Corporate Accountability, Business and Human Rights: an African Perspective

Rethinking the promotion of human rights conscious and accountable corporate behaviour, governance, oversight and regulation in Africa

1. Introduction

The Centre for Applied Legal Studies (CALS), a centre at the University of the Witwatersrand in Johannesburg South Africa, is hosting a series of conferences and gatherings to advance the theoretical and practical protection of human rights by business entities in and from an African perspective. The project is designed to be responsive to the various roles business entities play in sub-Saharan Africa in particular. The fraught relationship between mining, financing, commodities and energy, for example, and development in the region is well documented.

While a great deal has been written about human rights violations by multinational corporations in Africa, to a large extent this has been produced by people living outside the continent and, even more rarely, by people in affected communities.

In order to address this deficiency, CALS, together the Open Society Initiative of Southern Africa, is hosting two convenings. The first is a convening of African scholars who are thought leaders on business and human rights. The second is a gathering of affected communities. Both events will result in complimentary publications, recording the theoretical and practical approaches to business and human rights on the continent.

Specifically, the conferences hope to:

• Identify shortcomings in the business and human rights narrative to the extent that it fails to appreciate the social, legal, political and economic realities in Africa;
• Determine the extent to which the inequality between the Global South and Global North in the international arena has skewed the business and human rights narrative in favour of developed economies;
• Identify specific case studies and practical examples, which demonstrate the manifestation of global inequality into human rights violations;
• Raise key issues that should be addressed in order to make the business and human rights regime more responsive to the African context; and
• Develop new tools of analysis in evaluating the African agenda for business and human rights that so that it is both practical and substantive in content.

CALS hopes that these events will shift the business and human rights narrative, conceptualisation and theory from the Global North, to one that is more inclusive of, responsive to, and designed by, the Global South. It is hoped that this will facilitate creative and regionally relevant responses to corporate malfeasance in a region where business
practices have a disproportionate and negative impact on the development and protection of human rights.

2. Pan-African Academic Convening

The first event is a Pan-African academic conference on business and human rights under the theme ‘Corporate Accountability: An African Perspective’. The purpose of this event is to devise and develop African-based theories and approaches to how the business and human rights framework can better accommodate, and be more responsive to, the African political, social, legal and economic context.

The conference will cover a number of interrelated themes. The conference seeks to:

- Explore ways in which the business and human rights project can better respond to the causes, effects and maintenance of economic inequality between the Global North and Africa;
- Why poverty and inequality persist, despite increased investment in Africa;
- How this inequality facilitates the perpetuation of harmful business practices, despite the prominence of the business and human rights project at an international level;
- How this inequality can be addressed in a manner that sees human rights and poverty eradication informing Africa’s interactions with the Global North and its regulation of business.

3. Structure of the Conference

The conference will break away from the traditional format of a panel, presenting (usually) 15 minute papers to an audience, with a brief question and answer session after the presentations. This model rarely allows for the proper interrogation of the theories, ideas and opinions that evolve during the course of the convening.

The conference will comprise of sessions in which there will be four speakers discussing complimentary or aligned theories. Each presenter will have 4 minutes to present the kernel of their idea. Following the brief presentation, each panellist will move to a room where they will engage in an in-depth Socratic-type discussion with a small section of the audience. The participants will be invited to decide which panellist they would like to join in a more in depth discussion of the topic. The discussions are aimed at ensuring that the speaker is given a significant amount of time to discuss their paper, debate their ideas with participants, consider alternative theories and disciplines and find synergies for their ongoing work.

4. Publication

The first conference will take place in June 2017 and will bring together academics, theorists and thought leaders from African institutions to theorise on business and human rights. CALS
intends to collate the contribution of the invited speakers into an academic, peer-reviewed publication. One of the consequences of the diminution of the Global South’s interests in the business and human rights debate is the limited literature in this field emanating from the Africa, about Africa. The publication of a peer-reviewed publication, with an accredited publisher, will seek to adjust the comparative dearth of literature by African authors about the impact of business and human rights in Africa.

5. Conceptual Overview

5.1. Background to the Business and Human Rights Debate
Corporate actors are coming under increasing pressure to ensure that their business operations do not result in violations of human rights. Governments are also being asked to ensure that human rights considerations inform the regulatory and legal frameworks that govern multiple aspects of business operations within their jurisdictions. This has led to a rapidly growing discourse and body of literature on the role of businesses in the promotion of human rights and the extent to which they should be held liable for their contribution to human rights violations.

5.2. The Status Quo: The UN Guiding Principles
The United Nations Guiding Principles on Business and Human Rights (the Guiding Principles) frame much of the current discourse in this area. Many actors, especially from the Global South, are not convinced that the Guiding Principles impose binding obligations on corporations across borders. Rather, the state remains the key actor required to regulate corporations in their own jurisdiction. For states with weak governance or conflict zones, there is a limited ability to regulate and punish corporate malfeasance. The result is that little has changed for victims of corporate-linked human rights abuses. Since the adoption of the Guiding Principles, and despite a great deal of work on corporate complicity and accountability, tangible results and meaningful development remain to be seen, especially in Africa.

It is trite that this is particularly relevant to Africa, which for a variety of different reasons, experiences weak-governance and conflict. The weakness of African states is linked in many ways to the operations of the Global North and global trade and investment systems and resultant governance gaps. It is also a result of historical systems of colonisation, slavery, Apartheid, and imperialism which were intended to bring about development in some countries by means of the exploitation of others. It is within these governance gaps that multinational corporations, operating outside the jurisdictional reach of their home state, take advantage of weak corporate laws and regulations in the Global South. Host states, keen to ensure businesses invest in their countries, have been slow to put in place adequate and effective regulatory controls for corporations. The inevitable byproduct however, is an increase in abuses of human rights.

The Guiding Principles therefore retain, rather than shift, the status quo, which benefits
developed and developing economies and their corporations whilst retaining injustice for victims. It is therefore necessary to identify and understand the global factors that may frustrate their implementation in the first place, and why these factors may render the Guiding Principles themselves nugatory in regions which are more vulnerable to harmful corporate conduct.

Developments at the international level are positive, especially the establishment of the Open-Ended Intergovernmental Working Group on Business and Human Rights who were charged with elaborating upon a binding instrument for business and human rights. However, it is their utility at the domestic level that will be the true measure of their efficacy. How this dynamic will play out in the short, medium and long term will depend on how national jurisdictions decide to take the business and human rights movement forward, which in turn should influence developments at the international level. It is therefore essential that Africa play a meaningful and active role in these developments.

This conference has the potential to begin this particular discourse with a view to directing the content of the business and human rights discussion towards one that is specific and responsive to our continent.

5.3. The Business and Human Rights Narrative and Africa
The current business and human rights narrative assumes that once states adopt legal and policy measures to promote human rights-conscious business activities, compliance will follow. This assumption is flawed; not all states are on an equal playing field in terms of their capacity to regulate business. To be clear, ‘capacity’ does not mean that leaders in Africa are less capable leaders; rather it means that the cards are stacked against the region because of a combination of past colonialism; high levels of poverty; cheap labour; and the global trade and financial regime that entrenches cycles of poverty in the region. This inequality in capacity is not adequately catered for by the Guiding Principles.

Efforts need to be directed to creating an enabling environment in Africa, one in which the Guiding Principles and other human rights standards applicable to business can be implemented effectively.

An enabling environment is one that should ideally be characterised by a symbiotic relationship between the state and corporation. The state, through a regulatory regime characterised by good law, administration and enforcement, must create an environment in which corporations do not act contrary to the laws designed to protect and uphold the rights of its citizens.

An enabling environment however, needs more than just good laws and policies. It also requires the state concerned to be in a position to be able to enact those laws that will restrain companies without fear of losing the economic and social (albeit limited in some circumstances) benefits of having those multinational companies operate in its territory.
In this regard, the business and human rights narrative does not take into account the reality of the relationship that exists between African states and the Global North and multinational corporations. This relationship, especially in the context of foreign companies operating in Africa and the Global South, is one that is characterised by inequality and strongly favours the corporation.

Many African countries are eager to attract foreign investment for obvious reasons: economic development, poverty reduction, technical assistance and job creation being the biggest driving factors. The majority of global businesses are corporate citizens of the Global North, often with operations in the Global South (Although it must be noted that there is an increasing wave of powerful multinational corporations emanating from developing economies, and especially the BRICS states). Countries in the Global North derive benefits from their corporate citizens’ activities abroad, and therefore have a vested interest in these operations. In order to attract investment from other states and corporations, African states may advertise themselves as favourable investment destinations, offering official and unofficial tax and other regulatory exemptions; limited labour regulation; preferential governance regimes and compromised environmental obligations. Companies will choose to set up operations in those countries where they can maximise profits and efficiency. In other words, weak regulatory frameworks and poor governance are often reasons why companies will choose to do business in Africa.

These incentives enable and facilitate precisely the kinds of business practices which undermine human rights protections and perpetuate poverty.

Many African countries see any financial investment, even socially questionable financial investment, as better than no investment at all, satisfying themselves with only a small portion of the potential benefits (Although individuals in government may well benefit financially). African states that want to take a more pro-poor approach to regulating business, are designated by international financial institutions and Global North states as ‘unstable’ and not investor-friendly.

For example, in an investment arbitration against Mexico a Spanish company alleged that Mexico failed to protect an investment by not taking swift action against protests at a hazardous waste facility, implicating the right to protest; El Salvador is currently involved in arbitration with a Canadian mining company for refusing to grant mining authorisations because it is concerned about the implications for public health; and South Africa was taken to arbitration on the ground that its Black Economic Empowerment (BEE) mining regime violates the terms of investment protection treaties concluded by South Africa with Italy and Luxembourg, frustrating the realisation of transformation in the industry. These situations see countries being punished for trying to do the right thing.

Increased investment should be encouraged, but the incentive for investing in Africa cannot be weak human rights protections. There is an urgent need to challenge the persistent perception that in order to be human rights conscious there needs to be a trade-off between
being a commercially competitive business (or national economy) and being a socially responsible one. There is also a need to redefine investment so as to ensure that it yields not only financial return but positive environmental and social return. Financial growth must lead to pro-poor development and not just the growth of a country’s GDP.

6. The Need for an African Business and Human Rights Agenda

Africa needs a business and human rights agenda and strategy that will allow it to identify and unpack the issues that are frustrating Africa’s ability to address the conditions under which businesses operate. This requires more than the endorsement of frameworks such as the Guiding Principles, developing National Action Plans or even putting in place a treaty. It also goes beyond having the right laws in place. It requires the identification of the causes and reasons behind Africa’s vulnerability to harmful business practices; identifying those practices and understanding how and whom they affect and why.

It is therefore crucial that African academics, practitioners, leaders and policymakers strike a balance between the implementation of human rights standards and the normative development of other standards that will dilute appropriately and fairly the power held by corporations and Global North players. This is not a simple task and will demand a review of centuries of entrenched practices; the economic legacy of colonialism; the continued concentrations of power in the Global North; and the existence of laws and policies that were designed in a context where human rights were seen as outliers to the project of economics and profit maximisation.

This agenda should therefore articulate the violations that are unique to the continent and which arise as a result of economic exigency within its many countries.

7. Conference Issues and Themes

The conference will focus on practices that enable and facilitate business’ ability to undermine human rights protections and, in some instances, simultaneously frustrate African states from fulfilling their obligations to protect their citizens.

- **Tax exemptions**: A tax exemption is offered to a business to attract its operations and investment to the state in question. While tax exemptions ensure higher profits, they also reduce the pool of taxable revenue the state has available for public spending. It needs to be determined whether tax incentive schemes offered to businesses, in order to attract investment, comply with the human rights, particularly socio-economic rights, obligations of African countries.

- **Toxic waste dumping**: Africa has become a dumping ground for toxic and other forms of waste. Waste disposal is subject to more stringent (and costly) disposal laws in the
Global North. Africa, with a weak regulatory environment and its need to secure foreign funds, offers a more cost effective alternative. The harmful effects of this dumping on the lives and well-being of Africans is far reaching and needs to be addressed.

- **Tax justice and illicit financial flows:** Efficient revenue collection through taxation is essential if a country is to have sufficient resources to promote development and meet its socio-economic rights obligations. However, large sums of potential revenue are lost to both legal and illegal tax avoidance. Methods include non-payment of taxes through agreements with governments, subsidies and anonymous companies, loopholes, tax havens, creative accounting practices and transfer pricing. Although these methods may be lawful in a particular state, aggressive tax planning may fall short of international standards. These practices deprive countries in the Global South from resources necessary to deliver human rights to their populations. There is a need to explore how countries can maximise the tax benefits from business activities carried out within their borders.

- **Bilateral Investment Treaties (BIT) and agreements:** BITs determine the inflow and protection of foreign direct investment (FDI). In their present form, they are asymmetrical. Foreign investors are being accorded substantive rights under these treaties without being subject to any specific obligations. In this context, one question that has been increasingly debated in academia and in civil society is whether there is a need for a greater degree of balance in BITs between the legitimate interests of both the investors and the host country. This question is part of a broader debate on how human rights violations committed by corporations doing business abroad can best be addressed.

These agreements often insulate businesses from accountability for human rights violations or may hinder the ability of a host country to enforce human rights standards against offending businesses. BITs should be responsive to, and protective of, the socio-economic and developmental needs of the investee country in question. This should include clear requirements for the flow of the profits to reach indigent communities and should offer redress for human rights violations that arise as a result of the investment. Given the potential for human rights issues to arise in future investment treaty disputes, there is a need for human rights advocates to familiarise themselves with the features of the emerging international regime on foreign investment.

- **Human rights conditioned lending from financial institutions:** Financial institutions can be implicated in human rights violations by association. For example: the security personnel of a mining company, funded by a financial institution, reacts violently to on-site protests; corporate funding is provided to a manufacturing company which has a reputation for compromising health and safety standards to maximise profit; or project finance is provided for a new dam which will lead to forced and detrimental
relocation of indigenous people, with a disproportionate impact on women. Because a project will not get off the ground without sufficient financing, targeting financial institutions has the potential to prevent harmful business operations. Financial institutions, therefore, have the potential power to change corporate behaviour. Their financial leverage can have a positive influence on the human rights impacts of their clients. Human rights conditioned lending may have preventative value, ensuring business operations take into account potential human rights violations.

- **Pension funds and responsible investing**: Pension funds invest billions of dollars in initiatives around the world. Pension funds hold the largest amounts of money worldwide. Like banks, their investments can render them complicit in human rights violations in the absence of adequate human rights due diligence. Pension funds therefore also have considerable leverage in conditioning corporate behaviour.

- **Trade law, trade barriers and subsidy policies**: Trade agreements may have an impact on the ability of states to protect individuals from corporate human rights abuses. Trade agreements form an important backdrop and context for business enterprises to understand their human rights responsibilities given that provisions in these agreements have impacts on the development or decline of specific economic sectors. There is considerable scope for trade frameworks to address adverse impacts by business actors.

It is in these areas that Africa can and should exert more pressure in the global dialogue on business and human rights. Analysing and addressing how these practices result in insidious violations of human rights, irrespective of the sector or industry, has the potential to change the way business is being done in Africa. By focusing on these areas a country may be able to manage business operations by introducing human rights requirements and development imperatives at an early stage of its engagement with foreign corporations and governments. It also has the potential to create a business environment in which the benefits of investment can reach people in indigent circumstances, ensuring that revenue generated in Africa will benefit Africa instead of being transferred to tax havens.

8. **Themes**

The conference proceedings will focus on those issues, highlighted above, where inequality between the Global North and Global South has led to the entrenchment of practices that exclude human rights considerations.

The conference will assess whether the Guiding Principles and other relevant human rights instruments can be applied to these areas; how this should be done; what intervention, and its content should look like; and who the relevant role players are.
In addition, the conference will also look at the role of individual states, sub-regional bodies (the Southern African Development Community (SADC), East African Community (EAC) and the Economic Community of West African States (ECOWAS)) and the role of the African Union (AU) to harmonise investment and trade policies in Africa. The role of civil society and businesses in ensuring that Africa has the requisite governance capacity to implement a more enhanced business and human rights regime but also the diplomatic capacity to condition how business is done in Africa will also be explored.

The conference will also ask participants to analyse these issues through a gendered lens by looking at the feminisation of poverty in Africa and how in sectors, such as mining, women are particularly vulnerable to harmful business practices.

Further, the conference will look at Africa’s role in the global economy and its interactions with businesses and the Global North. Participants will be asked why Africa is more susceptible and vulnerable to harmful business practices.

In exploring Africa’s past, participants will analyse how the legacy of colonialism and the transition to independence shaped the way business was, and is, carried out in Africa; impacted African economies; created and failed to eradicate poverty (and continues to do so) and created a business environment that is conducive to human rights violations.

Participants will also be asked to focus on how Africa’s present is a product of its past and how this has led to the normalisation of unfairness and inequality in Africa’s interactions with the Global North, foreign businesses and other international institutions. This unfairness and inequality is seen, and perpetuated, in trade agreements, trade barriers and subsidies, BIT’s, country loan conditions and country specific tax and regulatory exemptions that facilitate illicit financial flows out of Africa. All these in turn implicate a variety of human rights directly and indirectly, permeating a number of sectors and industries.

With an understanding of Africa’s past, participants will be able to reflect critically on the present state of affairs. Participants will assess whether Africa is in a position, given the demand for African sourced natural resources and other goods produced on the continent, to demand a greater portion of the benefits that increased investment, trade and other business activities should yield (both economic and social). Specifically, participants will be asked to look at those practices, highlighted above, that retain the inequality between the Global North and Global South and what can be done to equalise this relationship.

Participants will evaluate these and other relevant practices and will be encouraged to explore these issues through the use of case studies. CALS hopes that participants will engage in a robust and sophisticated debate around the business and human rights project in Africa.
9. Conference Outputs

- A peer reviewed publication on business and human rights in Africa by African authors that draws on the outcomes of the first conference proceedings.
- Recommendations to businesses, governments, the United Nations Working Group on Business and Human Rights, the Open-Ended Intergovernmental Working Group on Business and Human Rights, African regional and sub-regional institutions and civil society on:
  o How international law and standards should be adapted to ensure that they promote human rights conscious business practices in Africa;
  o Enhancing Africa’s role and status in the global economy and participation in the development of an effective business and human rights regime;
  o Improving the governance capacity and the role of governments, business and civil society to develop and implement a robust business and human rights regime;
  o Weaknesses and deficiencies in the content of and manner in which African states are forced to enter into investment and trade related treaties;
  o Human rights weaknesses and deficiencies in the lending and investment practices of financial institutions;
  o Addressing the harmful effect of aggressive tax planning, tax exemptions and illicit financial flows;
  o Priority issues and knowledge gaps that require further work through the engagement with tax specialists, investment law experts and other relevant professionals and experts;
  o Facilitating constructive engagement between human rights and business practitioners.