Published in Daibert, Arlindo (ED) Direito Ambiental Comparado (Rio de Janeiro, Brazil: Belo Horizonte, Editora forum 2008) pp. 367 – 412.

APPLICATION OF ENVIRONMENTAL LAW PARADIGM TO TAME CONFLICT AND POVERTY IN NATURAL RESOURCE – RICH AFRICAN COUNTRIES

By

Prof. C.O. Okidi
Co-ordinator
CENTRE FOR ADVANCE STUDIES IN
ENVIRONMENT LAW AND POLICY
(CASELAP)
University of Nairobi
P.O. Box 30197 – 00100
NAIROBI
KENYA

A Presentation to
4th INTERNATIONAL CONGRESS ON
ENVIRONMENTAL LAW – 2007

RIO DE JANEIRO ATTORNEY GENERAL'S OFFICE

22nd to 24th May 2007.

(Version of 14th May, 2007)

CONTENTS

I INTRODUCTION

This presentation is prepared for a great occasion. Like most academics over fifty years of age, I have made several notable presentations, including those inaugurating specific epochs. But to me the present one is a kin only to one other: The Elizabeth Haub Lecture inaugurating award to me in September 1985, (the Award was for 1984), and which has been conferred on a number environmental law experts who are attending this 4th Environmental Law Congress. My reaction on receiving the news of the honour were practically similar.

As I express my gratitude to the Office of the Honourable Attorney General in the City of Rio de Janeiro for the honour, I am abundantly conscious of two fundamental issues. First, I am conscious of the many congratulations conveyed to me on this honour. To that I want to say, with profound humility that I must share the honour with my friends and colleagues worldwide, without whose support and encouragement, whatever I have done to deserve this recognition would not have been possible. I thank all such friends and colleagues whether they are here in Rio or not.

Secondly, this kind of recognition in my view, carries enormous challenges. Oftentimes people see such honour simply as recognition. But that is only one part. The bigger part is that it raises the bar of challenges and expectations. What I take with me, therefore, is not just the joy of recognition but the enormous challenge and expectation that I now have greater responsibility to do more for environmental law. In response, therefore, I must demonstrate the duty to explore new horizons in theory and application of environmental law. I must try to do abit of that in this presentation to the 4th International Congress on Environmental Law.

Choosing a topic for such an occasion is not easy. At the time of Elizabeth Haub Prize, I was preoccupied with how to demonstrate to eastern African countries that the newly adopted Nairobi Convention on marine environment would control environmental degradation. But most important is that it would also open up opportunities for promoting sustainable development[1]. In other words, I see this kind of occasion as an opportunity to share with colleagues thoughts over how a cognate issue which seem intractable at the moment could be resolved or mitigated.

For a few years now I have had reflections at the back of my mind as to how environmental law thinkers can contribute to mitigation of poverty and conflict in natural resource-rich African countries. Oftentimes, in Africa discourse on environmental law avoid facing intractable problems such as petroleum and energy, even though it is evident that the traditional contractual paradigms of mobilization and utilization of fossil fuels, for instance, have nurtured both bloody conflicts and abject poverty. In other wards, while conventional wisdom assumes that natural resource-riches should lead to national socio-economic prosperity and peace, the world has witnessed a preponderance of the exact opposite. Hopes of African countries were, at independence, that bringing an end to colonial exploitation of African natural resources will usher a new error of national

---

[1] The lecture was published as Okidi, C.O. "Nairobi Convention: Conservation and Development Imperatives" in Environmental Policy and Law Vol. 15 No. 2 (1985) pp 43-51.

control over natural resources and hence prosperity. In fact, this conception led to adoption of the United Nations General Assembly Resolution on Permanent Sovereignty Over Natural Resources in 1962[2]. A decade later the principle was applied to the resources of marine natural resources of the coastal state via the legal regime of the continental shelf and the exclusive economic zone (EEZ) by UN General Assembly Resolution on Permanent Sovereignty over Natural Resources of Developing Countries[3]. This was in response to the recent negotiations on the law of the sea and awareness that abundant living and non-living resources awaited coastal states under the extended jurisdiction in the new legal order of oceans.

As will have been evident to observers of the African scene mobilization, exploitation and utilization of natural resources has invariably left trails of conflict and widespread poverty whether the resources be from marine areas as is hydrocarbon from Nigeria or from Land as with diamond, gold and timber from Gambia and Sierra Leone.

We shall propose that however much the conventional commercial paradigm may be improved, on its own it will not mitigate the conflicts and poverty which has prevailed in most of the natural resource-rich African countries. There is a need for contractual and management paradigm guided by modern principles of environmental law.

My earlier thoughts on these issues were shared with elite group of environmental lawyers at the Second International Symposium for the Laureates by the Elizabeth Haub Prizes for Environmental Law and Diplomacy, held at Murnau, Germany from 20th to 22nd September, 2006[4]. I have since thought further about the topic and would like to propose the idea for these distinguished participants to reflect on the approach and determine if thinkers in environmental law can give them further effects.

This presentation will be in seven rather brief sections before final comments: We have chosen to first, give a brief and general statement about economy of African countries at independence in 1960's by summarizing the views of selected commentators. Since the pivot of this presentation is on environmental law it is appropriate, next, to define the concept and then give a brief outline of how Africans, as collective, have expressed themselves on environmental law. The simplest but clearest way to do that is by giving a quick profile of selected agreements and soft law instruments, which have been developed by African countries. We are addressing matters of development and environment with legal interventions. Therefore it is important that we start from the baselines.

---

2 UN General Assembly Resolution 1803 (XVII) of 1962 which declared that the rights of peoples and nations to permanent sovereignty over their natural resources must be exercised in the interest of their national development.

3 U.N. General Assembly Resolution 3016 (XXVII) of 18th December 1972.

4 My paper for that Symposium was entitle "How Constitutional Entrenchment Could Mitigate Conflicts and Poverty in Resource-Rich African Countries" published along with other presentations in Environmental Policy and Law Vol 37. No. 1 and 2 (2007). See also earlier related reflections in Okidi, C.O. "Management of Natural Resources and the Environment for Self-Reliance" in Journal Eastern African Research and Development Vol. 14 (1984) pp. 92-111.

The fourth section will describe the paradigm of conventional contracts and concessions for mobilization and utilization of natural resources in developing countries. Despite the efforts by developing countries to push for universal acceptance and protection of their interests the existing approach which we may call contractual and commercial paradigm has not promoted development that was expected. Instead, many of the countries have ended with intractable conflicts and poverty as described in the fifth section.

Explanations of the roots of the conflicts will suggest the key elements which are essential in the environmental law paradigm and which are essential for taming conflicts and poverty. Therefore the sixth section will outline and provide synoptic explanations as to why they are essential for protection of the threshold of sustainability and inter-generational equity. Key principles forming part of environmental aw paradigm and complementing intra- and inter-generational equity are precaution and prudence, accountability and transparency and public participation, both by individuals and through parliamentary representation to ensure that the agreed principles are moved beyond hortatory declarations to legislated norms and institutional arrangements. This will, therefore, be the single longest section of the presentation, even though it is drastically abbreviated.

The seventh section argues that the normative and institutional arrangements are ultimately entrenched in national constitutions, the highest legal order, to give them juridical stability. Statutes are easily amended at the whim of the legislators of the day. Before concluding the paper we shall flag afew principles based on democratic governance and which will enhance efficacy of management based on environmental law paradigm.

II AFRICA AT INDEPENDENCE

The general perception of colonial Africa was that it was a continent of abundant natural resources. In fact, early European explorers came to Africa in search of natural resources, to build their home economies, saw dangers of conflict in establishing spheres of influence for access to resources. That created the necessity for the 1885 Berlin Conference to partition Africa so as to lay claim and colonial control.

Specific areas of Africa were particularly known for resources to the extent that naming of colonies were in some instances done according to resources most abundant. Hence we had Gold Coast (now Ghana) and Ivory Coast, South Africa was know particularly for gold and diamond, Northern Rhodesia (Now Zambia) for copper, Southern Rhodesia (now Zimbabwe) for chrome; Congo was known for multiplicity of minerals and of course timber; Liberia and Sierra Leone known for diamond, gold and timber. There were also specific areas such as Kenya and Zimbabwe whose most valuable asset was land for agricultural products such as tea coffee and pyrethrum to be fed in the economy of the metropole.

To that list one should add such resources as land, wildlife, inland waters, fisheries and the marine resources particularly those within territorial sea and the exclusive economic zone, to which reference has been made above.

The legal, policy and economic regime under which these resources were exploited is part of colonial history and all are inextricably tied together. The colonial powers operated Africa as one huge but differential warehouse from which raw materials, natural resources were collected for industrialization and general sustenance of colonial economy. In other words, the colonial powers made no attempt to integrate the natural resources into the local economy, but larched on to this vital source of raw materials[5].

The question which will be pertinent later is to what extent have things changed? In what ways have the changes occurred? In that way we may determine application of environmental law paradigm.

III AFRICAN STATES AND ENVIRONEMNTAL LAW

(a) Definitions: Environment may be defined as the totality of nature and natural resources and includes the context within which they exist and interact as well as infrastructure constructed to support socio-economic activities. Thus, different natural resources such as water, land, forests, wildlife and air are simply components of the environment. Similarly, buildings, roads, hydraulic works, etc, are also components of the environment. Tools of environmental management include preservation which may be defined as "to set aside and protect selected natural resources, such as unique biological or geological formations, endangered or threatened species, representative biomass, or other natural or cultural sites of importance, so as to maintain their characteristics in a manner unaffected by human or natural activities to the fullest extent possible[6]. Thus, preservation is applied selectively and for specific purposes and circumstances.

To promote dynamic management of environment and its resources one applies the concept f conservation which means to manage and ultilize renewable natural resources sustainably and to avoid waste of non-renewable natural resources. The objective of conservation is, then to avoid waste of such non-renewable natural resources such hydrocarbons or hard minerals. On the other hand, conservation as a management tool ensures that renewable resources such as fisheries and forests are harvested and utilized in a way that protects the threshold of sustainability. It is in this respect that resource economists coined the concept of maximum sustainable yield.

The foregoing definitions then, suggest the modern definition of environmental law to mean that ensemble of norms expressed in common law doctrines, civil law norms, constitutional provisions, treaty law or general principles of law, otherwise called soft law which seek to promote rational management of environment, and natural resources,

---

5 There are several literature dedicated to analysis of political economy of colonial Africa. See for instance Kwame Nkrumah's Neo-Colonialism: The Last Stage of Imperialism (New York: International Publishers 1966). Kwame Nkrumah as been described by some observers as having been a great African and not so great Ghanian. See also Rodney, Walter, How Europe Underdeveloped Africa (London: Goggle – L'Ouverture Publications, 1972) and Leys, Colin, Underdevelopment in Kenya: The Political Economy of Neo-colonialism 1964-1971 (University of California Press, 1975).

6 For these definitions see Okidi, supra note 4

to protect inter-generational equity. In other words environmental law seeks to ensure that the present generation is able to enjoy environment and the resources therein without jeopardizing interest of future generations to enjoy the same.

(b) Attitudes of African Countries towards Environmental Law

If we are going to suggest environmental law paradigm as the mechanism for controlling contractual arrangements for management of African natural resources then it is imperative that we demonstrate an appreciation of African countries towards environmental law in the first place. It is not possible to locate a place with a package of attitudes of African states towards environmental law. There are, however, a number of indicators which can guide our work in this presentation. Such indicators include, inter alia, the range of statutes enacted by each state; the extent to which the states have entrenched environmental provisions in their constitutions; the practice of specific states in compliance with environmental norms; and the extent to which the status have adopted and are complying with environmental treaties.

For purposes of this paper we shall only provide an overview of various treaties and other important declarations adopted on continent-wide basis by African states on matters related to environment. The instances included here are representative enough to suggest the attitudes. It is not possible to go into the scope of ratifications and actual implementation, both of which are influenced by other factors such as locally available expertise and the national or regional lobby groups which promote such steps. For purposes of this paper it will be sufficient to identify the efforts taken so far.

It suffices, for purposes of this paper only to provide a profile of the agreements and other vital declarations. If we are to illustrate attitudes and inclinations of independent African states then we should begin with 1960's[7], the decade when 33 out of the present 53 countries, became independent.

Preparation for the first continent wide environmental treaty started in 1965 and culminated in adoption of the African Convention for the Conservation of Nature and Natural Resources adopted at Algiers, under aegis Organization of African Unity on 15th September 1968. This was a far-sighted agreement that covered all natural resource sectors except energy and energy related ones such as hydrocarbon and fossil fuel. Its principal flaws were that it did not provide for regular consultative meetings such as modern day conference of the parties and did not establish a secretariat or a permanent bureau to carry forward its implementation. Further, the convention did not provide for public participation and no provisions for procedural rights.

---

[7] Of all independent African countries only Ethiopia is known to have established itself as an independent entity between 1st Century BC and 3rd Century AD; Liberia in 1848; and South Africa in 1910. For countries which became independent in 1950's were Libya 1951, Morocco 1956, Tunisia 1956 and Ghana 1957.

The convention underwent drastic revision, a process which moved very gradually from 1983 to **July 11th 2003** when a new version, updated in several ways was adopted by the **Second Summit of the Heads of State and** Government at Maputo Mozambique[8] .

The revised Convention gives prominence to a number of principles which were expressed in Stockholm Declaration of 1972 was well as in the Rio Declaration of 1992. Key among these are "sustainable development" in Article XIV which was expressed in principle 13 of the Stockholm Declaration and was to be the centre-piece of the Brundtland Commission Report which charted the agenda for Rio Conference. As we saw earlier sustainable development and its conceptual correlate of intergenerational equity constitute the primary function of environmental law and its paradigm.

Also key in the amended version are the Procedural Rights (Article XVI) which include the rights of the public to environmental information, the right to participate in decision-making and access to administrative and judicial remedies. This article reflects Principle 10 of Rio Declaration. As we shall see later, the right to information and to participate in decision making in environmental matters, especially over management of natural resources, is key to the environmental law paradigm.

The revised Convention provides for a permanent bureau as a Secretariat and a conference of the parties. Essentially, the new instrument is substantively positioned as a framework treaty on environmental law in Africa even though its status is qualified by the 1991 Abuja Convention discussed below.

No continent-wide environmental instrument was adopted in the decade of 1970's a particularly bruising period in the war against colonialism. That was the primary preoccupation of the Organization of African Unity[9]. However, African Legal experts took with them the agenda of environmental law to the Asian African Legal Consultative Committee in New Delhi from 18th to 21st December 1978. A sub-committee of Experts discussed diverse issues and made recommendations on legal arrangements for environmental protection and included polluter pays principle, liability and compensation and implementation of international environmental agreements, among others.

---

[8] The process did not take continuous 20 years. The initial effort, prompted by Cameroon and Nigeria's request for revision and update of the Convention lasted from 1980 to 1983 when with assistance of expertise from IUCN the first draft was completed and discussed by OAU Experts in November 1983. The draft was then referred to member states for comments. Changes in numbers and expertise led to relegation of the exercise until 1996 when it was reactivated by an appeal from Burkina Faso. From that point OAU sought expertise from IUCN and UNEP in preparation of the updated revision, taking into account development in treaty law and general principles. Meetings of experts and diplomats steadily brought the process its conclusion in 2003. For details see IUCN, An Introduction to the African Convention on the Conservation of Nature and Natural Resources. (Bon: IUCN Environmental Law Centre) IUCN Environmental Policy and Law Paper No. 56 Rev 2006.

[9] A detailed account is given by Ajaegbo, D.I. "The United Nations development Decade in Africa 1960-1970: A political and Socio-cultural Analysis" in Journal of Eastern African Research and Development Vol. 14 1984 pp. 1-18.

There was no continent-wide environmental agreement in Africa in 1980's[10]. However, under the aegis of the Organization of African Unity, two very important documents dealing with economic development problems but incorporating significant provisions on environment and natural resources, were developed and adopted. They were the Lagos Plan of Action for the Economic Development of Africa 1980 to 2000 and Africas Priority Programme for Economic Recovery, 1986 to 1990, which are profiled below:

The Lagos Plan of Action[11] had three chapters which are directly concerned with the theme of this paper. Chapter III dealt with "Natural Resources", Chapter IX was on "Environment and Development" while Chapter XI was reserved for "Energy". Two sub-paragraphs of paragraph 3 in the preamble stand out as African countries declare their commitment individually and collectively and on behalf of their governments and people.

> "(f) [to] co-operate in the field of natural resources control, exploration, extraction and use *for the development of our economies for the benefit of our peoples* and set up the appropriate institutions to achieve those purposes" (emphasis added)

and

> "(h) [to] co-operate in the preservation, protection and improvement of the natural environment"

> Preambular paragraph 6, states, *inter alia* 6 ..... Indeed, Africa was directly exploited during colonial period and for the past two decades; this exploitation has been carried out through neo-colonial external forces which seek to influence the economic policies and directions of African States".

The commitment, in principle, is for African countries not only to protect their environment but also to take up control of their natural resources for development of national economies and peoples. Under the chapter on Natural Resources, the OAU members lament, among other things lack of information on their natural resource endowment of "large and unexplored areas and the activities of transnational corporations dealing with natural resources; lack of adequate capacity (capital, skills and technology)

---

10 Note, however, that under UNEP's Regional Seas Programme the following instruments were adopted: Convention for Cooperation in the Protection and Development of the Marine and Coastal Environment of the West and
Central African Region was signed in Abidjan on 23rd March 1981 with its accompanying Protocol concerning combating pollution emergencies. It had the participation of 21 states. The second one is the Convention for the Protection, Management and Development of the Marine and Coastal Environment of the Eastern African Region was adopted in Nairobi on 21 June 1985 by ten signatories including France and EEC. These are in addition to Protocols relating to the Mediterranean Sea and one agreement with a protocol relating to the Red-Sea and the Gulf of Aden. For details see United Nations Environment Programme, Status of Regional Agreement negotiated in the Framework of the Regional Seas Programme (UNEP, Nairobi 1987)

11 Organization of African Unity, Lagos Plan of Action for the Economic Development of Africa 1980-2000 (Addis Ababa OAU, 1981) p.6. See also Okidi, C.O. Appraisal of Selected Sub-Regional Legal and Institutional Machineries for the Control of Environmental Degradation in Africa. Unpublished report to OAU Education Science, Culture and Social Affairs (ESCAS) Department October 1986 pp. 34-39.

for the development of those resources; [and] considerable dependence on foreign corporations for the development of a narrow range of African natural resources...." The same paragraph concludes that there is....." ..... a disappointingly low general contribution of natural resources endowment to socio-economic development". The implication clearly is the need for capacity development; resolute strategies for integrating the natural resources in the national socio-economic development; and proper legal and institutional framework for realizing these objectives.

The Africa's Priority Programme for Economic Recovery (APPER)[12] synthesized short term objectives, within the period described in Lagos Plan of Action. The purpose was to identify the issues at the foundation of what was referred to as " Economic crises". The document was adopted by 21st Assembly of Heads of State and Governments at Addis Ababa in July 1985. Subsequently it was presented to a Special Session of U.N. General Assembly on economic crisis in Africa in May 1986.

For purposes of this discourse we must emphasize that African states saw the continents' economic recovery to depend largely on rational management of natural resources and the environment. The seven key issues in the document were: Drought and desertification control; management of water resources; soil and land conservation; prevention of adverse environmental consequences of irrigation; development of renewable energy resources; and land use planning especially careful settlement patterns. Account on environment in the document was so high that UNEP is known to have described the document as "Africa's Environment Blueprint"[13].

Bamako Convention on the Ban of the Import into Africa and the Control of the Transboundary Movement and Management of Hazardous Wastes Within Africa was adopted under aegis of the OAU at Bamako, Mali, on 30th January 1991[14]. Its adoption followed after that of Convention on the Control of Transboundary Movements of Harzardous Wastes and their Disposal which was adopted under aegis of the United Nations at Basel on 22nd March 1989[15]. African states were dissatisfied with Basel Convention which focused only on transboudary movement of such wastes and not covering issues of importation and management. The Bamako Convention also banned dumping of hazardous wastes at sea, in internal waters and waterways. All parties undertook to adopt precautionary measures to pollution problems.

Parties were committed to take appropriate legal administrative measures, including legislation, to implement the convention and to set up a focal point to oversee implementation of the agreement.

---

12 The summary below is base on Okidi, op.cit. pp 40-42.

13 Ibid p. 41.

14 Text of Bamako Convention is reproduced in Asian African Hand Book on Environmental Law (Published by Asian African Legal Consultative Committee, New Delhi and the United Nations Environment Programme Nairobi, 1999) pp. 713-740.

15 Ibid pp. 689-712.

The significance of the convention and the move to conclude it is that African countries were prepared to go beyond the global environmental standards in this matter. It is also important that African countries undertook to implement precautionary measures, rather than the discredited notion of accepting pollution now in exchange for wealth.

Treaty Establishing The African Economic Community was done at Abuja, Nigeria on June 3rd 1991[16] with the objectives of, *inter alia*, promotion of socio-economic development and integration in Africa, within a co-ordinated and harmonized continental policy framework and with optimal development, mobilization and utilization of human and material resources, as well as harmonization and coordination of environmental protection policies. The ultimate and broad objective is creation of a continent-wide economic community.

The treaty makes specific provisions on energy, natural resources, environment and control of hazardous wastes. On energy, the treaty enjoins parties to evaporate among themselves in research and assessment on mineral, water and nuclear energy resources. On natural resources parties are urged to mount prospection, exploitation and distribution of water resources. Explicit emphasis is placed on promotion of vertical and horizontal inter-industrial relationships. In other words, there must be industrialization using Africa's natural resources. Besides, African states must establish systems for exchange and transfer of expertise in scientific, technical and economic fields.

Contracting states undertake to promote healthy environment and to adopt national, regional and continental strategies and programmes for promotion of that objective. In which case, the decision to revise update and adopt the Maputo 2003 version of the 1968 African Convention is clearly pertinent. The convention provides for adoption of a protocol on environment, a matter which created a puzzle for those who were preparing revision of the 1968 convention. Whether that version would have properly been converted into the protocol will be determined by the governments. Similarly, development of a protocol on energy as envisaged in the convention will be determined by the governments.

SUMMARY

At the beginning of this section we identified environment as totality of nature and natural resources as well as the context within which they exist and interact but also including infrastructure constructed to support socio-economic activities. Environmental law, on the other hand is the ensemble of norms which are designed to ensure sustainable development and intra and intergenerational equity. On the other hand, African countries lament exploitation of its natural resources by colonial economic policies and the persistence of pressure by foreign companies and operators to continue with that practice. Therefore while African countries are, according to the foregoing profiles committed to rational utilization of natural resources for the benefit of national development and welfare of its people it is doubtful that such an objective is being fully realized. In other words the objective to integrate the natural resource wealth into national development

---

16 30 ILM 1241 (1991)

may have failed due to lack of expertise as well as appropriate legal and institutional frameworks.

This leads us to interrogate the existing universal contractual arrangements for management of natural resources and what it has led to in terms of national development of natural resource rich countries.

IV CURRENT TREND IN NATURAL RESOURCES CONTRACTS

This section is brief. It is intended primarily to highlight the trends and main features of the legal regime of contracts for natural resources between foreign companies and developing countries. In addition it will emphasize our concern that the critical problems of conflict and poverty which have bedeviled a number of African countries, and occasioning skepticisms, arise from in-country legal arrangements and only in part form external linkages. Granted, the multinational operators, whether public or private, operating in natural resources sectors in developing countries, clearly focus on speedy maximization of their profits. Over the years they have perfected the financial and management tricks to ensure their objectives while not necessarily violating the terms of their contracts. But that line of analysis is beyond the purview of this paper. The purpose here, ultimately, is to show that utilization of the resources at national level is fraught with difficulties which lead to conflict and poverty.

What then, is the trend in the state of contracts for natural resources management between multinational companies and African states? In his lecture at The Hague Academy of International Law in 1983, Andronico Adede gave sufficient demonstration of the trends sought in this paper.[17] The lecture distinguished two epochs and corresponding legal regimes. First, there were the old concession agreements for exploitation of natural resources. Their main features included use of royalties as the primary basis of setting financial payments to the host country by the foreign concessionaires. The concessions entailed rights over vast areas of land or resources most of which were left to lie idle but in the possession and control of the foreign company. Typically the concession agreements were for long periods without the possibility of any adjustments. There were hardly any conditions for participation in the enterprise either by the host government or its citizens. In the process the foreign company asserted claim to property rights over the area and its natural resources. Consequently, a form of enclave was created in the host country by the agreement. What this author understands is that concessions of this kind still exist with same of the areas being auctioned in foreign markets without the knowledge of the host country.

A particularly invidious aspect of these agreements has been the perfect shroud of secrecy. Such agreements were available only to the foreign investors to exchange among themselves; the African host countries were under obligation not to reveal the texts to others, nor to discuss among themselves. Clearly, the concession agreements under these circumstances were wholly extractive, exploitative and underscored the dominance of colonial powers who controlled Africa and its natural resources.

---

[17] Adede, A.O. "Legal Trends in International Lending and Investment in the Developing Countries" in Recueil des cours Volume 180 (The Hague: Matinus Nijhoff Publishers) pp. 13, 122-123.

The lecture analysis explained that this old legal order was in most cases, forced to change after the Organization of Petroleum Exporting Countries (OPEC) was established in 1961. OPEC members exchanged the contracts among themselves and this forced a new trend of participation of natural resources producing countries in decision-making. A typical new contract for natural resources has been described as follows:

> "The modern contracts contain detailed provision fixing the financial obligations of the multinational contractor; clauses concerning transfer of technology, employment and training of the host country national and security and welfare conditions of the mine workers; encouragement of local business interests by required local purchase of material; detailed provisions defining conditions under which the contract may lapse or be revoked and the fines to be imposed if the foreign corporation does not observe specified provisions of the contract; and conditions under which the agreement may be reviewed. Contracts further include ceilings on the amount to be spent by the transnational corporation in exploration or any other activity preceding actual commercial production of the mineral; specification of environmental standards, import/export regulations, and management structure; and provisions regarding means of settling disputes arising under the contract and determination of the governing law. The modern contracts also contain provisions concerning the level and nature of the government's participation in the operation as a joint venture based either on equity sharing, production sharing, or any other suitable form of association conducive to the eventual governmental ownership and management of the mining operation.
>
> These features of the modern transnational contracts will vary from contract to contract according to the alternative options chosen by the parties. Such variances, however, are now more an indication of the developing host governments' deliberate choices based upon their different domestic negotiating procedures and situation than of the former problem of blind negotiation in which the foreign companies suggested contract terms to which the developing countries were unable to suggest informed alternatives".[18]

There are two caveats to the foregoing lucid explanation. The term "modern" does not suggest quality, it simply refer to the departure from the old concessions which were based on royalty payments. Commentators[19] explain that other forms of contract include modern concessions, production sharing, service and work contract. The details and merits of these arrangements are however, beyond the scope of this discussion.

---

[18] Ibid p. 124 the term "modern contracts" as used in the text denotes the fact that they evince a clear departure from the previous epoch negation of host state participation in the transactions on their own territories and over their natural resources.

[19] Smith, David N. and Louis T. Wells, T. "Mineral Agreements in Developing Countries: Structure and Substance" in American Journal of International Law Vol. 69 (1975) pp. 560, 563.

The second caveat is that while in theory the veil of secrecy had been lifted, in practice the practice of secrecy may be widespread. We note, for instance, the controversy which is raging in Uganda at the time of this writing, as the Minister for Energy has flatly refused to allow Parliament to see and discuss the contract for oil prospecting (believed to be a production sharing agreement) with U.K.'s company called Tullow and Canada-based Heritage[20]. The Minister maintains that agreement between the government and the company require him to obtain permission of the companies first. Parliament, however, demands that they have a right to access the agreement even though they have not been specific on the legal basis of their position, finding out how widespread the practice of secrecy is, would be as an interesting exercise as the reasons behind it.

With the expected accrual of higher proceeds under the new legal regime it was expected that there would be increased attention to social welfare not only for the workers but also for general national population. Nigeria, the most populous country in Africa, has been an oil exporter since 1958 and was declared a major producer in 1973 thereby becoming a member of OPEC.[21] Therefore, it experienced the exploitative days of the old concession agreements, and should therefore, has been a beneficiary of the new legal order. In fact, these principles are hardly observed in practice because there is no mechanism for monitoring to ensure accountability and compliance.

Yet Nigeria still epitomizes the situation of abundant natural resources wealth fraught with conflicts and abject poverty, reaching crisis proportions. The recent *Niger Delta Human Development Report* launched by President Olusegum Obasanjo remarked in the following grim terms:

> "The Niger Delta is a region suffering from administrative neglect, crumbling social infrastructure and services, high unemployment, social deprivation, abject poverty, filth and squalor, and endemic conflict."[22]

The statement appears in the introductory chapter entitled "Amazing Paradoxes" which also observes that ordinarily, the Niger Delta should be a gigantic economic reservoir of national and international importance. Its rich endowment of oil and gas resources feed methodically into international economic system, in exchange for massive revenues that carry promise of rapid socio-economic transformation within the Delta itself. Yet, as noted above, the actual situation is an absolute opposite. The concern in this paper is that Nigeria is not alone in this bewildering situation and before this paper makes its recommendations it will be instructive to see afew examples of why existence of national natural resources wealth, within the context of current contractual arrangements, only evokes fears, skepticism and pessimism.

---

20 The controversy is elaborately reported in The East African April 2-8, 2007 p.6

21 See Nwankwo, Arthur A. After Oil, What? Oil and Multinationals in Nigeria. (Lagos: Fourth Dimension Publishers, 1982) pp. 11-12.

22 In United Nations Development Programme (UNDP): Nigeria, *Niger Delta Human Development Report* (UNDP Nigeria, Abuja 2006) p. 25. That the 517 page study was in fact funded by Shell Petroleum Development Company is evidence enough that the oil industry has recognized that oil companies can ignore the problems only at their peril. We shall see a summary of upheavals in Nigeria later below.

IV CONCLICTS, POVERTY AND NATURAL RESOURCES ABUNDANCE

Using examples and experience from six countries namely, Kenya, Uganda, Tanzania, Nigeria, Liberia and Sierra Leone, this section will highlight the basis of skepticism and reservations which accompany declared existence and discovery of natural riches in Africa. Later on the example of Chad, the fifth biggest oil producer in Sub-Saharan Africa,[23] will be discussed from a different perspective.

Kenya

Over the past two decades speculations have been rife that Kenya is likely to announce the discovery of commercially viable and vast reserves of oil underground and northern Indian Ocean coast. The matter has been particularly live during the year 2006 when the Assistant Minster for Energy announced that the government had signed mining contracts with about three oil companies to begin drilling by September or October 2006 in Lamu.[24]

There was an immediate protest from the local Lamu County Council Chairman who objected to a project on the grounds that magnitude, and concerning natural resources that belong to them, was being set in motion without involving the local authority or people.[25] About a week later the Permanent Secretary in Ministry of Environment and Natural Resources expressed his skepticism. He argued that management of oil reserves could pose serious challenges to the government which had a history of poor resources management and conflict resolution. He added, "How will we manage oil if we cannot manage our water resources....".[26]

It is the skepticism and reservation coming from a permanent secretary responsible for natural resources which is striking. His reaction reflected the deep suspicion among local citizens over the cavalier way local politicians and power brokers handle public wealth. On a related issue some Kenyan politicians were reported to be negotiating with a South African company called Redicon International for the control of fishing in the Kenyan part of Lake Victoria for a period of ten years.[27] This was an idea for an old style concession of the Kenyan part of the lake with the company having the sole right to fish and sell their catch locally and to European markets. The company is to pay a fixed sum of money, being royalty for the absolute concession over the lake and to exclude the local fishing communities and the government. The report adds: "The centerpiece of the plan by the South Africans is to take over policing and regulation of the lake from the Directorate of Fisheries".

---

23 See Neil Ford's account "Where does all the oil money go?" in African Business June 2006 pp. 34-35.

24 Daily Nation (Nairobi) March 20, 2006 p. 23.

25 Ibid.

26 Daily Nation (Nairobi) April, 28, 2006 p. 32.

27 Daily Nation (Nairobi) January 18, 2005, Business Week Section 2 entitled "selling Lake Victoria".

The newspaper reports revealed how the company representatives had entertained politicians from the Lake Basin to solicit their support. Not unexpectedly, the reports elicited vehement criticisms by people who saw livelihood of over ten million people in jeopardy through loss of jobs, nutrition and general livelihood. Clearly, the mere thought of such an idea ignores the very survival of the population whose livelihood relies on fisheries, and the clear danger to sustainable use of natural resources. The obvious consequence was to be conflict as a response to poverty and hopelessness. The skepticism of the Permanent Secretary was perhaps very well placed.

Uganda

During the month of July 2006, the press in Uganda had been replete with reports that the country had discovered large reserves of oil underground. In fact, three wells have been identified and Production Sharing Agreement signed with Australia's Hardman Resources Limited and U.K. – based Tullow Oil Company.[28] The reporters, with a sense of dismay, say that the agreement allocates to Uganda only 30 percent while the companies will take away 70 percent of the oil and its proceeds. The commentators see this as a disproportionate share given away and attribute this to a weak negotiating capacity. The local Banyoro community are also worried that the government is proceeding with the arrangements without considering their interests. They have, therefore, independently formed a Citizen's Oil Committee and vow to "….. avoid the problems faced by indigenous communities in oil-producing areas such as Niger Delta".

A feature article by a prominent commentator said:

> "Many Ugandans feel that not only do our weak institutions not have the capacity to deliver the benefits from the oil wealth to reach the general population, but our woefully corrupt public officials will ensure that nothing of the sort happens, once exploitation and exportation start".[29]

The problem to these Ugandans, is one of lack of requisite capacity and accountability. The population at all levels are convinced that leaders are incorrigibly corrupt. The Commentator adds.

> "The public have it on recent authority of none other than the Vice President of the Republic of Uganda, Prof. Gilbert Bukenya, that the government is in the grip of mafia ministers whose sole aim is grabbing public resources for their private enrichment"[30]

In fact, there are Uganda citizens who believe that without proper system of control and accountability and restraint "…. oil will breed dictatorship in Uganda. They say it will be impossible for leaders to avoid the temptation of clinging to power and hence remaining in charge of the billions of dollars from oil".[31] These reports discuss what they call the

---

28 The East African (Nairobi Weekly) July 10-16, 2006 pp. 1 and 6.

29 Buwembo, Joachim, "With Leaders Like Ours, we need Oil like a hole in our head." The East African July 10-16 p. 13

30 Ibid.

31 Ibid.

curse of oil in Nigeria and the dangers of killing "a few Saro Wiwa" there alluding to the execution of Ken Saro Wiwa in Nigeria for his role in the fight for right of the indigenous communities in oil rich Delta region of Nigeria. It is essential therefore, to ponder the legal structure and the normative requirements which should promote transparency, accountability and mechanisms for ensuring development with intergenerational equity. The Ugandan public require additional legal arrangements because the current production sharing and royalties alone are inadequate.

These developments and interpretations have led the Uganda Parliament to demand that the Ministry of Energy produce the contact before it for review. As explained earlier the Ministry has flatly refused arguing that release of the information would violate the contractual understanding with the foreign companies. The latter, the Ministry argues, would have to give consent first. So the crisis is still simmering and we can see here a clear negation of openness which is expected in modern contracts.

Meanwhile, Uganda Government has been hit by another problem as it resolved to concession about one quarter of Mabira Forest measuring 7,100 hectares, of tropical forest to be converted into a sugar plantation[32]. When local environmental organizations objected they were dismissed by the President. This led to an upheaval and massive public demonstration which led to armed forces being called upon to control the riots. At the end three people died in the riots. The situation would probably have been different if there was an open juridical arrangement through which the issue could have been debated in parliament as a requirement by law. The bottom line is that the current contractual arrangements for utilization of natural resources which ignore public participation will clearly be problematic in future. It probably shocked the President of Uganda that a matter of forest excision could upset and unite the public so intensely. To the public it was a matter affecting utilization of their wealth.

Tanzania

Tanzania has a long history of mining, particularly for gold, tanzanite and diamond but there these resources have not registered wealth for the country. Rich as Africa is on mineral resources, it is pointed out that Tanzania produces approximately 15 percent of Africa's total mineral wealth and is the third largest producer of gold and diamond, after Ghana and South Africa.[33] The mining is actually done by foreign companies, the bulk of them South African. The commentator points out that the minerals leave the country poor as ore is transported for processing outside Tanzania, only to return as cut stone or finished products to be sold at exorbitant prices, many times the value of the ore. This approach ignores the call in Lagos Plan of Action that minerals be processed locally in order to create vertical and horizontal linkages as the processing industry is integrated into national economy.

---

[32] See feature article entitled "Public Outcry Uganda's Disappearing Forests" in The East African (Magazine) May 7 – 13 2007 p. VII.

[33] Mucheke, Anne, "Muted celebrations as Mining Industry comes of age" in Business in Africa June, 2006 p. 8.

This approach disobeys the imperatives of conservation, requiring avoidance of waste, since with the raw ore the country has to export large volumes while receiving paltry returns. Tanzanian commentators advocate for arrangements which requires processing of the mineral wealth and value-addition locally. Lately, they want the government to invest in the mining sector beginning with exploration to refining of the same. They firmly believe that ".... *refining of the minerals locally before exportation will increase the monetary value, beside providing an opportunity to create jobs for skilled and semi-skilled workers*".[34] What seems apparent is that whether it is the government or a foreign company managing the resources there must be a legal regime spelling out the conditions for this approach to management of natural resources.

Tanzanians have other complaints over operation of the current legal regime of contracts, royalties and sharing of benefits. Frequently, government technocrats accept contracts that are manifestly iniquitous in that the agreements favour foreign firms. In some instances, payment are made in form of fees before any services are rendered. This was the case as Tanzanians parliamentarians discovered only in 2006 that technocrats had committed the government to lopsided contracts favouring foreign mining companies.[35] In addition, it was discovered that the contracts had loopholes permitting companies to fiddle with figures to avoid duties and royalties.[36]

Tanzania mining activities seem truly in need of rationalized policies and legislation with procedures for supervision. Ad hoc engagements sometimes crate second but short-term environments for investors and hazards to development of local communities. We note, for instance Bulyanhulu gold mines owned by Barrick Gold Tanzania, a private mining company was, for about a decade involved in a controversy with a community of about 15,000 people whose Kakola Settlement the company refused to recognize[37]. The people also lived without the regular infrastructure such as water and electricity. And when the company decided to build a road there they used dusty toxic aggregate dangerous to health of the community. Eventually, the community protests culminated in a blockade of the mining area, and halting all activities. It was at that point the company agreed to recognize the settlement and demarcating their area. It seems that even if an environmental impact assessment was conducted it did not take social aspects, including displacement and settlement of local population, into account. Such..... ..... impact also excluded management plan and thereby exposing the population to environmental hazards. Such a situation guarantees long term conflict.

Commentators caution that discovery of natural resource wealth may not bring wealth to the African countries. Instead there may be increasing poverty and possibly, conflicts.[38] The Tanzanian experience recounted above suggests that there should be a rigorous and transparent legal procedure for critically appraising every natural resource contract before

---

34 Ibid emphasis added.

35 See "Outrage over U.S. firm's exorbitant fees" in The East African June 26 – July 2, 2006 p. 4.

36 See Edwin, Wilfred, "Pressure mounting on government to act on exploitative contracts" in Ibid.

37 For these details and more, see The East African April 16-22, 2007 p. 25.

38 Okema, Michael, "Uranium: Beware the curse of mineral wealth" in The East African July 10 -16, 2006 p. 13. The article cautions Tanzanias after it was recently reported that the country has discovered commercially viable reserves of uranium.

it goes into effect. Further, it may be essential that the terms of the contract include regular monitoring to ensure sustained compliance with the broader conditions of the contract.

Nigeria

Nigeria, specifically the Niger Delta region, is very rich in petroleum and oil, being the seventh largest oil producing country in the world and a leading member of Organization of Petroleum Exporting Countries (OPEC). Yet the same Niger Delta region evinces the ravaging poverty, acute and perennial conflicts and the continuing environmental degradation described in the *Niger Delta Human Development Report* cited above.

To recall some of those trends we quote from an article entitled "Delta Blues" by David Christianson who observed as follows:[39]

> "The so-called Warri crisis in the Delta State, on the western rim of the oil-producing zone, in 2003, saw hundreds killed and forced all three of the oil majors operating in the area – Chevron, ELF and Shell – to stop production. September 2004 saw the onset of three months of intense fighting between rival militias – The Niger Delta Peoples' Volunteer Force (NDPVF) and the Niger Delta Vigilante (NDV) – in Rivers State at the eastern edge of the Niger Delta. The fighting, which drew in federal troops, saw firefights in Port Harcourt, the oil capital of Nigeria itself. Shell was forced to close a facility because security concerns prevented workers from traveling to an area to fix a technical problem.
>
> In February 2005, Nigerian forces attacked and allegedly razed Ijaw town of Odioma, in Bayelsa State, between Delta and Rivers States, killing 17 people in a failed attempt to arrest vigilantes. Earlier that month, soldiers had fired on protectors at Chevron's Escravaros oil terminal in the western delta, killing one and injuring 30. In September, 17 people were killed when the Federal Joint Task Force – consisting of army, navy, and paramilitary Mobile Police and the Nigerian Police Force – raided villages near Port Harcourt"

The Nigerian Government literally went to war against its own citizens who are protesting against exploitation of wealth, which they rightly claim to be theirs, by foreign oil companies which did not give them what they considered as fair share of the resources for their development. That is, in fact, one of the key conclusions of the *Niger Delta Human Development Report.*

The Delta region communities were also protesting against destruction of their environment by oil companies whose activities were manifestly indiscriminate. What may have been said in the environmental impact assessment is unclear, and may be none was done. There was hardly any effective environmental management plan. But the claim that since Shell Petroleum Development commenced operation in Niger Delta in

---

39 See David Christianson "Delta Blues" in Business in Africa April 2006 p. 60.

1956 it had caused intensive and widespread environmental degradation, was confirmed by a Legal Advisory Panel constituted by the House of Representatives of the Federal Republic of Nigeria. Establishment of the Legal Advisory Panel was done in response to a petition to the House by the Ijaw Aborigines from the State of Bayelsa.

The Panel composed of retired and distinguished judges who examined different literature related to environmental problems complained of. They concluded that the complaints against Shell Petroleum Development Company had merit and recommended that Shell pay the petitioners a sum of US$1.5 billion. This is simply a confirmation that even with the changed legal regime for petroleum management contracts, the conduct of companies still violate elementary environmental requirements – on a continuing basis. Clearly the contract for oil exploration, exploitation and transport should include conditions not only for environmental impact assessment, but also publicly assessed and monitored environmental management plan.

Nigerians also complain that, in general, the only jobs available to most of the inhabitants of the Delta, according to Neil Ford, are low-skilled positions in catering or security.[40] Ford adds that even where job opportunities have been generated the opportunities have very little to do with employment and underemployment. Consequently, very few people have stakes in the success of the oil sector. It would appear, then, that the agreements or contracts relating to transaction in these natural resource sectors should have capacity development plans designed to involve nationals in effective and technical management at all levels. Recall now that in Tanzania commentators had urged that the government takes over the mineral sector. More accurately, one may call on local ownership of the operations but only after sufficient and relevant capacity has been developed in the nationals. Again the future contractual arrangements should extend to publicly verifiable capacity development plans which are subjected to monitoring and regular reviews.

Nigeria's Delta region is known for flaring of gas, the process whereby gas released from petroleum and oil wells is destroyed by fire set in the sky. The first environmental problem here is that flaring defies basic requirement of conservation which is to avoid waste of non-renewable resources. The gas could be reclaimed and put to internal fuel usage, as liquefied natural gas or marketed as liquefied petroleum gas. It is estimated that the gross monetary value of the gas flare is in the order of US$2.5 billion per year to the economy, amounting to US$50 billion over 20 years.[41] These studies also estimated that "Flaring in Africa oil producing countries can produce 200 TWH (trillion tons) of electricity, which is more than twice the level of power consumption in Sub-Saharan Africa." The folly of such waste is glaring and leads one to keep in mind that the oil and gas are exhaustible.

Beside the wastefulness flaring also causes precipitates which have adverse effect on the lives of the local population in the Delta region. At the same time the precipitates reduce

---

[40] On issue of employment see Neil Ford's report "Deadly Mixture of Guns and Oil" in African Business April 2006 p. 53.

[41] See Ife, Ken "Corporate Social Responsibility in Nigerian Oil and Gas Flaring: Zero Gas Flaring by 2008" in Corporate Africa Spring 2006 pp. 37-42.

crop yield; eat away corrugated iron on the roofs and degrades land. Recently a court at Port Harcourt ruled that the precipitates were a health hazard to the extent that it is a threat to life and, therefore a violation of the peoples' constitutional rights. The court ordered that flaring be stopped forthwith. Oil companies believe they can accomplish the objective by 2008.[42] It should be noted too that, on a broader scale, flaring of the magnitude described above, releases massive green house gases.

That is the second case and it seems that people in the Delta region have now resorted to court action to obtain orders to stop environmental degradation. In a representative suit a member of Iwherekan Community in Delta State sought a court order in the Federal High Court of Nigeria, Benin Judicial Division at Benin City that gas flaring and its consequences on the population is a violation of their constitutional right to life[43]. He also pleaded that Shell Petroleum Development Company and Nigerian National Petroleum Corporation be compelled to stop further flaring of gas in the delta region. The court declared, indeed, that the companies had violated the constitutional right to life of the community. Further the court ordered that the company comply with the requirements of national environmental law for an environmental impact assessment, which had not been done. In the on going project, the company would do implement environmental management plan and of course environmental audit and monitoring.

Clearly, provisions in contracts and transaction agreements some of which are executed by technocrats without either transparency or provisions for monitoring on a continuous basis invariably lead to environmental degradation, poverty, hazards to health and socio-economic conflicts in Nigeria.

Liberia and Sierra Leone

Liberia and Sierra Leone are two republics which are neighbours but which evolved a common problem built around transnational greed in utilization of natural resources and the phenomenon of Charles Taylor, then President of Liberia. History and origins of the conflicts over the last twenty years or so, is too complex and long to be attempted in this paper.[44] It is sufficient here to say, in afew lines, something about events surrounding Guus van Kouwenhoven, the Dutch businessman who was alleged to be Taylor's right hand man, and dominated trade in natural resources of Liberia and Sierra Leonne.[45]

Guus business revolved around his company, Oriental Timber Company (OTC), through which he obtained concession over hundreds of square miles of forests. He exported tons of tropical hardwood to Greece, France and China. It is estimated that timber alone fetched as much as US$ 100 million per year. The business destroyed rain forest, the

---

42 Ibid.

43 Mr. Jonah Gbemre (Plaintiff) and (1) Shell Petroleum Development Company Nigeria Ltd (2) Nigeria National Petroleum Corporation, (3) Attorney General of the Federation (Defendants) Suit No. FHC/B.C.53/05 judgment given on 14th November, 2005.

44 For easy reading see New Africa, May 2006 pp. 10-23 and U.N., Report of the Panel of Experts Appointed Pursuant to U.N. Security Council Resolution 1306 (2000) Paragraph 19 in Relation to Sierra Leone, December 2000 available at http://www.sierra-leone.org/panelreport.html

45 This Information is for The Sunday Independent. 11th June, 2006 and BBC News 7th June 2006.

home to 9,000 species of plants and 1,300 species of vertebrate animals. In addition the business exported diamond.

In exchange, the business brought back large caches of firearms from Serbia, China, Ukraine and Russia. The business boss was, of course not alone in the contraband trade. Many factions and militia thrived on similar trade. One report says that "the rebels splintered and battled each other, along with the Liberian Army and West African peacekeepers. In 2003, the U.N. estimated that as many as 1.2 million people had lost their lives in most appalling circumstances because of conflicts arising from secret deals for exploitation of natural resources.

The end seems to have been reached. He has been convicted by a Dutch court for contraband business with former Liberian President. He will serve an eight years sentence in a Dutch jail. Curiously, he was acquitted of war crime charges even though he was purportedly found to have traded guns for timber rights and used his lumber company to smuggle weapons used by militias to commit atrocities – against civilians in West Africa.

The perpetrators of violence, murder and plunder in Liberia and Sierra Leone are said to have used their political and economic power to create total anarchy. And of course, there is no room for accountability wherever anarchy prevails, and *vice versa*. It is now upto the International Criminal Court at The Hague to decide Taylor's fate. But the end of the chaos has left behind totally and literally devastated Liberia and Sierra Leone.

Democratic Republic of the Congo (DRC)

There have been mind-boggling stories about the anarchy in the plunder of natural resources of DRC but these have been difficult to verify until this time when a democratically elected government is in place. One of the principal targets is valuable timber. It is reported, for instance, that since 2002 alone over 37 million acres of rainforest have been granted to the logging industry despite the fact that the area is home to rich biodiversity[46]. On the same pages, it is reported that under secret deals signed by a European company there is massive extraction of teak wood. Around 21 million hectares have been handed over to the logging companies "often for a few sacks of sugar, salt and tools" and making promises to build schools and hospitals.

These trends, together with massive and unabated contraband trade in hard minerals over the four decades, since 1960s, have created a sense of outrage among non-governmental organizations (NGOs) globally. A coalition of NGO's from Europe, African and the U.S has launched an appeal for exploitation of mineral resources in DRC in a way that "…. yields fair share of benefits for the Congolese people, and not only for the big foreign mining companies."[47] Over 75 organizations worldwide have signed the appeal and it is agreed that the natural wealth is abundant. "Congo posses 30 percent of the world's

---

46 For these accounts see The East African April 16-22, 2007 p.5.

47 Ibid Magazine page V

cobalt reserves and 10 per cent of all its copper as well as gold and uranium, oil, and between 40 and 50 per cent of Africa's water reserves. This includes Congo River which crosses its territory and is comparable to the Amazon in South America in terms of importance to the continent."[48]

These appeals are based on the need for public participation, intra and intergenerational equity and integration of natural resources within their development in national economy. What will be badly needed to realize these objectives is an appropriate legal and institutional framework for their implementation.

Conclusion

Experience from the above seven case studies show diverse but negative picture of what is happening in natural resources-rich African countries under the universal commercial paradigm or "modern" legal arrangements of contracts, royalties service and production sharing. As we saw earlier, it is expected that some of contracts provide for capacity building among local peoples. The analysis above show widespread skepticism and reservation whenever proven reserves are discovered. At the other extreme is violent confrontations conflicts and violence as in Nigeria where the local communities felt robbed of their rightful heritage by foreign companies which are insensitive to local development needs. It has been evident that the current "modern" contracts do not go far enough in protecting the interests of local populations and mitigating conflicts.

It is not possible in this paper to recount tales from all natural resources rich African countries where there have been intense conflict and dismal poverty. Examples would include Angola, Sudan and the low-level violence in Chad and Sao Tome and Principe. Given that respectable periodicals can feature "The Scramble for African Oil"[49] as a cover story, one can only urge that scholars and commentators must urgently think of legal and governance arrangements that go beyond the 'modern" contracts as they operate today and assist countries like DRC and Southern Sudan who are beginning afresh.

VI CONDITIONS FOR TAMING POVERTY AND CONFLICTS

1. Introduction

Reference has been made in this essay to the universal commercial paradigm characterized by the prevailing contractual arrangements for exploitation of natural resources in African countries by companies. It is characterized by sanctity of contracts where once the concession, royalty, production sharing or whatever agreement is signed, and mode of payment made, the host country does not normally interfere with the work of the company. Some of the contracts provide for environmental impact assessment but there is rarely an arrangement for monitoring or audit. That was an important lesson from the gas flaring case from Nigeria and there may be many other examples. The

---

48 Ibid,

49 See cover page of New African, July 2006, and the cover story by Daniel Volman pp. 16-21 which likens the scramble for oil in different African countries by multinational companies to the scramble for colonization of Africa following Berlin conference 1884 to 1886.

practice also depends on maximization of profits for the company. The idea of integration of the mining industry into the national economy is absent. Literature from the advent of independence upto contemporary ones, like Lagos Plan of action, urge that this be rectified. Above all there is no concern for inter-generational equity or that exploitation of the resources ascertain that interests of the present generation be realized without jeopardizing interests of future generations. It seems that these extractive philosophies and practices contribute significantly to rampant conflicts and poverty in natural resource rich African Countries.

In the definition of environmental law earlier in this paper, the ultimate objective it serves is to ensure intra- and intergenerational equity – and its conceptual correlate which is sustainable development. These, then become the organizing concepts around which environmental law paradigm is based. In this sense, other core principles[50] of environmental law, such as public participation, precautionary measures (including EIA, precautionary principle, and environmental audit, etc) are all designed to protect intra- and inter-generational equity and sustainable development.

It will have been evident that of the core principles which contribute to protection of intergenerational equity, the popular demand to mitigate conflicts and poverty in the last section are for public participation and provision of legal and institutional arrangements. Public participation provides the mechanism for monitoring, supervision and generation of alarm or call for cessation of conduct inimical intergenerational equity. Definitely then, parliaments have multiple roles, not only in legislation but also in public participations as the voice of the public.

2. Role of Parliament

One overarching condition that emerges from the foregoing discussions is that the contracts and transactions should be subjected to more authoritative, open and rigorous appraisal before approval for the execution is granted. It is apparent, and indeed ironic, that while openness is one of the features which Adede said typified the modern contracts, there still seem to be insufficient exposure. Thus, in 2006, parliament in Tanzania was somewhat livid about the contract of 2003, signed by technocrats but which did not protect interests of the nationals. Similarly, as we saw above that the Banyoro of Uganda are worried that legal arrangements regarding transaction in natural resources in their home area may subsequently lead them to violent conflicts like those found in the Delta region of Nigeria.

---

[50] In a study of four soft law instruments, namely The Stockholm Declaration of June 1972 (26 Principles); The World Charter of Nature of October 1982 (26 paragraphs), the Draft Covenant on Environment and Development, evolved from 1990 to 1994 (72 Articles) and the Rio Declaration on Environment and Development of June 1992 (27 Principles) seven principles were identified as being "core". They are: Intergenerational equity; Public participation; Polluter pays principle; Precautionary measures encampusing EIA, Precautionary principle, environmental risk assessment, and environmental monitoring; prior consultation; integration of environmental exigencies into development planning and management; and provision of legal and institutional mechanisms. For details, see Okidi, C.O. "Incorporation of General Principles of Environmental Law into National Law with Examples from Malawi" in Environmental Policy and Law Vol. 27 No. 4 (1997) pp. 327-335.

The institution which is particularly suited to debate and critically appraise, and periodically review such contracts is parliament, as a trustee of the public over the natural resources and the proceeds therefrom. In other words, African countries should not be content with removal of secrecy clauses in the contracts done. Instead the legal regime, including the contracts, should include a mandatory requirement that any contract or transaction relating to exploitation of all natural resources must be subject to ratification by a significant margin of parliamentarians. Recall in the Delta region dispute over environmental degradation intervention of the federal parliament was sought and that is when the US$ 1.5 billion surcharge was assessed. Surely, parliament could have been involved at the phase of development and adoption of the contract or transaction. That is also why Tanzania parliament in 2006 questioned the 2003 natural resources contract which had grossly disadvantaged the country.

In an analogous situation in Uganda, the National Association of Professional Environmentalists (NAPE) criticized the government for not being open and using parliament to assess the plans for Bujagali Dam and associated power purchase agreement and following the route of a previous contract with an foreign company, AES, which was terminated on allegation of grand corruption and ignoring national interests. The Association opined that the agreement "....should have been debated and approved by parliament. However, since this did not happen, the project is illegitimate. Otherwise, the Bujagali project remains a bad project for Uganda for a number of serious problems...." [51] They argued that the value addition of parliament is that before they approve or disapprove a contract or transaction they conduct the debates in a transparent and accountable manner.

Our arguments here are manifold: First, that appraisal of contracts and transactions through open parliamentary debates could have mitigated the circumstances that led to poverty and conflicts in natural resources rich African countries. Secondly, that approach has been recognized as useful. It is to be noted that among the items which should have been included in the contract presented for parliamentary debate, according to NAPE, is environmental impact assessment. In other words, NAPE recognized the necessity of elaborating conditions which will help parliament determine whether or not to approve the proposed contract. It is recognized that parliament offers a structured and authoritative forum for checking planned programmes of the executive branch of government. The supervisory role of parliament will, however, be complete and effective only if it includes a monitoring process. For instance, the proposed juridical order must require that regular reports on performance must be presented to parliament for periodic review and updates. Every contractor should prepare and submit the periodic report to parliament, through the minister, say every three years as a mandatory requirement so that any failure to do so is actionable before court.

Thirdly, it has been established in the preceding discussion that public participation is essential for effective natural resources management under environmental law paradigm. Parliament must be recognized as the collective voice of the public, and as

---

51 From website: http://us.f600.mail.yahoo/ym of 3rd March 2006. p. 5 of 10.

representatives of the latter. Members of Parliament may be petitioned by the public to intervene with the executive arm of government since the latter negotiates and signs natural resources management agreements. But that must be spelled out in the law specifically.

Fourthly, while the public may bring pressure to the point of disruption as discussed on DRC and Uganda, parliament, and only parliament, has constitutional power to legislate and create legal obligation to enforce environmental law paradigm, and its components as outlined hereunder. In its supervisory role, through the regular reports parliament must seek to ensure that there is equitable distribution of the proceeds from the natural resources and that socio-economic plans of the enterprise seek to eradicate poverty to every extent possible.

3. Specific Conditions

It is well and good to recommend reference of contracts and transaction in natural resources field to parliament for debate, monitoring and possible ratification. The caveat though is that parliament must have, in the enabling law, the precise components of the conditions which must be fulfilled in each case. On its own, parliament would not necessarily know or create the conditions to consider as the prerequisites to ratification. It is noted for instance that when NAPE suggested that if the proposal for Bujagali dam were to be deliberated upon before ratification seven specific factors would be considered. These, in their view, were: environmental impact assessment (EIA); affordability of electricity from the project; the issue of hydrology of Lake Victoria and River Nile; dam safety issue including the cracking of Owen Falls dam; tourism, cultural and spiritual significance of Bujagali falls to the local communities; and consultation process with local stakeholders. These are the conditions they considered as uniquely relevant to construction of the particular dam. In each case NAPE expected a full write up to brief the parliamentarians as to what would constitute satisfactory conditions of compliance. Unfortunately these conditions had not been incorporated in any law to be enforced.

In the broader context of ratification of contracts and transactions for natural resources we propose the following eight conditions to be satisfied before parliament can ratify a given contract or transaction. These reports, which are prepared for each project could probably be in form of an annex to the contract itself and therefore an integral part of the same. And of course, even though the report is prepared by the investor in consultation with the government, the presentation to parliament is done by the minister responsible for the specific sector of the proposed project. It is proposed that the reports represent: (a) Industrial Development Plan; (b) Socio-economic Development Plan; (c) Revenue Management Plan; (d) Resettlement Plan; (e) Environmental Impact Assessment; (f) Environmental Management Plan; (g) Environmental Restoration Plan; and (h) Capacity Development Plan. Each is explained briefly, in turn.

(a) Industrial Development Plan

The report to Parliament must demonstrate how, in fact, the natural resources for which the transaction, contract or concession is sought will contribute to industrial development

in the country's region of operation and nationally. The scope of the planned value addition before export, must be specified. In other words, export of the minerals, petroleum, oils or other resources out of the country as raw materials must, by law, be strictly forbidden.

Such industrial initiatives first and foremost create employment opportunities; places income in the hands of local people and thus improving their purchasing power to create a flip in the economy while improving overall socio-economic development. Secondly, it is an established fact in recent economic history, that the returns to primary commodities in international trade is erratic and invariably on the downward trend, relative to manufactured goods. Systematic studies within U.N. Economic Commission for Latin America under Professor Raul Prebisch proved the glaring anomaly and trend. That led to United Nations Conference on Trade and Development (UNCTAD) in 1964 and thereafter but the initiative has been scuttled by western market economies, beneficiaries of the status quo, when they deflected attention towards General Agreement on Tariffs and Trade (GATT) and now World Trade Organization (WTO). As a consequence the development component of UNCTAD has been relegated, if not abandoned except in rhetorics. It seems clear that no African country will develop while operating as a warehouse for raw materials to fuel industries in developed countries.

The minerals and petroleum resources are particularly valuable for vertical and horizontal integration if industrialization plan is effective. If the countries persist in export of raw materials they soon discover that oil, copper, forests, diamond etc are not forever. They will be depleted rapidly. On the other hand, industrialization will help integrate the harvesting of the natural resources in the fabric of national economy and will thus promote sustainable development, promoting the needs of the present generation and enhancing the chances of future generations to realize their own development needs.

(b) Socio-Economic Development Plan

There should be annexed a socio-economic development plan spelling out how the proceeds from the contract and transaction will improve the economy and social condition of the communities. Such a plan should show what priorities will be accorded to the immediate local communities *vis a vis* other areas of the country and ultimately how the whole country will benefit, so as to promote intra and inter-generational equity.

In this respect, the *Niger Delta Human Development Report* contains a veritable catalogue of experience and examples. In his "diagnosis of the Niger Delta Youth Crisis" reprinted in the Report, President Obasanjo identifies indices of neglect as "…. Infrastructure like roads, electricity, health services, capacity deficiencies arising from a failing school system, army of unemployed and unemployable youths, environmental degradation, etc"[52] Nigeria has opened its pages of experience and thus demonstrated the causes of conflict, dilapidation and poverty in a resource rich region of a country. They have thus offered the different parliaments what to look for in seeking promotion of sustainable socio-economic development and intergenerational equity.

---

52 Supra note 9 p. 366

(c) Revenue Management Plan

By the time investors decide to enter into a contract for development of given minerals, oil, fish, forest or other natural resources, they already are in a position to estimate the revenue likely to accrue therefrom. The investor and the government are then able to provide simulation of cash flow and how the country's revenue should be managed. Certainly, consideration must begin by determination of the share of revenue whether in form of royalties, taxes or production sharing, that should be assigned to the host country. That must be publicly declared before the contract is ratified to avoid the experience found in Tanzania's 2003 or the current controversy in Uganda.

Thereafter, there must be total disclosure to parliament as to how the country's share of revenue will be utilized. It must be established that revenue will not be diverted to accounts of politically influential individuals or groups but to public treasury and to specific public sector investments. In a recent study, the U.S. based organization, Human Rights Watch found different ways in which the wealth Rivers State in Nigeria lost revenues at local level through diverse techniques largely because of lack of a system for ensuring and monitoring transparency and accountability[53]. The parliamentary system of vetting revenue management should, at the very least control wild instances funds for wealth creating investments.

One country in Africa we find to have gone farthest in establishing a formula for revenue management is Chad. Working closely with the World Bank Group, they applied lessons of international experience to propose rationalized sharing of the oil resources.[54] To effect the principle, Chad enacted Law No. 001/PR/99 Governing the Management of Oil Revenues.[55]

The law specified what proportion of the revenue would go to priority areas, encompassing infrastructure, rural development, health, education, environment and water. But 10 percent of the direct resources, royalties and dividends, according to Article 9, was to be deposited in a "Savings Account opened in an international financing institution on behalf of future generations". This is indeed a novel idea, taking into account the significance of inter-generational equity in management of environment and its natural resources.

This is not to say that Chad provides the best approach. Rather, it offers ideas that can be improved upon. As we shall see later, Chad government later repudiated the conditions of the law and opted to divert the revenue to other uses, a decision which precipitated strong disagreement with the World Bank.

---

[53] Human Rights Watch, "Chop Fine: The Human Rights Impact of Local Government Corruption and Mismanagement in Rivers State, Nigeria Vol. 19 No. 2(A) January 2007 esp. pages 25-39.

[54] Information from The World Bank News Release No. 2000/395/AFR datelined 6th June 2000.

[55] Law No. 001/PR/99 "Governing The Management of Oil Revenue" was actually adopted by National Assembly on 30th December 1998. See also discussions in African Business, June 2006 p. 35 for "The Chadian Experience".

These developments simply emphasize the fact that revenue sharing, though a good idea, must be properly fortified in the national legal framework, possibly in the constitution, to avoid instability and arbitrary changes by the government of the day. For, indeed, there must be a revenue management plan for the proceeds from natural resources.

(d) Resettlement Plan

Transaction involving management and exploitation of natural resources do, invariably, entail displacement and relocation of population in local communities. This is often the case for mining, petroleum and oil drilling, and construction of public infrastructure. Oftentimes, the government in cohort with the investors do evaluation of the land and pay unilaterally determined compensation. It is often ignored that the displaced population increase the scope of demand and consequently, value of land within affected regions increases dramatically with the result that the compensation paid becomes inadequate to purchase land of comparable size and value. Money being fungible, it is a quickly spent on things other than land. In the end the displaced population turn out to be poor, landless and unemployed, which is a socially explosive condition.

Therefore, it is imperative that the government and investor, before displacing the population, identify the alternative land and facilitate the relocation and resettlement. Every care must be taken to ensure that cultural values are protected as proposed by Uganda's National Association of Professional Environmentalist in the case of Bujagali Dam discussed above. It must be kept in mind that development of any kind is for people and no transaction should be considered so valuable that it gets done despite the hardship and suffering it causes the population.[56] The project should leave the population better off and not in distress. The World Bank has expressed its concern for "Involuntary Resettlement" by Issuing an Operational Directive (OD 4.30 which offers basic guideline in such instances.

The second point to be taken into account in the relocation and resettlement is the interfacing of the new or old settlements with the actual activities of mining, drilling or transportation. In other words, there are two forms of settlement. The area of operation of investment is a settlement in its own right and must be positioned in such a way that effects of its activities do not cause harm to the new or old settlements. Similarly, the new settlements must be positioned away from the operations or transit routes.

In most African countries citizens are aware of their rights under the law. The government and the investor takes them for granted at great risk. An example exists in Kenya where a Mining Company rather cavalierly sought removal of local population to give way for titanium mining about ten years ago. But they have been locked in litigation of cases brought by the local community protesting what they consider as improper

---

56 See the theses in Cernea, Michael M. (Ed) Putting People First: Sociological Variables in Rural Development (Oxford University Press 1991). See also World Bank Operational Directive OD 4.30 of June 1, 1990.

displacement and in adequate compensation[57]. Investors would be satisfied with a situation of legal certainty even if it makes then pay higher costs.

(e) Environmental Impact Assessment

Wise people have pronounced, rather firmly, that experience is the best teacher. Indeed, there is abundant experience with violent consequences of environmental degradation the world over and glaring cases in the Delta region of Nigeria where a catalogue of 28 severe and disruptive violence occurred between January 2003 and January 2006, all related to the degraded conditions of the local communities.[58] With the local experience in mind the *Niger Delta Human Development Report* concluded that environment is the basis of sustainable development.[59] The parliament which belatedly endorsed a surcharge of US$ 1.5 billion against Shell would doubtlessly have scrutinized a proposed transaction to ensure that possible adverse environmental consequences have been considered and that credible preventive or mitigative measures are in place. As noted in the Benin High Court case *of Mr. Jonah Gbemre*, no environmental impact assessment was done by Shell Petroleum Development over flaring of gas.

Over thirty African countries have enacted framework environmental laws with accompanying environmental impact assessment (EIA) regulations of different levels of sophistication and complexity. More of the fifty three African states will evidently follow suit in the trend now perceived as a necessity. Some of the country examples discussed above, have enacted framework laws and EIA regulations: Nigeria – 1988; Uganda – 1995 and Kenya in 1999. Yet fears of environmental abuse persist in all of them with a number of countries fielding violent conflicts and disasters associated with exploitation of natural resources.

It is therefore, essential to subject the EIA regulations and guidelines in the context of each transaction involving specific natural resources to severe evaluation. The natural resources contract submitted for ratification by parliament must include how the company and the government will implement various aspects of the regulation, how adverse impact will be prevented or mitigated, the system for monitoring for compliance and the sanctions attached to any violations. Of course, If EIA has been conducted under requirement of, says national framework environmental law, then the same report would be submitted with the dossier to parliament.

(f) Environmental Management Plan

This plan relates to measures to be taken during actual operation and to further the objectives sought by EIA. If there was an environmental management plan and a regular

---

57 See cases of Rodgers Muema Nzioka V. Tiomin Kenya Ltd. 97 of 2001 High Court of Kenya at Mombasa decided on 21st Sept 2001.

Ropdgers Mwema Nzioka (Petitioners) v. The Attorney General and 8 Others (Respondents) Petition No. 613 of 2006 High Court of Kenya at Nairobi.

The investors have already spent nearly a decade fighting, litigation. They would have been better off under a situation of legal certainty and where the specific requirements were certain and subjected to vigorous and transparent procedures.

58 *Niger Delta Human Development Report*, op cit p. 351

59 Ibid. See Agenda 5 pp. 441-446.

system for monitoring to ensure compliance the Delta region, and other examples discussed above, would probably not have reached the disastrous stage of acute conflicts and confrontations with no solutions in sight.

Ibibia Worika, a Nigerian scholar, points out that environmental management plan (EMP) is frequently ignored in petroleum operations and be proceeds to recommend what its components should include:

> "Such EMP for proposed establishment should recommend feasible and cost-effective measures to prevent or reduce significant negative impacts to acceptable levels. It should also include measures for emergency response to accidental events, e.g. raptures, leaks, tanker ship accidents, fires, explosions, etc. It should also estimate the impacts and costs for these measures and of the institutional training requirements to implement them. Part of the EMP package should consider compensation to affected parties for impacts which cannot be mitigated, proposed work programme, budget estimates, maintenance schedules, staffing and training requirements as well as other necessary support services to implement the mitigating measures"[60].

He emphasizes that EMP must not be mixed up with EIA even though it may benefit from it.

(g) Environmental Restoration Plan

The investor must have contingency arrangements for restoration of the environment, should there be adverse effects and the relevant government ministry must undertake to ensure compliance. It is, of course, inevitable that the environment will be disturbed as a result of the operations. What action will be taken to restore the *status quo oute* whether on-shore or off-shore to rehabilitate the environment. This is consistent with the polluter pays principle, now well-accepted as a principle of environmental law. What Bamburi Cement Company has done at Haller Park in Nyali area of Mombasa will forcefully demonstrate the concept given that the company has not only restored the environment but is making money out of the tourist attraction with diverse tropical fauna and flora[61].

Such contingency measures must be explained to parliament if the contract is to be ratified.

(h) Capacity Development Plan

In each of the country case studies discussed above it was clear that nationals, and particularly local communities, have no expertise in the areas of natural resource transactions. To the extent that local people were employed they were engaged as lowly labourers, security guards or, at best, petty clerks.

---

60 Worika, Ibibia Lucky, Environmental law and Policy of Petroleum Development: Strategies and Mechanisms for Sustainable Management in Africa (Benin City : Gift-Prints Associates, 2002, p. 243.

61 See details on Haller Park at http://www.planetware.com/mombasa/haller-park-bamburi-nature-trial-ken-cst-hallp.htm. See also Worika, op.cit. pp. 175-184.

The investors, with line ministry's supervision, must demonstrate capacity building plan and how nationals will progressively take up low level and management positions. The objective is to demonstrate within what time-frame the investment management and operation will devolve to the national experts of the host country. This scheme should be monitored by the line ministry and a regular report made to parliament because it is likely to be problematic since foreign investors will rarely be prepared to envisage handing over to local experts. But this must be done as a specific policy matter converted to legislation with actionable obligations. For instance the license can be withdrawn from a company that persistently fails to demonstrate compliance with capacity development plans.

Capacity building for these purposes, is primarily a matter of national interest of the host country. The private investor can only employ local experts if they are available. But creating that competence is a national concern, even if a training levy is to be imposed on the investors to pay for the requisite training. Therefore, it would be imperative that the national authority responsible for the respective investment sector make an assessment o the necessary capacity for the sector, how much of it is available at the moment and the remaining gap. Such an effort was attempted by the United Nations immediately after the Convention on the law of the Sea was adopted in 1982[62]. The objective would be to train for immediate needs and for intergenerational succession.

The requirement for the investor is to offer the unskilled positions to local people, who will, of course need some training. Undocumented reports sometimes say that investors with strong public sector linkage, can bring home-based labourers and, at times, prisoners. An effective arrangement should progressively phase out low cadre employees according to an agreed schedule. That should impress parliamentarians.

Cross Cutting Issues

There are three fundamental, but cross cutting issues relating to ratification of the contracts by parliament, to render the procedure meaningful. It is proposed for discussion that ratification be done by a two-thirds majority of members of parliament. Natural resources are of fundamental national significance and the purpose of moving for ratification of the contracts and transaction to parliament is to ensure the highest level of transparency and accountability.

Secondly, for the above arrangements to be effective the contractual arrangement should require that progress reports of implementation of the contract be made to parliament on a regular basis. Biennial reports to parliament in order for the latter to exercise both a supervisory and monitoring role ensures strict adherence. It is important that parliament assume this role because it can also legislate to close gaps. The legislative authority must provide that an order of withdrawal of license shall be issued in event of non-compliance.

---

62 See Okidi, C.O. "Management Profile and Training Needs for Marine Resources Development in Developing Country: in United Nations, Institutional Arrangements for Marine Resources Development Report of the Expert Group Meeting on Institutional Arrangements 10th to 14th January 1983 (New York, United Nations, 1984) pp. 97-118.

Thirdly, that the foregoing requirements or their possible variations be legislated. The legal requirement would ordinarily be in form of statute. It is recommended, however, that they be entrenched in the national constitution for reasons that will be clear shortly.

VII CONSTITUTIONAL ENTRENCHMENT OF MONITORING CONDITIONS

Discussions at the beginning of this paper observed that provisions in modern contracts were a major development towards legal arrangements which would cater for interests of developing African countries. However, the ensuing analysis established that there were inadequate safeguards to ensure broadly based benefits to the country. The consequence was a litany of conflicts as well as widespread and abject poverty. The reason is that the legal regime did not require firm obligation, transparency, accountability and mechanisms of monitoring to ensure compliance. Discussions identified eight conditions which must be written into law and enforced, if the perennial conflicts and debilitating poverty are to be prevented or at least mitigated.

It is our view that the conditions should be entrenched in national constitution to give them an overarching and general application over all natural resources. Hardly do countries have all natural resources under one statute. The overarching and over-riding constitutional entrenchment will be applicable to provisions under specific statutes on minerals, oil, water, petroleum, fisheries, forestry and land which are usually governed by different national laws. It is important that the proposals made here be lodged in that overarching legal instrument which binds the entire national legal order.

Ghana Formula

The 1992 constitution of the Republic of Ghana offers a useful link with parliament as a forum for transparent deliberation on contracts and transactions on natural resources. Article 268(1) of the Constitution properly befits above discussions on the conditions for approval of contracts as it states as follows:

> "Any transaction, contract or undertaking involving the grant of right or concession by or on behalf of any person including the Government of Ghana, to any other person or body of persona howsoever described, for the exploitation of any mineral, water or other natural resources of Ghana made or entered into after the coming into force of this constitution is subject to ratification by Parliament".

This properly befits the discussions and conclusion on the eight conditions above. There are, however, three points necessary to create an effective supervision by parliament. First, the Constitution of Ghana provides no guidance, at all, to parliament on what conditions that must be fulfilled for the contract to be ratified. Given the technical nature of the subject, and the fact that implementation of such contracts have led to the kinds of misgivings from African observers and leaders, it is essential that the specific criteria be set out in the constitution. It is this requirement which the eight conditions set out above would be expected to meet. This would be a vital condition to be met if the disastrous conflicts and poverty are to be prevented, mitigated or otherwise tamed.

Secondly, the Ghana constitution does not provide for a monitoring role of parliament. A one-off discussion and ratification of the contracts will miss a significant supervisory role of parliament, a role rendered essential by history of neglect and failed expectations. After contracts were signed between investors and local technocrats the two have always done practically whatever they like. In the proposed arrangement, parliament should receive and debate implementation to ensure compliance with commitments originally given in the eight conditions, on a regular basis or as often as exigencies of implementation may require.

Thirdly, for completeness it is important to point out that in the case of Ghana, Article 268(2) of that constitution is dangerously poised and may undermine the success of this constitutional provision. It says that parliament may, by resolution supported by at least two thirds of all members of parliament, exempt a particular contract, transaction or undertaking from the requirement of paragraph (1) as above. It is not clear what circumstances would justify such exemptions. While the provision may be subject to abuse, it is also to be noted that a vote of at *least two thirds of all members of parliament* may be sufficient safeguard against any excesses. It would be preferable that such a leakage is not allowed for, though.

Including the conditions in a statute rather then a constitution is, indeed, possible. However, constitutions have the character of stability and changeable only as a major national decision and debate. An ordinary statute, on the other hand, can be a amended often by a simple majority vote of members present and voting, so long as a quorum is reached. That, in fact, was the case as the Chadian parliament amended the statute to implement the Revenue Management Plan. Those in power moved to change the vital parts of the law and thus altering apportionment of the funds in favour of short-term factional interests. In the process, they also decided to terminate some commitments and asked The World Bank to release the "future generations" fund. These changes violated the loan agreement under which the Bank had funded the oil transaction. As a consequence, the Bank terminated the funding and precipitated a major dispute which created an unhealthy environment between the two.

Amending the constitution to achieve similar results would not be impossible. But it may be much more difficult to achieve and therefore an obvious safeguard. It is, therefore, proposed that protection of natural resources be entrenched in the national constitution as a first point. But that conditions or indices to be considered before ratification, be isolated as done with eight items above. These, too, should be entrenched as component of the protection clause found in Article 268 (1) of the Constitution of Ghana.

It is apparent now that more African countries might accept a protection clause similar to the Ghana one in their constitutions. In The Proposed New Constitution of Kenya, provisions identical to Ghana's paragraphs (1) and (2) of Article 268 are included as Article 91 (1) and (2). Fortunately, environmental provisions were not part of the contentious issues which led to rejection of the draft constitution at the November 2006, national referendum. However, the Kenyan provision suffers the same limitations as with the Ghanian one but this can be avoided with prior deliberate reasoning. Several African

countries have entrenched environmental provisions in their constitutions[63] and would probably be receptive to introduction of environmental paradigm in their contracts for natural resources management in the constitutions.

It may well be possible for more and more African countries which have gone through or are aware of the conflicts discussed in this paper to adopt similar provisions. The argument in this paper is that such a provision should be accompanied by the eight conditions of transparency and accountability. Should a constitutional amendment to include the protection clause and the eight conditions be impractical, in the short run, then the provisions should be adopted as a statute.

VIII SAFEGUARDS

The system proposed here assumes rigorous and transparent parliamentary debates to ensure rational management protection of natural resources and the national development interests. It is conceivable that the parliamentarians may be collectively corrupt and awarding ratification of contracts which are inadequate or do not meet the best standard even if the reports are presented. The experience in Chad where Parliamentarians agreed to abandon the revenue management plan is instructive and may be repeated.

The following mechanisms are proposed as possible safeguards in protecting natural resources and the national peaceful development objectives:

1. Operation of democratic pluralism and a multiparty parliamentary system may make the corrupt agreement difficult to obtain. It is much easier to obtain a corrupt agreement under a single party parliament than under a competitive pluralism where those in opposition will capitalize on any evidence of corrupt practice on the part of the ruling party. The wave of clamour for democratic pluralism that has swept across Africa in the last two decades may be a healthy trend and opportunity for the suggestion in this essay. The civil society protests against misuse of natural resources in DRC and Uganda are instructive.
2. Knowledgeable, committed and well-informed civil society is vital for enforcement of environmental standards. It has been proposed above that the performance requirements in the constitution should be in form of actionable obligations with *locus standi* open as is in several framework environmental laws of African countries, notably in Kenya, Malawi, Tanzania and Uganda. So far, the civil society in Uganda has proved probably the most active in environmental advocacy and litigation and with decent record of success. There will be growing necessity for building the professional capacity and resource base of civil society organizations to keep parliamentary action on check. They may not sue parliament as such but they may find the clearance granted by parliament unconstitutional and pray for an injunction against the company's operations.

---

63 Carl Bruch and his colleagues identify 36 out of 53 African countries to have constitutional environmental duties and rights. The present discussion focuses on provisions which seek sustainable utilization. See Bruch, Carl, Wole Coker and Chris van Arsdale "Constitutional Law: Giving Force to Fundamental Principles in Africa" Published in Columbia Journal of Environmental Law" Vol. 26 (2001) pp. 131-211.

This is only an aspect of public participation in environmental decision making enshrined in Principle 10 of Rio Declaration and which is widely recognized in treaty law, statutes and general practice.

IX FINAL REMARKS

There is widespread concern, not only in Africa but also worldwide, that natural resources wealth have not brought socio-economic prosperity to the majority of the countries considered well-endowed. Instead, there is frequently a rampant poverty and environmental degradation. At the same time there have been widespread unrest often leading to violent armed conflicts. Such conflicts are often grounded in competition for access to, and control of, the natural resources and the proceeds emanating there from, with concurrent neglect of the local and national socio-economic needs.

This presentation has made the distinction between the current system of contracting, described as "modern" contracts where after a contract is concluded with the respective conditions for concession, production sharing royalties, tax regime or whatever else, the investor is left to execute the contract with only some consultation with the executive arm of government. While it is assumed that modern contracts are more open to review than the pre-OPEC contracts, evidence shows that such contracts are never available for review by either the civil society, or, worse still even by parliament. As explained in this paper, those are the lessons from Democratic Republic of Congo, Tanzania and Uganda. The degree of such restrictions will of course vary with countries but the system, which we refer to here as the universal commercial paradigm prevails generally in Africa.

The proposal here assumes that the so-called modern contracts may not, of themselves be generally faulty, even though they may not be perfect. The actual flaw is in total absence of an independent juridical mechanism for supervision to ensure that legally prescribed conditions are being met. The primary condition to be met is to ensure observance of intra- and inter-generational equity and sustainable development. Attached to this primary condition is the requirement for public participation both directly and through parliamentary representative and thus, promoting transparency and accountability. It is a crucial consideration that the system prescribes conditions to be met in implementation of the contracts as well as in regular reporting the promote intra- or inter-generational equity and sustainable development. That is why it has been called environmental law paradigm.

Economics of colonial administration treated African countries as a massive warehouse where raw materials, whether mineral, wildlife or agricultural produce were harvested for industrialization of the colonial power. The latter had their own system of control which was removed as part of decolonization process. The system of administration is post-colonial Africa took over with application of the universal commercial paradigm of contracting for natural resources. Operation of this system seem to have nurtured abject poverty and unsupervised competition for access to and control of the natural resource which has led to widespread conflicts. The proposal seeks to tame both negative trends of abject poverty and ravaging conflicts.

To apply the paradigm proposed here, it is essential that we establish the attitude of African countries towards environmental law. It is not practical to include the scope of the laws enacted by all African countries and to determine what has been done towards implementation. Instead, this study simply profiled treaties and other planning instruments adopted at continental level to show the global consensus on critical principles of environmental law. From that we derived confidence that African countries are receptive to environmental law and would be receptive to a management and regulatory paradigm which derives there from.

The conditions which attach to the contract must be legislated in order to establish their binding effect. It is on the basis of the conditions that parliament may ratify a contract for investors to prospect for and harvest the natural resources. The very act of ratification of the contracts by parliament is crucial for supervision of processes which lead to intra and intergenerational equity. But it is meaningful only if the totality of conditions attached to ratification actually lead to that objective. There may be more conditions than the eight offered in this paper but the conditions must be there. That is why we fault authors of the Ghanian constitution who provided for ratification of contracts by parliament but failing to specify conditions which parliament must deem to have been fulfilled.

This paper submits that while the principal obligation and conditions for ratification could properly be adopted in an act of parliament. However, it is submitted that the conditions are better entrenched in the national constitution so that they enjoy the protection of the highest legal order of the land and safe from easy amendments which may be done to an ordinary act of parliament. That is the experience learned from Chad where a revenue management formula with intergenerational provision was scrapped by parliament to give way to short-term sectional interests.

It is not reasonable to expect that the proposal for environmental law paradigm will bring to an end all manner of conflicts in resource-rich African countries. Conflict is often a complex and multidimensional phenomenon in a society. Nor yet is it certain that the approach will eliminate all manner of poverty. Clearly though ravaging conflict that arise from competition over the resources should be drastically tamed. By focusing on intra- and intergenerational equity, in a setting of resource abundance the tendency towards dismal poverty and dilapidated infrastructure should be drastically minimized. In the process this paradigm should also promote respect for rule of law in a just society.

That there are acute problems of conflict and poverty occurring in natural-resources-rich African countries is a reality. It is also true this should be a matter of urgent concern globally. In my view scholars have a duty to contribute ideas to prevention, or at least mitigation of the problems. I place the foregoing ideas to all of you. But I particularly would appreciate hearing ways Brazillian scholars can contribute to identifying how to avoid pitfalls and choose safe ways.