Who Owns the Land? A Right to Development Inquiry into Land Insecurities in Africa

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Abstract

This article illustrates that discourses on the insecurity or security of tenure in Africa have always centred on the questions of ownership, entitlement, access to and use of land—particularly when viewed in the context of historical injustices of colonial land dispossession and the ongoing practices of land grabbing that persist across the continent. The discussion focuses on the question: Who owns the land in Africa for which security of tenure is being sought? When compared with the universally guaranteed right to development, including for all the peoples of Africa as affirmed in Article 22 of the African Charter, the argument supports legitimate, legally grounded claims for land repossession. In conclusion, it is argued that if development justice is to be achieved, the discourse on security of land tenure in Africa should, at a minimum, support claims for land redistribution without compensation and uphold Indigenous ownership rights to ancestral lands. This is vital to ensure that, where dispossessed peoples are unable to recover their land, they are at least recognised as the legitimate owners and are thus entitled to reparations, compensation and/or lifetime royalties payable by the foreign occupiers.

Keywords: land insecurities; ancestral land ownership; security of tenure; development injustices; right to development in Africa

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Introduction

In this article, I argue that discourses on land insecurities and security of land tenure in Africa have always revolved around the question of ownership, particularly when viewed in the context of historical injustices such as colonial land dispossession and the present-day practices of corporate globalisation and land grabbing, which continue to undermine efforts and prospects for socio-economic and cultural development across the continent. I do so from a right-to-development perspective, to illustrate that no peoples anywhere in the world have endured more egregious development injustices resulting from perennial land insecurity than the Indigenous peoples of Africa, who, over the decades, have been systematically dispossessed of and alienated from their ancestral lands. From time immemorial, land in Africa has been valued as an ancestral communal legacy, belonging to the communities that inhabited the continent and traditionally passed down from generation to generation in accordance with customary tenure norms and practices (Home 2013, 405–409). The notion of ancestral land ownership for the Indigenous peoples of Africa is explained later.

Land insecurities in Africa, which stem from growing threats to the customary tenure system, began in the 19th century following European invasion and annexation of the continent. European powers claimed ownership of lands stretching from Cape to Cairo and from Dakar to Dar-es-Salaam, which were forcibly taken and partitioned among the British, French, Belgians, Dutch, Portuguese, Spanish and Italians. Notwithstanding the duration of European colonial occupation, the subsequent liberation struggles that erupted across the continent in the 1950s onward were, in effect, driven by the desire to repossess land from the European colonisers. Anti-apartheid veteran Motsoko Pheko (2013) affirms that "repossession of land was at the heart of the African struggle for freedom from European colonialism." He notes that, despite the granting of independence, many African nations still do not have access to land, which he describes as the "most essential resource for human survival" (Pheko 2013). He articulates the view that "liberation without repossession of land by the dispossessed is a gigantic colonial fraud" and that "there can be no true nationhood and national sovereignty without land" (Pheko 2013).

Against the backdrop of the persistent land insecurity in Africa, repossession claims have not only faced resistance, but have also been exacerbated by renewed large-scale land grabbing in many parts of the continent. In addition to treaty law that recognises sovereign collective land ownership rights—which are embodied in and form an integral part of the rights to self-determination and natural resource ownership—case law has also progressively upheld the sovereign ownership rights of Indigenous peoples to their ancestral lands. This notwithstanding, the Indigenous peoples of Africa continue to be threatened by the growing phenomenon of land insecurity, compounded by the complicity of post-colonial state governments which, besides being insensitive to the needs and exigencies of their peoples, have remained vulnerable to pressure by external

stakeholders to implement land reforms that perpetuate dispossession and disrupt historically secure customary patterns of landholding.

Unconvinced by arguments supporting statutory land tenure—which justify legal titling as a means to protect land rights and guarantee increased productivity—this article argues that with or without a land title, security of tenure is meaningful only to the extent that it enforces local communities' right to development. Drawing from the pre-colonial perception of land as an ancestral legacy, passed down from generation to generation since time immemorial, the argument is advanced in support of land repossession claims on the basis that such claims align with the human right to development guaranteed to all peoples—a right whose realisation entails, among other things, full sovereign ownership of land. Thus, the discourse on security of tenure will not yield productive outcomes without genuinely responding to the question: Who owns the land in Africa? There has never been a more relevant time to ask this question than now, especially given the shifting dynamics in the expansive pursuit of development objectives, both nationally and globally, which have triggered a renewed rush for massive land acquisitions across the continent.

This study was undertaken principally through desktop research, involving a socio-legal analysis of legal and policy instruments and a review of secondary literature sourced from books, journal articles, technical reports and internet sources. Socio-legal analysis is a research methodology necessitating a broader and more enriched contextual scrutiny of how the law applies to and operates in society and the extent to which it informs the formulation of alternative theoretical perspectives on societal issues (Sodd 2023, 1–11; McConville and Chui 2007, 5*)*. The analysis is primarily qualitative in nature. It highlights the fact that, despite being the ancestral peoples of Africa, the legitimate landowners have been increasingly dispossessed, creating a development injustice of enormous proportions.

Discussion proceeds from the starting point that land ownership is central to achieving socio-economic and cultural development. Security of land tenure, therefore, ought to be conceived from the viewpoint of the right to development. The point is illustrated in the next section by providing a historical account of the land question and its legitimate ownership. The interwoven concepts of ancestral land and Indigenous peoples are clearly explained to illustrate the connection and how land insecurities originated and have become a major problem in Africa. The next section delves into the argument for land repossession claims based on the right to development, with emphasis on the entitlement to full sovereign ownership of the land. This is supported by instruments that guarantee the right to development in addition to the legal framework and case law that recognise and protect the right to ancestral land for the Indigenous peoples of Africa. It is argued in conclusion that if development justice is to be achieved, the discourse on security of land tenure in Africa should, at a minimum, support claims for land redistribution without compensation. The law ought to, in this regard, focus on setting the record straight regarding who owns the land, which is vital in ensuring that

where the dispossessed peoples are unable get back the lands they are, at least, recognised as the legitimate owners and, therefore, entitled to reparations, compensation and/or lifetime royalties payable by the foreign occupiers.

Ancestral Land Ownership for the Indigenous Peoples of Africa

As noted in the introductory section, the notion of ancestral land ownership for the Indigenous peoples in Africa needs clarification for the reasons that legitimate claims for land repossession are continually being dismissed or diluted by counterclaims from European settlers who are beginning to claim equal entitlement to the land. Such claims, which only seek to justify the injustice of land dispossession, are strongly contested on the grounds, as illustrated in the proceeding sub-sections, that all ancestral lands belong exclusively to Indigenous peoples in Africa.

Indigenous Entitlement to Ancestral Lands

For a comprehensive understanding of the argument on Indigenous entitlement to ancestral lands, it is important first, to provide clarity on the mutually reinforcing concepts of Indigenous peoples and ancestral lands. In contrast to the narrow definition of Indigenous peoples under international law as referring to specific groups that are granted legal protection based on certain defined characteristics (Gocke 2013, 18), it is argued that all peoples of African ancestry are Indigenous to the continent. Aside from the relatively recent incorporation of the concept of Indigenous peoples into international law, populations in Africa have commonly been referred to as Indigenous to the communities where they live and the lands they occupy as ancestral to heritage (Gilbert and Couillard 2011, 47–67; Njoh 2011, 69–90; Barume 2010, 20–21). Being Indigenous means that the peoples existed, inhabited and used the lands across the continent from time immemorial prior to European colonial invasion from 1885. It builds on the augment that before the annexation of territories by European colonisers, who dishonestly claimed discovery of things and places, the peoples of Africa enjoyed incontestable ancestral ownership and control over the land for livelihood and survival in every part of the continent.

In accordance with pre-existing customary norms and practices, the land systematically passed from generation to generation by right of ancestry through family lineage. Indigeneity is an incontrovertible birthright of belonging to a community, and it is associated with land ownership as Sing'Oei and Shepherd (2010, 57–111) rightly observe. It is rooted in the reality that the peoples of Africa have no second birthright entitlement to land ownership anywhere else other than the African homeland. The African human rights system is formulated to uphold these perceptions and cultural value systems as highlighted in the African Charter on Human and People's Rights (1981, preamble), which stipulates that "[…] the virtues of African historical tradition and the values of African civilisation" should influence the conception of human and peoples' rights on the continent. The common heritage principle contained in Article 22(1) of the Charter, which implies communal ownership, is one of those unique values

that informs a proper understanding of the ancestral entitlement to land as a legacy vested in the Indigenous peoples of Africa.

The international law conception of Indigenous peoples is contained in the Martínez Cobo Report (1986, para 379), which notes:

> Indigenous communities, peoples and nations are those which, having a historical continuity with pre-invasion and pre-colonial societies that developed on their territories, consider themselves distinct from other sectors of the societies now prevailing in those territories, or parts of them. They form at present non-dominant sectors of society and are determined to preserve, develop and transmit to future generations their ancestral territories, and their ethnic identity, as the basis of their continued existence as peoples, in accordance with their own cultural patterns, social institutions and legal systems.

While this definition typically only qualifies specific groups of persons, it ought to be read within the African context as applicable to all peoples of African ancestry. Otherwise, to narrow down the definition to isolated groups or communities would have the effect of diluting the legitimate land claims of other dispossessed communities in Africa that are not listed as Indigenous. The Martínez Cobo Report (1986, para 369) recommends that "the right of indigenous peoples themselves to define what and who is indigenous must be recognized." The International Labour Organisation (ILO) Convention No. 169 (1989, Article 2) also recognises that "self-identification as indigenous or tribal shall be regarded as a fundamental criterion for determining the groups to which the provisions of the Convention apply."

The African Commission on Human and Peoples' Rights adopted the definition of peoples in the *Kelvin Mgwanga Gumne and Others v Cameroon* case as referring to those who manifest the characteristics of "a common historical tradition, a racial or ethnic identity, cultural homogeneity, linguistic unity, religious and ideological affinities, territorial connection, and common economic life, […]. Such a group may also identify itself as a people, by virtue of their consciousness that they are a people."[1] The Martínez Cobo definition was upheld verbatim by the African Court on Human and Peoples' Rights in the *African Commission on Human and Peoples' Rights v Republic of Kenya* (*Ogiek Community*) case in recognising the Ogiek as an Indigenous community.[2] By the criteria used to define indigeneity, the right of all other peoples of Africa to identify as Indigenous to the continent cannot be overlooked. It is noted in the preamble to the UN Declaration on the Rights of Indigenous Peoples (2007) that Indigenous peoples refer to those who have suffered historic injustices as a result of colonialism and dispossession of their ancestral lands, territories and resources, which has hindered them from exercising, in particular, their right to development in

1 *Kevin Mgwanga Gumne and Others v Cameroon* (2009) AHRLR 9 (ACHPR 2009) para 170.

2 *African Commission on Human and Peoples' Rights v Republic of Kenya* (2017) Appl No 006/2017 para 106.

accordance with their own developmental needs and interests. Acknowledging that all peoples have the right to development, in as much as other peoples may have competing claims to the land in Africa, which they have extensively exploited to their benefit, they cannot deny that the peoples of Africa are historically Indigenous to the continent and, accordingly, have first priority right to the ancestral lands. As an ancestral heritage, the land belongs to present and future generations of the peoples of Africa. It means that where ownership of the land becomes the subject of counterclaims, priority must go to the Indigenous peoples who retain ancestral ownership rights to the land.

The notion of ancestral land guaranteed to the Indigenous peoples of Africa may be understood more accurately from the point of view of the possibility of return. It is acknowledged that the question of return of the descendants of European colonisers to Europe remains a complex issue with no straightforward answer, especially on account of the silence of the law on the subject. However, practically speaking, when colonialism was outlawed in the 1950s, most European colonisers, especially in West and Central Africa, simply returned to Europe. In post-apartheid South Africa, despite the guarantee in the preamble to the 1996 Constitution that "South African belongs to all who live in it", huge numbers of Afrikaner whites are known to have fled the country in what has been described as "white flight" on the basis, as Griffith and Prozesky (2010, 28–37) explain that they no longer imagined the country (under Indigenous black governance) as "home" or a place of "dwelling" for them. As the South African example illustrates, Europeans who have settled in Africa retain the possibility of returning to Europe where they have a closer ancestral connection should they choose to do so. The Indigenous peoples of Africa who have been dispossessed of their ancestral lands have no such possibility and nowhere to return to because they solely belong to Africa. To be more explicit, for the peoples of Africa who, between 1526 and 1867, were taken to Europe and the Americas and enslaved, their progeny, have one destination of return, and that is to Africa where they retain ancestral entitlement to the homeland (Manby 2016, 101–102; Tetteh 2019; African Union/NEPAD 2019). The spirit of communal land ownership might have been disrupted, but at no point in history have the peoples of Africa renounced or relinquished their entitlement to the land.

Integral to the incontrovertible recognition of the peoples of Africa as Indigenous to the continent, are the absolute rights of entitlement and ownership over their ancestral lands. Ancestral lands must also be understood as denoting all the pre-colonial lands and territories, which Horman Chitonge (2022, 41–64) affirms, belonged to the peoples and communities of Africa before the post-colonial states were established. Ancestral lands refer to all the lands and territories that stretch from Cape to Cairo and Dakar to Dar es Salaam, which were annexed and occupied by European colonisers. Despite the end of colonial rule, which necessitated the restitution of the lands to the Indigenous communities in Africa, many European settlers have continued to hold onto the lands in their possession, in addition to ongoing land grabbing, which Essien (2015, 83–110) points out, has unjustly left Indigenous peoples and communities excluded from ownership of their land.

Reiterating the facts about the legitimate owners of the land in Africa is crucial as a matter of justice in remedying the injustices that have been sustained for close to a century and a half since the Berlin Conference of 1884–1885 that sanctioned European claims over territories in Africa. If the European invasion and annexation of Africa had not happened, the prevailing land insecurities and the resultant extreme levels of poverty that impact on the communities of the impoverished on the continent would not have been an issue for debate today. If not resolved, land insecurity will become a permanent impediment to the realisation of the right to development in Africa.

Land Insecurity and the Perpetrators Thereof

The problem of land insecurity commenced with the European invasion of the continent in the late 19th century and have remained a threat, manifested in various forms, to this day. By land insecurities is meant the disruption to the customary land tenure patterns and practices in Africa prior to the European invasion. The disruptions were occasioned by the introduction of colonial administrative systems, legal frameworks and implementation mechanisms that authorised and enabled the taking of ancestral lands from the indigenes to suit the interest and rent-seeking purposes of the colonial stakeholders (Cousins 2008, 60). Lund, Odgaard and Sjaastad (2006, 1) observe that land insecurities arise from the fact that ancestral entitlements to land and legitimate land rights become uncertain and indeterminate, consequently impacting adversely on disadvantaged and vulnerable groups and, therefore, also on their prospects for advancement. Beyond the colonial context, land insecurities have been exacerbated by dominant external actors like the World Bank, which has increasingly pressured African governments into undertaking land policy reforms that focus on the "promotion of increased land tenure security through formal registration and land titling" (Lund, Odgaard and Sjaastad 2006, 2). Contending that formal registration and land titling are incapable of redressing the land insecurities in Africa, any strategy for repossession and redistribution must begin with a practical approach that identifies the various perpetrators involved in land dispossession before addressing the development injustices that result from it.

Land dispossession by Christian missionary movements

Discourses on land dispossession and land insecurity in Africa have generally ignored the complicit role of Christian missionary movements in robbing the Indigenous communities where they settled of the vast stretches of land they hold to this day. It is vital to open this can of worms with the observation that the mission of faith-based interest groups was not divorced from the colonisation agenda. In fact, the process was, in many instances, subtly facilitated by the European missionaries (Schmidt 2015, 1–12; Akon 2014, 192–209). The missionary movements not only paved the way for the colonisation of Africa, but they were also complicit in dispossessing the Indigenous communities where they settled of their lands. While the missionaries' purpose was to spread the gospel of redemption and salvation, doing so entailed converting Africans to Christianity (through coercion or persuasion), which required erasing from the African

peoples, memory of self, culture and African spirituality and, more so, alienating the converts from their wealth and material possessions in exchange for promises of an eternal after-life of abundance and bliss in heaven.

Convinced and converted, most of the African peoples surrendered their lands to the Christian missionaries with the belief that material possessions on earth were vanity and that it was more spiritually profitable to store up treasures in heaven as recorded in the biblical gospel of Matthew 6: 19–21. The famous quote by the late Anglican Archbishop Desmond Tutu vividly illustrates this: "When the missionaries came to Africa, they had the Bible, and we had the land. They said, 'Let us pray.' We closed our eyes. When we opened them, we had the Bible, and they had the land" (Britannica 2024). Tutu's words illustrate how Christian missionaries acquired vast stretches of land, enriching themselves at the expense of the local communities they impoverished.

The Roman Catholic Church, for example, is the second largest landowner in the world after the British royal family, with landholdings estimated at close to 178 751 000 acres in just 20 countries with the largest number of Catholic adherents as of 2002 (Cahill 2006, 119). In Nigeria, out of a total acreage of 228 000 000 for the country, the Catholic Church is in possession of 503 000 acres (Cahill 2006, 119). The Roman Catholic Church also has a large presence in the Democratic Republic of the Congo and Uganda, but there are no available statistics on the land it owns there (Cahill 2006, 119). It is the same in Lesotho where the Roman Catholic Church has a dominant presence but no public record of the acreage of land under the Church's ownership. In South Africa, Mokone Lephoto (2018, 37) notes that the Catholic Church was "responsible for the dispossession of the natives of their land, to the extent that by 1912, Africans were in the possession of 13 per cent of their original land." Although statistics on the land owned by the various churches are not readily available, the Roman Catholic, Dutch Reformed, Moravian, Evangelical Lutheran and Methodist churches are among the largest landowners in South Africa (Weideman 1998, 489–490). Gillan (1998, 1–5) points out that the churches did not buy the lands they possess, but "stole" them from the local populations. This is ironic, given that one of the Ten Commandments of the Christian faith, as it is recorded in the book of Exodus 20: 15, firmly instructs: "Thou shalt not steal", clearly prohibiting the taking of what belongs to another.

Across the continent, protestant missionary and evangelical movements like the Anglicans, Presbyterians, Baptists and Full Gospel, among others, also massively dispossessed local communities of their lands and have, without remorse, remained in possession of those lands. The statistics on the extent of landholdings by the various Christian missionary movements are not readily available, which is a telling indication of a deliberate effort to conceal that information from public scrutiny. The missionary movements and churches pay no taxes for the extensive landed properties they own. It is of concern that instead of upholding land justice for the dispossessed, the missionary movements contributed to robbing the communities of their land possessions in the localities where they operate. Thus, in looking at land insecurity in Africa, the complicit

role of the churches cannot be overlooked. Studies need to be conducted to make available, concrete information on the landholdings by the missionary movements.

Colonial land dispossession and the illegality upheld by the post-colonial states

The most egregious disruption to security of land tenure in Africa happened when the unilateral decision was formalised and institutionalised at the Berlin Conference, 1984–1885 by some European countries to take possession of territories across the continent, notwithstanding the illegality that underpinned the entire process. Mieke van der Linden (2014, 4–5) notes that the European nations (Germany, France, United Kingdom, Belgium, Portugal, Spain and Italy) involved in the colonisation project, took a total of over 30 million square kilometres of land in Africa (except for Liberia and Ethiopia, which were not colonised)—about 20 per cent of the world's landmass. Some scholars have noted that the European countries championing the colonisation project justified their false territorial claims under 19th century international law by asserting that so-called "un-occupied territories" were "nobody's land" or "land belonging to no-one" and, therefore, available to be possessed and occupied by any state (Grant 2009, 596; Hendlin 2014, 141). It is argued, however, that such claims could not have applied to Africa, as the continent was already inhabited and governed by established communities long before the arrival of European colonisers. In fact, they encountered resistance from the native inhabitants across many parts of the continent and, in some cases, signed treaties with local chiefs—actions that implicitly acknowledged the existence of these communities and their ownership of the land.

The entire continent was inhabited by well-structured Indigenous ethnic and tribal communities which, from time immemorial, are known to have seen the rise and collapse of great ancient empires and civilisations predating European civilisation. By equating colonialism with civilisation, some have argued that without the colonial project, Africa would not have achieved its present levels of advancement (Sogunro 2015). On the contrary, without colonialism, the peoples of Africa would have retained their ancestral lands. Land is wealth and, without it, there is no measure of civilisation or development worth writing about. The wealth amassed from Africa during the colonial period was generated by plundering the ancestral lands and its appurtenant natural resources, which to this day, remain the source of wanton exploitation, leaving the legitimate owners impoverished and underdeveloped. King Leopold II claimed private ownership of the Congo (present-day Democratic Republic of the Congo), while Cecil Rhodes similarly appropriated land in Rhodesia (present-day Zimbabwe). Both extensively exploited these territories for their personal benefit before their respective home countries eventually took over and established formal colonial rule.

Once in possession, the colonial administrations introduced various pieces of legislation to legitimise their ownership and control over the land, notwithstanding that such legislation conflicted with the customary land tenure systems in force. In South Africa, for instance, the situation was a bit more complicated as settler colonialism later

morphed into the segregationist apartheid system. The introduction of the Native Land Act of 1913 made it illegal under section 1(2), for Indigenous African peoples who were allocated only 7 per cent of the country's total land area, to acquire property in areas designated exclusively to European settlers who claimed ownership of 93 per cent of the land. This land allocation was later revised following the passing of the Native Trust and Land Act of 1936, in terms of which 13 per cent of the land was apportioned to the Indigenous African communities, leaving the European settlers with 87 per cent (Nicolaides and Onumah 2023, 2; Rugege 2004, 284). To consolidate the segregationist apartheid system officialised in 1948, additional land legislation such as the Group Areas Act No. 41 of 1950, the Group Areas Act No. 36 of 1966, and Native Resettlement Act No. 19 of 1954, were adopted, which further limited the African communities' rights and ability to own land, which previously belonged to them (Bronin 2008, 231). Through this legislation, the apartheid government created 10 principally rural homelands for the African ethnic groupings (South African History Online 2019).

It is important to note that, prior to the European invasion of Africa, the continent did not have political entities recognised as states. The occupied territories belonged to various Indigenous communities and in terms of the customary tenure norms and practices in force, land was neither subject to private ownership nor was it a marketable commodity to be bought and sold. With colonialism outlawed, the departure of the colonisers ought to have meant the relinquishing of the territories they occupied to the communities that owned the land prior to colonisation. But the decolonised territories were instead transformed into the political states that exist today, and the governance and administration thereof, was bequeathed to the post-colonial governments created by the colonisers. The successor governments continued where the colonial administrations left off, thereby allowing the colonisers to maintain their grip over the post-colonial states. This conflicts with the principle of self-determination, which was the foundation of the struggle for liberation from colonial rule.

Decolonisation, in reality, was not designed to fully liberate the peoples of Africa. It only facilitated transition to a skewed system where statutory land laws inherited by the post-colonial states were, in most cases, simply retained and customary land tenure systems relegated or where such colonial statutory land laws did not exist, new ones were legislated by the post-colonial governments. In Cameroon, for instance, the passing of Ordinance No. 74/2 of 1974 granted the post-colonial state legal sovereign ownership over all unregistered land within the national territory, recognised as national domain. Besides the two other categories of land recognised by the Ordinance—private land, which must be titled and registered in the landowner's name and public land pertaining to the state—most of the land in Cameroon, particularly in the rural areas inhabited by local communities and managed through customary land tenure systems, is unregistered. As such, according to Article 14 and subsequent sections of the Ordinance, this land belongs to the state (Kenfack, Nguiffo and Nkuintchua 2016, 5). By implication, the government can take possession of unregistered land at any time it deems necessary, as it did in 2013 through a Presidential Decree, allocating a concession

of about 20 000 hectares of land traditionally owned by local communities to Herakles Farms, an American multinational corporation (Greenpeace 2016; Oakland Institute 2016).

The transition to constitutional democracy in South Africa, following the adoption of the seemingly progressive 1996 Constitution and the commitment to radical transformation, created high expectations of extensive land redistribution. Unfortunately, these expectations remain unmet and, according to Nancy Andrew (2020, 241–244), continue to generate conflicts. A land audit report of 2017 revealed that the European settlers, who make up less than 10 per cent of the South African population, currently own 72 per cent of the country's arable land while the remaining 28 per cent is shared among other segments of the population as follows: coloured (mixed race), 15 per cent; Indians, 5 per cent; Africans, 4 per cent; co-ownership, 1 per cent and others, 3 per cent (Department of Rural Development and Land Reform 2017, 7). This is not only grossly unequal, which contravenes the equality provision in the South African Constitution (1996, s 9), the excessively skewed land ownership pattern is also not reflective of the affirmation that "South Africa belongs to all who live in it" as stipulated in the preamble to the Constitution. Moreover, there is no indication of any willingness by the European settlers to redistribute the land in their possession.

In Namibia, where colonial and racially influenced apartheid laws and policies equally shaped the pattern of land allocation, the Namibia Land Statistics report of 2018 reveals: "In terms of freehold agricultural land, which constitutes 39.7 million hectares of the country, previously advantaged farmers own 27.9 million hectares (70 per cent) while the previously disadvantaged community own 6.4 million hectares (16 per cent). Government owns only 5.4 million hectares (14 per cent)" (Namibia Land Statistics Agency 2018, 30). The term "previously advantaged farmers" refers to those who have been privileged by "past discriminatory laws or practices" while "previously disadvantaged communities" refers to those who have been harmed by "past discriminatory laws or practices." In simple terms, while the privileged European settlers own 70 per cent of the arable land in Namibia, the disadvantaged Indigenous African communities own only 16 per cent. This injustice, John Nakuta (2020, 143–162) argues, is something the Indigenous peoples of Namibia cannot reasonably let go of as a bygone.

Land grabbing by foreign corporate multinationals

Massive land grabbing through corporate globalisation is currently one of the major threats to land tenure security in contemporary Africa, where local communities continue to lose their ancestral lands to large multinational corporations, often in complicity with national governments. As Oxfam (2019, 11) observes, this phenomenon is on a scale reminiscent of land dispossession during the colonial period. Transnational land grabbing in the agribusiness sector following the 2008 global financial meltdown that triggered unprecedented food and energy security crises, has been chronicled extensively in a broad range of literature (Ashukem and Ngang 2022, 404–405; De

Shutter 2011, 504; Cotula 2009, 17; Yang and He 2021, 1; Ashukem 2016, 66; Narula 2013, 110; Matondi et al. 2011, xi). Data provided by the Land Matrix (2024) indicates that, to date, 487 transnational land deals by various corporate multinationals in almost every country in Africa have been concluded, with obvious implications for the affected local communities. Antonio Tulone et al. (2022: 1) identify high debt to foreign organisations, the availability of virgin land, a strong inclination of host countries towards the cultivation of cereals and dependence on foreign markets for the supply of food commodities as some of the principal drivers of agribusiness land grabbing across Africa.

A major argument used by governments, investors and international institutions to justify land grabbing, as the Oakland Institute (2011) observes, is that agricultural investment will accelerate economic development, create jobs and spur infrastructure development in poor countries. On the contrary, on-the-ground realities reveal that the largely unregulated land acquisitions are not resulting in any of the promised benefits for local populations. Instead, they pose substantial threats to local economic stability and force millions of small farmers off their ancestral lands while small-scale local food farms are forced to make way for export commodities, including biofuels and cut flowers, which often, do not benefit local communities in any way (Oakland Institute 2011). Contrary to the food security argument in justification of land grabbing, the food insecurity situation in communities affected by massive land grabs in Africa has not improved and, in many instances, has worsened. This notwithstanding, foreign stakeholders have consistently sought justification to grab and take possession of land in Africa for various reasons.

In what has become known as the new scramble for Africa, land grabbing is not only increasing in intensity, but also expanding into new frontiers, including land conservation and the carbon credit sector, with the purported aim of decarbonising the economy, generating carbon credits and brokering carbon offsets. The principal actor in this regard is Blue Carbon, a United Arab Emirates (UAE)-based private company owned by the Dubai royal family, which, through a wave of apparently shady deals, has secured exclusive control over an estimated 25 million hectares of land to date: 8 million hectares in Tanzania, 8 million in Zambia, 7.5 million in Zimbabwe, 1 million in Liberia and 760 000 hectares in Nigeria (The Breakthrough Institute 2024; Down To Earth 2024; Rainforest Foundation UK 2023). Blue Carbon is also reported to have secured additional land deals amounting to millions of hectares (exact figures not yet disclosed) in Kenya and Angola (Carbon Herald 2023; Daily Maverick 2023) with many more such deals likely still in the pipeline. Notwithstanding the environmental arguments advanced in support of these agreements and the development financing benefits that may accrue to the state governments involved, the implications for local communities—who, in most of the cases, are not consulted or asked for their consent—continue to grow increasingly dire.

In addition to the ancestral lands lost to European settlers during the colonial and apartheid eras, which have yet to be returned to the peoples of Africa, more ancestral lands continue to be taken through land grab deals facilitated by post-colonial states. As indicated above, the peoples of Africa have additionally been dispossessed of an estimated 35 million hectares of land from 2000 to date within the agribusiness and carbon credit sectors alone, which subjects them to evictions and displacements at the discretion of the foreign multinationals which, henceforth, regulate access to and use of the land. It is crucial to note that land insecurity perpetrated by foreign multinationals is even broader than presented in this article. It extends into the extractive industries, particularly the mining sector, as well as infrastructure development, including dam construction and other mega projects that have increasingly displaced entire communities and adversely affected their right to development.

Right to Development Basis for Land Repossession Claims

In seeking to redress the problem of land insecurities in Africa, it is vital to situate prevailing land repossession claims within the context of the right to development, which is guaranteed to all peoples worldwide, and most importantly, to the peoples of Africa. This is essential because land, as a factor of production, is critical for development, and without it, meaningful progress and prospects for eradicating impoverishment are unlikely to be achieved. In other words, the absence of development would mean deprivation of the right to improvement in well-being, aspirations for better standards of living and legitimate expectations with respect to sustainable livelihood. This would amount to a human rights violation, as the concept of development has evolved in international law as an inalienable human right—known in actual terms as the human right to development.

Among other defining components, the Declaration on the Right to Development, adopted in 1986, Article 1(2) states: “The human right to development also implies the full realization of the right of peoples to self-determination, which includes, subject to the relevant provisions of both International Covenants on Human Rights, the exercise of their inalienable right to full sovereignty over all their natural wealth and resources.” To achieve the right to development, therefore, it is necessary for all peoples, without distinction, to exercise the derivative right to full sovereignty over all the natural resources, including the land. This, in turn, legitimises every land repossession claim articulated, either implicitly or explicitly, by the Indigenous peoples of Africa.

Entitlement to Full Sovereignty over the Land

The right to development is not only guaranteed by the Declaration on the Right to Development, as indicated above, but also by the African Charter (1981), which, unlike the Declaration, imposes a legally binding obligation for its realisation. The wording of Article 22(1) of the African Charter, stating that “all peoples shall have the right to their economic, social and cultural development with due regard to their freedom and identity and the equal enjoyment of the common heritage of mankind,” is unambiguous about

the right to full sovereignty over the common heritage—the land inclusive—as a prerequisite to the realisation of the right to development. From a communitarian point of view, the peoples of Africa, in accordance with the provisions of the Charter, are entitled to assert sovereign ownership of the land, with due regard to their liberty to identify as communities with Indigenous ancestral claims to the communal legacy.

State parties to the African Charter are, with respect to Article 22(2), enjoined to ensure, either through individual or collective action, that the peoples of Africa exercise their right to development. The obligation requires state governments to, for example, individually adopt domestic land legislation with concrete provisions on equitable redistribution or, on a collective scale, adopt a model law recognising the ancestral lands, with modalities on the repossession and redistribution of dispossessed and/or expropriated lands to the legitimate owners. Unfortunately, state governments have not only remained incapable of responding appropriately to facilitate the land repossession claims of their peoples, but in most cases, instead become complicit in expropriating land from their peoples.

Acknowledging that the right to development is a composite of all human rights and accordingly provides the framework mechanism for the full realisation of all the component rights, a comprehensive understanding of the right to development necessitates a purposive reading of related provisions of the African Charter and ancillary human rights instruments. It is important to reiterate that land dispossession, no matter the form or manner by which it manifests, is of the same nature as colonial or neocolonial domination. Thus, regarding claims for repossession of the land, Article 19 of the African Charter provides assurance that "nothing shall justify the domination of a people by another", while Article 20(2) provides that "colonised or oppressed peoples shall have the right to free themselves from the bonds of domination by resorting to any means recognised by the international community." The Office of the Prosecutor of the International Criminal Court (2016, para 41) has, in a policy paper, indicated that, based on the increased vulnerability of victims, the Prosecutor will consider prosecuting illegal land dispossession as a crime against humanity (see also Pereira 2020, 207). Land repossession claims are, therefore, not anathema to the means recognised by the international community, especially in asserting the right to self-determination, which is closely related to, and is of the same nature as the right to development.

As a matter of social justice, land repossession claims in Africa resonate with the defining principle outlined in Article 4(n) of the Constitutive Act of the African Union of 2000, which promotes social justice and ensures balanced economic development. It is a travesty of development justice that some people assume more entitlement to not only dispossess the peoples of Africa of their ancestral lands, but also fervently resist initiatives in favour of equitable redistribution of the land, which is a blatant violation of Article 20(1) of the African Charter that provides for the right of all peoples to existence. The right to existence is meaningless if it is not corroborated by the right to full sovereignty over land. Without ownership of the land, the dispossessed are overtly

denied their right to exist as a people, and consequently denied the right to development, making them vulnerable to the existential illegality that is being normalised through inaction.

Despite the several decades of colonialism, which alienated the peoples of Africa from their land, they have evidently never lost connection to it. As indicated earlier, while at face value aiming to achieve political freedom, the liberation struggles against colonial rule in Africa were about repossession of the land. Various stakeholders have extensively exploited the land in Africa—for natural resources extraction, agriculture, real estate and infrastructure development—to advance their own well-being, while the peoples of Africa have largely not reaped any substantial benefits in return for the exploitation of their ancestral lands. This historical injustice has continued to manifest in the impoverishment and relatively low levels of development throughout the African continent. The growing discontent among present generations of Africans, who were not there in the 19th century when the land was forcibly taken away from their ancestors, stems from the enduring knowledge that the land belongs to them by right of ancestry as the Indigenous peoples of Africa, a consciousness that will persist in future generations.

Sustainable development, which implies meeting the needs of present generations without compromising the ability of future generations to meet their own needs, guarantees intergenerational equity in access and entitlement to land and the natural resources necessary for development. It resonates with the reality that if the injustices of land dispossession are not resolved, future generations of the peoples of Africa will eventually have no inheritance or common heritage to depend on for their survival, well-being and improved standard of living. Future generations of African peoples will, hence, be denied the right to development, which incorporates the right to self-determination, full sovereignty over their land and the ability to shape policies on redistributive justice that guarantee satisfactory security of tenure to the populations across the continent.

Legal Framework on the Right to Land

There are no legal instruments specifically dedicated to the recognition and protection of the right to land in Africa; however, this does not imply that such a right does not exist. Perceived as property, the right to land is generally incorporated into the right to property and related provisions in various international, regional and domestic human rights instruments. At the international level, the ILO Convention No. 196 (1989, Article 13) is unambiguous in its recognition and protection of the land rights of Indigenous and tribal peoples as enshrined in Part II of the Convention, which underscores the obligation on governments to “respect the special importance for the cultures and spiritual values of the peoples concerned of their relationship with the lands or territories, or both as applicable.” The Convention (1989, Articles 14–19) further emphasises that the rights of ownership and possession of the peoples concerned over the lands and the natural resources pertaining thereto shall be recognised and specially

protected, and that the peoples shall not be removed (except lawfully and subject to consultation for informed consent and adequate compensation) from the lands which they have traditionally occupied and used. The ILO Convention has universal scope and, thus, applies to the Indigenous peoples of Africa.

The UN Declaration on the Rights of Indigenous Peoples contains provisions on the right to land like those enshrined in the ILO Convention. The Declaration (2007, Article 26) provides that "Indigenous peoples have the right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired" and recognises their entitlement to own, use, develop and control the said lands, territories and resources, which states are required to protect. Although the Declaration on the Rights of Indigenous Peoples is by nature not a legally binding and enforceable instrument of international law, it is currently one of the most authoritative sources in the reading of Indigenous peoples' rights, which the African Court referenced and relied on in the *Ogiek Community* case in making a determination on the community's right to their ancestral land.[3] It is important to reiterate, as highlighted earlier, that, contrary to the international law understanding of Indigenous peoples as referring exclusively to specific groups or communities, in Africa, the concept of indigeneity applies to all peoples with a birthright ancestry to the continent who have suffered historical injustices and disadvantages as a result of colonialism and, therefore, are entitled to the protections contained in the Declaration on the Rights of Indigenous Peoples.

In addition to Article 17 of the Universal Declaration of Human Rights (1948), the African Charter enshrines the right to property in Article 14, which is read as incorporating the right to land. Considered a natural resource, land rights are encompassed within Article 25 of the International Covenant on Economic, Social and Cultural Rights (1966) and, more specifically, in Article 21 of the African Charter, which guarantees the peoples of Africa sovereign ownership of their natural resources. It further emphasises that in no case shall the peoples be deprived of that entitlement (Ashukem and Ngang 2022, 406–409; Ngang 2021, 20–21). This is complemented by Article 22 of the African Charter, which recognises as an integral component of the right to development, equal enjoyment of the common heritage. The land in Africa is, as noted earlier, an incontestable ancestral common heritage, which all the Indigenous peoples of Africa are envisaged to benefit equitably from, for the realisation of their right to development. The Protocol on the Rights of Women in Africa (2003) Article 19(c) enshrines the right to property, including land, which constitutes an element of the right to sustainable development guaranteed to African women.

Case Law on Land Repossession

The Indigenous peoples of Africa have at no point prior to, during or after colonisation, renounced their connection to or ancestral ownership rights over any piece of land or

3 *African Commission on Human and Peoples' Rights v Republic of Kenya* (2017) Appl No 006/2017 paras 126–128 and 201.

territory anywhere across the continent. This is affirmed in the seminal judgment in the Australian *Mabo and Others v Queensland* case, where the court held that British colonial claim and control over the Murray Island did not extinguish the Meriam people's traditional title to the land.[4] The court held that pre-existing rights over the land survived and outlived colonisation, continuing to the present day because the people maintained their connection to the land, and their traditional title was never extinguished by legislation or any government actions. In recognising the traditional rights of the Meriam people to their land, the court equally acknowledged the existence of such entitlement to all Indigenous peoples, a decision that occasioned the passing of the Native Title Act 1993, providing the legal framework for the Indigenous communities in Australia to assert claims to their native title to the lands they had been dispossessed of (National Museum of Australia 1992). The same legal standard should apply to the Indigenous peoples of Africa regarding their ancestral title to the land on the continent.

Jurisprudence from the African Commission and the African Court, notably in the landmark *Centre for Minority Rights Development (Kenya) and Another v Kenya* (*Endorois*) and *Ogiek Community* cases,[5] has set a precedent affirming that, irrespective of the state's custodianship, the land ultimately belongs to the Indigenous communities to whom ancestral ownership is legitimately vested. Security of tenure over their ancestral lands having been disrupted as a result of the Kenyan government's land expropriation policy, the Endorois and the Ogiek peoples did not have to demonstrate entitlement to the land by means of formal registration or legal titling. Their claims were adjudicated on the basis of ancestral ownership as the applicants averred in the *Ogiek Community*[6] and *Endorois*[7] litigation. The African Court held in the *Ogiek Community* case that:

> In the instant case, the Respondent does not dispute that the Ogiek Community has occupied lands in the Mau Forest since time immemorial. In the circumstances, since the Court has already held that the Ogieks constitute an indigenous community (supra paragraph 112), it holds, on the basis of Article 14 of the Charter read in light of the above-mentioned United Nations Declaration, that they have the right to occupy their ancestral lands, as well as use and enjoy the said lands.[8]

4 *Mabo and Others v Queensland* (No. 2) [1992] HCA 23; (1992) 175 CLR 1; F.C. 92/014 (3 June 1992).

5 *Centre for Minority Rights Development (Kenya) and Another v Kenya Comm* 276/2003 (2009) AHRLR 75 (ACHPR 2009); *African Commission on Human and Peoples' Rights v Republic of Kenya* (2017) Appl No 006/2017.

6 *African Commission on Human and Peoples' Rights v Republic of Kenya* (2017) Appl No 006/2017 para 117.

7 *Centre for Minority Rights Development (Kenya) and Another v Kenya Comm* 276/2003 (2009) AHRLR 75 (ACHPR 2009) para 2.

8 *African Commission on Human and Peoples' Rights v Republic of Kenya* (2017) Appl No 006/2017 para 128.

In the *Endorois* case,[9] the African Commission found that the manner in which the Endorois were dispossessed of their traditional lands by the Kenyan government and denied access to the resources related to the land, amounted to a violation of the right to development (UN Office of the High Commissioner for Human Rights 2016). The African Court's judgment in the *Ogiek Community* case equally found that by dispossessing the Ogiek of their ancestral land, the Kenyan government violated their right to development.[10] The government was ordered, in both instances, to return the land to the dispossessed Indigenous communities to whom it lawfully belongs. The jurisprudential standards set out in the *Endorois* and *Ogiek Community* cases provide certainty that if other peoples like the dispossessed communities in South Africa and Namibia, among others, were to approach the African Commission or the African Court for a determination of their ancestral land ownership rights, they are likely to obtain favourable judgments. Like the Endorois and Ogiek peoples, other communities in Africa equally qualify for recognition as Indigenous peoples and, therefore, guaranteed protection under the African Charter, as the argument has been advanced in this article.

Conclusion

This article has endeavoured to illustrate that despite close to a century and a half of alienation and dispossession, the peoples of Africa have never relinquished their ancestral ownership rights over the land. Within the context of colonialism, the liberation struggles that the peoples of Africa led against the European colonisers were largely about land repossession. However, despite liberation and the acquisition of independence, many African communities have not only remained dispossessed, but their claims to land in South Africa and Namibia, among others, have continued to be stifled in favour of political expediency. In advancing the conversation on security of land tenure in Africa, it is critical not to overlook the fact that the debate will not be productive as long as the Indigenous peoples of Africa are denied entitlement to their ancestral lands.

If the law is to serve the purpose of guaranteeing justice in righting societal wrongs, including the development injustice resulting from land dispossession in Africa, advocacy for land justice ought to be concerned not only about formal registration and land titling but importantly, about responding to the crucial question: Who owns the lands in Africa for which security of tenure is being sought? It should not be taken for granted that present generations of African peoples have refused to subscribe to the narrative of disremembering the past and are justified in their radical claim to the land that was taken from their ancestors several decades ago. A land revolution might well be on the way if the persisting land insecurities are not satisfactorily resolved. Redistributive land justice may be delayed, but obviously, cannot be denied. The

9 *Centre for Minority Rights Development (Kenya) and Another v Kenya Comm* 276/2003 (2009) AHRLR 75 (ACHPR 2009) para 228.

10 *African Commission on Human and Peoples' Rights v Republic of Kenya* (2017) Appl No 006/2017 paras 207–211.

preamble to the South African Constitution notes for example, that "we, the people of South Africa, recognise the injustices of our past […]," which, of course, cannot be obliterated. To this end, the constitutional project for radical transformation in South Africa entails that the discourse on security of land tenure should unapologetically uphold claims for land repossession without compensation.

On a broader scale, the rulings in the *Endorois* and *Ogiek Community* cases have demonstrated the potential and instrumentality of the law in recognising Indigenous land ownership rights and, accordingly, ordering the restitution of the lands in question to their legitimate owners. Like in the Australian *Mabo* case, the African Union can and should be able to consolidate the legal position by adopting a model law on ancestral land ownership in Africa to ensure uniform recognition and protection of all the Indigenous peoples of Africa in their claim to the land. If development justice is to be achieved, it is argued in conclusion that the recognition of Indigenous ownership rights to the ancestral land is vital to ensuring that, where dispossessed peoples are unable to reclaim their land, they are at least acknowledged as the legitimate owners and, therefore, entitled to reparations, compensation and/or lifetime royalties payable by the foreign occupiers.

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