸⁵ Article 20 of the AU CA.

⁸⁶ ibid.

⁸⁷ ibid. See ISS/PSC Report 'Option to Restructure the AU to Ensure Greater Peace and Security' <<https://issafrica.org/pscreport/psc-insights/options-to-restructure-the-au-to-ensure-greater-peace-and-security>> accessed 20 March 2025.

⁸⁸ Article 21 of the AU CA.

⁸⁹ ibid.

⁹⁰ Article 15 of the AU CA.

⁹¹ ibid.

⁹² Article 22 of the AU CA.

⁹³ ibid.

development, security, human rights, globalisation, and political and democratic governance at the supranational level.⁹⁴ These issues form the key tenets of natural resource ownership and governance standards, as indicated in the EU institutional set-up. Scrutiny of the functions of these institutions reveals an intention to allow a certain level of supranationalism in these institutions. Article 9 of the AU CA demonstrates the power of the Assembly to determine common policies, monitor the common policies, and ensure that policies are adhered to by members. Similarly, the Assembly can impose sanctions on member states that do not adhere to these common policies.⁹⁵ The Executive Council coordinates and makes decisions on policies with respect to foreign trade, immigration matters, transport and communication, education, health, and agriculture.⁹⁶ This is similar to the EU regional position on the management of natural resources through the executive, the Assembly, and ministers appointed from individual countries.

The African Court of Justice and Human Rights has jurisdiction over matters that relate to the interpretation of the AU CA, disputes that arise between states, and acts and functions of the organs of the AU.⁹⁷ The General and Human Rights sections in the Court will constitute one or more special chambers.⁹⁸ Any judgment handed down by either chamber will be recognised as being rendered by the Court. The judgments granted by the Court are final and binding on the parties.⁹⁹ The African Court replicates EU court practice and structure by which juridical matters between participating governments are addressed in the natural resources management context.

The AU's right of intervention illustrates supranationalism through its CA, which provides for the sovereignty and territorial integrity of member states.¹⁰⁰ This is stipulated in Article 4(h), as amended in 2003, which provides that the AU has the right to intervene in member states in the case of war crimes, genocide, crimes against humanity and serious threats to legitimate order. Some of the natural resources that African

⁹⁴ Article 5 of the AU CA.

⁹⁵ *ibid.*

⁹⁶ Article 10 of the AU CA.

⁹⁷ Article 2 of the Statute of the African Court of Justice and Human Rights <<http://www.peaceau.org/uploads/protocol-statute-african-court-justice-and-human-rights-en.pdf>> accessed 20 March 2025.

⁹⁸ *ibid* at 19.

⁹⁹ *ibid.*

¹⁰⁰ See Babatunde Fagbayibo, 'A Supranational African Union? Gazing into the Crystal Ball' 2008 (3) *De Jure* at 497 <[https://repository.up.ac.za/bitstream/handle/2263/10063/Fagbayibo_Supranational\(2008\).pdf](https://repository.up.ac.za/bitstream/handle/2263/10063/Fagbayibo_Supranational(2008).pdf)> accessed 20 March 2025.

states are endowed with are used in the commission of heinous crimes because of disputes about the ownership and control of these resources.¹⁰¹ An argument could be made that the AU may intervene in the domestic affairs of member states. Seemingly, an alternative key mechanism for normative supranationalism could have been established, like the other normative supranational framework of the AU,¹⁰² following the granting of legislative powers to the PAP.¹⁰³ This legislative authority is absent in the PAP. However, the PAP has only consultative and advisory power that limits the execution of its mandate.¹⁰⁴ Weiler posits that decisional supranationalism relates to institutional structures and supervision processes which ensure that community policies and measures are rationally promulgated and executed.¹⁰⁵

This characterisation outlines the forms of the decision-making process in a supranational institution. The above discussion suggests that supranationalism, from the perspective of natural resource ownership and governance, may require the independence of intergovernmental institutions in the decision-making process.¹⁰⁶ A majority-based voting method supports the authority that flows from this autonomy. This majority-based voting system guarantees that member states are bound by the decision, even when in disagreement.¹⁰⁷ The AU possesses a negligible measure of normative supranationalism. But it has the essentials of decisional supranationalism.¹⁰⁸ Article 7 of the AU CA provides that the Assembly has the authority to rectify decisions through consensus or by a two-thirds majority of the member states in the AU in the absence of procedural matters requiring a simple majority.¹⁰⁹

¹⁰¹ See also 'Regional Initiatives against the Illegal Exploitation of Natural Resources' UN Economic Commission for Africa, Sub Regional Office of East Africa. <https://archive.uneca.org/sites/default/files/PublicationFiles/special_report_icglr.pdf> accessed 20 March 2025. The natural resource conflict in the Great Lake Region epitomises this scenario.

¹⁰² See Fagbayibo (n 102) at 403, 414, 415:

¹⁰³ See Article 4(2) of the Protocol to the Treaty Establishing the African Economic Community on Pan-African Parliament 2001 <https://au.int/sites/default/files/treaties/36301-treaty-0022_-protocol_to_the_treaty_establishing_the_african_economic_community_relating_to_the_panafrican_parliament_e.pdf> accessed 20 March 2025.

¹⁰⁴ *ibid.*

¹⁰⁵ Weiler (n 16) at 271.

¹⁰⁶ *ibid.*

¹⁰⁷ *ibid.*

¹⁰⁸ See Fagbayibo (n 102)

¹⁰⁹ *ibid.* See also Article 7 of the AU CA.

The extent of supranationalism of international institutions is determined by the presence of decisional and normative elements within the existing institutional framework.¹¹⁰ The absence of normative supranationalism in the AU structure implies that it is an intergovernmental institution. However, it must be emphasised that supranationalism does not mean a start from an ‘all-or-nothing’ position. Any enquiry to ascertain the presence or absence of supranational elements should not be directed at the all-embracing supranational characteristics,¹¹¹ but should also highlight the inherent blend or juxtaposition of intergovernmental and supranational elements.¹¹²

Supranational Elements in the Regional Economic Communities Arrangement

Regional Economic Communities (RECs) are regional alliances of African states designed with differing tasks and structures for general development programmes.¹¹³ The proposal to create RECs took place in the Lagos plan of action for Africa’s development of 1980, followed by the Abuja treaty of 1991 to promote wider African socio-economic and political alliance.¹¹⁴

The AU recognised eight RECs.¹¹⁵ However, there were proposals that states should harmonise policies, share information and synchronise

¹¹⁰ Weiler (n 16).

¹¹¹ Babatunde Fagbayibo, ‘Common Problems Affecting Supranational Attempts in Africa: An Analytical Overview’ (2013) 16(1) Potchefstroom Electronic Law Journal at 35/536 <http://www.scielo.org.za/scielo.php?script=sci_arttext&pid=S1727-37812013000100004> accessed 20 March 2025.

¹¹² *ibid*.

¹¹³ African Union: Regional Economic Communities (RECs) Available at <https://au.int/en/organs/recs> accessed on 20 March 2025.

¹¹⁴ *ibid*. See also Lagos Plan of Action Available at

https://www.google.co.za/url?sa=t&rct=j&q=&esrc=s&source=web&cd=4&cad=rja&uact=8&ved=2ahUKEwivs_jm4t3gAhUOb1AKHfSFBr0QFjADegQIChAC&url=https%3A%2F%2Fwww.merit.unu.edu%2Fwp-content%2Fuploads%2F2015%2F01%2FLagos-Plan-of-Action.pdf&usg=AOvVaw1N03eOeqxwoPeUOVOP6j2o Accessed on 20 March 2025

Abuja Treaty Available at

https://www.wipo.int/edocs/lexdocs/treaties/en/aec/trt_aec.pdf accessed on 20 March 2025

¹¹⁵ Atieno Ndomo, ‘Regional Economic Community in Africa A Progress Overview’ at 11 Available at

https://www.tralac.org/images/News/Reports/Regional_Economic_Communities_in

negotiations in natural resource exploitation for socio-economic development. Six of the RECs confirmed this extant position in treaties as captured below.

IGAD, from its establishing pact, highlights a supranational position. Article 7(b) and (e) of the IGAD agreement¹¹⁶ set the aim and objective of the authority to ‘harmonise policies about trade, customs and natural resources, and to initiate and promote programmes and projects for sustainable development of natural resources...’¹¹⁷ The joint effort of IGAD countries to coordinate their activities in natural resource management dates back to the early eighties.¹¹⁸ IGAD countries agreed to strengthen the management of natural resources at both national and regional levels.¹¹⁹ The objective was to attain optimum collective sustainable use of natural resources through streamlined regional guidelines.¹²⁰ However, in 2003, IGAD adopted the current natural resource strategy and implementation plan to support and enhance the efforts of member states in natural resource management.¹²¹ This was achieved through harmonisation of compatible governance systems and providing reliable, appropriate and readily available natural resource information to assist in viable natural resource management.¹²²

The SADC protocol on natural resource mining is unambiguous in its use of natural resources to promote the living standard of the people of the region. It emphasised the need to develop the region’s abundant mineral resources to improve the living standards of people within the SADC region in the preamble to the protocol.¹²³ Article 2 (1) and (2) highlights that member states’ recognition of a thriving natural resource sector supports the socio-economic welfare of the people in the region.

[_Africa_A_Progress_Overview_Atieno_Ndomo_GTZ_2009.pdf](#) accessed on 20 March 2025.

¹¹⁶ See Agreement Establishing Inter-Governmental Authority on Development IGAD Available at <https://www3.nd.edu/~ggoertz/rei/rei475/rei475.01tt.pdf> accessed on 20 March 2025.

¹¹⁷ *ibid.*

¹¹⁸ See IGAD Environmental and Natural Resource Strategy (2007) at 25 Available at https://igad.int/attachments/159_IGAD_ENR_Strategy.pdf accessed on 20 March 2025.

¹¹⁹ *ibid.*

¹²⁰ *ibid.*

¹²¹ *ibid* at 26

¹²² *ibid.*

¹²³ SADC Protocol on Mining Available at https://www.sadc.int/files/3313/5292/8366/Protocol_on_Mining.pdf accessed on 20 March 2025.

Hence, they should harmonise their national and regional policies targeted at the exploitation of natural resources.¹²⁴

The SADC protocol demonstrates a supranational agenda in the regional development of the natural resource sector¹²⁵ to enable socio-economically sustainable growth.¹²⁶ Policies are being harmonised to promote improved development of natural resource exploitation, targeting direct socio-economic benefits for the people.¹²⁷ Therefore, the natural resource sector strategies align with SADC's goal of prioritising and maximising job creation from natural resource exploitation.¹²⁸

The COMESA treaty regarding natural resource governance and control is clear in Articles 122(1) and 123(1), which encourage member states to agree on the collaborative and sustainable use of natural resources.¹²⁹ It states in Article 122(2) that, ...' States agree to take for their mutual benefit, concerted measures to foster co-operation in the joint and efficient management and sustainable utilisation of natural resources within common market'.¹³⁰

COMESA signed a memorandum of understanding with the government of Western Australia in 2014 to improve management of natural resources and promote socio-economic development of the region.¹³¹ COMESA works with the government to develop a harmonised mineral policy that focuses on the development of a regulatory framework.¹³²

¹²⁴ ibid.

¹²⁵ See SADC Regional Indicative Strategy Development Plan (2001) at 27 Available at https://www.sadc.int/files/5713/5292/8372/Regional_Indicative_Strategic_Development_Plan.pdf accessed 10/6/2019. See also SADC Regional Water Strategy (2006) Available at

https://www.sadc.int/files/2513/5293/3539/Regional_Water_Strategy.pdf accessed on 20 March 2025.

¹²⁶ ibid.

¹²⁷ ibid.

¹²⁸ ibid.

¹²⁹ ibid.

¹³⁰ ibid.

¹³¹ See Tralac Newsletter 'COMESA Takes Initiatives to Harmonize Mineral Policies in Member States' 4 September 2015 Available at

<https://www.tralac.org/news/article/8015-comesa-takes-initiative-to-harmonize-mineral-policies-in-member-states.html> accessed 20 March 2025.

¹³² ibid.

Similarly, the EAC's agreement in Articles 111 and 114 is clear on the mutual resolution of natural resource governance and control.¹³³ This stems from their position regarding undue and unsustainable use of natural resources and the need for exploitation for the socio-economic benefit of the people. Article 111 urges states to take determined efforts to foster co-operation in the collective management and sustainable utilisation of natural resources within the community.¹³⁴ Article 114 (2) (c)(i)(ii)(iv) and (v) further articulate in line with Article 111 for purposes of the mineral resource management that member states consent in the promotion of collective exploration, sustainable utilisation of shared natural resources. This aims to adopt a harmonised and common exploitation policy and regulations.¹³⁵

EAC member states initiated a plan to undertake an inventory of mineral and mining policies to stimulate harmonisation of mineral resource policies and mining regimes in the region.¹³⁶ Accordingly, each country's mineralisation reports had been prepared to support capacity building towards best practice in mineral sector regulations.¹³⁷

The ECCAS treaty in Article 56(a)(b) requires member states to complement policies in seeking, producing and processing mineral resources. To harmonise development to exploit similarities and complementarities in the communities.¹³⁸ However, Central Africa has been one of the most volatile regions in Africa, burdened by civil war, political strife triggered by natural resource-fueled conflicts.¹³⁹ Interestingly, the significance of the regional organisation was relegated to the background due to the burden of state preservation and the survival of the individual rulers.¹⁴⁰ Thus, regional breakdown and poor state capacity to address political and socio-economic needs have

¹³³ See Treaty for the Establishment of East African Community Available at http://www.eala.org/uploads/The_Treaty_for_the_Establishment_of_the_East_African_Community_2006_1999.pdf accessed on March 2025.

¹³⁴ *ibid.*

¹³⁵ *ibid.*

¹³⁶ See EAC Available at <https://www.eac.int/infrastructure/112-sector/environment-natural-resources-management/natural-resources-management>

¹³⁷ *ibid.*

¹³⁸ *ibid*

¹³⁹ See Christine MacAulay and Tony Karbo, "Assessing the Ability of the Economic Community of Central African States (ECCAS) to Protect Human Security in Central Africa" in *Political Economy of Regionalisation in Central Africa*, Chrysanthus Ayangafac (ed) Monograph No. 155, Institute for Security Studies (2008).

¹⁴⁰ *ibid.*

hindered regional socio-economic development.¹⁴¹ Currently, there is an African Development Bank (AFDB) integration effort to harmonise the ECCAS policies towards processing and exploiting natural resources.¹⁴² It is known as the Regional Integration Strategy for Central Africa (RISP-CA), designed to carve out a new framework to assist in the harmonisation of policies.¹⁴³ The strategy focuses on supporting the inclusion efforts of ECCAS and takes into account the recommendations of AFDB's past intervention endeavours to harmonise policies.¹⁴⁴

The preamble of the ECOWAS treaty underlines the need to pool sovereignties together to galvanise the ideal socio-economic development of the community. It posits that partial and gradual pooling of sovereignties stimulates a viable regional community in the context of a collective political will.¹⁴⁵

Article 31(1) points that, '...member states shall harmonise and co-ordinate their policies and programmes in the field of natural resources'.¹⁴⁶ To this end, Article 31(2)(a) (b)(c)(d) indicates what is expected of member states and how the pooling of sovereignties should serve in the governance of natural resources. These include states seeking knowledge, assessing their natural resources, concerted pricing and marketing policy and collective programmes targeted at natural resource use for socio-economic development.¹⁴⁷ The position of ECOWAS on supranationalism resonates with the provisions of the AU CA¹⁴⁸.

Conclusion

The doctrine of PSNR, as sustained in the ACHPR, focuses on the socio-economic development of the people.¹⁴⁹ It reverberates the right to political and economic self-determination of the people to use and

¹⁴¹ ibid.

¹⁴² See Multinational: Central Africa Regional Integration Strategy Paper 2019-2025 (African Development Bank Group) at 1 Available at <https://www.tralac.org/documents/resources/africa/2809-central-africa-regional-integration-strategy-paper-2019-2025-afdb/file.html> accessed 20 March 2025.

¹⁴³ ibid.

¹⁴⁴ ibid.

¹⁴⁵ See Revised Treaty of Economic Community of West African States (ECOWAS) Available at <http://www.ecowas.int/wp-content/uploads/2015/01/Revised-treaty.pdf> accessed on 20 March 2025.

¹⁴⁶ ibid.

¹⁴⁷ ibid.

¹⁴⁸ See AU CA Article 54 (1)(2)(a)(e) and 56(a) and (d)

¹⁴⁹ Gittleman (n 64) at 3.

dispose of their natural resources freely. This article demonstrates that the ECSC, now the EU, has galvanised a supranational governance method for natural resources to advance the collective socio-economic development of the people. There was no Pan African framework position on collective ownership and governance of natural resources that supports wider socio-economic development.¹⁵⁰ However, the AU, compared to the EU system, replicates elements that enhance broader political and socio-economic advancement. This article found that the ECSC / EU experience could serve as a model for Africa from the perspective that the AU CA provide an opportunity for states to harmonise their natural resource policies to stimulate collective socio-economic development. Therefore, making room for the pooling of sovereignties, that is, supranationalism, which is a departure from the sacrosanct principle of state sovereignty.¹⁵¹

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¹⁵⁰ Olowu (n 58) at 216. During the era of the OAU.

¹⁵¹ Fagbayibo (n 102) at 411.

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