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# RIGHT TO DEVELOPMENT IN AFRICA AND THE COMMON HERITAGE ENTITLEMENT

SUMMARY

This article examines the common heritage entitlement as a requirement for the realisation of the right to development enshrined in the African Charter on Human and Peoples' Rights ("the African Charter"). The question has been asked over and over again as to why Africa remains poor and underdeveloped, given that the continent is not lacking in the natural resources required to create development. In this register, the apparently rhetorical concern is situated within the context of the law and development discourse, wherein African legal scholars and practitioners are implored to consciously use the law as a tool to achieve the kind of development that seeks to improve quality of life, eradicate poverty, equalise opportunities, enhance freedoms, and maximise human well-being. The article responds to the enquiry from the angle of the right to development that entitles the peoples of Africa to socio-economic and cultural development, which, in essence, invokes the natural resource requirement for the attainment of that purpose. Despite the undertakings by state parties to the African Charter and the rulings in the cases that the African Commission and the African Court have dealt with on the question of natural resource ownership, prevailing realities across the continent present a worrying situation that demands a closer study of the common heritage entitlement, which guarantees that all the peoples of Africa can legitimately assert the right to socio-economic and cultural development. This article sheds light on the subject, which evokes the central question: Who owns the natural resources that make up the common African heritage?

## 1. INTRODUCTION

This article examines the common heritage entitlement as a requirement for the realisation of the right to development enshrined in the African Charter on Human and Peoples' Rights ("the African Charter"). The question has been asked over and over again as to why Africa remains poor and underdeveloped, given that the continent is not lacking in the natural resources required to create development.[1]

1 Robinson 2013:2; Mills 2010; Acemoglu & Robinson 2010:21-23; Youell 2008:139-140; Doyle 'The documentary: why is Africa poor' (2019) British Broadcasting Corporation. https://www.bbc.co.uk/sound/play/p003zt3q (accessed on 22 September 2019).

In this register, the apparently rhetorical concern lies within the context of the law and development discourse wherein Mashood Baderin implores African legal scholars and practitioners to consciously use the law as a tool to achieve the kind of development that seeks to improve quality of life, eradicate poverty, equalise opportunities, enhance freedoms, and maximise human well-being.[2] This article endeavours to respond to the enquiry from the angle of the right to development that entitles the peoples of Africa to socio-economic and cultural development, which, in essence, invokes the natural resources requirement for the attainment of that purpose.

The African conception of the right to development is anchored on the understanding that its realisation is, among others, contingent on the "equal enjoyment of the common heritage".[3] It presupposes that the common heritage (wealth of natural resources) is a primary determinant to realising the right to development. The provisions of the law necessitating dependence on, and the use of natural resources for development call for reflection on the derogations, unresponsiveness and persistent miscarriage of justice against the peoples of Africa, to whom entitlement to their natural resources and the equal enjoyment of the common heritage is guaranteed as a means to better living standards.

As much has been documented on the exploitation of natural resources in Africa, a fundamental concern regarding ownership rights, which is central to determining the extent of benefit to which impoverished communities are entitled, has not been given sufficient attention. Despite the undertakings by state parties to the African Charter and the rulings in the cases with which the African Commission and the African Court have dealt on the question of natural resources ownership, prevailing realities across the continent present a worrying situation that demands a closer study of the common heritage entitlement embodied in the assurance that all the peoples of Africa can legitimately assert the right to socio-economic and cultural development. This article sheds light on the subject, which evokes the central question: Who owns the natural resources that make up the common African heritage?

The response is framed in two main sections. The first part explores the question of sovereignty over natural wealth and resources. It delves into the legal instruments on the right to natural resources ownership; examines how African jurisprudence has dealt with the question of natural resources ownership, and proceeds to examine deprivation of that right as a perennial illegality. The second part focuses on the common heritage factor, explained as a component entitlement of the right to development in Africa, which is given context for proper comprehension through an illustration of the Democratic Republic of Congo (DRC) and South Africa. The article concludes that the right to development in Africa is stalled by disregard and persistent violation of the law that guarantees sovereign natural resources ownership rights to

2 Baderin 2010:27.

3 African Union, African Charter on Human and Peoples' Rights, adopted in Nairobi, Kenya, on 27 June 1981. OAU Doc CAB/LEG/67/3 Rev. 5 (1981):preamble and art. 22(1).

the peoples of Africa and thus denial of the right to equal enjoyment of the common heritage.

## 2. SOVEREIGNTY OVER NATURAL WEALTH AND RESOURCES

### 2.1 Framework of law on natural resources ownership

Following judgments pronounced by the International Court of Justice in the *East Timor*[4] and *DRC*[5] cases, the International Law Association has followed suit in affirming that ownership rights over land and natural resources has grown into customary international law.[6] As opposed to treaty law that binds only state parties; customary international law comprises codified or un-codified rules that define the universal concept of justice and is binding on all states, irrespective of the existence of a treaty. International custom, which derives from the general practice of states, is recognised in art. 38(1)(b) of the *Statute of the International Court of Justice* as a primary source of public international law. This means, as the International Law Association makes clear, that the instruments that make provision for natural resources ownership form an integral part of the corpus of enforceable law that is envisaged to have a transformational function and thus, instrumental for socio-economic and cultural development.[7] This clarification is important to make, in order to provide the context for understanding the nature of the instruments that make provision for the right to natural resources ownership, some of which are barely declaratory and may be argued not to have normative force. The instruments are examined in this context from the point of view of their recognition as an embodiment of customary international law and thus legally binding and enforceable.

Prior to the granting of independence to colonised territories, the United Nations (UN) General Assembly passed Resolution 626(VII) in 1952, asserting sovereign ownership of the peoples of those territories over the natural resources to which they were entitled to freely utilise and exploit in a manner desirable to them for purposes of their own socio-economic advancement.[8] By 1952, when the Resolution was adopted, states, as they are understood in their present configurations, did not exist in Africa. The peoples referred to in the Resolution could not have been conceived in a contrary sense other than the communities in existence at the time, whose natural resources ownership

4 East Timor, *Portugal v Australia*, Jurisdiction, Judgment (1995) ICJ Rep 90, 30 June 1995:par. 168.

5 United Nations, International Court of Justice; Armed activities in the territory of the Congo, *Democratic Republic of Congo v Uganda*, Judgment, ICJ Reports 2005:paras. 243-248.

6 International Law Association 'Indigenous Peoples Committee Report'. http://www.ila-hq.org/en/committees/draft-committee-reports-sofia-2012.cfm (accessed on 5 October 2019).

7 Soyeju 2015:372-380.

8 United Nations General Assembly Resolution 626(VII) on the Right to Exploit Freely Natural Wealth and Resources, adopted on 21 December 1952.

rights were envisaged to be recognised with respect to the pre-colonial *status quo* of communal ownership.

A decade later, in 1962, the UN General Assembly adopted Resolution 1803(XVII). It recognised that the "right of peoples and nations to permanent sovereignty over their natural wealth and resources must be exercised in the interest of their national development and of the well-being of the people of the State concerned".[9] Although Resolution 1803(XVII) attributes permanent sovereignty to both peoples and states, it is understood that, by 1962, most of the colonised territories had acquired independence and attained sovereign statehood. Upon becoming subjects of international law, states acquired juristic personality to represent their peoples and to guarantee their well-being through strict and conscientious compliance with the provisions on natural resources ownership, in order to promote social and economic development.[10]

The right to natural resources ownership crystallised into treaty law with the adoption of the twin international covenants on Economic, Social and Cultural Rights (ICESCR) and on Civil and Political Rights (ICCPR) in 1966. The covenants enshrine the rule that "[a]ll peoples may, for their own ends, freely dispose of their natural wealth and resources"[11] as an important prerequisite for socio-economic and cultural development to be achieved. Notwithstanding the *caveat* to progressively fulfil the rights contained in the ICESCR only to the maximum of available resources,[12] it is emphasised that no provision therein may be interpreted as impairing a people's right to freely utilise and, consequently, benefit from their natural resources.[13]

The right to permanent sovereignty over natural resources was further reiterated in Resolutions 2158(XXI) and 2386(XXIII), adopted in 1966 and 1968, respectively. In December 1970, the UN General Assembly adopted Resolution 2692(XXV) on permanent sovereignty over natural resources of developing countries and expansion of domestic sources of accumulation for economic development. Taking into account the conditions under which natural resources in developing countries are exploited (abusively and with impunity), the Resolution emphasised the need for these countries to assert sovereignty over those resources as a means to accumulate sufficient wealth for national development and for the benefit and welfare of their peoples.

Taking into consideration the welfare of some of the peoples that have suffered historical disadvantage in terms of alienation from their natural resources, the Declaration on the Rights of Indigenous Peoples was adopted in 2007. It recognises the rights of indigenous peoples across the world to own, use, develop, and control the "lands, territories and resources which

9 United Nations General Assembly Resolution 1803(XVII) of 14 December 1962 on Permanent Sovereignty over Natural Resources:par. 1.

10 United Nations General Assembly 1962:paras. 6-8.

11 International Covenant on Economic, Social and Cultural Rights (ICESCR), Resolution 2200A(XXI), adopted by the UN General Assembly 1966:art. 1(2); International Covenant on Civil and Political Rights (ICCPR), Resolution 2200A(XXI), adopted by the UN General Assembly 1966:art. 1(2).

12 International Covenant on Economic, Social and Cultural Rights:art. 2(1).

13 International Covenant on Economic, Social and Cultural Rights:art. 25.

they have traditionally owned, occupied or otherwise used or acquired", necessitating states to give legal recognition and protection to that right.[14] The Declaration is particularly relevant, because, despite the requirement to prevent and/or refrain from actions that may jeopardise the ownership rights of indigenous peoples over their natural resources,[15] the cases discussed below illustrate how state governments manifestly shun that responsibility. The Declaration on the Rights of Peasants and Other People Working in Rural Areas, adopted by the Human Rights Council in 2018, acknowledges the right to land for peasant and rural communities as including the right to have access and to sustainably utilise the land and the resources thereon for the purpose of securing a dignified lifestyle.[16]

The relevance of natural resources as constituting a primary means of subsistence and, hence, a major contributing factor to socio-economic and cultural development, is more clearly articulated in the Declaration on the Right to Development which provides that

> [t]he 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*.[17]

This provision is unambiguous in its recognition of peoples as having absolute sovereignty over natural resources. This is corroborated by the right to self-determination that incorporates the liberty to dispose of, and to be actively involved in the decision-making regarding the exploitation of those resources. Within the African context, the allocation of sovereignty over natural resources to the peoples of Africa is even more explicit. Art. 21 of the African Charter comprehensively articulates the guarantee that:

> 1. All peoples shall freely dispose of their wealth and natural resources. This right shall be exercised in the exclusive interest of the people. In no case shall a people be deprived of it.
> 2. In case of spoliation the dispossessed people shall have the right to the lawful recovery of its property as well as to an adequate compensation.
> 3. The free disposal of wealth and natural resources shall be exercised without prejudice to the obligation of promoting international economic cooperation based on mutual respect, equitable exchange and the principles of international law.
> 4. States parties to the present Charter shall individually and collectively exercise the right to free disposal of their wealth

14 United Nations Declaration on the Rights of Indigenous Peoples, Resolution 61/295, adopted by the General Assembly on 13 September 2007:arts. 25, 26, 28.

15 United Nations Declaration on the Rights of Indigenous Peoples:art. 8(2)(b).

16 United Nations Declaration on the Rights of Peasants and Other People Working in Rural Areas, Resolution A/HRC/RES/39/12, adopted by the Human Rights Council on 28 September 2018:art. 17; Suárez 2015:2.

17 United Nations Declaration on the Right to Development Resolution A/RES/41/128, adopted by the General Assembly on 4 December 1986:arts. 1(2), emphasis added.

> and natural resources with a view to strengthening African unity and solidarity.
>
> 5. States parties to the present Charter shall undertake to eliminate all forms of foreign economic exploitation particularly that practiced by international monopolies so as to enable their peoples to fully benefit from the advantages derived from their national resources.

The African Commission found occasion in the *Ogoni* case to contextualise the purpose for recognising the African peoples' ownership rights over their natural resources, as stated in art. 21 to the effect that

> [t]he origin of this provision may be traced to colonialism, during which the human and material resources of Africa were largely exploited for the benefit of outside powers, creating tragedy for Africans themselves, depriving them of their birthright and alienating them from their land. The aftermath of colonial exploitation has left Africa's precious resources and people still vulnerable to foreign misappropriation. The drafters of the Charter sure wanted to remind African governments of the continent's painful legacy and restore cooperative development to its traditional place at the heart of African society.[18]

By this, the African Commission delineates the ownership of natural resources, which it says is a birthright that the peoples of Africa are deprived of and left vulnerable to dominant foreign interests. Art. 21, as further pointed out in the *Ogiek* case, is conceptualised with the aim to "facilitate development, economic independence and the self-determination of the post-colonial states as well as the peoples that comprise those states, protecting them against multinationals as well as against the [s]tate itself".[19] Protection is emphasised for the purpose of safeguarding the exclusive interest of the peoples of Africa. Art. 14 on the right to property adds to the rule that ownership "may only be encroached upon in the interest of public need or in the general interest of the community and in accordance with the provisions of appropriate laws".[20]

The principle of exclusive interest requires – in the instance where a law of general application authorises expropriation of the resources of a community – that the sovereign interest of the peoples of that community be given first priority over other interests. Interpretations of this kind define the relevance of law to development in respect of which the African Charter guarantees that "[a]ll peoples shall have the right to their economic, social and cultural development with due regard to their freedom and identity and in the equal enjoyment of the *common heritage* of mankind".[21] For an ample understanding, the common heritage entitlement should be read in conjunction with art. 21, which together suggest that, in order to achieve socio-economic and cultural development, the peoples of Africa are entitled to equitably benefit from the wealth of natural resources on the continent.

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18 *Social and Economic Rights Action Centre (SERAC) & another v Nigeria* (*Ogoni* case) Comm 155/96 (2001) AHRLR 60 (ACHPR 2001):par. 56.

19 *African Commission on Human and Peoples' Rights (Ogiek Community) v Republic of Kenya* (2017) Appl No 006/2017:par. 193.

20 African Charter:art. 14.

21 African Charter:art. 22(1), emphasis added.

The role of the state comes into the equation, which necessitates defining in context. Art. 21(4) of the African Charter enjoins state parties to individually and collectively exercise the right to the free disposal of their wealth and natural resources with a view to strengthening African unity and solidarity. Art. 22(2) further mandates state parties to take concrete measures individually and collectively, in order to ensure that the right to development is achieved. These guarantees create a fiduciary relationship between states and the peoples of Africa, which needs to be given proper legal reasoning.

## 2.2 States' fiduciary responsibility in the governance of natural resources

The fiduciary responsibility of states in the governance of natural resources derives from the social contract theory, which posits that states exist for, and have an obligation to serve the people.[22] The state is thus portrayed as a fictional reality that would not exist without its primary substantive elements, the most important being the peoples that give relevance to its juristic personality under international law. Before states came to be in Africa, the peoples already were, and enjoyed sovereignty over the natural resources that provided the source of livelihood with dignity that buttresses the human rights agenda. Human rights law came along to endorse the inherent entitlements that all human beings possess by virtue of their common humanity.[23] Conventionally, the human person is recognised as a right holder (beneficiary), while the state (guarantor of human rights) is recognised as a duty bearer with the responsibility to give effect to the rights to which they have committed under human rights law.

Having the same nature as the right to development, the right to sovereign ownership over natural resources is protected under the African human rights system as a collective entitlement attributed to various communities of peoples. This means, as implied by the wording of art. 21(1) of the African Charter, that an individual cannot assert an exclusive ownership claim over natural resources, but is entitled to the enjoyment of that right as part of a community. State governments are mandated to exercise custodianship in the governance of natural resources on behalf and to the exclusive interest of the peoples of Africa who collectively share ownership rights over the resources.

The fiduciary responsibility of African state governments with regard to sovereignty over natural resources is examined within the human rights context as engendering, as the Africa Commission elaborated on in the *Ogoni* case, at least four compelling duties, namely to respect, to protect, to promote, and to fulfil.[24] The duty to respect obligates the state to refrain from actions that may interfere with, or deprive the peoples of their natural resources. The duty to protect enjoins the state to institute regulatory measures in the form of enforceable legislation and policies against third parties that may encroach into the natural resources ownership rights of the peoples. The duties to

22 Mouritz 2010:123.
23 Macklem 2007:575.
24 *Ogoni* case:paras. 45-47.

promote and to fulfil necessitate the state to take concrete actions through redistributive measures to ensure that the gains from the exploitation of natural resources are equitably redistributed to the benefit of all peoples.

With respect to the "painful legacy" of collective dispossession, the African Charter compels state parties to "eliminate all forms of foreign economic exploitation particularly that practiced by international monopolies so as to enable their peoples to fully benefit from the advantages derived from their national resources".[25] It requires a demonstration of responsiveness and accountability. In granting concessions to extractive industry multinationals, for instance, African state governments are obligated to secure the active participation of the peoples in the decision-making processes and, consequently, also regulate their operations so that local communities are not disenfranchised of their share in the wealth of natural resources that make up the common African heritage.

In contrast to these expectations, Duruigbo observes that the doctrine of natural resources ownership has rather evolved towards a leaning that attributes permanent sovereignty to states.[26] Cambou and Smis explain the concept of state sovereignty to imply the duty to respect and to protect the rights of peoples in disposing of their natural resources and the guarantee to enjoy the benefits of doing so.[27] Cotula observes that the allocation of sovereignty over natural resources to states is conceived within the international law principle of territorial sovereignty.[28] It is admitted that international law allocates sovereignty over natural resources to states, which often conflicts with the customary laws and practices that shape the lives of local peoples. African state governments tend to misconceive the international law principle of territorial sovereignty espoused in the OAU Charter and the *AU Constitutive Act*[29] as giving them the discretionary mandate to govern with absolutism. In many instances, it leaves the peoples they are mandated to protect dispossessed and excluded from the benefits deriving from the exploitation of their natural resources, as illustrated in the number of cases discussed below.

The origin of this injurious trend is deeply rooted in the systems that Africa inherited at independence, which includes replicating the colonial models that allowed administering authorities to alienate land from local communities and to exercise ultimate control over the territories they administered, which were considered as "crown" (state) land.[30] Upon acquiring statehood, the colonial administrations handed over their territorial possessions and the policies relating to the governance of those territories to the independent states that emerged. It then became legal for the state to assert sovereignty over all land and the resources thereon. Meanwhile, prior to the splitting up of Africa into pieces of colonial possessions, the continent was structured along community lines and

25 African Charter:art. 21(5).
26 Duruigbo 2006:37.
27 Cambou & Smis 2013:350.
28 Cotula 2018:5.
29 OAU Charter:art III(3); *Constitutive Act*:art. 3(b).
30 Whitehead & Tsikata 2003:70; Okoth-Ogendo 2003:110.

governed in accordance with the principles of collective ownership, shared patterns of livelihood and the heritage practices that sanctioned the passing down of communal wealth to successive generations of African peoples.

This pre-colonial arrangement was disrupted with the advent of the European invasion of the African continent, which brought along the idea of individual ownership and fierce competition that led to the gratuitous exploitation of the natural resources on the continent for private gains.[31] The adverse impact on socio-economic and cultural development in the colonies was not only colossal, but also dismal. When colonial rule took institutionalised form under the UN trusteeship system, the instruments that regulated the administration of colonised and trust territories established that the question of natural resources ownership remained the exclusive preserve of local peoples based on their native laws and customs. The Trusteeship Agreement authorising British administration over the trust territories of the Cameroons, for example, states that

> [i]n the framing of laws and relating to the holder and transfer of land and natural resources, the Administering Authority shall take into consideration native laws and customs and shall respect the rights and safeguard the interests both present and future of the native populations. No native lands or natural resources may be transferred except between natives, save with the previous consent of the competent public authority. No real rights over native land or natural resources may be created except with the same consent.[32]

From the above, it is understood that, even during the colonial period, sovereign ownership over natural resources was recognised to reside with the peoples and, more so, that those rights were immutable. In the absence of any law that authorises a state to deprive its peoples of their natural resources, doing so has become a perennial illegality perpetrated or facilitated by African state governments. Consequently, despite Africa's riches in natural resources, it is observed that the resources have largely only benefitted colonial powers and state governments rather than the peoples of Africa.[33] Former UN Secretary General, Kofi Annan, is quoted as remarking that "[i]nstead of being exploited for the benefit of the people, Africa's mineral resources have been so mismanaged and plundered that they are now the source of our misery".[34] The extent of the misery experienced by local communities has been the subject of litigation in a number of cases adjudicated by the African Commission and the African Court.

31 Turner 2000:3.

32 See, for example, Cameroons under United Kingdom Trusteeship – Text of the Trusteeship Agreement as approved by the General Assembly of the United Nations, New York, 13 December 1946, Treaty Series No. 20 (1947):art. 8.

33 Statement by the United States Deputy Secretary of State for African Affairs, Nagy Tibor, contained in a video footage recorded on 11 April 2019 (on file with the author).

34 Address at the Organisation of African Unity (African Union) Summit in Lome, 2000, cited in Ayittey 2002:1.

## 2.3 Jurisprudence on natural resources ownership

Besides the legal protection in the range of instruments discussed earlier, the enforcement mechanisms of the African human rights system provide jurisprudential evidence in the *Ogoni, DRC, Endorois* and *Ogiek* cases to the effect that neither the state nor any other non-state actor has the legitimacy to dispossess a people of their natural resources. These cases touch on the right to development and on the right to natural resources ownership.

The *Ogoni* case deals with the abusive exploitation of crude oil in the Niger Delta by Shell Petroleum Development Corporation; condoned and facilitated by the Nigerian government through ruthless military operations, causing massive displacements, damage to the natural environment, and health hazards to the Ogoni peoples.[35] The complainants alleged, among others, a violation of art. 21 on the right to natural resources ownership. In hearing the matter, the African Commission took the opportunity to delineate the treaty obligations of African state governments with respect to the rights enshrined in the African Charter. These duties entail, on the one hand, taking protective and regulatory measures against third party interference and, on the other, refraining from actions that may impair the right to the free use of natural resources by a community for the satisfaction of their subsistence needs.[36]

On the basis of the outlined duties, the Commission proceeded to establish that, even though the Nigerian government has the mandate to exploit oil in the Ogoni region, the proceeds acquired from doing so must be used for the socio-economic and cultural development of the Ogoni communities.[37] The Nigerian government not only failed to do so, but also neglected to regulate the operations of Shell Corporation and, more so, orchestrated the destruction of the Ogoniland in derogation of its treaty obligations. The Commission affirmed that this constituted a violation of art. 21 of the African Charter and, accordingly, the rights of the Ogoni communities over their natural oil wealth.[38] Although the Nigerian government was ordered to pay compensation to the Ogoni peoples, it is not established whether any such compensation has ever been paid.

The communication in the *DRC* case was filed against Burundi, Rwanda and Uganda, following the rebel activities perpetrated by their armed forces in the eastern provinces of the DRC, which led to massive violations of a range of human and peoples' rights protected by the African Charter.[39] Among the rights alleged to have been violated is art. 21 of the African Charter, which entitles the people of the DRC to freely dispose of their wealth and natural resources in a manner that is in their exclusive interest.[40] On the merits of the allegations, the African Commission found that Burundi, Rwanda and Uganda were indeed involved in the "illegal exploitation/looting of the

35 *Ogoni* case:paras. 1-9.
36 *Ogoni* case:paras. 45-47, 57.
37 *Ogoni* case:par. 54.
38 *Ogoni* case:paras. 55-58, 70.
39 *Democratic Republic of Congo v Burundi, Rwanda and Uganda* (2009) AHRLR 9 (ACHPR 2009) (*DRC* case):paras. 2, 69.
40 *DRC* case:par. 94; African Charter:art. 21

natural resources" in the DRC, in violation of the Congolese peoples' right to dispose of their wealth and natural resources, which, as the Commission noted, occasioned the violation of the right to economic, social and cultural development.[41] In terms of remedy, the Commission hazily recommended that Burundi, Rwanda and Uganda pay adequate reparations to the DRC "for and on behalf of the victims".

By ordering reparation to be paid to the DRC for, and on behalf of the victims, the Commission affirmed that the dispossessed communities are legitimately entitled to such reparations as a result of the illegal exploitation and looting of their natural resources. It would have been appropriate if the Commission helped by naming the particular communities to benefit from the reparations and more so, if it had been slightly more precise as to the nature of reparations that the victims could anticipate receiving. Given that the state is mandated to represent its peoples, it is reasonable that the African Commission ordered for reparations to be paid to the government of the DRC. Of concern, however, is whether, if paid to the government of the DRC, the reparations would effectively be directed to the affected communities.

The *Endorois* case equally dealt with the question of natural resources ownership, alleging violations connected to the forcible and arbitrary removal of the indigenous Endorois peoples from their ancestral land, resulting in disruptions of their communal patterns of existence and well-being.[42] From time immemorial, the semi-nomadic Endorois community is recorded to have established a sustainable pastoral economy and practised a cultural lifestyle that intimately connects them to their ancestral land in the locality of Lake Bogoria in central Kenya.[43] In their customary understanding of land ownership, the Endorois assert exclusive entitlement by right of ancestry to the land in the Lake Bogoria region, which they have utilised for habitation, cultural practices, and ancestral worship.[44]

The Kenyan government expropriated the land in question for commercial purposes to establish a wildlife reserve to boost the tourism industry.[45] The Endorois people were unlawfully evicted and thus severed from the standard of living which they value and with which they identify as a community.[46] Contrary to the provisions of art. 21 of the African Charter that requires a people's natural resources be disposed of only in their exclusive

41 *DRC* case:paras. 94-95; Kwame 2016:87-88; Sceats 2009:8; Oduwole 2014:15; Kamga & Fombad 2013:11-12.

42 *Centre for Minority Rights Development (Kenya) & Minority Rights Group International on behalf of Endorois Welfare Council v Kenya* Comm 276/2003 (2009) AHRLR 75 (ACHPR 2009) (*Endorois* case):paras. 2-6, 144.

43 Kavilu 'Indigenous Endorois call for implementation of African Commission ruling on their ancestral land'. http://www.galdu.org/web/index.php?odas=5087 (accessed on 12 June 2015).

44 *Endorois* case:paras. 72-73, 87.

45 Sing'Oei 2013:375.

46 Williams 'The African Commission 'Endorois case': Toward a global doctrine of customary tenure?' http://terra0nullius.wordpress.com/2010/02/17/the-african-commission-endorois-case-toward-a-global-doctrine-of-customary-tenure/ (accessed on 2 June 2015); *Endorois* case:paras. 115, 124.

interest, promises by the Kenyan government to provide compensation and an equitable share of the proceeds from the wildlife reserve were never fulfilled.[47] Several attempts to seek remedy from the local courts proved futile.[48]

The complainants resorted to the African Commission to seek restitution of their ancestral land and compensation for wrongful displacement. They raised a number of arguments to substantiate their claim of ownership over the land in question,[49] which, within the context of the common heritage entitlement, occasioned a violation of the right to development by the Kenyan government.[50] The complainants argued that the expropriation of the Endorois ancestral land deprived the community of the right to self-determination in disposing of their natural resources in the manner they would have wished.[51] Alluding to the *Ogoni* case, the African Commission held that a local community within a state is entitled, under art. 21 of the African Charter, to claim ownership of the natural resources contained within that region.[52]

Acknowledging the Endorois peoples' right to freely dispose of their natural resources, the African Commission noted that the Kenyan government failed to balance public interest with that of the affected community.[53] The government would have been justified in its action, if appropriate measures were taken to protect the interests of the community. Without evidence of any such measures, the Commission found the Kenyan government to be in violation of art. 21 of the African Charter and thus ordered for restitution of the Endorois' ancestral land in addition to adequate compensation for damages suffered as well as an equitable share in the benefits deriving from the wildlife reserve.[54] Although the orders have not been enforced, the decision reiterates the fact in law that ownership rights over natural resources belong to the peoples and not the state and thus also sets the rule that colonial-style invasion and land grabbing by the state is unlawful.

The landmark litigation adjudicated by the African Court in the *Ogiek* case equally dealt with the issue of land ownership for another indigenous community in Kenya. The Ogiek are reported to be the most vulnerable indigenous community that has, for centuries, inhabited the Mau forest, where they have established an ancestral bond and accordingly preserved it as the principal source of their livelihood and survival.[55] Dating back to the colonial period, the Ogiek people are known to have faced systematic marginalisation, which the present Kenyan government continues to perpetrate through repeated arbitrary evictions that alienate them from their forest habitat. Following an arbitrary eviction in 2009, three non-governmental organisations

47 Williams 2015:251.
48 *Endorois* case:par. 2; Sing'Oei 2013:386.
49 *Endorois* case:paras. 225-268.
50 *Endorois* case:paras. 279, 281-282, 288, 290-291, 297-298.
51 *Endorois* case:paras. 126-127.
52 *Endorois* case:par. 225.
53 *Endorois* case:paras. 267-268.
54 *Endorois* case:par. 298.
55 Sang 2001:114-118; Claridge 2018:57; Minority Rights Group International 2017a:1; *Ogiek* case:par. 6.

(NGOs) made a complaint to the African Commission.[56] Convinced that the allegations evinced serious and massive violations of several provisions, including arts. 21 and 22 of the African Charter, the Commission seized the African Court on behalf of the Ogiek community.[57]

In the opinion of the Court, the eviction constituted a "situation of extreme gravity and urgency, as well as a risk of irreparable harm to the Ogiek", necessitating the issuance of a provisional order, which, unfortunately, the Kenyan government failed to respect.[58] The Court read arts. 21 and 22 as having the effect that the Ogiek people are legitimately entitled to their ancestral land, which incorporates the right to have access to, utilise, occupy and enjoy the produce of the land.[59] The Court held that, by evicting the Ogiek from the Mau forest, the Kenyan government's action occasioned a violation of their right to development.[60] The Court's legally binding judgment not only imposes an obligation on the Kenyan government for its enforcement, but it also reiterates the guarantee that the right to own and exercise control over the natural resources within any particular community and as a means to achieve socio-economic and cultural development guaranteed to the peoples of Africa cannot be substituted with or subsumed into the government's prerogatives for development.

The government of Kenya has, to a narrow extent, demonstrated the political will to give effect to the ruling of the African Court by establishing a Task Force charged with enforcing the judgment. Interestingly, in taking this measure, the government ignores the Court's findings on inadequate consultation, failure to obtain the informed consent of the Ogiek people prior to their eviction, and the fact that they are not sufficiently involved in matters relating to their well-being and the development of their community. The composition of the Task Force, it is noted, neither includes any Ogiek representatives nor does its *modus operandi* reflect the wishes, aspirations or interests of the Ogiek community.[61] In a similar vein, despite multiple efforts, including by the African Commission, to ensure the enforcement of the *Endorois* decision, the Kenyan government's persistent avoidance to do so complicates the Endorois' prospects for repossessing their ancestral land and relying on same for survival and well-being.

56 *Ogiek* case:paras. 3, 8; Ogiek Peoples' Development Programme (d.n.a.):3.

57 *Ogiek* case:paras. 1, 6-10, 58-61, 101; Claridge 2018:57; Ogiek Peoples' Development Programme (d.n.a):3.

58 African Commission on Human and People's Rights. 'Order for Provisional Measures'. http://en.african-court.org/images/Cases/Orders/006-2012-ORDER__of_Provisional_Measures-_African_Union_v._Kenya.pdf (accessed on 2 April 2019); *Ogiek* case:paras. 16-18.

59 *Ogiek* case:paras. 195-211.

60 *Ogiek* case:paras. 207-211; Claridge 2018:59.

61 Minority Rights Group 2017b: 'Kenyan government Task Force to implement African Court's Ogiek judgment deeply flawed, MRG and OPDP say' *Relief Web* 13 November 2017. https://reliefweb.int/report/kenya/kenyan-government-task-force-implement-african-court-s-ogiek-judgment-deeply-flawed-mrg (accessed on 4 April 2019); Inman *et al* 2018:416.

The affirmative pronouncements by the African Commission and the African Court with regard to natural resources ownership provide reason to look at the common heritage entitlement a little more closely.

## 3. THE COMMON HERITAGE ENTITLEMENT

### 3.1 Communal ownership and the guarantee of equitable benefits

The African Charter not only guarantees the right to socio-economic and cultural development; it also establishes the norm that its realisation is conditional on the extent to which all the peoples of Africa benefit from the common heritage of mankind. The principle of the common heritage of mankind has its foundation in international law, where it is understood to mean that certain spaces and the resources thereon belong to and are available for use and to the benefit of all humanity.[62] Its usage in the African Charter is not too different. In terms of the provisions of the legal instruments examined earlier, the common heritage would be understood as referring to the ensemble of natural wealth and resources that are considered a shared communal possession, to which the peoples of Africa are legitimately entitled by virtue of their African ancestry. It presupposes a dispensation that imposes the need to revalorise the African value system of communal resources ownership that offers the opportunity for collective benefits.

Read in conjunction with art. 21 of the African Charter, the common heritage entitlement not only guarantees material benefits from disposing of natural resources, but also entails that the resources, on which the lifestyles, well-being and survival of the peoples of Africa depend, may not be interfered with. Without adequate recognition and protection of the African peoples' right to exercise control over, and the liberty to utilise or dispose of their natural resources as they may deem appropriate, it is unlikely that socio-economic and cultural development would be achieved. Where there is a conflict of interest, the interest of the peoples must prevail. In the event, for example, where the state is compelled, in terms of the law of general application, to expropriate as it may sometimes become necessary to satisfy a public interest, the common heritage principle obligates the state to give first priority to the affected communities.

The African Charter allocates to state parties a regulatory role to individually or collectively facilitate the equal enjoyment of the common heritage, probably by ensuring equitable distribution of available resources as a means to equalise opportunities for development and guarantee a fair share in the benefits that are obtained in the process. The idea of equitable (re)distribution is born from the recognition that the natural resources that are needed to create development are scarce and not evenly distributed and, consequently, limit prospects to improve well-being for all the peoples of Africa. The common heritage is incorporated in the provision on the right to development with the intent to rationalise

62 Taylor 2010:64.

the exploitation of the natural resources that are earmarked as communal possessions and to utilise same in such a manner that all the peoples of Africa get to reap substantive socio-economic and cultural benefits.

It is, however, rightly noted that aspirations to achieve equitable (re)distribution of natural resources is "currently [still] a pipe-dream",[63] necessitating, as a priority, a strong state apparatus guided by principles of the rule of law and functional institutions to be able to effectively enforce the common heritage entitlement to the benefit of all the peoples of Africa. Because natural resources governance (exploitation and conversion into substantive entitlements of well-being) requires enormous capital and technology, which local communities may not possess, it requires the state to oversee the extraction processes by ensuring that the exclusive interest of local communities is not jeopardised.

Finally, greater cooperation among African countries is required in order to enable the African peoples in the countries that are deficient in natural resource endowments to share in the benefits that the common heritage provides. Under the prevailing circumstances where competing interests tend to override, the question is whether African state governments can, indeed, be guided by the law to view the common heritage entitlement as a major contributing factor to socio-economic and cultural development.

## 3.2 Some country illustrations: The DRC and South Africa

The common heritage entitlement is explicitly enshrined in the *Constitution of the Democratic Republic of Congo* (2005), which provides that "[a]ll Congolese have the right to enjoy the common heritage of mankind. The State has the duty to facilitate enjoyment thereof".[64] This provision relates to, and is qualified by the preceding provision, which entitles all Congolese people to benefit from the country's natural resources, which the state is obligated to redistribute equitably as a means to achieve the right to development. It states that "[a]ll the Congolese have the right to enjoy national wealth. The State has the duty to redistribute the wealth equitably and to safeguard the right to development".[65] The state is portrayed as having a protective, regulatory and facilitating mandate to equitably redistribute the natural resources that make up the common heritage to the benefit of all Congolese peoples.

Modelled as one of the most progressive constitutions in Africa in terms of the range of socio-economic rights contained therein, including the right to development, the *Constitution of the Democratic Republic of Congo* ignites hope for better living standards for the Congolese peoples. This creates a dispensation for the rule of law, which demands of the government to comply with its legal commitments, especially with regard to natural resources governance. In the event of an encroachment into the common heritage, the government is obligated to represent and assert the violated right and to seek

63 Kostakos & Zhang 2013:9.
64 *Constitution of the Democratic Republic of Congo* (DRC) 2005:art. 59.
65 *Constitution of the Democratic Republic of Congo*:art. 58.

remedy on behalf of the Congolese peoples, as in the case against Burundi, Rwanda and Uganda.[66]

This notwithstanding, the entitlement to the common heritage can most importantly only become meaningful to the Congolese people when the government tangibly – through appropriate legislation, national development policies and practical redistributive measures – facilitates access to, and enjoyment of the benefits from the country's natural resources. Such legislation, policies and measures would ensure that the exploitation of the natural resources in the country, including – especially by non-state actors – are adequately regulated as a matter of necessity, taking into consideration the first priority interest of the Congolese peoples to get out of poverty and to equally enjoy better standards of living on the same scale as those who are currently reaping all the benefits.

The scenario in the DRC – that has been ravaged by conflict – presents a different reality, where natural resources are plundered with impunity by a composite mix of belligerent local warlords and foreign multinationals at the expense of the well-being of the local populations that are supposed to enjoy better living standards from the exploitation of those resources. While states are empowered to exert authority and territorial sovereignty, the fragile Congolese government appears to have no leverage to regulate the operations of the private sector actors involved in illegal extraction of natural resources in the country. Of course, this creates the leeway for wanton looting[67] that leaves the Congolese peoples among the most impoverished in Africa and the world.

In a country report published in 2015, Samndong and Nhantumbo point out that the government of the DRC has endeavoured to develop a national legislative framework on the governance of natural resources and the environment.[68] As part of the transitional measures, they recommend explicit recognition of natural resource ownership rights for the Congolese peoples.[69] However, even as the legislative framework is indicative of a genuine aspiration for transformation, it is shown to be constrained by lack of strong law enforcement mechanisms, resulting in ineffective governance and corruption that diverts proceeds from the exploitation of natural resources and reduces equitable distribution of benefits among the peoples of the DRC, particularly the affected local communities.[70]

In the case of South Africa, coming from a background of deep cleavages resulting in part from the collective dispossession and uneven distribution of the country's resources, as part of the transitional arrangement, it would have been expected that the question of resource reallocation is treated as

66 African Charter:art. 47.
67 Petitjean 'Perenco in the Democratic Republic of Congo: When oil makes the poor poorer' (2014) Multinationals Observatory. http://multinationales.org/Perenco-in-the-Democratic-Republic (accessed on 14 September 2019); United Nations Security Council 2001:6-7.
68 Samndong & Nhantumbo 2015:20-32.
69 Samndong & Nhantumbo 2015:40.
70 Samndong & Nhantumbo 2015:16-17.

a major priority in view of equalising opportunities for development to the benefit of the previously disadvantaged Black communities. Far from that, the *Constitution* that was adopted to redress the apartheid injustices and to drive post-apartheid transformation surprisingly ignored to sufficiently address concerns relating to resource redistribution. This is particularly so in the case of land, which has remained a burning issue in present-day South Africa.

The sec. 25 property rights provision of the *Constitution* mentions "equitable access to all South Africa's natural resources" in a very confusing manner.[71] A comprehensive reading of the entirety of sec. 25 reveals that it does not promote access to the country's natural resources, as stated, but rather limits prospects for equitable redistribution. With regard to land, the *Constitution* provides that

> 25(5) The state must take reasonable legislative and other measures, within its available resources, to foster conditions which enable citizens to gain access to land on an equitable basis.
>
> […]
>
> 25(7) A person or community dispossessed of property after 19 June 1913 as a result of past racially discriminatory laws or practices is entitled, to the extent provided by an Act of Parliament, either to restitution of that property or to equitable redress.

While subsec. 5 obligates the state to take concrete measures to facilitate equitable access to land, subsec. 7 limits the prospects by authorising land restitution only to persons and communities dispossessed post-1913. Sec. 25(7) thus precludes the vast majority of the Black population that was massively dispossessed of their lands during the colonial period prior to 1913 from seeking restitution of those lands, in spite of increasing legitimate demands for land redistribution. The guarantee of equitable access to natural resources is further conflicted with sec. 25(2), which states that "[n]o one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property". The *caveat* in this provision literally forbids the enactment of any other law that may authorise expropriation of the 72 per cent of land reported to be in the possession of a handful of individuals.[72]

This raises the crucial concern whether the constitutional project for transformation that envisages redressing apartheid injustices and equalising opportunities for socio-economic development is achievable when, advertently or inadvertently, the law limits options for demanding a fair share in the common heritage of the country that is said to belong to all who live in it.[73] The discourse on land redistribution seems to find ease in the fact that sec. 25 is already in the process of being amended to allow for land expropriation without compensation.[74] If Baderin's notion of conscious use of the law to promote balanced socio-economic and cultural development is to apply, it is reasonable to effectively

71 *Constitution of the Republic of South Africa* 1996:sec. 25(4).
72 Adams & Howell 2001:1, 5-6.
73 *Constitution of the Republic of South Africa*:preamble.
74 Sibanda 2019:130.

eliminate existing hurdles that stand in the way of a fair redistribution of the land to the benefit of the dispossessed segments of the population.

Subjective views, based on private law understandings of ownership defined by imported clichés of Roman-Dutch law that views land primarily in terms of commercial value,[75] do not stand up to moral justification and the spirit of the constitutional project for transformation intended to right the wrongs of the past. The commitment to improve quality of life and to free the potential of every South African citizen obligates the government, with respect to the rights to socio-economic development, to sufficiently equip the previously disadvantaged with the capacity, as it may be necessary, to be able to effectively manage and put the land to productive use. Otherwise, customary practice indicates, as illustrated in the cases discussed earlier, that local and indigenous peoples require land not necessarily for commercial purposes, but essentially for their own subsistence and livelihood.

It is important to admit that development is not solely about securing economic advancement. It is also about promoting the social and cultural aspects that relate directly to the livelihood of local peoples to whom land is sacrosanct. Sibanda's "social function" conception of land ownership as a means to secure the "socio-economic wellbeing of the beneficiaries of land and the rural economy" is commendable.[76] However good the amendment of sec. 25 turns out to be, it does not guarantee that land redistribution will happen owing to the rigid political system that remains resistant to transformation, with justification to sustain the overtly monopolistic economy that considers the poor unproductive and, consequently, suffocates legitimate demands for redistribution of the South African common heritage, from which every citizen is constitutionally entitled to benefit.

## 4. CONCLUSION

The analysis in this article illustrates that the utter disregard – or persistent violation – of the law that guarantees to the peoples of Africa sovereign ownership over their natural resources constitutes one of the principal limitations to implementing the right to development in Africa. This problem arises from deviations from the law towards prioritising corporate interests in the exploitation of natural resources. This tends to blur the explicitly stated well-being and subsistence interests of the peoples of Africa, which is rooted in the entitlement to the equal enjoyment of the common heritage. Bearing in mind that prospects to reap substantive benefits from the common heritage remain hanging in the balance, as competition for Africa's natural resources intensifies, it is essential to recollect the minimum normative standards for piloting the processes for socio-economic and cultural development in Africa.

The peoples of Africa are, by virtue of the provisions of the legal instruments and the rulings of the African Commission and the African Court discussed in this article, recognised as having permanent sovereign ownership rights over

75 Sibanda 2019:132-138.
76 Sibanda 2019:142-146.

their natural resources, which they are entitled to utilise for their collective well-being and to exercise the liberty to dispose (authorise the exploitation) thereof as they may deem necessary. The state is granted the important custodianship role to enforce the law and, in accordance, empowered with the institutional capacity to assert and to exercise with authority, the competency to protect the collective interest of the peoples of Africa. This mandate compels African state governments to regulate the governance of the natural resources that constitute the common heritage in a manner that allows local communities to share equitably in the benefits that derive from the exploitation of those resources.

By drawing attention to these obvious facts, the purpose is not necessarily to say that African state governments are oblivious of their human rights obligations towards the peoples of Africa, but, most importantly, to highlight the manifest demonstration of bad faith and wilful intent to keep the peoples of Africa perpetually impoverished. Besides contravening the sacrosanct principle that enjoins state parties to honour their treaty obligations in good faith, there is no justification why the rulings with specific orders relating to the natural resource ownership of the communities in question in the *Ogoni*, *DRC*, *Endorois* and *Ogiek* cases have not been complied with.[77] The reticence of the governments implicated in these cases implies, as part of the constraint to the realisation of the right to development in Africa, a deliberate contempt of the institutions that uphold the very law that seeks to protect the exclusive interest of the peoples of Africa.

While the common heritage entitlement commands concrete redistributive measures in the governance and exploitation of natural resources, in respect of which African state governments are predisposed to legitimate accountability, the practical realities indicate that the laws that make provision for such a right are yet to be taken seriously. As illustrated by the examples of the DRC and South Africa, even though those governments are constitutionally mandated to facilitate equitable access to, and mutual benefit from the natural resources that abound therein, the extreme levels of poverty resulting from deprivation are worrisome. When the laws that lay down the principles of governance of natural resources in Africa for the purpose of socio-economic and cultural development fail to meet enforceable standards, the scenario is created for the impoverished to revolt.

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