

**INDIGENOUS PEOPLE'S RIGHTS AND RENEWABLE ENERGY
PROJECTS IN INTERNATIONAL CONTEXT**

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ABSTRACT

Everyone in this world aims for having a pollution free and low carbon society. For that the renewable energy resources are especially useful. For establishing these renewable energy resources the indigenous people have been displaced across the globe and not given any compensation in many instances. In the project the author would like to look the status of indigenous people in Africa. The author would deal with various regional and international charters which support the indigenous people's rights in the project. The Author would also deal with how the investors are supposed to follow the human rights when they are establishing the renewable energy companies. The author prominently discusses about "The African Charter on Human and Peoples' Rights, 1981" (also known as the Banjul Charter) which speaks about the sustainability of renewable projects and the rights of indigenous people in such situation. The author would conclude the project stating the suggestions.

INTRODUCTION

Who are Indigenous peoples?

Most of the indigenous people live from artic region to pacific region in the world. There is no standard definition of indigenous people under any international law and policy. Even the declaration of indigenous people does not set out any standard definition as to who includes indigenous people. As per Article 9 and Article 33 Indigenous people have the right to belong to any indigenous community and follow their own customs and traditions and also, they have the

right to determine their own identity.¹ A Bolivian proposal was not adopted at the United Nations in 1948 to establish a sub-commission to research the social issues of aboriginal peoples.

The International Labour Organisation (ILO) was the first international body to take action on indigenous issues, and the only body affiliated with the precursor of the United Nations, the League of Nations. The ILO convention distinguishes between tribal people and indigenous people in the Notification 169 the self-identification stating that it should be considered as fundamental criteria². The former Commission on Human Rights set up an open-ended inter-sessional working group in 1995 to consider, as submitted by the Sub-Commission, the draft declaration on the rights of indigenous peoples. This open-ended working group, consisting of States and with the participation of indigenous individuals and delegates, along with non-state actors and academia, met annually until 2006, when the Chair submitted a draft declaration to the Human Rights Council. In June of the same year, the Council adopted the draft and sent it to the General Assembly, which adopted the Declaration in 2007.

According to the UNPF [The United Nations Permanent Forum on Indigenous Peoples] the indigenous people are the people having strong link to territories and surrounding resources, having different economic, political, or social systems and have variant language, beliefs and cultures.

What are Renewable Energy Resources?

Renewable energy is a form of energy after using it replaces itself and if it is managed well then it can last indefinitely. The urge for renewable energy started because of the global warming which resulted in storms, ice melts, droughts, hunger, unrest and migration³.

¹ *Indigenous Peoples and the United Nations Human Rights System, Fact Sheet No. 9/Rev.2, UNITED NATIONS New York and Geneva, 2013*

² "(a) Tribal peoples in independent countries whose social, cultural and economic conditions distinguish them from other sections of the national community, and whose status is regulated wholly or partially by their own customs or traditions or by special laws or regulations."

"(b) Peoples in independent countries who are regarded as indigenous on account of their descent from the populations which inhabited the country, or a geographical region to which the country belongs, at the time of conquest or colonization or the establishment of present State boundaries and who, irrespective of their legal status, retain some or all of their own social, economic, cultural and political institutions."

³ *Politics of Renewable Energy in Africa: Nature, Prospects, and Challenges, By Samuel Adams and William Asante, December 13th 2019, 10.5772/intechopen.89019, Last Accessed on 20th May, 2021*

Consequently there has been consensus in transition to renewable energy resources such as fuel substitution for curbing climate crisis⁴.

Renewable energy in Africa

On 11th July 2001, the African Union adopted The Convention of the African Energy Commission (CAEC) which came into force on 13th December 2006 and established the African Energy Commission (AFREC). As per Article 4 of CAEC the commission must draft out energy policies, plans based on all levels and strategies for its implementation and developing the energy sector in Africa. However, the citizens of the African Continent still have very less share in accessing the power generated by energy resources.

The below table shows which country is best for which renewable energy resource in Africa.

Renewable energy	Leading African countries with capacity (MW)	Leading African countries in production (GWh)
Geothermal	Ethiopia, Kenya	Kenya
Hydropower	Congo DR, Egypt, Ethiopia, Ghana, Morocco, Mozambique, Nigeria, South Africa, Sudan, Zambia	Angola, Cameroon, Congo DR, Cote D'Ivoire, Egypt, Ethiopia, Ghana, Kenya, Malawi, Morocco, Mozambique, Namibia, Nigeria, South Africa, Sudan, Tanzania, Uganda, Zambia, Zimbabwe.
Wind	Egypt, Ethiopia, Morocco, South Africa, Tunisia.	Egypt, Ethiopia, Morocco, South Africa, Tunisia.
Solar	Algeria, Egypt, Morocco, Reunion, South Africa	Algeria, Egypt, Morocco, Reunion, South Africa
Bioenergy	Eswatini, Ethiopia, South Africa, Sudan, Zimbabwe	Angola, Egypt, Eswatini, Kenya, Mauritius, Reunion, South Africa, Sudan, Tanzania, Uganda, Zimbabwe

Source: Renewable Energy Statistics 2019. Abu Dhabi: The International Renewable Energy Agency; 2019

INTERNATIONAL AND REGIONAL TREATIES GOVERNING SUCH OCCURRENCES IN AFRICA

1. AFRICAN COMMISSION ON HUMAN AND PEOPLES' RIGHTS [BANJUL/AFRICAN CHARTER], 1981 DEVELOPMENT OF THE CHARTER⁵

⁴ Burke MJ, Stephens JC. Political power and renewable energy futures: A critical review. *Energy Research & Social Science*. 2018;35:78-93. DOI: 10.1016/j.erss.2017.10.018, Last Accessed on 20th May, 2021

Many NGOs and Governmental organizations in 1960s and 1970s wanted to have a mechanism to enhance and promote human and fundamental rights of people. Consequently, the African Charter came into existence on 27th 1981. A commission is also established under that African Charter for effective implementation of human and fundamental rights. But the recommendations of the commission are not mandatory. Hence most of the governments ignore those recommendations. The enforcement mechanism is lacking in the commission hence a protocol to establish an African Court on Human and People's Rights was adopted in 1998 but it took almost 10 years for enforcing and implementing the protocol.

KEY FEATURES OF THE CHARTER

The Charter has two types of rights one is individual rights and the other one is collective rights. Article 3-18 deal with the former rights and Article 19-24 deal with the latter rights. Article 1, Article 2, and Article 26 are the rights which apply to everyone commonly such as general provisions. Both, the individual and collective rights are subjected to these Articles which state that:

- a. Articles 1 and 2 oblige all States parties to implement and give effect to the rights found in the Charter, without discrimination, in their domestic laws and to ensure that individuals and peoples may enforce those rights through domestic courts and administrative.⁶
- b. Article 26 continues in the same vein requiring that States parties ensure that domestic courts are independent and those governmental and non-governmental human rights institutions may operate and promote and protect the rights found in the Charter.⁷

These individual and collective rights further include civil, political, social, economic, and cultural rights. Some these different right overlap on each other which deal with life, liberty, personal security, justice, culture, and other basic human needs such as food, shelter, health, and education. Such rights are incredibly significant for the indigenous people. Hence, in each scenario if the indigenous people do not have access to justice, if they are used for slavery or

⁵ A Guide to the African Charter on Human and Peoples' Rights by Amnesty International, ISBN: 0-86210-407-6 978-0-86210-407-8, www.amnesty.org., Last Accessed on 20th May, 2021

⁶ Art 1 & Art 2 of The African Charter on Human and Peoples' Rights, 1981

⁷ Art 26 of Id.

subjected to inhuman conditions, if they are not allowed to participate in elections then the human rights given in Article 15, Article 16 and Article 17 of the charter are violated.

Another significant right provided in the charter Article 14⁸ which deals about the right to property. This right is incredibly significant about the indigenous people's struggle for protection and recognition of their rights related to their territories and traditional lands.

The Concept of 'Peoples' in the Charter⁹

The term 'peoples' rights' in the charter is not defined properly. Some have argued that peoples' rights mean the rights given by the state to collective number of people. However the African Commission has interpreted that it includes rights of various groups and it went on to recognize that such various groups also have right of self-determination.¹⁰

Mandate of the African Commission

Article 45 of the Charter states that, "*The Commission relatively broad powers to promote and ensure the protection of human and peoples' rights. The Commission may collect documents; undertake studies and research; organize seminars and conferences; formulate principles on which domestic legislation may be based; cooperate with other African and international human rights institutions; interpret provisions of the Charter on the request of an OAU member State, the OAU itself, or an African organization recognized by the OAU; and perform any other task that may be entrusted to it by the OAU Assembly of Heads of State and Government.*"

Apart from all these the main function of the commission is to protect the human and people's rights that are given in the charter. Also the domestic remedies must be exhausted before approaching the African Commission.

⁸ Article 14 of the Charter provides: "*The right to property shall be guaranteed. It may only be encroached upon in the interest of public need or in the general interest of the community and in accordance with the provisions of appropriate laws.*"

⁹ *Groups and the African Charter on Human and Peoples' Rights* Author(s): Rachel Murray and Steven Wheatley Source: *Human Rights Quarterly*, Feb., 2003, Vol. 25, No. 1 (Feb., 2003), pp. 213-236 Published by: The Johns Hopkins University Press Stable URL: <https://www.jstor.org/stable/20069658>

¹⁰ *The Social and Economic Rights Action Center and the Center for Economic and Social Rights v. Nigeria*, Communication 155/96, Fifteenth Activity Report, 2001-02, ACHPR/RPT.15.

Resolution on the Situation in Rwanda, Seventh Annual Activity Report of the African Commission on Human and Peoples' Rights, 1993-94, ACHPR/APT/7th, Annex XII, at para. 2.

2. THE WORKING GROUP OF EXPERTS OF THE AFRICAN COMMISSION ON INDIGENOUS POPULATIONS/COMMUNITIES IN AFRICA, 2003¹¹

In the report of the Commission's working Group on indigenous people, the commission recognized the existence of "Indigenous People", which was adopted in 2003. It also opined the rights given which the basic human and fundamental rights, in African Charter to all people which include indigenous people cannot be violated.¹² Thus, the right to self-determination should not be utilized to substantiate secession from various other people.¹³ Undeniably, the African Commission has also pointed out that "*The protection of rights to land and natural resources is fundamental for the survival of indigenous communities in Africa and such protection relates both to Articles 20, 21, 22 and 24 of the African Charter.*"¹⁴

This has been in line with many of the judicial pronouncements and decisions given by various UN human rights bodies in support of indigenous rights relating to ancestral lands of the indigenous people.

Even when the collective rights provided in Charter are not justiciable the commission wants to deal the complaints concerning those alleged violations of People's Rights.¹⁵ This upheld the basic purpose of the African Charter that is to treat everyone on same footing without any bias. While the collective rights must be developed in a better, but the African Commission

¹¹ African Commission on Human and Peoples' Rights, Report of the African Commission's Working Group of Experts on Indigenous Populations/Communities, adopted by the African Commission at its 34th Ordinary Session, November 2003. The full report is available in English through the Commission's website at http://www.achpr.org/english/_info/wgip_others.htm

¹² African Commission on Human and Peoples' Rights, Report of the African Commission's Working Group of Experts on Indigenous Populations/Communities, adopted by the African Commission at its 34th Ordinary Session, November 2003. The full report is available in English through the Commission's website at http://www.achpr.org/english/_info/wgip_others.htm or at <http://www.iwgia.org/graphics/SynkronLibrary/Documents/publications/Downloadpublications/Books/AfricanCommissionbookEnglish.pdf>, Page 77

¹³ This is essentially the position taken by the UN Working Group on Indigenous Populations when it drafted the UN Declaration on the Rights of Indigenous Peoples.

¹⁴ African Commission on Human and Peoples' Rights, Report of the African Commission's Working Group of Experts on Indigenous Populations/Communities, adopted by the African Commission at its 34th Ordinary Session, November 2003. The full report is available in English through the Commission's website at http://www.achpr.org/english/_info/wgip_others.htm or at <http://www.iwgia.org/graphics/SynkronLibrary/Documents/publications/Downloadpublications/Books/AfricanCommissionbookEnglish.pdf>, Page 21

¹⁵ E.g. *Katangese Peoples' Congress v. Zaire*, Communication 75/92, Eighth Annual Activity Report 1994-95, ACHPR/RPT/8th, Annex VI; See also notes 7 and 8.

has been time and again upholding such rights for e.g., in the case of the Ogoni people of Nigeria.¹⁶

3. THE UNITED NATIONS DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES, 2007¹⁷

In 2007 the Declaration on the Rights of the Indigenous People has been adopted by United Nations General Assembly. This declaration is one of the most prominent one which deals specifically about the recognition, protection and promotion of the rights of indigenous people. Some of the most important substantive rights contained in the Declaration and under international law and policy more broadly are outlined below.

1. Right of Self-determination

The declaration has affirmed the right of self-determination and thus the indigenous people are free to pursue their own political, economic, social, cultural and economic development.

In relation to such right to autonomy or self-government of indigenous people, Article 4 states that: “indigenous peoples, in exercising their right to self-determination, have the right to autonomy or self-government in matters relating to their internal and local affairs, as well as ways and means for financing their autonomous functions.” And Article 34 of the Declaration states to “promote, develop and maintain their institutional structures and their distinctive customs, spirituality, traditions, procedures, practices and, in the cases where they exist, juridical systems or customs”

The indigenous people’s political rights and the right to self-determination are closely intertwined. The indigenous people’s rights include the right to participate in the decision-making process of the legislative or administrative matters which would affect on the right pf the indigenous people. It is the state’s duty to consult and cooperate with the indigenous people in such decision-making process and they should also ensure the prior consent from indigenous people before implementing any change of those legislative or administrative measures.¹⁸ The “United Nations Expert Mechanism on the Rights of Indigenous Peoples” has undertaken a study on indigenous people and their right to participate in decision-making from 2009-2011. and it

¹⁶ *The Social and Economic Rights Action Center and the Center for Economic and Social Rights v. Nigeria, Communication 155/96, Fifteenth Activity Report, 2001-02, ACHPR/RPT.15.*

¹⁷ The United Nations General Assembly. The Declaration on the Rights of Indigenous People. 2007.

¹⁸ See art. 18 of the Declaration of Rights of Indigenous People, 2006

opined that, “participation rights of the indigenous people are that they must have been sought prior consent on the activities that have a huge impact on the indigenous people and their lands, territories, and resources.”¹⁹ This is also in favor of Article 26 and Article 27 of the declaration which states the same.

2. Cultural Distinctiveness

The cultural distinctiveness of the indigenous people makes them unique and one of the defining factors²⁰. From giving right to cultural equality and many more the declaration has many provisions relating to anti-discrimination and adverse treatment of indigenous people. These rights include “right not to be subjected to assimilation or destruction of their culture”; “the right to practise and revitalize their cultural traditions and customs, to teach their cultural mores, and to the repatriation of human remains”; and “the right to maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions.”

4. THE UN GUIDING PRINCIPLES ON BUSINESS AND HUMAN RIGHTS

There are three guiding pillars on Business and human rights. They are:

- **Duty of the state to protect human rights against third party abuse through suitable policies, legislation, regulations etc.**
- **There is corporate responsibility to protect human rights and to act with due diligence.**
- **There should be effective judicial and non-judicial remedies.**

Since their endorsement, the Guiding Principles have guided international integration of business and human rights standards, enhancing their role as the global authoritative framework for business and human rights.²¹

¹⁹ Expert Mechanism on the Rights of Indigenous Peoples, advice No. 2: indigenous peoples and the right to participate in decision-making (A/HRC/18/42, annex). In the case of the Mayagna (Sumo) Awas Tingni Community v. Nicaragua, Judgement of 31 August 2001, the court held that, “For indigenous communities, relations to the land are not merely a matter of possession and production but a material and spiritual element which they must fully enjoy, even to preserve their cultural legacy and transmit it to future generations”

²⁰ “Prior to the Declaration, the international human rights system had been slow to endorse the concept of rights vested in groups, except for the right to self-determination. It had been generally perceived that individuals’ rights would be sufficient to ensure adequate protection and promotion of rights with a collective dimension, such as the right to culture. However, with the adoption of the Declaration, the international community clearly affirms that indigenous peoples require recognition of their collective rights as peoples to enable them to enjoy human rights.”

²¹ <https://www.ungreporting.org/resources/the-ungps/>, Last Accessed on 20th May, 2021

IMPACT OF RENEWABLE ENERGY PROJECTS ON INDIGENOUS COMMUNITIES IN KENYA²²

Report 28 of IWGIA explores the socio-cultural consequences of two separate projects in many indigenous groups, the Lake Turkana Wind Power Project and Olkaria Geothermal Power Plants. Relocation has occurred in both programs. Indigenous communities were relocated to create a road to the project area for the wind project, and then an effort was made to reconstruct the village with some better facilities. The village, however, grew exponentially after, among other reasons, the city was overwhelmed by an influx of people searching for jobs, which created major problems. A resettlement program of four Maasai villages was initiated by the geothermal project, which failed to take important cultural aspects into account.

Health and environmental concerns related to radioactive gases emitted in geothermal power production have also been reported in the geothermal project, and there has been a rise in skin diseases, stillbirths in cattle and premature delivery in local communities. The two green energy initiatives reviewed in this study have used dubious methods to respect indigenous residents' territorial rights. In one of the case studies, controversies over forced relocations and the neglect of the right of indigenous peoples to free, prior and informed consent (FPIC) led to an ongoing court case. Such procedures often impose an unfair burden on local governments because their resources for accessing information and hiring legal counsel are often scarce compared to the resources available for litigation by private corporations or government authorities. The report found that it was possible to fail to obey the corresponding human rights regulations because the stakeholders involved do not consider local communities as indigenous, against their own self-identification and recognition by the African Commission on Human and Peoples Rights (ACHPR). Failure to identify affected persons as indigenous means that there is no enforcement of international human rights mechanisms that protect indigenous peoples and their territories. This report, itself a follow-up to the 2015 IWGIA Human Rights Report evaluating the effect of the same projects on indigenous communities, draws immediate attention to the fact that while planning and implementing such projects, the Kenyan state and renewable energy companies must take responsibility for upholding the rights of indigenous peoples as enshrined in various international measures. This also means that, from planning to building,

²² “*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*”, available at <https://www.iwgia.org/en/kenya/3534-impact-of-renewable-energy-projects-on-indigenous-communities-in-kenya>., Last Accessed on 20th May, 2021

indigenous peoples must be included in project designs, inter-generational benefit-sharing systems must be enforced, and communities must have access to the energy produced.

CONCLUSION

Indigenous peoples are among the first and worst affected by climate change because of their close relationship with the environment and dependence on natural resources, such as the Saami in Norway, Sweden, Finland and Russia, and the Guarani in Brazil. For example, the warmer weather and loss of sea ice across the Arctic are changing the availability of traditional food sources and raising the risk of indigenous peoples dependent on Arctic land and waters to fly. Deforestation, declines in rainfall, and increases in droughts are adversely affecting the livelihoods and access to water of indigenous people in the Amazon.²³ Indigenous peoples' rights are now gradually being integrated formally into domestic legal frameworks. The courts were also instrumental in the implementation, in domestic proceedings, of the interests of indigenous peoples expressed at the international level.²⁴ More generally, and sometimes with the participation of national human rights organizations, under international human rights law, government policies affecting indigenous peoples are gradually taking their rights into account.



SUGGESTIONS



1. Indigenous people should advocate for transition to low-carbon economies along with climate change.
2. Governments should legislate laws and policies which ensures the active participation of indigenous people in the decision-making process and also in sharing benefits out of renewable energy projects.
3. Human Rights must be ensured and followed by the Renewable Energy investors. Thus, it would reduce the friction between indigenous people who are the stakeholders and investors.
4. Renewable Energy Companies should engage in discussions with the local governments and local communities and they should encourage the indigenous people practices.

²³ *Respecting the rights of indigenous peoples as Renewable grows*” by Radhika Shah & Phil Bloomer, *Stanford Social Innovation Review*, 2018

²⁴ *See, for example, Aurelio Cal et al. v. Attorney General of Belize (Supreme Court of Belize, 2007)*