International Accountability in the Implementation of the Right to Development

By:

Obiora Chinedu Okafor

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The *Report of the UN High-Level Panel on the post-2015 Development Agenda* (May 2013), the HPLR, called on all concerned, to make "five big transformative shifts": move from reducing to ending poverty (with no one left behind); put sustainability at the core of development; transform economies for jobs and inclusive growth; build peace, as well as effective, open and *accountable* institutions for all; and forge a new global partnership (based at least in part on mutual *accountability*). This call was supported by the UN Secretary-General's Report (July 2013). Thus, both key UN reports stressed the need for attention to be paid to accountability as a key factor in facilitating the attainment of the then proposed SDGs; something that was not meaningfully present in the framework of the now defunct Millennium Development Goals (MDGs).

It should be noted, however, that the particular conception of accountability

espoused in these two reports is a limited one. Its near-entire focus is on accountability at the *national* level. Not nearly as much is said about the role of good governance on the *international* plane in fostering the kind of mutual accountability that is envisaged. Despite this gap, however, it did seem like some thought went into considering the role that the international rule of law could play in fostering the desired level of mutual accountability. From the "monitoring and peer review mechanisms" proposed by the HLPR to the "participatory monitoring frameworks for tracking progress" and "mutual accountability mechanisms for all stakeholders" suggested by the Secretary General, the UN appeared at this point to have been on the right (albeit quite modest) path of embedding accountability into post-2015 international development thought and practice.

Yet, the SDGs themselves do not include any meaningful mechanisms for holding the relevant actors accountable for delivering on the resources without which almost all of the goals cannot be achieved. Instead, the SDG document is filled with now quite tired and historically less than effective platitudes about the need for greater international partnerships in realising the right to development, including presumably across the South-North axis. Such mere platitudes have rarely if ever convinced, let alone cajoled, states to deliver on their ambitious promises to provide capital, technology, market access, and human resources to the countries that need them.

Instructively, meaningful mechanisms for ensuring some accountability with regards to development praxis have existed for some time at the African regional level – whatever the lapses in their utilization. Article 22 of the African Charter on Human and Peoples' Rights provides for a legally binding right of peoples to development. This right has formed the subject of petitions at the African Commission on Human and Peoples' Rights, and has been litigated at the African Court of Human and Peoples' Rights – successfully in some cases. For example, in the Endorois case (2009), the African Commission held that the right of the Endorois people of Kenya to development required that they be properly consulted and compensated when the state embarks on development projects which would involve the seizure of their lands and affect their lifestyle. In the Ogiek case (2017), the African Court held similarly regarding the Ogiek people of Kenya.

This accountability framework does not, however, apply outside Africa and as such does not completely plug the accountability gap at issue here. They are, however, a good example of the ways in which hard law can be brought to bear to help enhance accountability in the development field. This is necessary because, despite the benefits of soft-law, they do not always suffice to do the job. For, the framing and naming of a norm as something called “law” (as hard law) is almost never an idle exercise, and is hardly ever inconsequential. At a minimum, classifying a violation *as a violation of law* takes away from relevant actors the often-heard excuse that they will not comply with a norm because it is non-binding. Law limits the field of argument available to the actors addressed by a norm and constricts the size of the ball park within which they can play. In this way does it strengthen the hands of those who would demand the vindication of the relevant (development) norm. In sum, hard law matters! This is exactly why all-too-many actors on the global level have historically resisted the classification of the right to development as a legal norm. And that is why the widespread tendency today is to subject the most heinous or egregious international crimes to hard law norms and processes and not merely to non-law or soft law norms.

Interestingly, in the international criminal law realm, there is now a kind of graduated and calibrated scale of responsibility and accountability in which the more heinous the international crime and the more responsible for it one is, the more there is a tendency to use hard law to deal with it. A broad analogy with international criminal law would suggest that a similar kind of graduated and calibrated scale of responsibility and accountability might be in order in the realm of the international law of development. For example, we can as a first step identify a very small core (or umbra) of the most serious violations of the right to development and deploy hard law norms and mechanisms to advance greater compliance with these norms. One way of doing so is to include these core violations either in a new treaty, or in a new Protocol to the *Covenant on Economic Social and Cultural Rights*. In this respect Article 22 of the African Charter and the increasing number of interesting decisions which have interpreted and applied it situations are a kind of avatar. As a second step, we can then identify for inclusion in the penumbra a larger set of violations of the right to development which may be suitably dealt with in softer ways (such as preparing new guidelines or compacts for implementing that right, and

mainstreaming the right into the Un Human Rights Council's Universal Periodic Review process).

All in all, what should be kept in mind is that, as the wise Canadian thinker and diplomat Ivan Leigh Head once noted, an element of law (and of accountability), some measure of it, will be needed in the effort to realize the right to development. It is for this reason that the African example of establishing meaningful regional-level accountability mechanisms in the development field, undergirded by hard law, ought to be replicated at the UN level.

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* Professor and York Research Chair in International and Transnational Legal Studies (Tier 1) at the Osgoode Hall Law School, York University, Toronto, Canada; This blogpost is based on a forthcoming paper that I co-authored with Dr. Uche Ngwaba.

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