Primary Human Rights Responsibility in Africa's Extractive Industries

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The extractive industries play a vital role in the economies of several African states and have attracted significant foreign investment in Africa. However, the activities of the Transnational Corporations (TNCs) in these industries pose egregious threats to the human rights of members of host communities. In response to these threats, commentators have argued that in addition to host states' obligations, TNCs, as well as their home states, have significant roles to play in protecting and safeguarding human rights in host communities. This short piece argues that while these arguments may hold sway, host African states continue to have primary responsibility and should rise to their obligation to protect human rights of impacted communities against the harmful effects of TNCs' activities. Moreover, the controversies surrounding the extraterritorial jurisdiction of states and the silence of international law regarding enforceable obligation on TNCs demonstrate the difficulty in embracing the newer approaches regarding the roles of home states and TNCs.

Continuous violations of human rights in the operations of extractive companies are a testament to regulatory lapses in African countries' legal frameworks. Extractive activities are conducted responsibly by the same operators in countries with strong regulatory mechanisms. The attitude of TNCs is that of 'when in Rome, act like Romans' because TNCs neglect international best practices in the extractive industries to embrace corporate rascality which fits into the political climate of some African countries. In Nigeria, for example, environmental degradation as a result of either oil spills or gas flaring violate human rights. Pollution of the air, farmlands, and water certainly violate an array of rights including rights to a healthy environment, health and adequate living conditions.

Similarly, human rights violations in Tanzania's oil and mining sectors are well documented. The most predominant violations are related to child labour, compensation for land acquisition, health and livelihoods. Regrettably, governments are complicit in these violations especially regarding the allocation of land as the obligations on TNCs to consult communities or for mandatory compensation before acquiring lands, if available, are often not enforced. Also, there are similar complex issues relating to human rights in the extractive industries in Ghana, South Africa, Uganda, and the Democratic Republic of Congo. What can be garnered from these instances is that the regulatory approach of many African states typifies the "governance gap" as explained by John Ruggie.

The traditional paradigm remains that states in Africa have the primary responsibility to protect human rights as their counterparts in other regions. Africa's host states' responsibilities to protect human rights are derived from their obligations under international human rights treaties, and these responsibilities include preventing and investigating human rights violations and providing access to justice through regulatory measures.

There is a growing debate among scholars on the responsibilities of home states to protect human rights outside their territory. This perspective is mostly useful for countries that have poor legal frameworks for both policy-making and enforcement mechanisms, which include many African states. It is either that the African states are unwilling to improve their laws owing to their preference

for economic development or that the resistance of the TNCs – strengthened by their financial influence – thwarts the efforts of African states to make new laws as seen in the recent failure of the Nigerian government to pass the Petroleum Industry Bill into law. It is usually a combination of these reasons although the former is more prevalent. These reasons explain why human rights advocates have argued for home states to assume the responsibility of protecting human rights by controlling the extraterritorial activities of TNCs that adversely impact human rights on the basis that these TNCs are headquartered in those home states. Indeed, some home states are developing plans to ensure responsible business practices by companies operating in extractive industries abroad. For instance, the recent appointment of an Ombudsperson responsible for investigating complaints regarding human rights abuses by Canadian companies operating abroad raises high hopes of tackling human rights violations in the extractive industries in Africa as Canadian TNCs are key players in the extractive industries in Africa. Although it is too early to comment on the effectiveness of these steps, the fact that the Ombudsperson lacks the power to enforce human rights standards against infringing corporations indicates that Africa's host states continue to bear human rights responsibility.

Recently, there have been discussions, including within Third World Approaches to International Law scholarship, for TNCs to be held liable for human rights violations in international law. To demonstrate that these discussions are not only academic, the Working Group on Extractive Industries, Environment and Human Rights in Africa emphasized that it is legally recognized that TNCs "have obligations towards right holders in Africa." However, as expected, there has been resistance from some supranational forces of the global North on attempts to impose human rights obligations on corporations due to the fear that any inhibitions on their activities could negatively impact on the corporations' competitiveness. Moreover, since home states and TNCs are for the most part beneficiaries of the economic gains arising from the operation of these investments in a manner that violates human rights, they are not likely to take these responsibilities seriously.

Therefore, despite the potential value that the arguments for home states responsibility and TNCs obligation could offer to human rights protection in Africa's extractive industries, African states have the primary responsibility to

protect their citizens from human rights violations and should not depend on external actors. It may be unnecessary to argue for home state responsibility and TNCs obligations if African states are genuinely willing to make TNCs face real consequences for human rights malfeasance. Insisting that the African states continue to have primary responsibility ensures that advocacy for human rights protection in the extractive industries remains focused on Africa's governments to achieve the desired result. However, the extent to which human rights violations in extractive industries will be curbed depends on the political will of governments in Africa. The idea that home states and TNCs have roles to play does not in any way shift human rights responsibility away from the African states.

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