CHAPTER 8

The Quest for Effective Remedies in the Home States of Transnational Corporations

Legal Realism Versus Legal Reality

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Abstract

This paper examines the availability of effective legal remedies in the home state of transnational corporations that violate the rights of local communities in developing countries. In this regard, three fundamental obstacles in the quest for justice are identified. First, courts may dismiss claims for lack of jurisdiction. Second, finding liability on the part of the subsidiary of a transnational corporation so as to award compensation can suffer from flaws in the regulatory framework of the host state, which generally constitutes the applicable law. Third, the principle of the corporate veil provides the opportunity to parent companies to escape liability. Given the unjust consequences of this state of affairs, this paper identifies opportunities to redress the current lack of effective legal remedies in the home state of transnational corporations.

Keywords


1 Introduction

By recognizing a right to improved living standards and to sustainable development as well as a right to a clean and healthy environment,¹ the Ethiopian constitution is clearly committed to protecting the Ethiopian population against corporate conduct that deprives them of their economic, social, and

¹ Articles 43.1, 44.1, 90.1, and 92.1 of the Constitution of the Federal Democratic Republic of Ethiopia Proclamation No 1/1995, Federal Negarit Gazeta, Year 1, No 1 Addis Ababa, August 21, 1995.
cultural rights (ESC rights). At the same time, however, the country seeks to attract foreign investors, in particular in the mineral and agricultural industry, in order to abide by the terms of its constitution and to protect the environment, livelihood, and health of its people, the Ethiopian government should design and enforce an effective regulatory framework. Nevertheless, in a world of economic globalization one may wonder why developing countries, like Ethiopia, bear the responsibility to protect their people against abuses by wealthy corporations, whose economic might and corresponding international leverage regularly exceed that of a single state.

Although the focus on non-state actors in the international arena is increasing, international law has yet to follow this trend. This is illustrated by the United Nations (UN) Framework on the protection of human rights in the context of business drafted by the Special Rapporteur on the issue of human rights and transnational corporations and other business enterprises, John Ruggie.3 This framework is based on three pillars: the state’s ‘duty’ to protect, the corporation’s ‘responsibility’ to respect, and the provision of effective remedies. This wording might not immediately warn inattentive readers, but there is an important difference between describing an actor’s obligation as a ‘duty’ or a ‘responsibility’. Only the former is legally enforceable. Consequently, when a corporation violates the ESC rights of laborers or communities, these victims cannot enforce their human rights as such against the perpetrator.4 Instead, they need to invoke national regulations, adopted by the state under its legal obligation to protect.

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4 Unless in a constitutional system where human rights apply horizontally, such as South Africa.