Book Review: Challenges and Prospects of Corporate Responsibility in Africa: Conversation with Oyeniyi Abe's book on Business and Human Rights in Africa

By:

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Introduction

The recently released book by Oyeniyi Abe: *Implementing Business and Human Rights Norms in Africa* (Routledge 2022) is a comprehensive analysis of human and environmental rights impact of business activities in Africa. The book discusses conceptual and practical issues arising in the Business and Human Rights (BHRs) landscape in Africa. Furthermore, the book contains instructive developments on competing theories on corporate international human rights

obligations and the range of remedies available to rights holders and 'victims' of corporate misconduct. Even more, commanding is the author's choice to present in accessible manner case studies of Nigeria, Kenya, and South Africa. Although different to many extents, the legal and policy frameworks in regulating business activities in these countries are very informative as most domestic developments on BHRs are not emphasized enough in traditional literature. Relating this development with three tragedies that occurred in these countries, the read provides, nonetheless, some hope regarding the ability of the domestic level to play its primary role in addressing the issues arising in this field. Abe’s book offers a renewed perspective on several talking points with no claim of settling the legal and political debate. Instead, the book calls for a continuous conversation to bring a new layer of understanding in a field full of uncertainty and contradictions.

The foundations of business human rights obligations in the African human rights system

One of the central conceptual themes of Abe’s book is the most appropriate way of holding business entities responsible for their violation of international human rights and environmental norms. It is not an overstatement to say that this issue has been a conundrum. Obsessed by a state-centred approach, the dominant literature almost doggedly affirms that business entities, especially multinational enterprises (MNEs), do not bear human rights and environmental obligations. This narrative was further favoured by the UN Guiding Principles on Business and Human Rights (UNGPs), notwithstanding their undeniable contribution to building a normative framework imposable to MNEs and other businesses. Abe correctly explains that the 'real challenge under BHR is to develop a framework or model for corporate accountability, and at the same time identify distinct roles and responsibilities of states’ (p.36). One of the ways in which he approaches these issues is to look at governance theories, such as the theory of social change or stakeholder theory, to build a new narrative in the field. He also makes a strong business case in respecting human rights as observance of human rights norms gives corporations a social license to operate. Although the author acknowledged their legal limits, most of his analysis builds on the UNGPs.

Arguably, corporate obligation in Africa appears settled under the African human rights system, which has developed a rather progressive legal on which corporate responsibility can be firmly based. The African Commission on Human and People's Rights (the Commission), has interpreted several provisions of the African Charter on Human and Peoples' Rights (the Charter) as applicable to business entities. According to the Commission, under the African Charter, the obligations of business corporations towards rights holders 'have a clear legislative basis', which is the correlation between the rights and duties of individuals under Article 27 of the Charter. For the Commission, as much as the Charter can impose obligations on individuals, 'there is an even stronger moral and legal basis for attributing these obligations to corporations and companies'. MNEs' international legal subjectivity in the African context is not disputable and the Commission considers that their 'obligations are legal obligations rather than just matters of social responsibility of companies'. Furthermore, several African human rights and environmental instruments imposes direct obligations on business entities. For instance, the Bamako Convention (1991), which prohibits the import of all hazardous and radioactive wastes into the African continent, clearly imposes duties on legal persons, such as foreign companies, related to the illicit export of hazardous waste. Most interestingly, there is an impressive development in the domestic legislation which has given rise to what I consider a 'regional *jus commune*' establishing general rules of regional international law on corporate legal obligation and responsibility. The possibility of customary international law with only a regional scope of application has long been recognized by the International Court of Justice. These rules cover not only primary rules – rules of conduct – of MNEs but also secondary rules concerning legal mechanisms to hold these companies into account. In that regard, the provision of corporate criminal responsibility under the Malabo Protocol ultimately results in regional opinio juris. Thus, African scholars must take ownership of these unique developments in building their narrative on the human rights obligations of MNEs in Africa. Based on our dramatic realities, it is our task to tell a different story about business responsibility for human rights and environmental abuses.

Community participation: Some procedural challenges in implementing FPIC in the African context.

Abe’s book effectively captures the right to participation of affected local communities in the context of business activities. The book emphasizes the potential of FPIC in assuring community participation. Under international law, FPIC is the right recognized to certain communities to freely give or withhold consent to any decision that will affect their lands, environment, and more general livelihoods. FPIC is a principle with a strict personal scope of application in its initial international formulation. It applies only to indigenous people and was recognized as such in the UN 2007 Declaration on the Rights of Indigenous Peoples. However, in my view, the African human rights system has developed a more progressive approach to extending FPIC’s scope beyond indigenous communities. This makes FPIC a critical legal, political and political tool for local communities affected by business and so-called 'development' projects in Africa. Several times, the African Commission referred to FPIC as applicable to 'indigenous communities' and 'local communities', for example, the Resolution on Climate Change and Forced Displacement in Africa, Resolution on a Human Rights-Based Approach to Natural Resources Governance, and the African Convention on the Conservation of Nature and Natural Resources. Furthermore, in *Endorois v. Kenya* (2009), the African Commission found that for ‘any development or investment projects that would have a major impact within the Endorois territory, the State has a duty not only to consult with the community, but also to obtain their free, prior, and informed consent, according to their customs and traditions’. Across the continent, local communities want to be at the centre of their 'development', imposing their right to consultation and consent on their states and business entities through protests turning FPIC into a powerful political instrument. However, as pointed out by Abe, the implementation of the FPIC is fraught with challenges. In addition to the main challenge related to the right to information that he points out, one can also think of other procedural hindrances that jeopardize the effectiveness of consultations requirement in many African contexts. From my experience visiting some mining-affected communities in different African countries, it is critical to continue reflecting on what a proper consultation should look like. Frequently, MNEs, in complicity with corrupt state actors, conduct ‘bogus’ consultations that are not representative of the views of the community as a whole. At all times, 'inadequate participation' must conduct consultations based on equal bargaining position, with community representatives fully informed of project developments, giving the community an opportunity to shape the

policies or heighten their role in the project.

The issue of local chiefs and traditional leaders possessing enormous representative powers in many African communities is even more concerning. Unfortunately, some traditional leaders are captured by business leaders, compromising their role in legitimately representing their communities. Gender representation in these processes is also often compromised. In communities where a patriarchal division of labour keeps women at a long distance from decision-making processes, they have no say in consultation processes. In some situations, the overreliance on traditional chiefs brings additional challenges relating to collective decision-making within communities. The Bujagali Energy Project in Uganda offers a pertinent example of a divided community due to internal rivalries among traditional leaders. In this case, the Independent Review Mechanisms of the African Development Bank found that the consultation requirement does not equate to a veto right for some community representatives, especially when the community is divided. Most importantly, the case offers significant lessons regarding the implications of procedural aspects of consultation and cultural heritage and spiritual issues.

The need to strengthen access to domestic remedies in Africa

Access to remedy is extensively discussed in Abe's. The human and environmental rights would be illusory and ineffective if no remedy exists. Observing principles such as FPIC or due diligence may contribute to preventing business-related human rights violations. However, the reality of business operations in Africa is characterized by violations because of the lack of taking these preventative measures. Also, even when strictly observed, due diligence and FPIC do not mean that violations will never occur.

Access to an effective remedy in the context of business human rights violations in Africa has generally been a nightmare. The many obstacles to remedies in the African context are due to different factors comprehensively discussed in a study conducted by the African coalition for Corporate Accountability and Accountability Counsel. Although African rights holders have legitimately sought justice in various fora, the role of the domestic legal system in ensuring remedies is crucial. I consider that the reinforcement of this role must be an essential focus of African stakeholders, especially civil society

organizations and local communities in this field.

Regional and sub-regional fora have proven unable to address corporate human rights and environmental violations decisively. The African Court of Human and People's Rights has such a limited competence that most corporate misconduct in Africa is kept out of its reach. Although the African Commission has shown a more proactive approach to these issues, its power to adopt binding decisions is controversial. It has adopted a state-centric approach in delivering its decisions that do not directly affect MNEs. This is evident in the SERAC v. Nigeria case, where, despite the evidence of the central role of Shell, the Commission had to initially assess and decide Nigeria's obligation under the African Charter. The same decision was reached in the Kilwa Massacre case. Although recent decisions through home state litigation, for example, *Vedanta*, and *Okpabi* – UK, *Nevsum* – Canada, appears promising, there is a long way for host states to effectiveily adjudicate these cases, as the structural obstacles in the legal systems of the host states as well as the legal conservatism of judges are evident challenges.

It critical that Africa invests in the ability of their domestic systems to provide effective remedies. Firstly, any action at the international level must only be understood as complementary to the domestic level. States where violations occur, are the ordinary enforcers of human rights obligations, and they must provide remedies in cases of violation by third parties. Secondly, contrary to the general perception, home state litigation comes at a symbolic cost that does not always contribute to empowering African individuals and affected communities. Even where this has led to 'positive' outcomes – which has been the exception rather than the rule – these home state decisions bring some representations that are necessarily limited as they prove unable to tell the whole story of structural corporate exploitation, plundering, dispossession which has contributed to the enrichment of their own countries. Therefore, access to remedy in the domestic context is a reaffirmation that Africans can take ownership of their destinies. As rightly pointed out in the book, most domestic legal frameworks are normatively well-equipped to offer a remedy to right-holders. The main obstacles are not legal, but political and practical. It is therefore, the role of Africans to put the amount of pressure needed on their governments and institutions to ensure that they serve their citizens. In this regard, recent developments on strategic and public interest ligation on human

rights, community rights and environmental issues in countries such as South Africa and Kenya are welcome developments.

Conclusive observations: the Sisyphean task of constraining businesses in a neo-liberal world

Requiring business entities to comply with human rights and environmental obligations in a neoliberal setting is similar to a Sisyphean task with no end. This might not sound too optimistic. However, the dominant economic model that has glorified profits at all costs should be revisited. For far too long, business entities have considered that the only purpose of an enterprise is to maximise profit. This paradigmatic trait of a neoliberal world encouraged by national and international policies, has created a system whereby private economic actors are so powerful that they can capture state structure and prevent them from adopting, and implementing business and human rights norms. This situation has been exacerbated in Africa, where the postcolonial state has quickly lost its regulatory power due to its structural deficiencies.

The neoliberal orientations of the state, somehow imposed by international bodies and policies, have led to the rush for foreign investments at all cost and minimum constraints on economic actors. Coupled with a long history of exploitation from slavery to colonization, and the unchecked efforts at globalization, African countries have found themselves having to confront the monstrosity of MNEs. The resistance from MNEs to engage meaningfully in the process for adopting an international treaty reveals the vast contradictions between those who suffer from business impunity and those who benefit from it.

Imposing human rights and environmental obligations on coporate actors requires a profound reflection on the global economic model. The promises of the BHR movement can only fail if we are oblivious to the anti-human, anti-peoples, and anti-environment nature of neoliberalism as it has evolved over the last forty years. It is no longer enough to portray those who have consistently posed these questions as ideological agents of anti-capitalism. As climate change is no more questionable, this should now be part of a general reflection regarding the existential threats that this model poses to individual, communities, and the environment. Abe’s work significantly contributes to this

necessary conversation.

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