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THE EMERGENCE OF RIGHT-BASED APPROACHES TO RESOURCE GOVERNANCE IN AFRICA: FALSE START OR NEW DAWN?

Damilola S. Olawuyi*

INTRODUCTION

Africa is home to a significant percentage of the world's deposits of natural resources, especially non-renewable natural resources such as oil, natural gas, and heavy metals like gold, iron, copper, silver, and others.¹ According to the 2014 BP Statistical Energy Survey, Africa had proven oil reserves of 132.438 billion barrels at the end of 2013, equivalent to 41.2 years of current production and 8.01% of the world's reserves.² Similarly, Africa produced an average of 8804.4 thousand barrels of crude oil per day in 2011 or 10.44% of the world production.³ Countries such as Nigeria, Libya, Algeria, Egypt, and Angola are historical giants in oil production in Africa; they account for eighty-five percent of the continent's oil production.⁴ While Ghana, South Sudan, South Africa, Namibia, Gabon, Congo, Cameroon, Tunisia, Equatorial Guinea, the Democratic Republic of the Congo, and Cote d'Ivoire have attracted significant investment interests for mineral resources ranging from gold, bauxite, cobalt, industrial diamond, phosphate rock, platinum-group metals ("PGM"), vermiculite, and zirconium.⁵ As such, the African mineral industry is one of the largest mineral industries in the world.⁶

Despite these statistics, however, resource extraction and utilization in Africa have not provided corresponding economic, social, and environmental development and growth.⁷ Africa remains home to the world's most impoverished people.⁸ In 2014, thirty-four of forty-two nations identified as having "Low Human Development" on the United Nations' ("UN") Human Development Index were in Sub-Saharan Africa.⁹ Furthermore, thirty-four of the forty-eight nations on the UN list of least developed countries are African countries.¹⁰ African countries also have the lowest life expectancy rates, an overall average of forty-eight years, which is an abysmally low figure when

compared to other resource-rich countries such as Canada (eighty-two years), the United States (seventy-nine years), the United Kingdom (eighty-two years), and Qatar (eighty-three years).¹¹ Therefore, for several decades, resource-rich African countries have been identified as fitting global examples of resource cursed nations – the paradox of countries having more resources, yet less economic, social and environmental development and growth.¹²

“Efforts to ensure the integration of human rights and sustainable development goals under international law have therefore resulted in the rapid ascendancy of human rights-based approaches (“HRBA”) to resource development.”

The resource extraction industry in Africa has been accompanied by numerous human rights concerns, arguably more so than any other region. Over the years, the impact of pollution from resource extraction projects has been among the human rights issues raised.¹³ For example decades of oil spills, gas flaring, and effluent discharge into Nigeria's Niger Delta have severely damaged the ecosystem and environment of that region.¹⁴ According to a 2011 report by the United Nations Environment Programme ("UNEP"),

many of the environmental and social consequences of oil spillage in the Niger Delta are now irreversible.¹⁵ Resource exploration and production have also resulted in human rights concerns in the form of lack of opportunities for participation by citizens in governmental and technocratic decision-making processes leading to the approval of resource extraction projects, arbitrary confiscation of traditional and indigenous lands without compensation, and siting of resource processing projects in poor and vulnerable communities, and criminalization. Advocates for human rights and proponents of opposition movements against opposing governmental corruption and lack

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of governmental accountability on resource use have faced persecution. Additionally, judicial and quasi-judicial remedies for victims of the above-mentioned human rights violations have been absent.¹⁶

Over the last decade, international law has increasingly recognized the need to integrate human rights into policy resource utilization frameworks to avoid these unintended negative consequences of resource exploitation.¹⁷ This is part of a broader theoretical debate and effort aimed at coordinating the systemic integration and reading of international law instruments in coherent, cohesive, and mutually supportive ways.¹⁸ Efforts to ensure the integration of human rights and sustainable development goals under international law have therefore resulted in the rapid ascendancy of human rights-based approaches (“HRBA”) to resource development.¹⁹

The HRBA as advocated by the United Nations places emphasis on addressing and mitigating human rights impacts of resource development projects.²⁰ The aim of the HRBA is to ensure that projects or policies intended to advance resource utilization do not result in adverse human rights consequences.²¹ A rights-based approach recognizes the interdependence of human rights and the integrity of the natural environment; it also provides normative frameworks on how to address systemic and structural imbalances that exclude minority groups from decision-making processes on matters that affect their environment and resources.²² The United Nations Human Rights Commissioner seemed to summarize these frameworks when she noted that:

Without explicit human rights safeguards, policies intended to advance environmental or development goals can have serious negative impacts on those rights. Thus, technocratic processes have excluded women from decision-making, economic and social inequalities have been exacerbated (and, with them, societal tensions), indigenous peoples have seen threats to their lands and livelihoods from some emission reduction schemes, scarce food-growing lands have sometimes been diverted for the production of biofuels, and massive infrastructure projects have resulted in the forced eviction and relocations of entire communities. Simply put, participatory, accountable, non-discriminatory and empowering development is more effective, more just, and, ultimately, more sustainable...Member States should commit to ensuring full coherence between efforts to advance the green economy, on the one hand, and their solemn human rights obligations on the other. They should recognize that all policies and measures adopted to advance sustainable development must be firmly grounded in, and respectful of, all internationally agreed human rights and fundamental freedoms, including the right to development...States should resolve to work to advance a *human rights-based approach* to the green economy, based on the principles of participation, accountability (at the national and international

levels), non-discrimination, empowerment, and the rule of law in green economy efforts, and to pursue a model of economic growth that is socially and environmentally sustainable, just and equitable, and respectful of all human rights.²³

Summarily, the HRBA seeks to mainstream five inter-connected human rights norms and principles into decision-making: access to information; participation and inclusion; accountability and rule of law; equality and non-discrimination; and access to justice.²⁴ Through the HRBA, procedural human rights are harmonized and integrated into policies and project activities, thereby giving citizens a basis to for demanding enforcement.²⁵

The HRBA represents a shift from a needs-based approach to an approach that requires governments and project proponents to consider the impact of a particular project on the existing human rights. It integrates human rights safeguards into project plans and implementation.²⁶ The HRBA identifies rights-holders and their entitlements as well as corresponding duty-bearers and their obligations. The HRBA then works towards strengthening the capacities of rights-holders to make their claims, and of duty-bearers to meet their obligations.²⁷ Furthermore, the HRBA provides a legal framework for citizens to demand human rights recognition, fulfillment and protection in resource utilization. It provides a process-based framework through which the human rights of the public could be protected in resource extraction projects.²⁸

Practically, this approach means that existing resource regimes would be reformed to include elements of participation, accountability, equality and non-discrimination, access to information, and access to justice.²⁹ It would provide a threshold that would require governments and project proponents to demonstrate that these elements have been complied with and guaranteed to citizens in project planning and execution. It would also include establishing complaint mechanisms and procedures for stakeholders or private individuals whose human rights have been infringed upon to seek redress, to block the approval of extraction projects, or to seek the review of already approved projects.³⁰

Though not legally binding, the *John Ruggie Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework* provides normative guidance on how human rights requirements can be framed and integrated into resource governance.³¹ The Ruggie Framework encourages business enterprises to carry out ‘human rights due diligence’ or a ‘human rights risk assessment’ before executing projects, to demonstrate that human rights are respected.³² This would include assessing actual and potential human rights impacts, integrating and acting upon the findings, tracking responses, communicating how impacts are addressed, and putting in place processes to enable the remediation of adverse impacts.³³

In an attempt to reflect and recognize this growing integration of the HRBA into legal regimes on natural resource utilization in Africa, the African Commission on Human and Peoples’ Rights

("African Commission"), adopted a *Resolution on a Human Rights-Based Approach to Natural Resources Governance* ("the 2012 African Resolution") at its 51st Ordinary Session held from 18 April to 2 May 2012 in Banjul, Gambia.³⁴ This resolution is arguably the most significant attempt so far by Governments in Africa to recognize, adopt, and mainstream human rights language into the development and use of natural resources. Amongst other things, it calls on government to ensure that respect for human rights in all matters of natural resources exploration, extraction, toxic waste management, development, management, and governance, in international cooperation, investment agreements and trade regulation prevails.³⁵ The overall aim of the resolution is to ensure a systemic integration of human rights into policies and legislation on resource utilization in Africa.³⁶

However, as commendable as this resolution is, a number of practical and implementation issues arguably arise with the nature and scope of this resolution; especially the weight attached to soft law instruments in African countries.³⁷ The aim of this Article is to examine the scope and content of this resolution and discuss its potential for serving as a normative guidance on which countries may build more robust local enactments including regional arrangements to ensure responsible resource development in Africa.

This Article identifies practical paradoxes and on-the-ground challenges that such a resolution may face. Apart from substantive issues of international law, this article examines practical questions such as institutional capacity, resource allocation, and administrative human capacity that have to be addressed to move the idea of mainstreaming human rights issues into resource development in Africa from pious theoretical wishes to reality.

This Article includes three parts. Part one examines the nature and scope of the 2012 African Resolution to identify the key requirements and elements under the HRBA for resource utilization in Africa. Part two draws out the key practical and implementation challenges that proposals in Africa may face. This section discusses how practical questions such as institutional capacity, resource allocation, and administrative human capacity

would have to be pragmatically addressed if this approach is to stand a chance of success in Africa. Part three concludes by discussing legal and policy frameworks for addressing identified practical and on the ground challenges.

NATURE AND SCOPE OF THE 2012 AFRICAN RESOLUTION

The 2012 African Resolution was adopted in the context of the 2012 United Nations Conference on Sustainable Development ("Rio+20 Conference"), which called on countries to recognize the interrelationship between sustainable develop-

ment and human rights during mining and extraction.³⁸ A rights-based approach to sustainable development was recognized at the Rio+20 Conference as an approach that guarantees the achievement of the interlinked objectives of Rio+20: poverty eradication, transforming unsustainable consumption and production, and protecting natural resources by ensuring rights to local autonomy and rights to participation in natural resource management.³⁹

Prior to the Rio+20 Conference, the High Level Expert Meeting on the "New Future of Human Rights and Environment: Moving the Global Agenda Forward" had canvassed the need to develop holistic policy frameworks to ensure that efforts to encourage sustainable development recognise the relationship between

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human rights and the environment, ensuring their mutual benefits are realised.⁴⁰ The Expert Meeting recognized that the protection of the environment and the promotion of human rights are increasingly intertwined, and as such must be understood as complementary goals, and part of the fundamental pillars of sustainable development.⁴¹ The outcome of this meeting was developed as a proposal to the Rio+20 Conference to consider the linkages between sustainable development and human rights and to provide guidance on how these linkages may be better recognized in resource development through multilevel governance.⁴²

As the Expert committee rightly noted, the linkages between sustainable development, human rights, and the environment are generally established. In America, for example, the *Additional Protocol to the American Human Rights Convention on Economic*

and Social Rights, proclaimed both the rights of individuals and the duty of governments to protect and respect human rights in the pursuit of development.⁴³ In Europe, the *UNECE Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters* (“Aarhus Convention”), whose signatories were primarily from Europe and Central Asia, recognizes the need for participation, access to information, and access to justice for the adequate protection of the environment and the enjoyment of basic human rights, including the right to life itself.⁴⁴ The *2004 Revised Arab Charter on Human Rights* also enjoins States to take all necessary measures commensurate with their resources to guarantee the right to environmental protection and participatory development.⁴⁵

In Africa, Article 24 of the 1987 African Charter on Human and Peoples’ Rights (“African Charter”) provides that “all peoples shall have the right to a general satisfactory environment favourable to their development”.⁴⁶ The African Charter however fails to provide practical and expansive guidelines on how respect for human rights could be recognized in resource utilization and governance.⁴⁷ Unlike the Aarhus Convention, which contains expansive provisions on the elements of participatory development, access to justice, access to information, and accountability in resource development,⁴⁸ the African Charter is arguably lacking in terms of details regarding how human rights protection may be mainstreamed into resource development and utilization.⁴⁹ As such, resource development projects in Africa for many years have been faced with several problems relating to lack of transparency, low-level accountability, and lack of respect for the human rights of indigenous communities where resource extraction activities take place. The 2012 African Resolution adopted by African leaders seeks to fill this gap in the African Charter.

The 2012 African Resolution calls on State Parties to the African Charter to respect human rights in all matters relating to natural resources governance.⁵⁰ The Resolution highlights the interdependence of human rights and development recalling articles Twenty, Twenty-one and Twenty-four of the African Charter which protect peoples’ right to freely determine their political status and pursue their economic and social development according to the policy they have freely chosen, their right to freely dispose of their natural resources, and their right to a satisfactory environment respectively.⁵¹ The Resolution emphasizes the need to implement previous international law declarations such as Principle One and Twenty-two of the 1992 Rio Declaration. These principles focus on human entitlement to a healthy and productive life in harmony with nature and the need to ensure that local communities have a vital role in environmental management and development.⁵²

Noting the recent and rapid progress in defining minimum international standards with respect to natural resources, the resolution observed and emphasized how current natural resource governance is gravely hampered by ill-planned development, misappropriation of land, corruption, bad governance, and prevailing insecurities.⁵³ The resolution also focused on how communities in Africa continue to suffer disproportionately from

human rights abuses in their struggle to assert their customary rights to access and control various resources, including land, minerals, forestry, and fishing.⁵⁴

To address these problems of resource mismanagement, corruption, human rights violations associated with resource utilization, and inadequate stakeholder engagement and participation, the Resolution calls upon states to adopt a human rights-based approach to natural resource governance.⁵⁵ The states are asked to ensure respect for human rights in all matters of natural resource exploration, extraction, toxic waste management, development, management, and governance: in international cooperation, investment agreements and trade regulation prevails.⁵⁶

SUMMARY OF PROPOSALS

In summary, the 2012 African Resolution calls on countries to carry out four important action plans aimed at integrating human rights principles and standards into national legal frameworks on resource development. These action plans are: establishing a rights-based legal framework, strengthening regional efforts on resource governance, establishing monitoring and accountability mechanisms, and developing a human rights impact assessment framework.

ESTABLISH RIGHTS-BASED LEGAL FRAMEWORK

The 2012 African Resolution calls on African countries to “establish a clear legal framework for sustainable development as it impacts on natural resources, in particular water, that would make the realization of human rights a prerequisite for sustainability.”⁵⁷ This aspect of the resolution arguably identifies that developing conceptual formulations and standards on human rights based approaches is only a part of the task in Africa. However, other fundamental questions arguably relate to the mechanisms to be put in place to carry through those standards: how the concepts would be operationalized and translated into concrete action plans; how progress would be monitored and evaluated; and what further action would be taken in the case of unsatisfactory progress? Therefore, there is a need for a legal framework that sets out the modalities for enforcing the linkages between human rights and resource governance.

To mainstream human rights norms into resource governance in Africa, it is arguably important for countries to develop project approval frameworks that would ensure that resource extraction projects, actions, or measures that do not guarantee or satisfy the requirements of accountability, access to information, participation, equality and access to justice would not be approved no matter the economic significance or relevance. In concrete terms, this framework would provide rights based modalities for project approval and the human rights conditions that must be met before projects can be approved. The framework would establish a minimum human rights threshold for project approval. This legal threshold would lay down the levels of protection for individual human rights, which would be regarded as the minimum acceptable outcome under a given project or policy scenario.⁵⁸ The legal framework should also set out modalities that contain this threshold levels that should not be breached during resource extraction activities or projects.

Strengthen Regional Efforts on Resource Governance

Secondly, the 2012 African Resolution calls on African countries to:

Strengthen regional efforts, such as the 2009 ECOWAS Directive on Mining and the African Commission's Working Group on Extractive Industries and Human Rights, to promote natural resources legislation that respect human rights of all and require transparent, maximum and effective community participation in a) decision-making about, b) prioritisation and scale of, and c) benefits from any development on their land or other resources or that affects them in any substantial way.⁵⁹

The 2012 Resolution aims to harmonize, strengthen, and build on previous efforts by African Governments to introduce human rights concepts into resource governance. There are three key prior important regional efforts in Africa that serve as the foundation for the 2012 Resolution: the 2009

ECOWAS Directive on the Harmonization of Guiding Principles and Policies in the Mining Sector ("ECOWAS Directive"), Declarations of the Pan African Parliament, and the 2009 African Mining Vision.⁶⁰ The 2012 Resolution aims to bring together these previous efforts to ensure coherence, coordination and consistency.⁶¹

First, *The 2009 ECOWAS Directive*, which is applicable to fifteen West African countries that are members of the Economic Community of West African States ("ECOWAS"),⁶² emphasizes the importance of stakeholder engagements and consultation in resource development.⁶³ The ECOWAS Directive sets out guiding principles for harmonizing mining regulatory regimes across member states and is binding on ECOWAS members.⁶⁴ It called on member States to respect the free prior informed consents of local communities that face potential impacts from mining, hydrocarbon development, or natural resource projects more broadly.⁶⁵

The ECOWAS Directive urges countries to ensure free prior informed consents ("FPIC") when communities will be affected by mineral or hydrocarbon projects.⁶⁶ Specifically, it calls on companies to obtain free, prior, and informed consent of local communities before exploration begins and prior to each subsequent phase of mining and post-mining operations.⁶⁷ The ECOWAS Directive emphasizes the importance of applying FPIC throughout the project lifecycle—from pre-mining, mining operations, closing and post-closure periods. Stakeholders that will be affected by a project must be consulted freely and prior to the approval and design of such mineral development

project.⁶⁸ Furthermore, the directive defines "mineral" to include not only industrial minerals, but also petroleum, thereby making the directive applicable to both the solid mineral and oil and gas sectors.⁶⁹ The ECOWAS Directive therefore arguably remains the most significant FPIC policy document in Africa. It aims to improve transparency and stakeholder consultation and engagement in mineral policy formulation, implementation, and decision-making process. It also establishes guidelines for countries to mitigate to the extent possible the negative impacts of resource development on the environment and the local communities, in line with international best practices.⁷⁰

However, the effects and scope of the ECOWAS Directive are restricted as it applies only to fifteen countries in a conti-

ment of about fifty-four countries.⁷¹ Furthermore it provides wide discretions to member States to determine how they will meet the objectives of the Directive.⁷² The ECOWAS Directive also focuses extensively on FPIC and fails to speak to other human rights concerns facing the resource sector in Africa such as marginalization of

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women from decision making processes, governmental corruption and lack of transparency, forceful acquisition of indigenous lands, and inadequate compensation.

Some of these human rights issues have been highlighted by the *Pan African Parliament*, which has increasingly promoted regional efforts aimed at addressing human rights concerns in resource utilization in Africa.⁷³ The Pan-African Parliament is the African Union's legislative body.⁷⁴ It has advisory and consultative powers to examine, discuss, or express an opinion on any matter, either on its own initiative or at the request of the Assembly or other policy organs and make any recommendations it may deem fit relating to, *inter alia*, matters pertaining to respect of human rights.⁷⁵ In its Sixth Ordinary Session, held in Addis Ababa, Ethiopia (January 2012), the Pan-African Parliament expressed concern over the rise of large-scale land acquisitions and the impact of domestic and foreign investment in land, water, and related natural resources.⁷⁶

The Pan-African Parliament called on states to “[ensure] effective consultations with local communities and various people affected by investment projects and [ensure] that any investment is approved through free, prior, and informed consent of affected communities.”⁷⁷ The recommendations also call for enhanced land certification and registration systems that take into account pastoralist, women's, and communal rights in advance of investment.⁷⁸ The Pan-African Parliament has therefore found that human rights issues in resource extraction projects agitate imbalanced power relations in numerous dynamics including: men and women, local governments and the

governed, elders and the young, rich and the poor, indigenes and non-indigenes, educated and non-educated.⁷⁹ The Parliament has also identified how these power relations create the right atmosphere for land grabs and resource-based conflicts.⁸⁰ This expansive approach of the Pan-African Parliament calls for solutions beyond FPIC. A significant demerit, however, is that the Pan-African Parliament is yet to attain full legislative powers, as such can only advise and speak on these issues and cannot effect any legislative or executive change.⁸¹

Attempts to attain executive and binding policy shift in mainstreaming human rights protection into resource governance took the center stage at the 2009 African Union Summit of African Heads of State, where African Heads of States adopted

The 2009 African Mining Vision ("Vision Report").⁸²

The Vision Report highlights human rights challenges that face mining projects, particularly inadequate stakeholder engagement and consultation in resource extraction, along with the social and environmental side effects of resource extraction.⁸³ It calls on countries to develop a "new social contract for mining" that would balance local benefits with national poverty-alleviation efforts.⁸⁴ The Vision Report encourages African countries to develop new legal instruments to facilitate local community participation, multi-stakeholder partnerships of government, private sector, and local communities, and to ensure broad participation in the decision making, monitoring and evaluation of mineral projects.⁸⁵ The framework describes public participation not just as consultation, information sharing, and dispute resolution, but also as "participatory decision making."⁸⁶

In December 2011, the African Union Conference of Ministers responsible for mineral resources adopted an Action Plan to implement the Africa Mining Vision- *The Addis Ababa Declaration on Sustainable Africa Extractive Industry: From Vision to Action* ("Addis Ababa Declaration").⁸⁷ The Addis Ababa Declaration calls on African States to "strengthen transparency, accountability, and access to information, improve public participation and provide capacity building programmes for local communities, civil society and the legislature in order to provide effective oversight that will create a well-governed mining sector that is inclusive and appreciated by stakeholders."⁸⁸ The Addis Ababa Declaration calls on all African Union member states "to create a mineral sector that is environmentally

sustainable and is socially responsible through strengthened environmental and social impact assessments, developing and adopting common environmental, health and safety standards, as well as through monitoring the implementation of environmental and social funds."⁸⁹

Summarily, previous efforts to the 2012 African Resolution advocate for the integration of five inter-connected human rights norms and principles into decision-making: access to information, participation and inclusion, accountability, equality and non-discrimination, and access to justice.⁹⁰ By referencing these previous regional attempts to mainstream human rights language into the resource sector in Africa, the 2012 African Resolution hopes to recognize the emergence and growing relevance of human rights in African resource governance and to ensure that emerging legal and policy frameworks harmonize and integrate these previous efforts. The practical challenge in many African countries is arguably not the absence of regulation, but the proliferation of several divergent and competing regulatory efforts and structures scattered across different documents without coordination and harmonization.

The 2012 African Resolution serves as an umbrella resolution aimed at harmonizing the three cardinal objectives of the 2009 ECOWAS Directive, Declarations of the Pan African Parliament, and the 2009 African Mining Vision.

These objectives are increased stakeholder engagement in decision-making about prioritisation and scale of benefits from any development on their land or other resources that may affect them in any substantial way. The 2012 African Resolution also expands its scope beyond West Africa and furthers the discussions beyond FPIC issues.⁹¹ It explicitly identifies other human rights challenges that threaten the sustainability of resource utilization in African countries most especially the lack of effective remedies, lack of fair compensation, and respect for the rights of indigenous peoples as well as the rights of women.⁹²

ESTABLISH MONITORING AND ACCOUNTABILITY MECHANISMS

Thirdly, the 2012 African Resolution calls on African countries to: "set up independent monitoring and accountability mechanisms that ensure that human rights are justiciable and extractive industries and investors legally accountable in the country hosting their activities and in the country of legal domicile."⁹³ Accountability focuses on the need for policy makers to

“The practical challenge in many African countries is arguably not the absence of regulation, but the proliferation of several divergent and competing regulatory efforts and structures scattered across different documents without coordination and harmonization.”

demonstrate that resource development has been conducted in accordance with human rights and to report fairly and accurately on performance results vis-à-vis mandated roles and/or plans.⁹⁴ It is the obligation to review, monitor, and enforce compliance with human rights standards and obligations in the design and execution of resource development projects.⁹⁵ It encompasses the structural conditions, the processes, and the indicators/outcomes through which the practical impacts of a resource development project on the human rights of the public are reviewed and monitored.⁹⁶

This element encourages African countries to develop and establish rules and safeguards that prevent human rights violations in resource development, and to establish relevant institutions to monitor and enforce such rules. Human rights monitoring may include establishing special rapporteurs or expert committees and working groups to gather information on projects and to provide recommendations when there is violation.⁹⁷ Apart from establishing such review structures, part of the task is to ensure their accessibility and independence.⁹⁸ Such review teams must therefore be equipped with the resources to perform spot assessments, fact-findings and investigations, such that they could gather first-hand information on the true impacts of a project on the human rights of host communities.

HUMAN RIGHTS IMPACT ASSESSMENTS

The fourth element of the HRBA advocated by the 2012 African Resolution is for countries to ensure a number of fundamental rights starting with independent social and human rights impact assessments that guarantee free prior informed consent.⁹⁹ The HRBA also ensures: “effective remedies; fair compensation; women, indigenous, and customary people’s rights; environmental impact assessments; impact on community existence including livelihoods, local governance structures and culture, and ensuring public participation; protection of the individuals in the informal sector; and economic, cultural and social rights.”¹⁰⁰

This minimum standard would require countries to flag the likely impact of a resource development project on fundamental human rights and to demonstrate or describe the efforts put in place to mitigate or avoid these results.¹⁰¹ This would include “assessing actual and potential human rights impacts, integrating and acting upon the findings, tracking responses, and communicating how impacts are addressed.”¹⁰² Through a Human Rights Impact Assessment (“HRIA”) national authorities could systematically identify, predict, and respond to the potential human rights impact of a resource development project or policy.¹⁰³ As Mary Robinson, the former Human Right Commissioner rightly notes:

In each situation we confront, a rights-based approach requires us to ask: what is the content of the right? Who are the human rights claim-holders? Who are the corresponding duty-bearers? Are claim-holders and duty-bearers able to claim their rights and fulfill their responsibilities? If not, how can we help them to do so? This is the heart of a human rights based approach.¹⁰⁴

Agreeably, the HRIA raises four key questions. First, what human rights concern does this project raise or could it raise? What groups are likely to be affected by these human rights concerns? What specific rights are affected by this project or policy? And finally, what efforts would be taken to address these issues in the process of project design and implementation? An HRIA would provide clear and comprehensive answers to these questions to avoid any element of surprise or secrecy in project implementation. The HRIA goes beyond only evaluations or human rights auditing in that, it identifies the areas of overlap between human rights and a project, and also identifies holistic solutions and methods for avoiding the identified human rights impacts.¹⁰⁵

HRIA would complement other impact assessments such as the EIA and the social impact assessment. Its main difference is that it would be framed by appropriate international human rights principles and conventions to demonstrate how a project could affect the recognised human rights of stakeholders and how best to directly provide a leeway to those peoples whose rights may be at risk. A HRIA would arguably help to produce comprehensive analyses that show a direct link between a project activity and how it might affect human rights. It takes a project-by-project approach to aid a quick understanding of the current situation and issues and the human rights impact both now and in the future. It would also help to shed light on measures that could be taken to avoid any anticipated impact.

HRIsAs would also require project proponents to demonstrate the fair distribution of projected risks. Arguably, HRIsAs would help to assess the implications of projects affecting low income people, the representation afforded to such categories in decision-making, and ways to protect the interests of the marginalized through project re-design or alternative mitigation plans. It would make it compulsory for project proponents to demonstrate that a particular section of the society is not exceptionally disadvantaged by a project before said project could be approved. By developing concrete risk assessment procedures to ensure better characterization of risk across populations, communities, or geographic areas, measures would then be put in place to reduce high concentrations of risk among specific population groups.

PARADOXES AND CHALLENGES OF IMPLEMENTING THE HRBA TO RESOURCE DEVELOPMENT IN AFRICA

The 2012 Resolution is undoubtedly an essential first step and a strong proactive effort aimed at ensuring a systemic integration of human rights issues in resource utilization in Africa. It establishes key action points through which African countries may integrate human rights standards into legal regimes on resource development.¹⁰⁶ It emphasizes the importance of an integrated assessment to identify the human rights impacts, the impact on social and environmental issues, and the overall risks of projects.¹⁰⁷ It also emphasises the importance of effective community engagement through disclosure of project-related information, consultation with local communities on matters that directly affect them, and the need for project proponents to

manage and disclose the human rights concerns, as well as the social and environmental performance throughout the life of the project.¹⁰⁸ The resolution is undoubtedly a significant effort by African States to establish a clear legal threshold and guidelines that resource development projects and investments must meet before they could be approved or executed.

However, despite the huge promise of the HRBA as a holistic policy framework for mainstreaming human rights safeguards into resource development in Africa, a number of practical and implementation issues arise with the nature and scope of this resolution.¹⁰⁹ This section of the Article will discuss three main practical questions: institutional capacity, resource allocation, and political will, that must be addressed to move the idea of mainstreaming human rights issues into resource development in Africa from pious theoretical wishes to reality.

INSTITUTIONAL CAPACITY

The HRBA framework proposed by the 2012 Resolution advocates for the reflection of human rights norms in legal regimes on resource development such as mining and oil and gas development laws. This could include the expansion of resource development regimes human rights provisions, the enlargement of governance structures to provide for a human rights assessment and review of mitigation projects. These are

radical transformations that could expand the scope of activities of energy and oil and gas entities into the uncharted areas of interpreting human rights and making decisions based on the human right impacts of a project. Offenheiser and Holcombe posed this question when they wrote:

Mainstreaming a rights-based approach into our organizations is a complex transition. It cannot simply be decreed and implemented. If sound blueprints are to be drawn from this vision, an organization needs to deepen its understanding of the philosophical principles involved and how they apply on the ground in local development contexts.¹¹⁰

The question therefore is whether entities such as energy ministries, boards, and departments that are comprised mainly of geologists, engineers, energy practitioners, and administrators have the capacity to accommodate such a complex reform.¹¹¹ Put simply, do geologists, environmentalists, scientists and outsiders to human rights have the capacity to mainstream human rights?¹¹² The UNDP defines capacity as the ability of

individuals, institutions, and societies to “perform functions, solve problems, and set and achieve objectives” in a sustainable manner.¹¹³ Adopting this definition, the question is whether these bodies have the abilities and resources to perform human rights-related functions.

This question was not considered or addressed by the resolution.¹¹⁴ Lack of proper capacity and training to implement policies has been one of the most significant banes of previous policy prescriptions on sustainable resource governance in Africa.¹¹⁵ For any country to successfully implement the HRBA in the resource sector there must be focused examination and study of the nature and level of capacity development and training required to reform resource governance institutions so that they understand and apply human rights standards.¹¹⁶ For

example, administrators that have not acquired direct and extensive training on human rights could be enlisted for courses and advanced human rights training. This would provide the basic knowledge necessary to understand and handle human rights issues arising within the scope of their work.

QUESTION OF RESOURCES

Similar to the question of expertise and capacity is the question of resources. The nature of transformation in governance structures advocated under the

HRBA comes with high resource implications. For example, the expansion of the current institutions, cost of staffing, training, and program funding are implementation issues that need to be addressed.¹¹⁷ Due to limited resources and competing budget priorities, the rights based approach, which requires a radical transformation may run into implementation problems.¹¹⁸

The question of available resources for policy implementation is always a reoccurring one in the African context. In Nigeria for example, decades of pollution, inadequate stakeholder engagement, and restiveness in the oil producing Niger Delta region is not due to lack of policies and legislation that aim to address the problem, but mainly the absence of sufficient financial resources to drive implementation.¹¹⁹ Providing social and health amenities, building new schools for locals, and organizing community engagement initiatives have come with inherently expensive costs that have made practical implementation impracticable.¹²⁰ It is therefore important to examine how human rights reforms in the resource development sectors would be implemented in light of exceeding demands for limited resources in many African countries. There is a need to examine

“The resolution is undoubtedly a significant effort by African States to establish a clear legal threshold and guidelines that resource development projects and investments must meet before they could be approved or executed.”

and recommend cost-saving measures to implement rights-based initiatives at the lowest cost possible.

To reduce the cost of a human rights based approach, the United Nations emphasizes an approach that builds on existing capacities and resources to keep costs down.¹²¹ Their emphasis here should be on forging strong inter-agency linkages and partnerships to draw on available resources of existing agencies and bodies to reduce the costs of implementation and adopting cost-saving options such as using web conferencing for training rather than in-person training in order to keep costs down.¹²²

POLITICAL WILL

The political will question is a significant question that will go a long way to determine whether the idea of mainstreaming human rights into resource development in Africa will transcend from pious theoretical wishes to reality. Questions of political will relate firstly to the weight attached to resolutions and soft law instruments in international law and in many African countries.¹²³ While some have argued that soft law is not law, some question the importance of soft law in general because it does not create binding legal obligations.¹²⁴ This article does not intend to delve extensively into these debates. Instead, it aligns itself with the view that even though resolutions adopted by the African Union are not international treaties and therefore do not have legally binding force, they have important legal functions and normative effects to the extent that they often elaborate and interpret norms.¹²⁵ Resolutions provide interpretations and guidelines on how a country should apply a treaty in order to fulfill its international obligations.¹²⁶ Soft law instruments play significant roles in the development and evolution of international law.¹²⁷ This Article agrees with Higgins' observation that the passing of binding decisions by an international body is not the only way in which the development of the law occurs.¹²⁸ Legal consequences can also flow from acts which are not, in the formal sense, 'binding'.¹²⁹ Not only do soft law instruments provide flexible guidelines on how to tackle emerging concerns, they provide a template on how international policies can be implemented, they and serve as forbearers to binding hard law instruments in the future.¹³⁰ The 2012 African Resolution provides a normative guideline and template on which African governments can frame and develop efforts to integrate the protection, respect, and fulfillment of their existing international human rights obligations with the utilization of natural resources. As highlighted above, the 2012 African Resolution suggests a full range of actions that could be taken at the national level to reinforce and integrate human rights of local communities during resource extraction activities and projects.¹³¹

A second aspect of the political will question is whether African countries will generally agree to implement and adopt a rights-based reform that could holistically empower a large section of the public to block resource development projects, to demand accountability, to request project information and to even challenge project decisions. In many African countries, regional or international declarations and even treaties will be recognized at the national level only after they are domesticated

and translated into local laws.¹³² Thus, to implement the 2012 African Resolution and the HRBA at the national level, the first step is for African countries to develop national master plans and legislation aimed at domesticating and translating the 2012 Resolution into binding legislation. This raises the question whether the reforms proposed by the 2012 Resolution will not be seen as an attempt to grant the public a cudgel with which to beat the State into submission during project approval processes, or to empower NGOs to habitually oppose resource development projects. These concerns are in fact reasonable, particularly the fear that NGOs and interest groups could capture and frustrate projects and plans through the proposed rights-based processes.¹³³

The answer to this political will question could depend, to a large extent, on whether African Governments view the reforms proposed in the 2012 African Resolution as a needless empowerment drive or as an opportunity for genuine reconsideration and change in the ways resource extraction activities are implemented. The latter reading is arguably the more sustainable one. Lack of political will by African policy leaders to implement transformative policies in the resource sector has sounded the death-knell on several policy prescriptions on sustainable resource governance. The prevalence of corruption, lack of transparency and low level of accountability often result in the blockage or frustration of international and regional policies aimed at transforming business as usual models into more transparent, empowering, and accountable ones.¹³⁴

Without creating a rights-based atmosphere underpinned by respect for human rights, resource extraction projects will continue to be hampered by protests, sabotage and obstructions, as is currently the case in many African countries, making it nearly impossible for governments to access resources, execute projects, and obtain oil income.¹³⁵ African governments must therefore understand the importance of the rights-based notions canvassed by the 2012 African Resolution as an opportunity for a fresh start in the ways in which resource projects are designed, implemented, and executed. Human rights should not only come to the table when there is a protest or concern; human rights must be recognized and adopted by African governments as part of the rule of the game. By including human rights standards into resource extraction legislation, approval frameworks, plans, programmes, and policies, human rights issues will be better recognised and protected. Protecting human rights will arguably reduce the perennial conflicts between governments, international oil companies, stakeholders and local communities.

A rights-based reform of natural resource governance structures in Africa will also depend largely on the level of awareness that is created at the national level by civil societies and advocates on the need for action. Considering the nature of human rights problems generated by resource extraction projects, particularly the dislocations of people from ancestral lands and homes, it is important to raise awareness on why these reforms to extant approval processes are not only important, but also required. Laws and policies in Africa have been largely influenced by the ability of Non-Governmental Organisations

(“NGOs”) and environmental interest groups to raise awareness and put pressure on national governments, to effect change or reform.¹³⁶

CONCLUSION

The 2012 Resolution is so far the most ambitious attempt by African governments to integrate human rights language into legal and policy regimes on resource extraction in Africa. Though not legally binding, the Resolution encourages African governments to mainstream five inter-connected human rights norms and principles into decision-making related to natural resources governance: participation and inclusion, access to information, accountability and rule of law, equality and non-discrimination, and access to justice.¹³⁷ The Resolution provides normative guidance on which African countries may build more robust local legislation and even regional arrangements to ensure responsible resource development and respect for human rights in all matters of natural resources exploration, extraction, toxic waste management, development, management supervision and governance, in international cooperatives, investment agreements and trade regulations prevails.¹³⁸

However, practical and implementation questions such as the question of capacity, resource availability and political will have to be addressed to move the idea of mainstreaming human rights issues into resource development in Africa from pious theoretical wishes to reality. For the 2012 Resolution to bring about any change, there is a need for an evolved understanding of the basis

and importance of the resolution. Primarily, it is important for African leaders to understand that the 2012 Resolution does not necessarily introduce new obligations that many States do not already have under several international human rights treaties. The 2012 Resolution builds on existing human rights obligations under international law, which virtually all African countries already agreed to protect, respect and fulfil.¹³⁹ As such, the 2012 Resolution will not grant new or revolutionary rights that NGOs and the public do not already possess. The 2012 Resolution has

“Protecting human rights will arguably reduce the perennial conflicts between governments, international oil companies, stakeholders and local communities.”

enormous potentials is to provide an opportunity for African countries to incorporate these already existing obligations and considerations while planning and designing resource development projects, in order to prevent violations and tensions. Through the framework proposed by the resolution, African countries could meet their obligations under both

human rights instruments and resource development regimes. It provides an avenue to package a collection of international obligations under both human rights treaties and resource development regimes into one toolkit to enhance implementation.

This evolved understanding of the reforms proposed would foster a balanced recognition of why it is important to incorporate human rights obligations into resource development legislation, programs and projects. It will also provide an opportunity for governments to work with stakeholders to anticipate, address, and prevent human rights problems that resource development projects could generate, so that development projects do not necessarily have to result in petitions, protests, kidnapping, maiming, and violence.



ENDNOTES: THE EMERGENCE OF RIGHTS-BASED APPROACHES TO RESOURCE GOVERNANCE IN AFRICA: FALSE START OR NEW DAWN?

¹ See BRITISH PETROLEUM, BP STATISTICAL REVIEW OF WORLD ENERGY JUNE 2014, 9 (2014) [hereinafter BRITISH PETROLEUM], available at <http://www.bp.com/content/dam/bp/pdf/Energy-economics/statistical-review-2014/BP-statistical-review-of-world-energy-2014-full-report.pdf>; see also AFRI. DEV. BANK AND THE AFRI. UNION, OIL AND GAS IN AFRICA, xxvii (July 2009) [hereinafter AFR. DEV. BANK], available at <http://www.afdb.org/fileadmin/uploads/afdb/Documents/Publications/Oil%20and%20Gas%20in%20Africa.pdf>.

² See BRITISH PETROLEUM, *supra* note 1, at 9.

³ MBendi Information Services, *Oil and Gas in Africa*, <http://www.mbendi.com/indy/oil/af/p0005.htm> (last visited Apr. 15, 2015).

⁴ U.S. Energy Information Administration, *Oil and Natural Gas in Sub-Saharan Africa* (Aug. 2013), http://www.eia.gov/pressroom/presentations/howard_08012013.pdf.

⁵ INT'L STUDY GROUP REPORT ON AFRICA'S MINERAL REGIMES, MINERALS AND AFRICA'S DEVELOPMENT, 9 (Nov. 2011), available at http://www.uneca.org/sites/default/files/publications/mineral_africa_development_report_eng.pdf.

⁶ BRITISH PETROLEUM, *supra* note 1, at 7.

⁷ Michael Alexeev & Robert Conrad, *The Elusive Curse of Oil*, 5-7 (Aug. 2005), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=806224; Paul Stevens, *Resource Impact: Curse or Blessing? – A Literature Survey*, 9 J. OF ENERGY LIT. 3, 42 (June 2003), http://graduateinstitute.ch/files/live/sites/heid/files/sites/mia/users/Rachelle_Cloutier/public/International%20Energy/Stevens%20Resource%20Curse.pdf; see also Antonio M.A. Pedro, *Mainstreaming Mineral Wealth in Growth and Poverty Reduction Strategies*, Economic Commission for Africa, 2 <http://repository.uneca.org/bitstream/handle/10855/5565/Bib-39857.pdf?sequence=1>; AFR. DEV. BANK, *supra* note 1, at 46.

⁸ Seventy-five percent of the world's poorest countries are located in Africa. See The World Bank, *Poverty Headcount Ratio at \$2 a day (PPP) (% of Population)* (2015), <http://data.worldbank.org/indicator/SI.POV.2DAY?locations=AF> (displaying geographic areas with the percentage of the population living on less than two

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