

# **An Energy Justice Approach to Resolving the Conflict between the Development of Energy Access Projects and Human Rights Risks and Violations in Africa: Can a Balance be Struck?**

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# **An Energy Justice Approach to Resolving the Conflict between the Development of Energy Access Projects and Human Rights Risks and Violations in Africa: Can a Balance be Struck?**

## **Abstract**

This article addresses the potential widespread conflict between the development of energy access projects and human rights risks and violations in Africa. While this conflict is well known in the continent of Africa due largely to the need to increase energy access, solutions to tackle it are scarce. This article proposes using the United Nations (UN) Human Rights-Based Approach (HRBA) strategically to create a framework to conceptualize and solve such conflict. For this purpose, it analyses the effectiveness of the HRBA, whilst highlighting some of the challenges facing its implementation in African countries. The article concludes that until human rights risks and violations - considered to be ‘energy injustice’ concerns - are mainstreamed through the HRBA framework and its principles into the plan and development of energy access projects, the conflict will continue to rise and may become another dilemma similar to the environmental protection and energy development discourse in Africa.

**Keywords:** Energy justice; energy access; energy project; human rights-based approach; human rights; Africa

## **1. Introduction**

Over the years, there has been growing attention on how energy access can be provided to the world’s most vulnerable populations, especially in Africa.<sup>1</sup> Particularly, in the sub-Saharan region, energy access is said to be one of the world’s worst,<sup>2</sup> with 48 per cent of the share of the global population that lacks energy access residing in the region.<sup>3</sup> Presently, there is a global consensus that in addition to the use of fossil fuels, the challenges of poor economic

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<sup>1</sup> Presently, over 1.3 billion people lack energy access. (Report from the International Energy Agency). According to the World Energy Outlook, 2016, more than 95 per cent of those living without electricity and modern cooking fuels are in countries in sub-Saharan Africa and Asia. [www.worldenergyoutlook.org/resources/energydevelopment](http://www.worldenergyoutlook.org/resources/energydevelopment) accessed 10 April 2022.

<sup>2</sup> Antonio Castellano and others, *Brighter Africa: The Growth Potential of the sub-Saharan Electricity Sector* (2015) <http://www.mckinsey.com/industries/electric-power-and-natural-gas/our-insights/powering-africa> accessed 12 April 2022.

<sup>3</sup> Kabiru Salami and Adigun Agbaje, ‘Energy Struggles and City Life in Africa’ in Yinka Omorogbe and Ada Ordor, (eds) *Ending Africa’s Energy Deficit and the Law: Achieving Sustainable Energy for All in Africa* (Oxford University Press 2018) 291.

development and the impacts of climate change affecting developing countries could be addressed using renewable energy.<sup>4</sup> The provision of energy access through the development of renewable energy projects offers an opportunity for African countries to achieve the UN Sustainable Development Goals (SDGs),<sup>5</sup> but there are risks to human rights. For example, renewable energy projects in Senegal,<sup>6</sup> and energy exploration and production activities in the Niger Delta Region (NDR) of Nigeria leading to gas flaring,<sup>7</sup> are allegedly affecting the rights to health, life and subsistence of host communities among others.<sup>8</sup> Similarly, the Mambilla hydro-power project, considered to be one of Africa's largest with a cost estimate of US\$5.7 billion aims to expand electricity access in Nigeria.<sup>9</sup> It is reported that the proposed project which will potentially affect property rights, the right to subsistence through forced displacement and the right to health among others will include the construction of four dams and 700 kilometres of electricity transmission lines in Africa's most populous nation.<sup>10</sup> The same challenge is seen to be manifesting in the Karuma hydropower project currently being constructed on the river Nile in the Kiryandongo District of Uganda: the largest dam in the East African country which is affecting property rights through displacement of people in host communities.<sup>11</sup> Unfortunately, upon execution, such a project would require the use of a large body of water and land that local communities may be depending on for subsistence.<sup>12</sup> These episodes evince how the large infrastructure regularly needed to enable access to energy in the African continent, also regularly pose a threat to human rights.

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<sup>4</sup> Subhes C. Bhattacharyya, 'Renewable Energies and the Poor: Niche or Nexus' (2006) 34 (6) *Energy Policy* 659-663.

<sup>5</sup> UN General Assembly, Transforming our World: the 2030 Agenda for Sustainable Development, UN Resolution No. A/RES/70/1, 70/1. <[www.un.org/ga/search/view\\_doc.asp?symbol=A/RES/70/1](http://www.un.org/ga/search/view_doc.asp?symbol=A/RES/70/1)> accessed 2 April 2022.

<sup>6</sup> Giulia Franchi, Land Grabbing and Dodgy Transactions: The Case of Senhuile-Senethanol in Senegal, [www.tieproject.eu/wordpress/wp-content/uploads/tackling/tie1.pdf](http://www.tieproject.eu/wordpress/wp-content/uploads/tackling/tie1.pdf) accessed 30 August 2022.

<sup>7</sup> Social Development Integrated Centre, 'Sanction, Flames of Hell: Gas Flaring in the Niger Delta', available at [https://saction.org/wp-content/uploads/publications/flames\\_of\\_hell.pdf](https://saction.org/wp-content/uploads/publications/flames_of_hell.pdf) accessed 30 April 2022.

<sup>8</sup> Olubayo Oluduro, *Oil Exploitation and Human Rights Violations in Nigeria's Oil Producing Communities* (Intersentia 2014) 231.

<sup>9</sup> Damilola S. Olawuyi, 'Energy (and Human Rights) for All: Address Human Rights Risks in Energy Access Projects' in Raya Salter, Carmen C. Gonzalez and Elisabeth Kronk Warner (eds), *Energy Justice: U.S and International Perspectives* (Edward Edgar 2018) 74.

<sup>10</sup> Report that Nigeria Approves Construction of 3,050MW Mambilla Electricity Project at 5.7 billion Premium Times (September 4, 2017).

<sup>11</sup> Remington Fritz, 'Development-Induced Displacement in Kiryandongo District: A Case Study of the Karuma Hydroelectric Power Plant' (2021) Independent Study Project Collection 3404. [https://digitalcollections.sitedu/isp\\_collection/3404](https://digitalcollections.sitedu/isp_collection/3404) accessed 30 April 2022.

<sup>12</sup> United Nations Human Rights Office of the High Commissioner: Joint Statement on the Human Rights of People Affected by Dams and Other Water Infrastructure <https://www.ohchr.org/en/statements/2021/11/joint-statement-human-rights-people-affected-dams-and-other-water-infrastructure> accessed 22 September 2022.

We note that the challenges arising from the development of energy access projects have focused on the impacts on human rights after the completion of the project.<sup>13</sup> However, emerging debates are now paying attention on indirect impacts before commencement and during the implementation of the project, and how they hinder the enjoyment of other human rights.<sup>14</sup> In the course of developing energy access projects, there are concerns over gross human rights violations including forced displacement, compulsory acquisition of lands for project sites, loss of right to farm and subsistence, marginalisation and concentration of energy projects in poor and vulnerable communities, exclusion and lack of citizen's participation in project planning, governmental repression, lack of accountability on projects, absence of review and complaint mechanisms for victims of environmental pollution to obtain redress.<sup>15</sup>

This paper proposes to use a framework that balances two conflicting interests: first ensuring access to energy as a precondition for the fulfilment of socio-economic rights, and second ensuring the protection of other human rights in the development of energy access projects. The central thrust of the paper is that pursuing both the development of energy projects that allow wider access, as well as the protection of human rights, are compatible goals. Consequently, States must entrench tools that allow for their alignment. This paper makes the case for the recognition of access to energy as an autonomous human right and highlights the human rights risks attendant to energy transitions. It, therefore, repurposes the HRBA framework for this area of law and policy as a tool that could be used to ensure that there is a fair balance in resolving the conflict between the development of energy access projects and human rights risks and violations.

The contribution of this paper to energy scholarship and policy is to propose a framework to resolve the conflict between the provision of energy access as part of promoting socio-economic, civil and political rights on the one hand, and protecting the remaining bouquet of human rights on the other hand. This is done in the context of African States where the tension between economic development and protection of human and environmental rights is

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<sup>13</sup> United Nations Human Rights Office of the High Commissioner: Baseline Study on the Human Rights Impacts and Implications of Mega-Infrastructure Investment (2017) <https://www.ohchr.org/sites/default/files/2022-01/Baseline-Study-on-the-Human-Rights-Impacts-and-Implications-of-Mega-Infrastructure-Investment.pdf> accessed 25 September 2022

<sup>14</sup> Olawuyi, 'Energy (and Human Rights) (n 9).

<sup>15</sup> Business & Human Rights Resource Centre, 'Renewable Energy and Human Rights Benchmark: Key Findings from the Wind and Solar Sectors' [https://media.business-humanrights.org/media/documents/2021\\_Renewable\\_Energy\\_Benchmark\\_v5.pdf](https://media.business-humanrights.org/media/documents/2021_Renewable_Energy_Benchmark_v5.pdf) accessed 20 November 2022; See also Damilola S.Olawuyi, *The Human Rights-Based Approach to Carbon Finance* (Cambridge University Press 2016) 1-15.

prevalent. The significance of the paper lies in assessing how the applicability of the HRBA framework by policymakers in African States could help to resolve the conflict between the two competing interests. This approach would strengthen Africa's energy law and policy regime toward addressing the conflict arising from energy access projects and the protection of other human rights.

Following this introduction, section 2 outlines the need for energy access in Africa. Section 3 considers the extent to which the right to energy access is inextricably linked to the realisation of international human rights. Section 4 discusses the nature of the conflict between energy access projects and human rights risks and violations in Africa. Section 5 examines the HRBA framework as an energy justice approach that could be used to 'strike a balance' in resolving such conflict. Section 6 highlights some of the challenges to the implementation of the HRBA framework in Africa. Section 7 offers some concluding remarks.

## **2. Need for Energy Access in Africa**

The need for increased energy access has gained significant attention following the adoption of the UN SDGs, which under Goal 7 proposes access to affordable, reliable, sustainable, and modern energy for all.<sup>16</sup> This strengthens the argument that energy has a place within the human rights framework.<sup>17</sup> The term 'energy access' describes access to benefits to be derived by people from an energy system that comprises energy supply and the end-use technologies that convert the energy derived from the particular energy carrier (crude oil, natural gas, the sun, wind, and water).<sup>18</sup> This implies that the provision of significant energy access could lead to increased activity and productivity which contributes to higher Gross Domestic Product (GDP) and in turn makes available capital and resources.<sup>19</sup> Conversely, lack of energy access exacerbates other social challenges, such as poverty, food scarcity, inadequate access to clean water, poor health, stunted economic growth, and climate change.<sup>20</sup>

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<sup>16</sup> UN General Assembly, Transforming the world: the 2030 Agenda for Sustainable Development, UN Resolution No. A/RES/70/1, 70/1 <[www.un.org/ga/search/view\\_doc.asp?symbol=A/RES/70/1](http://www.un.org/ga/search/view_doc.asp?symbol=A/RES/70/1)> accessed 1 April 2022.

<sup>17</sup> Adrian Bradbrook, Judith Gardam and Monique Cormier, "A Human Dimension to the Energy Debate: Access to Modern Energy Services" (2008) 26 (4) *Journal of Energy and Natural Resources Law*, 526-552, 539.

<sup>18</sup> Vijay Modi, Susan McDade, Dominique Lallemond, and Jamal Saghir, *Energy Services for the Millennium Development Goals* (2005), available at <[http://www.unmilleniumproject.org/documnts/MP\\_Energy\\_Low\\_Res.pdf](http://www.unmilleniumproject.org/documnts/MP_Energy_Low_Res.pdf)> accessed 20 March 2022.

<sup>19</sup> Maansi Verma, 'Achieving Redistributive Energy Justice: A Critical Analysis of Energy Policies of India' in Usha Tandon, (ed) *Energy Law and Policy* (Oxford University Press 2018) 379.

<sup>20</sup> International Energy Agency, *Modern Energy for All*, in *World Energy Outlook 2016*, <[www.worldenergyoutlook.org/resources/energydevelopment/](http://www.worldenergyoutlook.org/resources/energydevelopment/)> accessed 22 February 2022.

Particularly in Africa, energy is a scarcer commodity than in other continents of the world.<sup>21</sup> We note that 15 per cent of the world's population resides in Africa, yet they represent only 3 per cent of global electricity consumption.<sup>22</sup> The annual per capita consumption of electricity is 518KWh in sub-Saharan Africa: this is the same amount of electricity used by just one individual in the Organisation for Economic Cooperation and Development countries in just 25 days.<sup>23</sup> It is noteworthy to mention that the provision of energy access in Africa has only reached the wealthy, urban, middle class and commercial sectors, and has bypassed the large rural populations and urban poor.<sup>24</sup> According to the Forum of Energy Ministers in Africa, it is reported that most agricultural activities in the continent, particularly in rural areas, still rely on human beings and animals for energy input.<sup>25</sup> Without doubts, there are significant improvements that could be gained from the development of key energy access projects in Africa as its absence could continue to slow down the economic growth of the continent, and its participation in the modern global economy already remains marginal.<sup>26</sup>

Presently, insufficient energy access in the continent of Africa remains a major hindrance to the fulfilment of human rights and the economic growth and development of the continent. We note that one-fifth of the world's population – that is about 1.4 billion - lack access to energy and twice as many still rely on the traditional use of biomass for cooking.<sup>27</sup> Unfortunately, of these energy-poor people lacking access to energy and services, there are about 1.1 billion lacking electricity and 1.9 billion without clean cooking fuels who reside in Africa and South Asia.<sup>28</sup> Reports show that most parts of the African continent are still in the dark after nightfall

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<sup>21</sup> Ziviayi Chiguvare and Helvi Ileka, 'Challenges and Opportunities for Increased Energy Access in Sub-Saharan, With Special Reference to Namibia' in Oliver Ruppel and Bernd Althusman (eds), *Perspectives on Energy Security and Renewable Energies in sub-Saharan Africa: Practical Opportunities and Regulatory Challenges* (Macmillan Education Namibia 2016) 22.

<sup>22</sup> *ibid.*

<sup>23</sup> Earl Cook, *Man, Energy and Society*, (1976) San Francisco, W.H. Freeman.

<sup>24</sup> Fact Sheet: The World Bank and Energy in Africa. <<http://web.worldbank.org/WBSITE/EXTERNAL/COUNTRIES/AFRICAEXT/0..contentMDK:21935594~pagePK:146736~piPK:146830~theSitePK:258644,00.html>> accessed 8 March 2022.

<sup>25</sup> The Forum of Energy Ministers of Africa, 2006, Energy and the Millennium Development Goals in Africa, Washington D.C., The World Bank, <[http://siteresources.worldbank.org/EXTAFRREGTOPENERGY/Resources/Energy\\_and\\_MillenniumFEMA\\_Report.pdf](http://siteresources.worldbank.org/EXTAFRREGTOPENERGY/Resources/Energy_and_MillenniumFEMA_Report.pdf)> accessed 12 March 2022.

<sup>26</sup> Chiguvare and Ileka (n 21) 21.

<sup>27</sup> World Energy Outlook, Global Status of Modern Energy Access <<http://www.worldenergyoutlook.org>> accessed 2 March 2022.

<sup>28</sup> Global Tracking Framework: Executive Summary, <<http://documents.worldbank.org/curated/en/250491468182351466/Executive-summary>> accessed 8 February 2022.

more than a century after the invention of light bulbs.<sup>29</sup> The implications of this reality are far-reaching. For example, school children cannot read after dusk, companies and businesses cannot operate and grow efficiently, and clinics cannot refrigerate vaccines.<sup>30</sup> Additionally, the lack of energy access in many countries in Africa which is supposed to facilitate the fulfilment of socio-economic rights makes the attraction of foreign direct investments a daunting task. This, therefore, underscores the need to provide more energy access to increase economic development and growth in Africa.

From the above, it is clear that increased energy access has the potential to lift people out of energy poverty, thus creating dignified living conditions and expanding ample economic opportunities in Africa.<sup>31</sup> It could also lead to an improvement in the delivery of quality healthcare services and the provision of sufficient power in hospitals to preserve medicines, whilst aiding the development of local pharmaceutical manufacturing.<sup>32</sup> Additionally, energy access could improve the quality of educational services and the general educational achievement of children and ensure that school children, particularly in rural areas have electricity to study when it is dark.<sup>33</sup> According to the World Energy Assessment report, energy access facilitates the provision of sufficient food, accommodation, clothing, water, and health, together with access to information, agriculture, commerce, industry and mining.<sup>34</sup> In contrast, lack of energy access not only undermines human development but also hinders reasonable enjoyment of many human rights, in particular those that are connected to improving the standard of living.<sup>35</sup> The next section discusses the gathering momentum in the debate on whether to recognise the right of access to energy often referred to as the right to development - as an integral part of international human rights.

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<sup>29</sup> Fact Sheet: The World Bank and Energy in Africa. <<http://web.worldbank.org/WBSITE/EXTERNAL/COUNTRIES/AFRICAEXT/0,,contentMDK:21935594~pagePK:146736~piPK:146830~theSitePK:258644,00.html>> accessed 8 March 2022.

<sup>30</sup> *ibid.*

<sup>31</sup> *ibid.*

<sup>32</sup> Thoko Kaime and Robert Glicksman, 'An International Legal Framework for SE4All: Human Rights and Sustainable Development Law Imperatives' (2015) 38 (5) *Fordham International Law Journal* 1405, 1426.

<sup>33</sup> M. Kanagawa and T. Nakata, 'Assessment of Access to Electricity and the Socio-economic Impacts in Rural Areas of Developing Countries' (2008) 36 *Energy Policy*; S.R. Khander, D.F. Barnes and H.A. Samad, *Welfare Impacts of Rural Electrification: A Case Study from Bangladesh*, (World Bank Policy Research Working Paper Series 4859) 2, 7-9, 29-31.

<sup>34</sup> World Energy Council, "World Energy Assessment: Energy and the Challenges of Sustainability" (UNDP, 2000) (World Energy Assessment) <[www.undp.org/content/dam/aplaws/publication/en/publications/environment-energy/www-ee-library/sustainability-energy/world-energy-ass](http://www.undp.org/content/dam/aplaws/publication/en/publications/environment-energy/www-ee-library/sustainability-energy/world-energy-ass)> accessed 22 March 2022.

<sup>35</sup> See Report of the UN Conference on the Environment and Development, Rio de Janeiro Brazil 3-14 June, 1992 P. 46, UN Doc.A/CON. 151/26 (Vol. I-II), Annex II (12 August 1992).

### 3. Energy Access as Human Right

It is recognised that energy access is fundamental to the full enjoyment of not only economic and social rights but also civil and political rights.<sup>36</sup> According to Omorogbe, access to energy is ‘the ability to obtain energy that is adequate, available when needed, reliable, of good quality, affordable, legal, convenient, healthy, and safe for all required energy applications across households, productive enterprises, and community institutions’.<sup>37</sup> This implies that energy is intimately linked to the fulfilment of several human rights as it propels the ability to work, live, survive, and execute tasks.<sup>38</sup>

Due to the evolving nature of international human rights law, there have been scholarly debates about the recognition of the right of access to energy as part of human rights law. As a result of this, debates on the need to address concerns relating to human rights and development have remained topical in both scholarly works and political discourse.<sup>39</sup> Arguably, this has led to conclusions that recognise the right to development as part of the human rights framework.<sup>40</sup> Bradbrook, Gardam and Cormier opined that the above argument is based on the simple fact that access to energy and its services is implicit in a range of existing human rights obligations, in particular those captured in the field of socio-economic rights.<sup>41</sup> However, the question that remains to be answered is the extent to which the right to energy access can be practically seen to fall within the ambit of international human rights law. To answer the question, it is useful to explore the historical foundations relating to the intersections between the right to energy access and human rights.

A statement published in 1977 by Karel Vašák, the Director of the Human Rights and Peace Division of the United Nations Educational, Scientific and Cultural Organisation, identified three separate categories of human rights namely: (i) political and civil rights which require states to refrain from interfering with certain freedoms; (ii) economic, social, and cultural rights which require action to be taken by states, and (iii) solidarity rights, including the right to

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<sup>36</sup> Olasupo Owoeye, ‘Access to Energy in sub-Saharan Africa: A Human Rights Approach to the Climate Change Benefits of Energy Access’ (2016) 18 (4) *Env. L. Rev.* 284-300.

<sup>37</sup> Yinka Omorogbe, ‘Universal Access to Modern Energy Services: The Centrality of the Law’ in Yinka Omorogbe and Ada Ordor, (eds) *Ending Africa’s Energy Deficit and the LAW: Achieving Sustainable Energy for All in Africa* (Oxford University Press 2018) 11.

<sup>38</sup> Raphael J. Heffron, *Energy Law: An Introduction* (Springer, 2015) 1-2.

<sup>39</sup> S.P Marks ‘The Human Rights Framework for Development: Seven Approaches’ (2003) *Francois-Xavier Bagnoud Centre for Health and Human Rights* 12.

<sup>40</sup> *ibid.*

<sup>41</sup> Bradbrook, Gardam and Cormier (n 17) 539.



development.<sup>42</sup> Whilst the authors of this article acknowledge the merits of the tripartite classification of human rights by Vašák as probably one that is practical, commonly used, and a comprehensive categorization of human rights, it has been criticised by other human rights scholars. Thus, there are some criticisms of the three generations of rights to the extent that there are now in practice separate groups of human rights containing specific features.<sup>43</sup> However, we consider the three generations of rights useful to analyse the extent to which energy access is needed for their realisation.

### 3.1 Civil and Political rights

The key instrument for this first category of human rights is the International Covenant on Civil and Political Rights (ICCPR) adopted by the UN General Assembly in 1966.<sup>44</sup> For instance, Article 6 of the ICCPR explicitly recognises the right to life. Although this appears not to directly address the right to development, it could be argued that such a right is implied. The Human Rights Committee (HRC) responsible for monitoring state compliance and implementation of the ICCPR adopted a General Comment No. 6 in 1982 that endorsed a wide interpretation of the inherent right to life to include measures to increase life expectancy and reduce infant mortality.<sup>45</sup>

It is instructive to note that attempts to protect and promote civil and political rights are achievable through conscious effort towards the provision of energy access and services.<sup>46</sup> This makes the right to life inextricably connected to the right to food and health which also requires the provision of energy access for its realisation. Thus, it could be argued that the realisation of the right to food and health does not happen spontaneously but needs a series of preconditions, an essential one being energy. Therefore, energy access and the services it brings

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<sup>42</sup> Karel Vašák, *Human Rights: A 30-year Struggle: the Sustained Efforts to give Force to Law to the Universal Declaration of Human Rights* UNESCO Courier, 11:29-32 (Paris, November 1977).

<sup>43</sup> Spasimir Domaradzki, Margaryta Khvostova and David Pupovac, 'Karel Vašák's Generations of Rights and the Contemporary Human Rights Discourse (2019) 20 Human Rights Review 423-443.

<sup>44</sup> International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR)

<sup>45</sup> UN Human Rights Committee, 'General Comment N0 06: *The right to life* (art 6)' (30 April 1982), <<http://www2.ohchr.org/English/bodies/hrc/comments.htm>> accessed 12 March 2022.

<sup>46</sup> Adrian Bradbrook, 'Achieving Access to Modern Energy Services: A Study of Legal Strategies' in Yinka Omorogbe and Ada Ordor (eds), *Ending Africa's Energy Deficit and the Law: Achieving Sustainable Energy For All in Africa* (OUP 2018) 30.

could be argued to also include the right to life as energy is essential to the realisation of the right to food and health.<sup>47</sup>

Another argument that connects civil and political rights to energy is the notion of using energy to expand people's capabilities to achieve what they value doing or being: that is by making energy and its services a means for people to achieve, maintain or improve certain conditions or states of human life.<sup>48</sup> This means that without access to energy and its services, some aspects of our civil and political rights which may require people's capability to realise them will be limited. The argument here is attributed to what energy is used for or what it could be used to achieve in people.<sup>49</sup>

### **3.2 Economic, Social and Cultural Rights**

The second category of human rights is premised on the argument that energy access is implicit in existing human rights obligations under the International Covenant on Economic, Social and Cultural Rights (ICESCR), adopted by the UN General Assembly in 1966.<sup>50</sup> While there is no express mention or reference to energy access in this instrument, it is clear that access to energy and its services is crucial to the realisation of the economic goals contained in the Resolution. For instance, Article 11 of the ICESCR sets out a number of rights essential for the fulfilment of the right to an adequate standard of living such as adequate food, clothing and housing and to the continuous improvement in living conditions. Arguments can also be made from Articles 12 and 13 of the ICESCR on the right to the highest attainable standard of physical and mental health and the right to education respectively. The reality is that to effectively realise these rights, there is a need to provide modern energy services such as lighting, heating, cooling, clean water, and sanitation.<sup>51</sup> It, therefore, means that access to energy and services is contingent to implement these rights.

### **3.3 Solidarity: Right to Development**

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<sup>47</sup> Matthias Pape, *Humanitarian Intervention: Zur Bedeutung der Menschenrechte in den Vereinten Nationen* (Nomos 1997) 303.

<sup>48</sup> Giovanni Frigo, Manuel Baumann and Rafaela Hillerbrand, 'Energy and the Good Life: Capabilities as the Foundation of the Right to Access Energy Services (2021) 22 (2) *Journal of Human Development and Capabilities*.

<sup>49</sup> Elizabeth Shove and Gordon Walker, 'What Is Energy For? Social Practice and Energy Demand' (2014) 31 (5) *Theory, Culture & Society* 41-58.

<sup>50</sup> International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICESCR).

<sup>51</sup> Bradbrook (n 46) 30.

The third category, solidarity rights which include the right to development, features a more salient role for access to energy as a human right in itself. Arguments on this category were brought to the fore in 1972 by Keba M'Baye, the President of Senegal Supreme Court, with a definition of the right to development. According to M'Baye, the right to development is integral to human rights because people cannot exist without development, and all fundamental rights and freedoms are linked with the right to existence.<sup>52</sup> In reality, access to energy remains a precondition for the realisation of the right to development. This implies that the recognition of the right to development is dependant on states having to live up to their duty to promote the right of access to energy because without energy development is limited.

Part of the right to development has strong links to the first and second categories as the various rights under those categories have been incorporated within the right to development. The right to development is enshrined in the UN Declaration on the Right to Development (DRD).<sup>53</sup> From the Declaration, Article 1:1 states:

The right to development is an inalienable human right by virtue of which every human being and all peoples are entitled to participate in, contribute to, and enjoy economic, social, cultural and political development, in which all human rights and fundamental freedoms can be fully realised.

Additionally, the UN General Assembly declared in Article 10 of the Vienna Declaration and Programme of Action that the right to development is a universal and inalienable integral part of fundamental human rights.<sup>54</sup> This implies that the right to development exists under international human rights law, however, the challenge with the various UN Declarations is that they are non-binding soft laws.<sup>55</sup> Thus, it can be seen that the right to development which is supposed to be facilitated energy access has only attained the status of 'soft law' and remains largely unenforceable on the global level.<sup>56</sup> This means that enforcement is entirely within the prerogative of a member state as there are no clearly defined mechanisms to ensure enforcement at both the international and domestic levels.

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<sup>52</sup> Keba M'Baye, *Le droit au developpement comme un droit de l'homme* (1972) 5 *Revue des droits de l'homme* 528, 530. See generally Karel de Vey Mestdagh, 'The Right to Development' (1981) 28 *NILR* 30.

<sup>53</sup> Declaration on the Right to Development, UNGA Res 41/128 (4 December 2008) UN Doc A/Res/41/128 (1986); See generally Arjun Sengupta, 'On the Theory and Practice of the Right to Development' (2002) 24 *Human Rights Quarterly* 837.

<sup>54</sup> Vienna Declaration and Programme of Action, UNGA Res 48/121 (12 July 1993) UN Doc A/Conf157/23.

<sup>55</sup> Bradbrook (n 46) 35.

<sup>56</sup> Carol Ngang, Serges Kamga and Vusi Gumede, *Perspectives on the Right to Development* (eds) (Pretoria University Law Press 2018) 2.

### 3.4 Other International Instruments

Beyond the discussions on the intersection between energy and the three generations of rights gleaned from the UN instruments, other international instruments have indirectly attempted to place the right to energy access within the human rights framework. For instance, Article 16 of the African Charter on Human and Peoples' Rights grants all individuals the right to enjoy the best attainable state of physical and mental health, and requires that states should take necessary measures to protect the health of their people.<sup>57</sup> Also, Article 11 of the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights states that everyone has the 'right to live in a healthy environment and to have access to basic public services.'<sup>58</sup> These provisions indirectly emphasised the importance of energy to realisation the rights above. For example, energy is needed to ensure the provision of public services such as good health care, housing and educational centres which in turn help people to lead a fair standard life.

Bradbrook opined that from the provisions in these instruments, strong arguments can be made that basic public services including the provision of electricity supply and general energy access are crucial for the provision of other public infrastructures, such as transportation, clean water, and health.<sup>59</sup> This has led several human rights law scholars to argue that the divergences surrounding the right of access to energy could be attributed to the apparent lack of common understanding.<sup>60</sup> This is further complicated by the fact that most of the domestic, regional and international instruments are silent on the explicit right of access to energy, thus resulting in scholars having to engage assiduously in interpreting the provisions of these instruments to justify the existence of the right of access to energy as part of international human rights.<sup>61</sup> However, with the recent recognition of access to a clean and healthy environment as a

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<sup>57</sup> African Charter on Human and Peoples' Rights (adopted 27 June 1981, entered into force 21 October 1986) OAU Doc CAB/LEG/67/3 rev 5.

<sup>58</sup> Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights (Protocol of San Salvador) (entered into force 16 November 1999) OAS Treaty Series No 69 (1988) reprinted in Basic Documents Pertaining to Human Rights in the InterAmerican System OEA.Ser L V/ii.82 Doc 6 Rev 1 AT 67 (1992).

<sup>59</sup> Bradbrook (n 46) 31.

<sup>60</sup> Ngang, Kamga and Gumede (n 56) 2.

<sup>61</sup> Anthony Ware, 'Human Rights and the Right to Development: Insights into the Myanmar Government's Response to Rights Allegations' (2010) 18<sup>th</sup> Biennial Conference of the Asian Studies Association of Australia 3.

universal human right via a UN General Assembly Resolution in 2022,<sup>62</sup> it could be argued that access to energy could at some point in the future receive such recognition.

Of great importance to the discourse in this Article is the provision of the Convention on the Elimination of All Forms of Discrimination against Women with recognition of the right to energy access in consideration of the rights of rural women. It provides that each state party shall ensure that women have the right: ‘to enjoy adequate living conditions in relation to housing, sanitation, electricity and water supply, transport and communications’.<sup>63</sup> This appears to be one of the international instruments that directly placed and recognised the right of energy access to be a key part of international human rights. However, in terms of practical enforcement, the challenge remains that there is need for individual states to do more to guarantee enforcement at the domestic level through domestication of the provisions of the convention.

In sum, it can be seen that energy access rights have different interpretations in international instruments, but to realise the right itself, there needs to be a clear recognition of it as an integral part of international human rights. Such recognition together with enforcement mechanisms could lead to the realisation of what the various instruments seek to achieve. However, in the course of developing energy access projects in order to realise rights contained in the international instruments, certain conflicts could arise due to risks and violations that such projects may pose to human rights. An account of the nature of these conflicts is undertaken in the next section.

#### **4. Energy Access Projects versus Human Rights Risks and Violations in Africa**

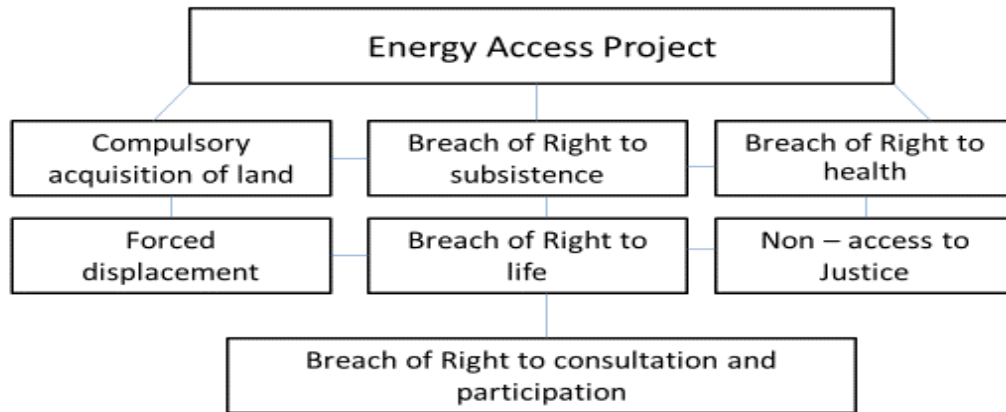
This section illustrates how the process of developing energy access projects could result in far-reaching human rights concerns or violations in African countries. In order to advert this, this paper proposes a framework (an energy justice model) to strike a balance in addressing a potential conflict between the development of energy access projects and how they affect other human rights. The approach put forward in this paper is characterised by one that would involve the mainstreaming of human rights into the design, planning and execution of energy access projects in Africa. This is a novel introduction in energy literature, particularly from the perspective of Africa to incorporate the HRBA into energy law and policy regime. This, in

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<sup>62</sup> United Nations General Assembly Declares Access to Clean and Healthy Environment a Universal Human Right <https://news.un.org/en/story/2022/07/1123482> accessed 20 August 2022.

<sup>63</sup> UN Convention on the Elimination of All Forms of Discrimination against Women [CEDAW] adopted 18 December 1979, entered into force 3 September 1981, art 14.2(h).

turn, would address the two conflicting interests (that is protecting human rights versus economic benefits) arising from any developmental projects.



**Fig 1.** The figure shows the categories of fundamental human rights potentially affected by the development of energy access projects.

Presently, there are reports of different forms of human rights risks and concerns that occur in the process of developing energy access projects in Africa.<sup>64</sup> The human rights risks range from non-consultation and participation of citizens in project planning and implementation; to siting of projects in poor and vulnerable communities; lack of accountability on projects; absence of judicial and quasi-judicial remedies for victims affected by the project; forced displacements and compulsory acquisition of lands as project sites; loss of subsistence rights and marginalisation, governmental repressions amongst others. These human rights concerns generally raise questions relating to the threat posed to human rights as a result of the

<sup>64</sup> Business & Human Rights Resource Centre, ‘Renewable Energy Transition in Africa Risks being Derailed by Human Rights Failures’ (2022) <https://www.business-humanrights.org/en/from-us/media-centre/renewable-energy-transition-in-africa-risks-being-derailed-by-human-rights-failures/> accessed 30 September 2022; See also the Danish Institute for Human Rights: Scoping Paper: Human Rights and the Energy Transition in Kenya (2022) [https://www.humanrights.dk/sites/humanrights.dk/files/media/document/Kenya%20Energy%20Transition%20and%20Human%20Rights%20Scoping\\_accessible.pdf](https://www.humanrights.dk/sites/humanrights.dk/files/media/document/Kenya%20Energy%20Transition%20and%20Human%20Rights%20Scoping_accessible.pdf) accessed 25 November 2022; See also Rachael Tugume, ‘My land has been taken to make way for Uganda’s oil pipeline – is this what’s meant by ‘economic upliftment’? Daily Maverick October 2022 [https://www.dailymaverick.co.za/opinionista/2022-10-31-my-land-has-been-taken-to-make-way-for-ugandas-oil-pipeline-is-this-whats-meant-by-economic-upliftment/?utm\\_term=Autofeed&utm\\_medium=Social&utm\\_source=Twitter#Echobox=1669858615](https://www.dailymaverick.co.za/opinionista/2022-10-31-my-land-has-been-taken-to-make-way-for-ugandas-oil-pipeline-is-this-whats-meant-by-economic-upliftment/?utm_term=Autofeed&utm_medium=Social&utm_source=Twitter#Echobox=1669858615) accessed 30 December 2022.

development of energy access projects. An analysis of the rights affected by the development of energy access projects is undertaken below.

#### **4.1 Compulsory Acquisition of Land**

One of the most repressive aspects of the injustice arising from energy access projects is the forceful land grabs and compulsory acquisition by national governments in the interest of the public, subject to the payment of adequate compensation.<sup>65</sup> This is widely recognised, particularly in Africa, where there are laws that empower national governments to acquire lands for the public interest.<sup>66</sup> A striking example of a project that has faced such a challenge is the 2015 61MW Kinangop Wind Power Project in Kenya opposed by farmers with the argument that their right of ownership of the land on which the project would be constructed should be protected and that the land should be used for food production, and not for the generation of power.<sup>67</sup> This led to massive protests in support of their right to own land despite the promise from the project proponents to pay compensation.

It can be seen from the above that any attempt at compulsory acquisition of land remains a violation of human rights as it affects the right of individuals to exclusively own and enjoy their properties. Under Article 17 of the Universal Declaration of Rights (UDHR), '[e]veryone has the right to own property alone as well as in association with others' and [no] one shall be arbitrarily deprived of his property'.<sup>68</sup> Furthermore, Article 14 of the African Charter on Human and Peoples' Rights, provides that the right to exclusively own, possess and use property is guaranteed under international law.<sup>69</sup> Whilst it may be true that energy access projects are indeed a matter of public interest, it is clear from this that when justifying the deprivation of the right to own and enjoy properties, project proponents must provide minimum

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<sup>65</sup> See Article 14, African Charter on Human and Peoples' Rights (1981); Article 1, Protocol No. 1 to the European Convention on Human Rights (1952); Article 21, American Convention of Human Rights (1969).

<sup>66</sup> For instance, in Nigeria, under section 28 of the Land Use Act of 1978, the Governor of any State in Nigeria can revoke the statutory right of occupancy for overriding public interest in his state. Overriding public interest in this case could amongst other things mean the requirement of the land by the Government of the State or by a Local Government in the State, in either case for public purposes within the State, or the requirement of the land by the Government of the Federation for public purposes. See also section 28 (2) (b) of the Land Use Act of 1978, Laws of the Federation of Nigeria.

<sup>67</sup> Maina Waruru, (2015), "Gusts of Opposition Hit Kenyan Wind Farm Project," Business Daily Africa, 21 May 2015, retrieved from: <https://www.businessdailyafrica.com/Gusts-of-opposition-hit-Kenyan-wind-farm-project/-/539546/2724472/-/nsy5fhz/-/index.html>.

<sup>68</sup> Article 17 (1) and (2), Universal Declaration of Human Rights (1948). <<https://www.un.org/en/universal-declaration-human-rights/>> accessed 25 September 2022.

<sup>69</sup> See United Nations Declaration on Human Rights, (Adopted 10 Dec. 1948) G.A Res. 217A9 (III); See Charter on Human and Peoples Right, (Adopted 27 June 1981, entered into force 21 Oct. 1986, O.A.U Doc. CAB/LEG/67/3 Rev. 5.

procedural guarantees for the participation of individuals affected by such decisions and provide adequate compensation. This is in tandem with the provisions of international instruments relating to property rights to land - stipulating that the deprivation of such rights should be followed by the informed consent of property owners, together with the payment of adequate compensation.

## 4.2 Forced Displacement

Another energy injustice flowing from the energy conflict is the forced displacement of people from their homes to execute energy access projects. This injustice is intertwined with the loss of some important aspects of peoples' traditional lifestyles and culture.<sup>70</sup> Forced displacements of people for energy projects to thrive is a violation of international human rights to the protection and enjoyment of the benefits of culture.<sup>71</sup> For instance, Article 27 of the ICESCR provides that persons belonging to minorities have the right to enjoy their own culture.<sup>72</sup> Furthermore, Article 27 of the ICCPR also provides that 'persons belonging to minorities shall not be denied the right in community with other members of the group to enjoy their own cultures'.<sup>73</sup>

Forced displacement of indigenous people denies them access to resources, food, water and to enjoy their culture.<sup>74</sup> It is recognised in international law that access to resources through which indigenous people could enjoy their own culture is a major part of their cultural rights.<sup>75</sup> For example, the construction of the Garafiri Dam Hydroelectric Power Plant on the Konkouré River in Guinea led to the forced displacement of around 2,140 persons.<sup>76</sup> The purpose - to

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<sup>70</sup> Damilola Olawuyi, 'Aguan Biogas Project and the Government of the United Kingdom: Legal and International Human Rights Assessment' (2013) 4 (3) Queen Mary L.J. 41.

<sup>71</sup> *ibid* 41.

<sup>72</sup> International Covenant on Economic Social and Cultural Right (Adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3.

<sup>73</sup> International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR).

<sup>74</sup> See Astrid Milena Bernal, *Lhaka Honhat Association vs. Argentina: The Human Right to Environment in the Inter-America Court* <https://gnhre.org/community/lhaka-honhat-association-vs-argentina-the-human-right-to-environment-in-the-inter-american-court/> accessed 30 August 2022.

<sup>75</sup> This was emphasised by the Inter American Human Rights Court in the case of *Mayan Indigenous Communities from the Toledo District, Belize* where the court held that "certain indigenous peoples maintain special ties with their traditional lands and a close dependence, as such the use and enjoyment of the land and its resources are integral components of the survival of the indigenous communities. See Report No. 40/04, Case 12.053, Merits, *Mayan Indigenous Communities from the Toledo District, Belize* 12 Oct. 2004.

<sup>76</sup> <https://www.salini-impregilo.com/en/projects/dams-hydroelectric-plants/garafiri-dam> accessed 26 September 2022; Mame Dagou, Cheikh Mamina and Madiodio Niassé, 'West African Experience in Managing People Displaced by Large Dams' in Jamie Skinner, Madiodio Niassé and Lawrence Haas (eds), *Sharing the benefits of large dams in West Africa: The case of displaced people* (International Institute for Environment and Development, London, UK 2009) 10.



generate hydroelectric power and supply water - led to the resettlement which implied leaving behind the homeland where the displaced community was born and where their ancestors are buried. Moreover, the traditional mosques allowing the practice of cultural customs had to be abandoned as part of a move to new lands where neither a traditional connection existed nor were the mosques rebuilt or compensation paid.<sup>77</sup> The culture of the community was not protected due to resettlements as in countless other energy access projects, especially dam constructions, over the continent.<sup>78</sup>

### **4.3 Breach of Right to Subsistence**

Developments of energy access projects could also lead to denying citizens the opportunity of farming and hunting for subsistence. This poses a threat to the enjoyment of subsistence rights. The reality is that when citizens are ejected from their land due to the planned execution of large-scale energy access projects, they lose the right to their subsistence involving local hunting and farming. Article 11 of the ICESCR provides that as a minimum, ‘everyone shall enjoy the necessary subsistence rights and that in no case should people be deprived of their own means of subsistence’.<sup>79</sup> In practice, energy access projects sometimes require the use of arable land, and the acquisition of such lands may become a violation of the right to subsistence. More so, Article 11(2) and Article 14 (2) of the ICESCR put a responsibility on states to carry out reforms that would ensure that citizens and particularly the rural communities continue to have access to arable lands. Therefore, energy access projects must be accompanied by appropriate and effective measures to ensure that they do not proceed at the expense of the fundamental human rights of indigenous communities and the environment upon which they depend for their physical and cultural well-being.<sup>80</sup>

For example, the Gilgel-Gibe III Dam in the lower Omo valley of Ethiopia promises an expected capacity of 1,870 Megawatt to make the country in the Horn of Africa independent in its energy supply. However, the hydro-electric mega-project has massive effects on the local

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<sup>77</sup> Mame Dagou, Cheikh Mamina and Madiodio Niasse, ‘West African Experience in Managing People Displaced by Large Dams’ in Jamie Skinner, Madiodio Niasse and Lawrence Haas (eds), *Sharing the benefits of large dams in West Africa: The case of displaced people* (International Institute for Environment and Development, London, UK 2009) 16.

<sup>78</sup> Chris de Wet, ‘The Experience with Dams and Resettlement in Africa’ (2000) Contributing paper prepared for Thematic Review I.3: Displacement, Resettlement, Rehabilitation, Reparation and Development. Cape Town, South Africa: World Commission on Dams, 6.

<sup>79</sup> See the International Covenant on Economic Social and Cultural Right (Adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3.

<sup>80</sup> See Inter-Am. C.H.R., Report on the Situation of Human Rights in Brazil, OEA/Ser.L/V/II.97 Doc.29 rev.1, ch. VI (Sept. 29, 1997).

livelihood of various ethnic groups living around the river banks.<sup>81</sup> Since 2015, when the filling of the reservoir started, the seasonal flood of the Omo River has been absent. Therefore, flood-retreat agriculture, a cultivation technique which is of crucial importance for crop production in this semi-arid area, became impossible. Moreover, even though the local agro-pastoralists were not forced ‘with the barrel of a gun’ to leave their homesteads, the actual deprivation of their most productive and reliable cultivation areas left them with no other option than to take part in ‘villagisation’ and resettlement programmes.<sup>82</sup>

#### **4.4 Breach of Right to Life**

Energy access projects have also been known to be a major cause of the loss of life in vulnerable communities where such projects are cited. Unfortunately, as good as energy projects may be towards improving economic development, they could also pose a threat to human health and lives. For instance, energy projects in the Niger Delta Region (NDR) of Nigeria are known to be a potential threat to the right to life. This is mainly a result of pollution from oil and gas production in the region. In Nigeria, the pollution of the environment via gas flaring received judicial disapproval when a Federal High Court held that gas flaring violated the constitutional right of local communities in the NDR and that these communities have a right to life and dignity of the human person which includes the right to clean environment.<sup>83</sup>

The right to life is a fundamental human right from which no derogation is permitted even in times of war or public emergency.<sup>84</sup> By extension, this would include any energy project even though it is to bring about economic growth and development. Under Article 6 of the ICCPR, the right to life has crucial importance and its effective protection is the prerequisite for the enjoyment of all other human rights.<sup>85</sup> This is aptly emphasised in Article 4 (1) of the American Convention on Human Rights (ACHR) and Article 4 of the African Charter on Human and

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<sup>81</sup> Jon Abbink, ‘Dam Controversies: Contested Governance and Developmental Discourse on the Ethiopian Omo River dam’ (2012) 20 *Social Anthropology* 125-144.

<sup>82</sup> Benedikt Kamski, ‘Water, sugar and growth: the practical effects of ‘failed’ development interventions in the southwestern lowlands of Ethiopia’ (2019) *Journal of Eastern African Studies* 1-21.

<sup>83</sup> Smith Azubuike and Ondotimi Songi, ‘A Rights-based Approach to Oil Spill Investigations: A Case Study of the Bodo Community Oil Spill in Nigeria’ (2020) 1 (1) *Global Energy Law and Sustainability* 28-54.

<sup>84</sup> See the United Nations General Comment on Article 4 no. 29 of 24 July 2001; See also Manfred Novak, ‘Civil and Political Rights’ in Janusz Symonides, *Human Rights Concepts and Standards* (Routledge 2016) 75.

<sup>85</sup> International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR). <<https://www.ohchr.org/en/documents/general-comments-and-recommendations/general-comment-no-36-article-6-right-life>> accessed 30 August 2022.

Peoples Right (AfCHPR).<sup>86</sup> It is noteworthy that the duty to protect the right to life remains a fundamental obligation of national governments.<sup>87</sup> By extension, national governments have to ensure that energy access projects do not threaten human life and survival.<sup>88</sup>

#### **4.5 Breach of Right to Health**

Another injustice closely related to the right to life and the possible impact of energy access projects is health challenges. The development of energy projects, particularly in African countries are oftentimes executed without a detailed environmental impact assessment or even human rights impact assessment.<sup>89</sup> Regrettably, such projects affect the right of people to enjoy good health. Article 25 of the Universal Declaration on Human and Peoples Right provides that everyone has the right to a standard of living adequate for the health and well-being of themselves and their family.<sup>90</sup> Under Article 16 of the AfCHPR, every individual shall have the right to enjoy the best attainable state of physical and mental health. This makes it essential for energy project proponents to ensure that a robust and non-biased human and environmental impact assessment is carried out before obtaining approval from host states.

It is pertinent to note at this juncture that there is an absence of legislative guidelines for mandatory standards on human rights impact assessments in many African countries.<sup>91</sup> Nigeria remains an interesting example where there is no robust legal framework for human rights impact assessments to be conducted as a prerequisite for energy project approval. This is evidenced in the operations of energy companies in the NDR (i.e., oil and gas exploration and production) resulting in environmental damage. Consequently, the contamination of land, surface and groundwater, and sedimentary contamination leave local farmers without food and

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<sup>86</sup> African Charter on Human and Peoples' Rights (adopted 27 June 1981, entered into force 21 October 1986) OAU Doc CAB/LEG/67/3 rev 5.; American Convention on Human Rights (Adopted 22 November 1969, entered into force 18 July, 1978) O.A.S. Res. 447 (IX-0/79).

<sup>87</sup> See United Nations General Comment 6/16 of 27 July 1982, para. 5.

<sup>88</sup> Olawuyi, 'Aguan Biogas Project and the UK Government' (n 70) 43.

<sup>89</sup> Syna Obaji, The Conversation 'Environmental Impact Assessment don't work in Nigeria: Here is why?' <https://theconversation.com/environmental-impact-assessments-dont-work-in-nigeria-heres-why-188796> accessed 21 September 2022.

<sup>90</sup> Universal Declaration on Human and Peoples Right, (Adopted on December 10, 1948) G.A. res. 217A (III), U.N. DocA/810 at 71 (1948).

<sup>91</sup> See World Bank, Human Rights Impact Assessment: A Review of the Literature, Differences with Other Forms of Assessments and Relevance for Development (2013) <https://documents1.worldbank.org/curated/en/834611524474505865/pdf/125557-WP-PUBLIC-HRIA-Web.pdf> accessed 22 September 2022.

local fishermen/fisherwomen without fish.<sup>92</sup> These impact the right to a clean and healthy environment, the right to potable water, and the right to health.<sup>93</sup>

Despite general human rights legislation in Nigeria, no legislation or policy instrument mandates human rights impact assessments for energy projects at the federal, State, or municipal levels.<sup>94</sup> The activities of energy companies in the NDR result in environmental degradation, thus leading to serious health concerns for residents of oil host communities. This is in addition to the siting of some energy projects in residential areas, especially in poor and vulnerable neighbourhoods, which raises concerns about violations of the international human right to health.

#### **4.6 Breach of Right to Consultation and Participation**

The role of consultation and participation while developing energy access projects cannot be overemphasised. Presently, international law recognises the concept of participatory democracy and prior informed consent procedures.<sup>95</sup> For instance, Article 25(a) of the ICCPR stipulates that every citizen shall have the right and opportunity to participate, without distinction and unreasonable restrictions, in the conduct of public affairs, directly or through freely chosen representatives.<sup>96</sup> This makes it essential for energy project proponents to provide direct opportunities to members of the public to have input in the decision-making process regarding matters that directly affect them rather than just mere consultation.<sup>97</sup>

The right discussed above is protected through the mechanism of free, prior and informed consent, an instrument that helps to protect indigenous peoples' rights and benefits all stakeholders of a project by minimising the risk of conflict.<sup>98</sup> Unfortunately, in many African

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<sup>92</sup> Zeldanne Elum, Keletso Mopipi and Adanna Henry-Ukoha, 'Oil Exploitation and its Socioeconomic Effects on the Niger Delta Region of Nigeria' (2016) 23(13) Environmental Science and Pollution Research 12880-9.

<sup>93</sup> Azubuike and Songi (n 83) 28.

<sup>94</sup> Olawuyi, Energy (and Human Rights) for All: (n 9) 91.

<sup>95</sup> Malgosia Fitzmaurice, 'Some Reflections on Public Participation in Environmental Matters as a Human Right in International Law' (2002) 2 Non-State Actors and International Law 12. [file:///C:/Users/ga18480/Downloads/nail-article-p1\\_1.pdf](file:///C:/Users/ga18480/Downloads/nail-article-p1_1.pdf) accessed 20 September 2022.

<sup>96</sup> International Covenant on Civil and Political Rights (Adopted 22 November 1969, entered into force 23 March 1976) 999 UNTS 171 (ICCPR), <<http://www2.ohchr.org/english/law/ccpr.htm>> accessed 2 April 2022.

<sup>97</sup> Dinah Shelton, 'The UN Human Rights Committee's Decisions' Human Rights Dialogue: Cultural Rights (2005) <[http://www.cceia.org/resources/publications/dialogue/2\\_12/section\\_3/5151.html](http://www.cceia.org/resources/publications/dialogue/2_12/section_3/5151.html)> accessed 30 March 2022.

<sup>98</sup> The International Work Group for Indigenous Affairs (IWGIA) 'The Impact of Renewable Energy Projects on Indigenous Communities in Kenya: The Cases of the Lake Turkana Wind Power Project and the Olkaria Geothermal Power Plants' [https://www.iwgia.org/images/publications/new-publications/IWGIA\\_report\\_28\\_The\\_impact\\_of\\_renewable\\_energy\\_projects\\_on\\_Indigenous\\_communities\\_in\\_Kenya\\_Dec\\_2019.pdf](https://www.iwgia.org/images/publications/new-publications/IWGIA_report_28_The_impact_of_renewable_energy_projects_on_Indigenous_communities_in_Kenya_Dec_2019.pdf) accessed 20 August 2022.

countries where energy projects are carried out, this participatory mechanism is not being used sufficiently to avoid a potential breach of human rights. For instance, the Olkaria Geothermal Project in Nakuru County in Kenya generated a lot of tension with the forceful relocation of four villages for the energy project to be sited. It was reported that there were significant shortcomings in achieving consultation with persons affected by the project, including a failure to use the Maasai language (Maa) and a relative failure to consult the traditional authority structure of the Maasai elders.<sup>99</sup>

It is important to note that the process of participation is not only expected to take place during the environmental impact assessment but one that should take place before the execution of the project. This process can be categorised according to the Three Pillars of the Aarhus Convention (1998),<sup>100</sup> – as per access to information about the environment, public participation in the decision making and environmental justice.<sup>101</sup> Therefore, the practice of state authorisation of energy access projects without clear and adequate participation by citizens through a free, fair, direct and transparent consultative process is a human rights violation.

#### **4.7 Non-access to Justice**

The third pillar of the Aarhus Convention<sup>102</sup> is environmental justice and its lack of access or complaint procedure to indigenous communities is another injustice. A dispute resolution channel provides an opportunity for members of a community where an energy project is to be sited to block the approval of the project or to seek a review before and after its approval. The lack of dispute resolution channels freezes out their fundamental human rights which may be repressed by the home state. Presently, international law stresses the importance of access to justice as a cornerstone for protecting, respecting and fulfilling human rights.<sup>103</sup> The practice of having a review channel while developing energy access projects complements a wider

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<sup>99</sup> *ibid.*

<sup>100</sup> Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (June 1998) <<https://www.unece.org/fileadmin/DAM/env/pp/documents/cep43e.pdf>> accessed 30 March 2022.

<sup>101</sup> Giuseppe Cirella and others, 'Exploring Community of Practice in Uganda's Public Sector: Environmental Impact Assessment Case Study' (2018) Sustainability 1-17.

<sup>102</sup> The Aarhus Convention is created to empower the role of citizens and civil society organisations in environmental matters and is founded on the principles of participative democracy. The Convention establishes a number of rights to the individuals and civil society organizations with regard to the environment. The Parties to the Convention are required to make the necessary provisions so that public authorities, at a national, regional or local level, will contribute to these rights to become effective. The rights include (i) access to environmental information; (ii) public participation in environmental decision making; and (iii) access to justice.

<sup>103</sup> Olawuyi 'Aguan Biogas Project and the UK Government' (n 70) 48.

stakeholder engagement as it provides opportunities for all stakeholders to raise concerns about the project and how it may affect their human rights.

From the discussion above, more often than not energy access projects in Africa tend to conflict with the protection of fundamental human rights. In practice, this seems to be more problematic for developing countries, particularly those that require significant energy access to boost economic growth and development. The opportunity to receive some credits for developmental projects is why national governments in developing countries are careless of the impacts of executing energy access projects. For Africa, poor access to energy remains a fundamental problem that continues to stall economic growth. This explains why there is a need to increase energy access in the continent. However, it is important to reiterate that the realisation of that agenda should be carried out in ways that do not appear to threaten fundamental human rights. The next section turns to discussions on how to strike a balance in addressing the conflict.

## **5. Striking a Balance: Using the United Nations Human Rights-Based Approach (HRBA) Framework**

The HRBA is a conceptual framework for the process of human development that is normatively based on international human rights standards and operationally directed to promoting and protecting human rights.<sup>104</sup> Originated in 1997 when the former Secretary-General, Kofi Annan, it launched the UN Programme for reform and called on all entities of the UN to mainstream human rights norms into their respective mandates and activities.<sup>105</sup> Furthermore, it calls for human rights to be mainstreamed into the design and planning for the development of energy access projects. It emphasises the need to respect, protect, and fulfil all human rights in the development of energy access projects.<sup>106</sup> The aim is to ensure that energy access projects for economic development do not result in negative human rights consequences.<sup>107</sup>

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<sup>104</sup> Office of the United Nations High Commissioner for Human Rights, Frequently Asked Questions on a Human Rights-Based Approach to Development Cooperation, 15.

<sup>105</sup> See Report of the Secretary General, 51<sup>st</sup> Sess., July 14, 1997, UN Doc.A/51/950 (1997). Also, the 1998 Report of the Secretary General to the UN Economic and Social Council recommended that: (i) adoption of a “human rights-based approach” to activities carried out within the respective mandates of components of the United Nations system; (ii) development of programs/projects addressing specific human rights issues; (iii) reorientation of existing programs as a means of focusing adequate attention on human rights concerns.

<sup>106</sup> Olawuyi, Energy (and Human Rights) for All: (n 9) 79.

<sup>107</sup> See UN Practitioners’ Portal on Human Rights Based Approaches to Programming, The Human Rights Based Approach to Development Cooperation: Towards a Common Understanding among UN Agencies, HRBA PORTAL, available at <<http://hrbaportal.org/the-human-rights-based-approach-to-development-cooperation-towards-a-common-understanding-among-un-agencies>> accessed 2 February 2022.

At the African level, the HRBA framework has also been supported by the African Union's 2012 Resolution on a Human Rights-Based Approach to Natural Resources Governance which urges states in Africa to ensure that business enterprises, including energy operators, have a responsibility to respect, protect, and fulfil human rights in their operations and investments.<sup>108</sup> The introduction of the HRBA framework is borne out of the necessity to restore faith in energy access projects by way of mainstreaming human rights principles and standards into energy law and policy. What this means is that the framework creates an opportunity for project proponents and host government to ensure that energy access projects protect, respect and fulfil human rights throughout the various stages of operation, including planning, funding of the project, implementation, monitoring, and evaluation in communities where they are executed. More so, adopting the HRBA in projects will create the possibility of having such projects conform to other human rights obligations and principles, while strengthening their acceptability, effectiveness and guaranteeing their long-term efficiency.<sup>109</sup>

The HRBA framework introduces five interconnected human rights principles into development planning and decision-making, all of which are needed while developing the project. These principles include (1) Participation and inclusion; (2) Access to information; (3) Non-discrimination and equality; (4) Equality and accountability; and (5) Access to justice.<sup>110</sup> The significance of these principles is that their applicability in the design, approval, and financing of the energy access projects would provide project proponents and governments the opportunity to anticipate and prepare for the human rights impact of the project on the public and to take steps to mitigate them.<sup>111</sup> This creates an environment where efforts to expand energy access projects can proceed in a way that takes into account fundamental human rights.

For Africa in particular, where economic growth and development seems to be occurring at a slow pace, many national governments are sometimes under pressure to undertake development projects. Unfortunately, this has led to executing energy access projects without

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<sup>108</sup> Damilola Olawuyi, 'Corporate Accountability for the Natural Environment and Climate Change', in Ilias Bantekas and Michael Ashley Stein, (Eds) *The Cambridge Companion to Business and Human Rights* (Cambridge University Press: Cambridge, UK, 2021).

<sup>109</sup> Sébastien Jodoin, 'Rights-Based Frameworks for Climate Finance' (Sustainable Development Law on Climate Change, Legal Working Paper Series 2010).

<sup>110</sup> Human Rights Council, The Guiding Principles on Business and Human Rights: Implementing the United Nations Protect, Respect and Remedy' Framework, UN Doc. A/HRC/17/31, 21 March 2011. The Guiding Principles (designed by Professor John Ruggie) are intended to provide practical advice to governments, companies and other stakeholders on how better to protect individuals and communities from adverse human rights impacts of business activities.

<sup>111</sup> Olawuyi, *The Human Rights-Based Approach to Carbon Finance* (n 15) 20-40.

sufficiently taking into account potential human rights risks. Thus, the HRBA framework presents an opportunity to ensure developmental projects conform to human rights norms and standards and ultimately help host governments in African States and project proponents to avoid violating human rights while developing the project. For instance, the idea of setting up hydro-electric power seems to be very welcoming in many developing countries in Africa but despite the benefits of such projects, there are other human rights that are likely to be affected, perhaps negatively.

As earlier mentioned, the HRBA could be used to resolve the conflict between the development of energy access projects and protection of other human rights. This is achieved where national governments and project proponents at inception of the project consider human right risks and potential violations and move to address them before they occur. The process would involve mainstreaming the protection of other human rights into the process and procedure in executing the energy project as way to strike a balance between protection of human rights and economic benefits.

To effectively resolve the conflict, there is need for states to attempt to strike a balance. The idea of striking a balance is a process where project proponents can definitively show that potential human rights issues arising from the project have been taken into account and measures to address them have been put in place before executing the project. Doing so would see a win-win situation for those that are likely to be affected by the project (that is their human rights), as well as projects proponents and the state. In this sense, the HRBA framework calls for a human rights impact assessment that requires the project to demonstrate that elements of the five principles have been complied with. This is where energy law and policy instruments could be used as a tool by African States to integrate the HBRA principles as a strategy to strike a balance in resolving the conflicting interests. Thus, African States could make the implementation of the HRBA principles mandatory through the process of incorporating them in energy law and policy regime as way to ensure compliance. This means that energy access projects and their proponents would be required to show compliance with the principles for any project. According to the World Bank, the initiative of the human rights impact assessment is designed to examine policies, legislation, programs, and projects together with identifying and measuring their effects on human rights.<sup>112</sup> This approach would allow energy project

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<sup>112</sup> See World Bank Human Rights Impact Assessment: A Review of the Literature, Differences with other Forms of Assessments and Relevance for Development (2013),



proponents to identify the likely impact of the project on human rights and demonstrate that the principles have been complied with.<sup>113</sup> The following section discusses the five principles, their impact on the development of energy access projects and how they could be used to protect broader human rights in the development of energy access projects.

## 5.1 Participation and Inclusion

Participation and inclusion mean that people should be involved in decisions that affect their rights and should not be excluded from playing active roles in energy access programmes.<sup>114</sup> It has been described as the right of the public to ‘take part in’ and to ‘influence’ decision-making processes on energy projects.<sup>115</sup> Additionally, participation involves members of the local community who try to secure some economic and/or social benefits from the presence of the planned work within their area and/or to get adequate compensation for the harm done to their environment.<sup>116</sup> It requires national governments and project proponents to provide opportunity for every member of a community be involved actively in regulatory approval processes leading to the execution of energy access projects.<sup>117</sup> Adopting this principle in Africa’s energy law and policy regime would provide some guarantee to those who will be affected that all human rights risks concerning the project have been considered and addressed. Participatory approaches not only allow grassroots legitimation of projects but also enable the timely identification of non-obvious risks. The principle pays true regard to the mantra that development must belong to the people. This means allowing people to take part in the conduct of public affairs such as decision-making relating to energy projects.

Full participation and inclusion in all aspects of society are important in order to empower individuals to fulfil their potential as citizens and contributing members of their communities. This principle, if adopted (i.e., mainstreamed into the energy law and policy regime), could help project proponents in Africa to work better together with members of host communities to identify, predict and mitigate potential adverse human rights impact of projects. Also, it would give people in host communities a sense of belonging: by creating an opportunity for

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[http://siteresources.worldbank.org/PROJECTS/Resources/40940-1331068268558/HRIA\\_Web.pdf](http://siteresources.worldbank.org/PROJECTS/Resources/40940-1331068268558/HRIA_Web.pdf) accessed 5 April 2022.

<sup>113</sup> James Harrison, ‘Establishing a Meaningful Human Rights Due Diligence Process for Corporations: Learning from Experience of Human Rights Impact Assessment’ (2013) 31 (2) *Impact Assessment and Project Appraisal* 107-117.

<sup>114</sup> Olawuyi, *Energy (and Human Rights) for All*: (n 9) 89.

<sup>115</sup> Olawuyi, *The Human Rights-Based Approach to Carbon Finance* (n 15) 120.

<sup>116</sup> Bernard G. Taverne, ‘Human Rights in Natural Resources Development: Public Participation in the Sustainable Development of Mining and Energy Resources (2002) 10 *International Energy Law & Taxation Review* 265.

<sup>117</sup> *ibid* 90.

them to be involved in the design, implementation, and evaluation of energy projects carried out on their lands and ancestral territories. More so, the adoption of this principle by individual States in Africa would help to provide clear and comprehensive answers to human rights questions and avoid future conflict that may arise from energy projects. This, would in turn, reduce the risks that the projects become the subject of contestation among communities, developers and the government.

## **5.2 Access to Information**

Access to information means to provide to members of the public and other interested stakeholders reports on potential human rights risks from energy projects. Access to information should not stop at making reports available to the public but should also be about the quality and quantity of information made available.<sup>118</sup> Access to information is a means through which States could ensure the practical protection of human rights because it is central to ensuring the effectiveness of other procedural rights.<sup>119</sup> According to Bellver and Kaufmaan, access to information is one of the interpretations of transparency which is considered to be the timely and reliable economic, social and political information accessible to all relevant stakeholders.<sup>120</sup>

It is important to note that true public participation and inclusion is impossible without access to the right sorts of information. In practice, the essentiality of public access to information is made apparent by the fact that meaningful public participation in decision-making processes and effective access to justice rely largely on the adequate provision of information to the public.<sup>121</sup> Therefore, where this principle is adopted in the energy law and policy regime of African states, it could help to balance the two conflicting interests – ensuring access to energy and protection of human rights. This is because the principle of access to information can establish a viable platform that would allow people that are likely to be affected by energy projects to access vital information about the project even before executing it. Thus, where people in host communities whose human rights are likely to be affected by development

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<sup>118</sup> Azubuike and Songi (n 83) 49.

<sup>119</sup> Uzuazo Etemire, 'The Escazú Agreement: Public Access to Environmental Information and the Goal of a Sustainable Future' (2022) *Journal of Energy & Natural Resources Law* DOI: [10.1080/02646811.2022.2087332](https://doi.org/10.1080/02646811.2022.2087332).

<sup>120</sup> Ana Bellver and Daniel Kaufmann, 'Transparenting Transparency Initial Empires and Policy Applications', Preliminary Draft Discussion Paper Presented at the International Monetary Fund (IMF) Conference on Transparency and Integrity, Washington, DC World Bank, 6-7 June 2005.

<sup>121</sup> Uzuazo Etemire, 'Public Access to Environmental Information: A Comparative Analysis of Nigerian Legislation with International Best Practice' (2014) 3 (10) *Transnational Environmental Law* 149-172.

projects are engaged in discussions based on information available to them, this would help to improve decision-making on energy projects.

### 5.3 Non-Discrimination and Equality

The principle of non-discrimination and equality is a fundamental concept in international human rights law.<sup>122</sup> Discrimination occurs when a group of people or a community is treated less favourably than others, especially as it relates to how the decision on energy projects for economic purposes are sited.<sup>123</sup> In the context of this article, the principle of non-discrimination and equality is anchored on the premise that all forms of discrimination must be prohibited, prevented and eliminated in the course of planning and implementing energy projects. The objective is to ensure that negative outcomes from energy projects do not impact vulnerable members of the society.<sup>124</sup>

Largely, it has been observed that within the planning and development stages of energy projects, there may be a group of people that are discriminated against and do not have equal representation when decisions regarding the project are being taken. This is where the principle of non-discrimination and equality is relevant. Project proponents must, therefore, demonstrate that there is no discrimination against people that will be affected by the impact of a project, and who have interests in or are concerned about the project. This is a strategy that could be used to identify and address the root causes of inequalities, social exclusion, and human rights violations that impede the efficacies of development programmes and policies.<sup>125</sup> For example, we note that public authorities in the United Kingdom have adopted the Equality Impact Assessment framework as an instrument for ensuring that projects undertaken do not discriminate against disadvantaged or vulnerable groups.<sup>126</sup> This approach has also been adopted in Scotland through the Equality and Human Rights Commission to encourage corporations to mainstream the Equality Impact Assessment in the design and implementation

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<sup>122</sup> Equality and Human Rights Commission, 'A Guide to Business and Human Rights' (2014) [https://www.equalityhumanrights.com/sites/default/files/a\\_guide\\_to\\_business\\_and\\_human\\_rights\\_1\\_1.pdf](https://www.equalityhumanrights.com/sites/default/files/a_guide_to_business_and_human_rights_1_1.pdf) accessed 28 September 2022.

<sup>123</sup> Olawuyi, *The Human Rights-Based Approach to Carbon Finance* (n 15) 63-139.

<sup>124</sup> Oyeniyi Abe, *Implementing Business and Human Rights Norms in Africa: Law and Policy Interventions* (Routledge 2022) 83.

<sup>125</sup> Damilola S. Olawuyi, 'Advancing Climate Justice in International Law: An Evaluation of the United Nations Human Rights-Based Approach' (2015) 11 (1) Fla. A&M U.L.Rev.112.

<sup>126</sup> Mary-Ann Stephenson and James Harrison, *Unravelling Equality? A Human Rights and Equality Impact Assessment of the Public Spending Cuts on Women in Coventry*, Joint Report of the Centre for Human Rights in Practice, University of Warwick and Coventry Women's Voices (2011).

of projects to address negative human rights impacts.<sup>127</sup> The same approach could be adopted by African States by incorporating this principle in their energy law and policy regime to make ensure that an energy project does not discriminate against disadvantaged people and vulnerable communities.

#### **5.4 Equality and Accountability**

Accountability in recent times has gained significant attention and has become a part of mandatory human rights' due diligence. This principle describes the steps a company must take to become aware of, prevent and address adverse human rights impact in the course of operation.<sup>128</sup> It embodies elements of the second pillar in the HRBA framework founded on corporate responsibility by asking companies (including proponents of energy projects) to ensure that they conduct themselves in good moral conduct when conducting their operations.<sup>129</sup> The principle which is framed mainly in the context of due diligence requires energy project proponents and/or companies to progressively strengthen and deepen their due diligence to prevent human rights risks and violations in the design and implementation of projects.<sup>130</sup> Additionally, it requires project proponents to meet a legal standard of conduct that has been set out in the energy law and policy regime. For African states that are quick to secure contracts for development purposes, the conduct of appropriate human rights' due diligence through accountability helps to address the risk of legal claims against them by showing that they took every reasonable step to avoid involvement with alleged human rights violations.<sup>131</sup> In practice, this principle demands that energy proponents must be able to establish that a project has been developed in agreement with human rights rules and standards.<sup>132</sup> Thus, what is required of individual states is to use the energy policy regime as a governance structure to set an expectation for companies that would make due diligence effective. Where this principle

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<sup>127</sup> See the Equality and Human Rights Commission, [www.equalityhumanrights.com/en/advice-and-guidance/equality-impact-assessments](http://www.equalityhumanrights.com/en/advice-and-guidance/equality-impact-assessments) accessed 30 August 2022.

<sup>128</sup> John G. Ruggie, 'Protect, Respect and Remedy: A Framework for Business and Human Rights' (2008) 6 (3) OGEI p.17 [www.ogel.org](http://www.ogel.org)

<sup>129</sup> Oyeniyi Abe, 'The Feasibility of Implementing the United Nations Guiding Principles on Business and Human Rights in the Extractive Industry in Nigeria' (2016) 7 (1) Journal of Sustainable Development Law and Policy 148.

<sup>130</sup> John F. Sherman III, 'Beyond CSR: The Story of the UN Guiding Principles on Business and Human Rights' A Working Paper of the Corporate Responsibility Initiative, Harvard Kennedy School [https://www.hks.harvard.edu/sites/default/files/centers/mrcbg/files/CRI\\_AWP\\_71.pdf](https://www.hks.harvard.edu/sites/default/files/centers/mrcbg/files/CRI_AWP_71.pdf) accessed 25 September 2022.

<sup>131</sup> Shift Project: Accountability as Part of Mandatory Human Rights Due Diligence [https://shiftproject.org/wp-content/uploads/2020/10/Shift\\_mHRDD\\_Accountability\\_October2020.pdf](https://shiftproject.org/wp-content/uploads/2020/10/Shift_mHRDD_Accountability_October2020.pdf) accessed 25 August 2022.

<sup>132</sup> Abe 'Implementing Business and Human Rights Norms in Africa' (n 124) 77.

is adopted in the national energy policy regime of African States, it could ensure that development projects meet the responsibility to respect human rights.

## 5.5 Access to Justice

The principle of access to justice deals with the ‘ability of people to seek and obtain a remedy through formal or informal institutions of justice, and in conformity with human rights standards’.<sup>133</sup> Access to justice is the third pillar of John G. Ruggie Framework setting out the UN Guiding Principles on Business and Human Rights which provide a distribution of functions between States and companies to respect human rights in their activities and apply due diligence procedures in their operations.<sup>134</sup> The Ruggie Framework was formulated in 2011 to guide the behaviour of companies and all relevant actors through actions geared toward to “protect, respect, and remedy adverse human rights consequences of the operations of companies.”<sup>135</sup>

Access to justice ensures that where the externalities of energy access projects are not adequately addressed by the participatory mechanisms in the projects, those whose rights have been or are likely to be impaired have access to a suitable legal remedy. Access to justice also means access to the political order and benefits arising from social and economic developments in society.<sup>136</sup> For African States, people experiencing human rights harm from energy project development have difficulties in accessing remedies. In practice, affected stakeholders face a range of legal and practical barriers in accessing judicial remedy, including meeting the burden of proof, the costs of accessing legal advice, and the availability of class or group actions.<sup>137</sup> Consequently, NGOs have pushed for the advancement of this principle in the energy policy regime due to its strong emphasis on judicial grievance mechanisms with optimism that it will help to further the objectives of the HBRA framework.

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<sup>133</sup> UNDP Programming for Justice: Access for All -A Practitioner’s Guide to a Human Rights-Based Approach Access to Justice <https://www.undp.org/asia-pacific/publications/programming-justice-access-all> accessed 30 September 2022.

<sup>134</sup> UNHCR Res 17/4(2011) UN Doc HR/PUB/11/04 <[RES/17/4 Human rights and transnational corporations and other business enterprises / RightDocs - Where human rights resolutions count \(right-docs.org\)](#)> accessed 20 September 2022.

<sup>135</sup> Abe (n 129) 138; See also John G. Ruggie, ‘Protect, Respect and Remedy: A Framework for Business and Human Rights’ (2008) 6 (3) OGEL [www.ogel.org](http://www.ogel.org)

<sup>136</sup> Basil Ugochukwu, ‘Engendering Access to Justice in Nigeria: The Role of Public Interest Litigation’ in David Lawson, Adam Dublin and Lea Mwambene (eds) *Gender, Poverty and Access to Justice* (Routledge 2020).

<sup>137</sup> Eghosa Ekhatior, ‘Improving Access to Environmental Justice Under the African Charter on Human and Peoples’ Rights: The Roles of NGOs in Nigeria’ (2014) 22 (1) African Journal of International and Comparative Law 63-79.

In sum, where the HRBA framework and the principles above are engaged by African States, this could potentially help to prevent the infringement of human rights that are likely to be affected by energy projects. Additionally, adopting the framework could mean that States can, at all times, monitor and supervise energy project activities to ensure the protection of broader human rights from the actions of public entities and corporations. Notwithstanding the benefits of the framework to resolve the conflict by striking a balance, some challenges may hinder their implementation in Africa.

## **6. Challenges to the UN HRBA Framework in Africa**

Just like other international instruments set up to resolve disputes, the HRBA framework designed for resolving the conflict between the development of energy access projects and the protection of fundamental human rights is not without challenges. The challenges are more apparent in Africa because many countries in the continent require development projects such as - energy access to increase economic growth and standards of living for the fulfilment of human rights. In this regard, some scholars have argued that while translating the framework into practice is challenging, the steps taken to adopt it will improve the overall impact and sustainability of economic development.<sup>138</sup> Turning to the limitations of the HRBA framework, the challenges there are gleaned from the responses of duty-bearers (normally public authorities/governments). This is related to how they ensure that minimum core rights regarding health, subsistence, life, access to justice, consultation and participation, housing and/or social security are fulfilled. We look at these challenges from a practical perspective and in the context of Africa.

### **6.1 Implementation Barrier**

The effective implementation of HRBA in energy access projects with practical measures to secure enforcement to protect the human rights of vulnerable communities presumes the existence of binding obligations on developing countries. Under the existing international legal regime consisting of non-binding UN Declarations, UN resolutions, international documents, Action Plans and other soft law instruments the obligation is lacking to implement the HRBA anyway. Therefore, the legal obligation to establish the HRBA is needed to relatively ensure that a fair balance is struck between the development of the project and the protection of fundamental human rights.

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<sup>138</sup> Emilie Filmer-Wilson, 'The Human Rights-Based Approach to Development: The Right to Water' (2005) 23 (2) Netherlands Institute of Human Rights 213-241.

## **6.2 Lack of Political Will**

Another impediment to the effectiveness of the framework in Africa is the lack of political will towards resolving the conflict through the implementation of the HRBA framework. We note that many national governments of African countries are usually not enthusiastic about the need to ensure the protection of human rights where energy access projects are being developed. Unfortunately, States in Africa have been more concerned with hosting major energy access projects at all costs, irrespective of the human rights risks or consequences of such projects.<sup>139</sup> One can only speculate that the fear of losing partners and the maximisation of profits is the reason for this. A key challenge in this regard is the decision to host a project being left entirely in the hands of national governments. We note that placing such a crucial decision in the hands of a country that is interested in such projects has led to the approval of questionable projects that pose a potential threat to human rights.

## **6.3 Pressure to Carry out Development Activities**

The African continent strives for growth and development as is repeatedly recorded in various documents of the African Union (AU) such as Agenda 2063.<sup>140</sup> Inclusion and sustainability in this development are crucial to balance the pursuit of economical and infrastructural development and the protection of human rights. Presently, the African continent appears to be witnessing a new era with China's influence and interest in developmental projects, particularly in rural communities. We note that energy projects geared towards development represent other infrastructure projects, such as building expressways, a major part. Only one of many examples is the Karuma Hydro-electric Power Station in Uganda which is currently under construction and with 85 per cent funded by the Chinese government.<sup>141</sup> This cooperation with China appears to be a major challenge because of its approach towards the protection of human rights in Asia and the influence of the African cooperation partner in these projects seems, voluntarily or involuntarily, of no avail.

## **6.4 Corruption**

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<sup>139</sup> The IWGIA Report (n 98) 33.

<sup>140</sup> See African Union Agenda2063 <https://au.int/en/documents/20141012/key-documents-agenda2063> accessed 2 April 2022.

<sup>141</sup> NS Energy Business: Karuma Hydropower Project in Uganda <https://www.nsenerybusiness.com/projects/karuma-hydropower-project-uganda/#> accessed 12 April 2022. The Karuma hydropower project is a 600MW run-of-the-river power plant under construction on the Nile River, in Kiryandongo District, Uganda.

According to the Corruption Perception Index (CPI) 2019, sub-Saharan Africa is the lowest-scoring region, and seven of the ten bottom countries are in Africa.<sup>142</sup> The high rate of corruption on the African continent influences energy access projects at different stages and to varying degrees. The resulting breaches of human rights are amongst the worst consequences and primarily affect already disadvantaged groups of persons. Oftentimes the right to consultation and participation of the affected community is already breached before the commencement of the project which then only allows the subsequent realisation. Thus, in addition to the breach of the right to consultation and participation, other rights such as the ones mentioned above are also violated during the process. The HRBA as a counterpart to corruption can be seen as bilateral – on the one hand, corruption has an impact on HRBA by nullifying the positive effects of the framework, and on the other hand, HRBA can strengthen both the position of claim holders and the performance of duty bearers.<sup>143</sup> The influence of the HRBA on corruption, especially the causes of corruption, may be restricted but it would still fall short being a challenge for the implementation of the HRBA. This finding is supported by the reference made by the UN Convention against Corruption to the HRBA concepts.<sup>144</sup>

## **6.5 Lack of Adequate Resources**

In practice, even when blocking out all other challenges and assuming full support from all sides, the actual challenge of limited resources cannot be ignored. This is attributed to the nature of political regimes as well as cultural and institutional factors that may significantly influence any strategy adopted for implementation.<sup>145</sup> The implementation of legal frameworks and programmes causes costs on the administrative level which are neither covered by the issuing institution nor bearable by developing countries. Arguably, when assuming the issuing institutions like the UN or AU are interested in actual implementations, the bulk stops with them to resolve inadequate or limited resources which do not necessarily result in financial injections. This becomes a problem for African States that may be willing to implement the

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<sup>142</sup> See Transparency International: Corruption Perspective Index 2019, [https://www.transparency.org/news/feature/cpi\\_2019\\_Sub\\_Saharan\\_Africa](https://www.transparency.org/news/feature/cpi_2019_Sub_Saharan_Africa) accessed 10 April 2022.

<sup>143</sup> Thusitha Pilapitiya (UNDP), The impact of corruption on the human rights-based approach to development (2004) <[http://www.albacharia.ma/xmlui/bitstream/handle/123456789/30538/0284The\\_Impact\\_of\\_Corruption\\_on\\_the\\_Human\\_Rights\\_Based\\_Approach\\_to\\_Development%282005%29r.pdf?sequence=1](http://www.albacharia.ma/xmlui/bitstream/handle/123456789/30538/0284The_Impact_of_Corruption_on_the_Human_Rights_Based_Approach_to_Development%282005%29r.pdf?sequence=1)> accessed 3 April 2022.

<sup>144</sup> United Nations Office on Drugs and Crime: UN Convention Against Corruption [http://www.unodc.org/documents/brussels/UN\\_Convention\\_Against\\_Corruption.pdf](http://www.unodc.org/documents/brussels/UN_Convention_Against_Corruption.pdf) accessed 10 April 2022.

<sup>145</sup> Morten Broberg and Hans-Otto Sano, 'Strengths and Weaknesses in a Human Rights-Based Approach to International Development - An Analysis of a Rights-Based Approach to Development Assistance Based on Practical Experiences' (2018) 22 (5) The International Journal of Human Rights 664-680.



framework but lacks the capacity as a result of the unavailability of resources to pursue the implementation of the HRBA framework.

## **7. Conclusion**

This article has set out to examine two conflicting interests in the context of Africa: the provision of access to energy and the protection of human rights in the development of energy projects and argues for the use of the HRBA framework as a tool to strike a balance. This was done bearing in mind the global movement to conceptualise energy access as integral to the realisation of existing socio-economic rights. In doing so, the paper built its main argument on three pillars. Firstly, analysing the need for increased energy access in Africa and its importance to the realisation of rights that are central to human survival and development. Here, the article concludes that energy access is needed for the realisation of the three categories of human rights namely: civil and political rights, economic, social and cultural rights and, solidarity right (right to development). Secondly, the existing conflict between energy access development and human rights risks and violations was established. Here, the article identified the use of the HRBA framework and its principles as a strategic tool that could be used to strike a balance. Thirdly, it provided an analysis of the HRBA framework that could be used to resolve the conflict between energy access projects and human rights concern in African States. As noted in the introduction, there is mostly attention to human rights *ex post facto*, and the use of this strategy is a preventative nature to address the conflict arising from the development of energy access projects.

The key conclusion in this article is that to effectively strike a balance between the conflicting interests, the application of the HRBA framework as an energy justice approach should be incorporated into the energy law and policy regime of African States. This energy justice approach would result in the integration of human rights into energy access projects, and would further create a duty on African States that encompasses legal, political, administrative, and cultural measures that safeguard human rights and ensure that risks and violations arising from energy projects are treated as unlawful. The use of the HBRA framework by policymakers will mark a significant departure from the dilemma that governments in Africa face in terms of whether they should pursue economic development at the expense of the protection of human rights.

In particular, for African countries, the adoption and implementation of the HRBA framework through the five principles is potentially a way of integrating human rights concerns into the

process and procedures for the planning, approval and development of energy projects. The framework would provide viable procedural approaches that African States, and perhaps countries in other regions, could use to resolve potential conflicts between development projects and human rights risks and violations.