New wine in old bottles: the renewable energy sector, climate justice and Pillar III of the United Nations Guiding Principles

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Background

The renewable energy campaign is significant for probably two main reasons in the African context- combating climate change, and climate friendly power generation to drive industrialisation on the continent as a critical development goal. As investment in the renewable energy sector intensifies[1], the important question is to what extent are vulnerable communities hosting renewable energy projects secured against human rights violations, and whether they are guaranteed reasonable access to remedies when these rights are breached. Despite the inherent potentials of the renewable energy sector, the Business and Human Rights Resource Centre (BHRC) cautioned that ‘‘a fast transition to

renewable energy is essential, but it will be neither fair for people nor sustainable for companies unless undertaken with human rights considerations at its core''[2].

The need for caution is underscored by contemporary BHRC statistics pointing to an upsurge in human rights incidents arising from renewable energy projects almost in a manner reminiscent of the ills associated with investment in the fossil fuel industry[3]. According to a 2016 press release by the BHRC, at least 115 allegations of human rights violations by the renewable energy companies had been lodged with the Centre as at 2016, whereas 94 such allegations reportedly took place after 2010[4]. The BHRC lists some of the abuse allegations as including killings, harm to indigenous peoples' lives and livelihoods; land grabs; threats; and intimidation; dangerous working conditions and poverty wages[5]. The above concerns were underlined by Phil Bloomer[6] who noted that as essential as the role of the renewable energy sector is (given the quest for an urgent shift to a green economy) wind and hydropower companies must not be allowed to facilitate this transformation at the expense of poor people's land and livelihoods[7].

Addressing the above eventualities would entail prioritising climate justice in the realisation of climate-focused goals. Simply put, climate justice implies that activities designed to combat climate change (including the realisation of development goals) must be amenable to a human right centred approach marked by respect for the rights of the most vulnerable people[8]. Indeed, Mary Robinson[9], a leading protagonist of the climate justice campaign affirmed that "it is important to remain cognizant that not all action which is good for the planet is automatically good for people. We require a just transition where human rights inform all climate action."[10]

Therefore, when States take action to address climate change, they are enjoined to do so whilst upholding their obligation to respect, protect and fulfil human rights, including the obligation to provide effective remedial procedures [11]. Corporations have similar responsibility under Pillars II and III of the United Nation Guiding Principles on Business and Human Rights (UNGP).

As with other large-scale community-based development projects, a veritable

governance structure that integrates key human rights safeguards such as free, prior and informed consent (FPIC) as a right of local host communities[12] as well as a sound grievance mechanism is required for renewable energy projects. The survey conducted by the BHRC indicated that out of about 50 examined companies operating in the renewable energy sector only about 34 manifested some commitment to consulting with local communities, while only 6 companies adhere to the internationally recognised right to FPIC[13].

Climate justice and grievance mechanisms

As noted above, putting human rights at the centre of the climate change campaign and pursuit of development goals such as efficient and sustainable energy generation implicates principles of climate justice. Along this line, the United Nations Framework Convention on Climate Change (UNFCC), clarified that measures targeted at climate justice must be predicated on an international safeguard system that prevents social and environmental harm, and promotion of public participation, transparency, accountability and equity [14]. Further, the UNFCC recommended that a robust grievance mechanism, which ensures that those who may be negatively affected by climate related activities can submit their grievances with a view to timely resolution, is necessary for the success of an international safeguard system[15].

The strategic importance of a sound grievance mechanism[16] in relation to community-based investment projects was highlighted by the Centre for International Environmental Law, Earth Justice and Client Earth (2015) to include helping institutions minimize harm to communities and ecosystems by protecting existing rights, obligations and standards[17]. Grievance mechanisms are similarly credited with potential to facilitate transparency and stakeholder participation, effectively infusing projects with the needed legitimacy as contemplated under principle 31 of the UNGP, while promoting sustainable development[18].

Principle 25 of the UNGP envisages a host of non-judicial grievance mechanisms that the state can establish or work with businesses to achieve.[19] Corporations should remediate harm they have caused (through engaging in legitimate non-judicial dispute resolution processes such as operational level

grievance mechanisms, mediation, and binding non-judicial processes) such as by providing ‘a fair and independent process, being accountable, and producing outcomes that are consistent with human rights’.[20] This access includes procedural as well as substantive safeguards, namely that access should be proportionate in terms of being expeditious, free to access and speedily, and transparent (procedural safeguards), and that the quality of the outcome should be one which gives effect to the victim’s human rights, redressing and repairing the harm caused (substantive)[21]. Both elements establish the core foundation of access to an effective remedy[22].

Conclusion

It is important to ensure that such grievance mechanisms are robust with a clear mandate to hold corporations accountable to internationally recognised human and labour rights. The threat is that such processes will amount to no more than a PR campaign used by corporations in order to project that they act responsibly. The evidence so far is that most non-binding grievance mechanisms used by corporations have not delivered human rights compatible solutions to victims or communities. At least their use is not widely documented and has not been transparent or a source of continuous learning[23] as per the requirements of Principle 31 of the UNGP.

Thus, it is vital that binding processes such as court litigation and arbitration are available for victims or communities to approach for access to an effective remedy. We believe that the bulk of the responsibility rests on industry initiatives which are usually active in medium and large size renewable energy projects, including financing entities which are committed to the equator principles[24], binding and non-binding grievance mechanisms that victims can engage to remove the threat of harm, or for reparation of harm caused by corporations’ business conduct.

Moreover, we believe that careful design should go into strengthening the independence and impartiality of such processes, and that there is a great transparency in the process for all stakeholders including members of the public, investors, NGOs, and financing companies. The latter will allow the process to be a continuous source of learning, so all stakeholders could learn

from it in order to prevent similar situations from occurring.[25]

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[1] The Guardian Newspaper in 2015 reported an upsurge in investment in new wind, solar and hydro plants noting that about £198 million was invested in renewable energy globally marking the largest annual increase of clean energy implementation. See The Guardian Newspaper UK'Renewable energy smashes global records in 2015 report shows', June 2016 available at https://www.theguardian.com/environment/2016/jun/01/renewable-energy-smashes-global-records-in-2015-report-shows accessed on August 18, 2019.

[2] Business and Human Rights Resource Centre ''Towards Responsible Renewable Energy'', November 2016 p1 available at https://www.business-humanrights.org/sites/default/files/Towards%20Responsible%20Renewable%20Energy%20%20Final_1.pdfaccessed on August 18, 2019

[3] Business & Human Rights Resource Centre ''Press Release: 50 Renewable Energy Companies' Human Rights Policies & Records Examined'', November 3, 2016 available at https://www.business-humanrights.org/en/press-release-50-renewable-energy-companies%E2%80%99-human-rights-policies-records-examined, accessed on August 22, 2019

[4] Ibid

[5] Business and Human Rights Resource Centre online report ''Fast and Fair Renewable Energy Investments- A Practical Guide for Investors'' July 2019 p4 available at https://www.business-humanrights.org/sites/default/files/Renewable%20Energy%20Investor%20Briefing_0.pdf , accessed on August 21, 2019

[6] Phil Bloomer is an Executive Director at the Business and Human Rights Resource Centre.

[7] Ibid (n2) above

[8] Mary Robinson Foundation 'Principles of Climate Justice' available on Foundation's website, see https://www.mrfcj.org/principles-of-climate-justice/, accessed on August 21, 2019.

[9] Mary Robinson is a Former UN High Commissioner for Human Rights and seventh President of Ireland.

[10] Mary Robinson's Keynote Speech 'A New Vision for Multilateral Cooperation' at the 2017 Partnership Forum Economic and Social Council (ECOSOC) 5th April 2017 available at https://www.mrfcj.org/wp-content/uploads/2017/04/ECOSOC-Partnership-Forum-Speech-FINAL.pdf, accessed on August 21, 2019

[11] John H. Knox, ''Human Rights and Safeguards in the New Climate Mechanism established in Article 6, paragraph 4 of the Paris Agreement'' May 3, 2016 p1 available at https://www.ohchr.org/Documents/Issues/Environment/Letter_to_SBSTA_UNFCCC_May2016 , accessed on August 22, 2019. John H. Knox is the United Nations Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment.

[12] See article 19 of the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP)

[13] Ibid (n2) above

[14] Centre for International Environmental Law; Earth Justice & Client Earth ''Grievance Mechanisms in the UNFCCC: An Essential Component of an International Safeguard System'', March 2018 p1 available at http://www.ciel.org/wp-content/uploads/2015/08/GrievanceMech_UNFCCC_Dec2011.pdf accessed on August 18, 2019.

[15] ibid

[16] Grievance mechanism in this context implies both judicial and non-judicial mechanisms.

[17] Centre for International Environmental Law; Earth Justice & Client Earth (n14) above

[18] Ibid

[19] UNGP (n 1), Principle 25

[20] EU Oil and Gas Guide (n 2); See also Communication From The Commission To The European Parliament, The Council, The European Economic And Social Committee And The Committee Of The Regions 'A Global Partnership for Poverty Eradication and Sustainable Development after 2015' Com(2015) 44, Brussels 5.2.2015, p12 available at https://ec.europa.eu/europeaid/communication-global-partnership-poverty-eradication-and-sustainable-development-after-2015_en accessed on September 5, 2019

[21] Directorate-General for External Policies- European Parliament, Access to Legal Remedies for Victims of Corporate Human Rights Abuses in Third Countries, PE 603.475 February 2019, p 11, available at http://www.europarl.europa.eu/RegData/etudes/STUD/2019/603475/EXPO_STU(2019)60347 accessed on September 5, 2019.

[22] Principle 31 of the UNGP.

[23] See forthcoming Article Farah Y, Makhoul Malakee, 'Non-judicial grievance mechanisms as a viable access to an effective remedy for victims of business related human rights violations', In Hourani, S., and Oliveira, L., Access to justice, Kluwer (2020)

[24] Principle 6 of the equator principles expects Borrowers to establish non-judicial grievance mechanism similar to the UNGP operational level type.

[25] For in depth analysis see Farah, Y. & Makhoul, M., 1 Oct 2017, *Research Handbook on EU Energy Law and Policy.* Leal-Arcas, R. & Wouters, J. (eds.). Edward Elgar, p. 309-335 Chapter 17, available at https://www.researchgate.net/profile/Rafael_Leal-Arcas/publication/320456010_Research_Handbook_on_EU_Energy_Law_and_Policy/links/59 Handbook-on-EU-Energy-Law-and-Policy.pdf?origin=publication_detail accessed on September 5, 2019

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