

The Viability of the Maastricht Principles on Extraterritorial Obligations of States on Socioeconomic Rights in Advancing Socioeconomic Rights in Developing Countries

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Abstract

The purpose of this paper is to examine the effectiveness the recently adopted Maastricht Principles on Extraterritoriality of Obligations on socioeconomic rights. Although not a binding document by any standard, the Maastricht Principles seek a lasting solution to impunity often displayed by big multi-national companies (MNCs) regarding their activities in many developing countries. Thus, the Principles aim at ensuring that home states of companies bear the responsibilities for human rights violations committed outside their territories. This article critically analyses the content of the Maastricht Principles on Extraterritoriality with a view to ascertaining its viability for holding non-state actors, particularly multinational companies, liable for human rights violations committed outside their headquarters

1. Introduction

Traditionally, states are regarded as the subject of international law. This position is reinforced under international human rights instruments, where human rights obligations are imposed on states. In most international and regional human rights instruments, the obligation to respect, protect and fulfil human rights are often addressed to states parties to the instruments. This has led to the belief, albeit erroneously, that non-state actors cannot be held accountable for human rights violations. However, in recent times, the activities of multinational companies are beginning to have adverse effects on the enjoyment of human rights across the world, particularly in developing countries. There has been documented evidence of how activities of multinational companies (MNCs) have led to gross human rights violations in developing countries (Amnesty International 2010). Such practices range from unfair labour practices, degradation of environment or complicity in attacks on union leaders or members. These hitherto unnoticed negative activities of multinational companies have been exposed by concerted efforts of activists and civil society groups in developing countries. Notable among these include labour malpractices committed by Nike in Indonesia and other Southeast Asian countries and the complicity of Royal Dutch Shell in the execution of Ken Saro-Wiwa and other human rights activists in Nigeria (Amnesty International 2009). More recent campaigns have included targeting Coca-Cola for alleged involvement of its bottlers in Colombia in the assassination of trade union leaders.

Sadly, human rights abuses committed by multinational companies often go un-redressed in many developing countries. This is often due to the fact that most multinational companies have their headquarters somewhere else and host countries are sometimes either unwilling or lack the political will to take up these companies. There is now a growing consensus under international law that multinational companies should be held accountable for human rights violations they commit. Indeed, over the years different initiatives have been adopted to hold MNCs accountable for human rights violations. This includes the concept on horizontality of human rights, enactment of national legislation such as the Aliens Tort Act and more recently the adoption of the Principles on Extraterritoriality of Obligations on Socioeconomic Rights in 2011.

The purpose of this paper is to examine the effectiveness of these initiatives, paying particular attention to the Principles on Extraterritoriality of Obligations on socioeconomic rights. Although not a binding document by any standard, the Maastricht Principles seek a lasting solution to impunity often displayed by big multi-national companies regarding their activities in many developing countries. Thus, the Principles aim at ensuring that home states of companies bear the responsibilities for human rights violations committed outside their territories. This article critically analyses the content of the Principles on Extraterritoriality with a view to ascertaining its viability to holding non-state actors, particularly multinational companies, liable for human rights violations committed outside their headquarters.

2. Are MNCs Subject of International Human Rights Law?

In many parts of developing countries MNCs have continued to play major roles in the economic activities of the people by providing employment opportunities and building the capacity of indigenous people. Also, MNCs have continued to explore business opportunities and provide the necessary technical support to their host countries. MNCs are involved in various aspects of economic activities including mining, oil exploration, manufacturing and building and construction activities, thereby improving the earning of host countries and overall standard of living. However, while MNCs contribute greatly to annual earning of host countries, sometimes they are either directly or indirectly involved in human rights violations within the territories of the host states. Such violations range from complicity in the brutality of host states. police and military, the use of forced and child labour, suppression of rights to freedom of association and speech, violations of rights to cultural and religious practice, infringement of rights to property (including intellectual property), and gross infringements of environmental rights (Kinley and Joseph 2002 pp 7-11). This has raised an important question as to whether human rights obligations can be imposed on MNCs.

Unfortunately, most human rights instruments; beginning with the Universal Declaration on Human Rights to the binding human rights treaties, do not directly impose obligations on MNCs. However, the traditional notion that obligations under international law are imposed on states is fast changing as non-state actors can, in some circumstances, bear obligations under international law. A good example of the situation where non-state actors may incur obligations under international law has been in the area of international criminal law. It would be recalled that during the Nuremberg Tribunal individuals were held accountable for their roles in the grotesque violations of human rights and crime against humanity committed during the Second World War. That could be described as the turning point in the attempt to impose obligations under international law on non-state actors.

More than ever before, commentators have vehemently argued that, though created for making profits, MNCs are under legal and moral obligations to respect and protect human rights (Frey 1997 p 153; Ratner 2001 p 443; Stephens 2002 p 45). In recent times, different attempts have been made to ensure that MNCs are directly responsible for human rights violations they commit. Beginning from the mid-70s the international community has adopted initiatives towards this end. These include the Sullivan Principles of 1970, the UN Draft Code of Transnational Corporation of 1977, the Organization for Economic Cooperation and Development (OECD) Guidelines for Multinational Enterprises of 1976 (which have been revised on several occasions) and the International Labour Organization Tripartite declaration of principles concerning MNEs of 1977 (Katuoka and Dailidate 2012 p 1304). The OECD Guidelines impose obligations on MNCs to 'respect and protect human rights of those affected by their activities consistent with the host government's international obligations and commitments'.¹

Today, the OECD Guidelines remain one of the most widely used instruments defining the obligations of multinational enterprises.² It has been noted that the Guidelines were adopted as part of the Declaration on International Investment and Multinational Enterprises, 'which in its other parts sought to facilitate trade among OECD countries in particular by requiring the parties to adopt the principle of national treatment and by seeking to minimize the risk of conflicting requirements being imposed on multinational enterprises, the Guidelines were seen as a means to encourage to opening of foreign economies to foreign direct investment' (Schutter 2005 p 13).³ They sought to ensure that all States parties would contribute, by the setting of national contact points and their cooperation with the OECD Investment Committee (previously known as the Committee on International Investment and Multinational Enterprises (CIME)), to ensuring a certain level of control on the activities of multinational enterprises incorporated under their jurisdiction, even if this supervision remains purely voluntary and may not lead to the imposition of sanctions.

In addition to the initiatives of the OECD, the International Labour Organisation (ILO) has adopted the Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy³. From the outset, the Declaration through its Preamble, explains that the it is founded on the belief that 'the advances made by multinational enterprises in organizing their operations beyond the national framework may lead to abuse of concentrations of economic power and

¹See para. 2 of the Chapter on 'General Policies'

²The Guidelines are addressed to the governments of the 30 States parties of the Organisation, but have also been adopted by those of Argentina, Brazil, Chile and the Slovak Republic. These governments 'recommend to multinational enterprises operating in or from their territories the observance of the Guidelines' (Declaration on international investment and multinational enterprises, 27 June 2000, I.). There is therefore no territorial limitation to the application of the Guidelines. As most multinational enterprises are domiciled in industrialized countries members of the OECD, the Guidelines are practically of almost universal applicability to transnational business enterprises.

³The Tripartite Declaration was adopted by the Governing Body of the International Labour Office at its 204th Session, on 16 November 1977.

to conflicts with national policy objectives and with the interest of the workers. Furthermore, the preamble explains that the complexity of multinational enterprises and the difficulty of clearly perceiving their diverse structures, operations and policies sometimes give rise to concern either in the home or in the host countries, or in both'. Thus, one of the important aims of the Tripartite Declaration is to 'encourage the positive contribution which multinational enterprises can make to economic and social progress and to minimize and resolve the difficulties to which their various operations may give rise, taking into account the United Nations resolutions advocating the Establishment of a New International Economic Order'.

More importantly and in addition to the existing rights of workers –such as references to the principles of freedom of association⁴ and the right to collective bargaining⁵, the prohibition of arbitrary dismissals⁶, or the protection of health and safety at work⁷-guaranteed by the different ILO Conventions and recommendations (ILO 1998),⁸the Tripartite Declaration places emphasis on the respect for the fundamental rights of workers. In particular, paragraph 8 of the Tripartite Declaration contains a detailed and general provision on respect for human rights. It provided thus:

All the parties concerned by this Declaration should respect the sovereign rights of States, obey the national laws and regulations, give due consideration to local practices and respect relevant international standards. They should respect the Universal Declaration of Human Rights and the corresponding International Covenants adopted by the General Assembly of the United Nations as well as the Constitution of the International Labour Organization and its principles according to which freedom of expression and association are essential to sustained progress. They should also honour commitments which they have freely entered into, in conformity with the national law and accepted international obligations.

While it can be said that the Tripartite Declaration is of moral significance, having been adopted by consensus by the ILO Governing body, which is usually made up of governments, employers and workers, the Declaration remains, as such, a non-binding instrument.⁹

Aside the aforementioned initiatives, at the beginning of the new millennium the UN has shown an interest in making MNCs directly responsible for human rights violations across the world. Some of these initiatives include the Global Compact (2000), the UN Norms on the Responsibilities for Transnational Corporations and Other Business Enterprises with Regard to Human Rights (2003), the Report of the Special Representative of the Secretary General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie – "Protect, Respect and Remedy: a Framework for Business and Human Rights" (2008 discussed in detail below). In particular, the UN draft Code of Conduct on Transnational Corporations was prepared in readiness for adoption in 2003. The Code of Conduct provides inter alia that 'Transnational Corporations shall respect human rights and fundamental freedoms in the countries in which they operate. In their social and industrial relations, transnational corporations shall not discriminate on the basis of race, colour, sex, religion, language, social, national and ethnic origin or political or other opinion. Transnational Corporations shall conform to government policies designed to extend equality of opportunity and treatment'. Sadly, however, due to the stiff opposition by MNCs and some disagreements between developed and developing countries regarding international law and the responsibilities of MNC, the draft Code of Conduct could not be adopted (See Sprote 1990; UN Sub-Commission on Prevention of Discrimination and Protection of Minorities 1996; Muchlinski 2000; Jagers 2002).

More recently, the UN through its special mechanisms has attempted to make the link between the activities of corporations and their implications for the enjoyment of human rights. The Ruggie's framework, which culminated in a UN Guidelines on Business and Human Rights, today remains the most comprehensive attempt at making MNCs accountable for human rights violation across the world. The framework is hinged on three pillars namely; the state duty to protect against human rights human abuses by third parties including corporations through appropriate laws policies and adjudication; the duty of corporations to respect human rights through due diligence and to avoid infringing the rights

⁴Para. 41-47.

⁵Para. 48-55.

⁶Para. 27.

⁷Para. 36-39.

⁸See for instance, ILO Declaration on Fundamental Principles and Rights at Work, adopted in June 1998 by the International Labour Conference

⁹ The Addendum to the Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy adopted by the Governing Body of the International Labour Office at its 238th Session (Geneva, November 1987) and 264th Session (November 1995) states that 'In keeping with the voluntary nature of the Declaration all of its provisions, whether derived from ILO Conventions and Recommendations or other sources, are recommendatory, except of course for provisions in Conventions which are binding on the member States which have ratified them'.

of others; and ensuring greater access to effective remedy (judicial and non-judicial) for victims of human rights violations. The Guidelines propose five priority areas through which states can work to promote corporate respect for human rights and prevent corporate-related abuses. They include: (a) striving to achieve greater policy coherence and effectiveness across departments working with business, including safeguarding the state's own ability to protect rights when entering into economic agreements; (b) promoting respect for human rights when states do business with business, whether as owners, investors, insurers, procurers or simply promoters; (c) fostering corporate cultures respectful of human rights at home and abroad; (d) devising innovative policies to guide companies operating in conflict-affected areas; and (e) examining the cross-cutting issue of extraterritoriality.

In addition, the Guidelines deal with the notion of corporate responsibility to respect and protect human rights. According to the Guidelines, corporations are expected to take due diligence so that human rights abuses will not occur by reason of their activities. Generally, the notion of due diligence is often applied to hold states accountable for its failure to prevent the violations of human rights by a third party. Thus, in cases of violence against women, the UN Declaration on Violence against Women and the CEDAW Committee in its General Recommendation 19 have both noted that a state could be held accountable for acts of violence perpetrated against women in private if it is shown that such a state fails to adopt appropriate laws and policies to prevent this from happening. It remains to be seen how this principle will be applied to corporations.

The use of the term 'responsibility' rather than 'duty' would seem to suggest that respecting rights is not currently an obligation that international human rights law generally imposes directly on companies, although elements of it may be reflected in domestic laws. This weak language would tend to reinforce the difficulty often encountered by the international community in holding corporations accountable for the human rights violations they perpetrate. Given that the Principles are rooted in human rights principles and standards, a stronger language could have been more appropriate for this purpose. An alternative argument in this regard would be that the use of the word 'responsibility' instead of 'duty' is a question of nomenclature and does not in any way diminish the obligations of corporations to ensure that their activities do not lead to human rights violations.

It is important to note here that a business entity's corporate responsibility to respect human rights applies across its business activities and through its relationships with third parties connected with those activities—such as business partners, entities in its value chain, and other non-State actors and State agents. In addition, corporations need to consider the country and local contexts for any particular challenges they may pose and how those might shape the human rights impacts of company activities and relationships.

Despite the different attempts to make MNCs directly responsible for human rights violations, little or no success has been achieved. The major setbacks relate to the fact most of these initiatives lack binding force and can be described as nothing more than hortatory. More importantly, the different initiatives fail to establish a monitoring and accountability mechanism to ensure proper enforcement of the rules. The fact that these different attempts are codified in non-binding documents implies that compliance is voluntary and will depend on good faith on the part of MNCs. Katuoka and Dailidaitė (2012) have argued that the voluntary nature of these initiatives can both be advantageous and disadvantageous in the sense that MNCs are more willing to cooperate so as to ensure the success of these initiatives when they are not being compelled. On the other hand, since MNCs are under no obligation or compulsion to comply with these initiatives the tendency is that they may be complacent in implementing the provisions of the different initiatives (Katuoka and Dailidaitė 2012). The failure of these initiatives to address the serious challenge of holding MNCs directly responsible for human rights violations brings to the fore once more the weakness of international human rights law in this regard.

3. Attempts at the National Level to Make MNCs Responsible for Human Rights Violations

In addition to various initiatives to ensure that MNCs are directly responsible for human rights violations, some attempts have equally been made at the national level towards making MNCs accountable for violations of human rights. It should be borne in mind that most of the human rights violations perpetrated by MNCs often occur within the territory of the host state. In most cases where the host state is a developing or least developed country it becomes very challenging if not impossible to hold MNCs responsible for such violations. This is particularly true in a situation where the MNC involved plays crucial role in economic development of the host state. Due to this challenge, recent development has shown that some 'home states' are making attempts at regulating the activities of MNCs carried out in other jurisdictions. The most often cited example relates to the Alien Tort Claims Act (ACTA 1789) of the United States. This Act permits people to bring an action extra-territorially in the Federal Court of the US. It provides that "[t]he district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the

United States.”¹⁰. This provision has been interpreted purposively by US courts to mean that they have jurisdiction over enterprises either incorporated in the United States or having a continuous business relationship with the United States, where foreigners, victims of violations of international law¹¹ wherever such violations have taken place, seek damages from enterprises which have committed those violations or are complicit in such violations as they may have been committed by State agents.¹² Also, a Second Circuit Court has noted that the rules of international law are not cast in stone but changes with time. Therefore, this makes it necessary to invoke the ATCA as a tool for the protection of human rights in Federal Courts in the US (Postner 1996 p 661).¹³

Despite the promising nature of this law and various court cases against MNCs under the ATCA, no decision has been made against any MNC so far of all the cases that have come before the courts. This once more points to the difficulty in holding MNCs accountable for human rights violations they commit. It also serves as a reminder of the weakness of international human rights in addressing this very important situation. In particular, it reinforces the extraterritorial limitation of national legislation in curbing the negative activities of MNCs. Kinley and Joseph have argued that the court might be more willing to find against MNCs violations relating to the *jus cogens* including rights to be free from slavery, life and freedom from torture than contentious socioeconomic rights such as the right to health, clean environment and trade union (Kinley and Joseph 2002). A further indication of the limitation of using domestic legislation to make MNCs accountable for human rights violations.

4. How Relevant are the Maastricht Principles on Extraterritoriality of Obligations in Advancing Socioeconomic Rights?

In 2011, a group of experts convened a meeting in Maastricht, Netherland and came up with a document known as the Principles on Extra-territorial Obligations of States on socioeconomic rights. This important document seeks to address the ever perennial challenge of holding multi-national corporations legally accountable for the violations of socioeconomic rights that occur outside their countries of registration. The preamble to the Principles provides thus:

The human rights of individuals, groups and peoples are affected by and dependent on the extraterritorial acts and omissions of States. The advent of economic globalization in particular, has meant that States and other global actors exert considerable influence on the realization of economic, social and cultural rights across the world.

It is further stated in the preamble that the essence of the document to clarify the content of the Principles on extraterritoriality of states obligations to realize economic, social and cultural rights with a view to advancing and giving full effect to the object of the Charter of the United Nations and international human rights. Deva has noted that there are four broad ways of exercising control over the activities of MNCs-unilateral, bilateral, multilateral and international.(Deva 2004 p 37).He noted further that of these four, the unilateral and international regulations would seem to be the most feasible (at p 42).¹⁴Under the unilateral model- which could either be ‘home state’ or ‘host state’ regulation- a state could impose or enforce internationally recognised rights on MNCs (at p 43).¹⁵In the case of international regulation, the international community assumes the responsibility to regulate the activities of MNCs in the context of human rights violations. Under international law, the general principle is that the exercise of authority by a state over activities that occur outside its jurisdiction is deemed to impinge the sovereignty of the country where the activities occur (Cassels 1993 p 273; Senz and Charlesworth 2001 p 2). Therefore, extraterritoriality of regulation is often permitted on exceptional cases.

Although the Principles do not specifically provide reasons to justify extraterritoriality of obligations, Deva (2004) has identified four crucial points justifying the need for extraterritorial obligations for MNCs. Firstly;extraterritoriality of

¹⁰28 U.S.C. §1350.

¹¹ The U.S. Supreme Court consider that, when confronted with such suits, the U.S. federal courts should ‘require any claim based on the present-day law of nations to rest on a norm of international character accepted by the civilized world and defined with a specificity comparable to the features of the 18th-century paradigms/violation of safe conducts, infringement of the rights of ambassadors, and piracy’ which Congress had in mind when adopting the First Judiciary Act 1789 (*Sosa v. Alvarez-Machain*, No. 03-339, slip op. at 30-31 (US Sup Ct 2004)).

¹² See in particular *John Doe I v. Unocal Corp.*, 395 F.3d 932, 945-946 (9th Cir., 2002) (complicity of Unocal with human rights abuses committed by the Burmese military); and *Sarowiwa v. Royal Dutch Petroleum Co.*, 2002 WL 319887, *2 (S.D.N.Y., 2002) (complicity of Shell Nigeria and its parent companies Shell UK and Royal Dutch in the human rights abuses committed by the Nigerian police).

¹³Posner, T. R. *Kadic v. Karadzic* 70 F.3d 232. *American Journal of International Law* (1996) 90(4): 661.

¹⁴*Ibid.*

¹⁵ *Ibid.*

obligations does not apply to all MNCs, but only those who have connections with the concerned state. Secondly, given that extraterritorial law seeks to implement international instead of national policy, it is more likely to be condoned than an extraterritorial law that seeks to promote national foreign policies. This is even more so when one considers that the protection of human rights is no longer a municipal matter. This point was emphasized by the International Court of Justice in the *Advisory Opinion on the Legal Consequences of the Construction of Wall in the Occupied Palestine Territory*.¹⁶ While commenting on the scope of application of the International Covenant on Civil and Political Rights, the Court noted as follows:

*[W]hile the jurisdiction of States is primarily territorial, it may sometimes be exercised outside the national territory. Considering the object and purpose of the International Covenant on Civil and Political Rights, it would seem natural that, even when such is the case, States parties to the Covenant should be bound to comply with its provisions.*¹⁷

This position has been reiterated in the case of *Democratic Republic of the Congo v. Uganda*¹⁸ where it confirmed that human rights law may extend extraterritorially in respect of core human rights instruments.

Thirdly, it can be argued that the so-called extraterritorial regulation of MNCs is 'misleading' and in fact far less 'extraterritorial' in nature. This is because such regulation affects only the parent corporation incorporated within the territory but operating abroad through its corporate hand.¹⁹ Fourthly, it is now incontestable that both home and host states are under obligations under international law (and in some cases national law) to respect and protect human rights. This would seem to imply that they must ensure that all entities within their jurisdiction comply with human rights standards (Kinley 2002 pp 38-42).

Principle 3 of the Principles on Extraterritoriality declares that 'All States have obligations to respect, protect and fulfil human rights, including civil, cultural, economic, political and social rights, both within their territories and extraterritorially'. For the avoidance of any doubt, the Principles then proceed by attempting to provide a definition of extraterritorial obligations. According to the Principles, extraterritorial obligations encompass:

- a) obligations relating to the acts and omissions of a State, within or beyond its territory, that have effects on the enjoyment of human rights outside of that State's territory; and
- b) obligations of a global character that are set out in the Charter of the United Nations and human rights instruments to take action, separately, and jointly through international cooperation, to realize human rights universally.

The implication of Principle 8 is that a state will not only take necessary steps to prevent violations of socioeconomic rights within its jurisdiction but will also be obligated to prevent such violations outside of its jurisdiction. In this regard, the Committee on Economic Social and Cultural Rights has noted as follows:

When an external party takes upon itself even partial responsibility for the situation within a country (whether under Chapter VII of the Charter or otherwise), it also unavoidably assumes a responsibility to do all within its power to protect the economic, social, and cultural rights of the affected population.²⁰

This is based on the principle affirmed during the Vienna Programme of Action that the protection of human rights is the primary responsibility of all states.²¹ In other words, 'while the beneficiaries of human rights obligations are the rights-holders who are under a state's authority and control, the legal obligations to ensure the rights in question are owed to the international community as a whole (Schutteret al 2012)'.

Principle 8 (b) echoes provisions in the UN Charter and other human rights instruments, by calling on states to take actions, separately or jointly, through international cooperation with a view to preventing human rights violations.²² This emphasizes an important point that the protection of human rights, particularly socioeconomic rights is a joint responsibility of states, regardless of their level of development. Implicit in this provision is that developed countries as much as developing countries are under obligations to prevent violation of socioeconomic rights across the world. Given

¹⁶Advisory Opinion 2004 ICJ 136, 9 July

¹⁷Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I. C. J. 136, ¶ 109 (9 July).

¹⁸Armed Activities on the Territory of the Congo (DRC v. Uganda), 2005 I.C.J. 26 (19 Dec.).

¹⁹See for instance, A Lowenfeld, *International Litigation and the Quest for Reasonableness: Essays in Private International Law* (1996) 106.

²⁰See General Comment 8 of the Committee

²¹Vienna Programme of Action UN Doc A/CONF 157/24 Part 1 ch III.

²²See particularly, articles 55 and 56 of the UN Charter, which adopt the phrase 'joint and separate action' compare with article 2 (1) of the International Covenant on Economic, Social and Cultural Rights, which prefers the phrase 'individually and through international cooperation'.

that most of the MNCs have their headquarters in developed countries, it is imperative for these countries to work with developing countries where most MNCs operate so as to avoid or minimize socioeconomic rights violations that may occur as a result of the activities of MNCs. Experience has shown that most developed countries have often been complicit with regard to human rights violations perpetrated by MNCs in developing countries. This certainly betrays the 'separate and joint' obligations of states to prevent human rights violations.

Principle 9 (a) and (b) of the Principles explains when extraterritorial obligation may arise. Extraterritorial obligations arise when a state exercises control, power, or authority over people or situations located outside its sovereign territory in a way that could have an impact on the enjoyment of human rights by those people or in such situations. All states are bound to these obligations in respect to human rights. Also, extraterritorial obligations may arise on the basis of obligations of international cooperation set out in international law. This is more or less a reinstatement of states commitment under the UN Charter. Under article 56 of the Charter (1945) states pledge themselves 'to take joint and separate action in cooperation with the Organization' to achieve the purposes set out in Article 55 of the Charter. Such purposes include: "universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion."²³

The Principles provide the situation under which states has the obligation to respect, protect and fulfill socioeconomic rights. This includes situations where the state exercises authority of full control or where the acts or omission of a state may affect the enjoyment of socioeconomic rights or where 'the State, acting separately or jointly, whether through its executive, legislative or judicial branches, is in a position to exercise decisive influence or to take measures to realize economic, social and cultural rights extraterritorially, in accordance with international law'.²⁴

Principle 12 deals with an important aspect of international human rights law. It notes that states may be responsible for the acts or omission of a non-state actor acting under direct instruction or control of the state. This is often referred to as the doctrine of due diligence under international law. The CEDAW Committee in its General Recommendation 19 (1983) on violence against women has noted that acts of violence perpetrated by a private actor can be imputed to the state based on the doctrine of due diligence.²⁵ Some human rights tribunals have adopted a similar position. For instance, in *SERAC and another v Nigeria* the African Commission on Human and Peoples' Rights found the Nigerian government to be in violation of various provisions of the African Charter for failing to prevent human rights violations occasioned by the activities of Shell in Ogoniland.²⁶ This is an important decision which can be invoked to hold a state accountable for human rights violations carried out by a private actor or entity outside the jurisdiction of the state. Indeed, this is the primary aim of Principle 12.

Under the section dealing with the obligations to respect, the Principles identify that both direct and indirect actions of states may lead to the violations of socioeconomic rights. Therefore, states are enjoined to refrain from taking any action that may directly or indirectly interfere with the enjoyment of socioeconomic rights outside their territories.²⁷ With regard to the obligation to protect, the Principles provide that states must regulate the activities of non-state actors so that they do not interfere with the enjoyment of socioeconomic rights. These include taking administrative, legislative, investigative, adjudicatory and other measures. Principle 25 provides that states must take measures to protect socioeconomic rights in the following situations;

- a) The harm or threat of harm originates or occurs on its territory;
- b) Where the non-State actor has the nationality of the State concerned;
- c) As regards business enterprises, where the corporation, or its parent or controlling company, has its centre of activity, is registered or domiciled, or has its main place of business or substantial business activities, in the State concerned;
- d) Where there is a reasonable link between the State concerned and the conduct it seeks to regulate, including where relevant aspects of a non-State actor's activities are carried out in that State's territory;
- e) Where any conduct impairing economic, social and cultural rights constitutes a violation of a peremptory norm of international law. Where such a violation also constitutes a crime under international law, States must exercise universal jurisdiction over those bearing responsibility or lawfully transfer them to an appropriate jurisdiction.

Regarding the obligation to fulfil, the Principles highlight a number of actions states must take. This includes taking

²³The Charter of the United Nations was signed on 26 June 1945

²⁴ See Principle 9 (c)

²⁵ CEDAW General Recommendation 19 on Violence against Women adopted August 1983 (CEDAW/C/7) 1.

²⁶ (2001) AHRLR 60 (ACHPR 2001).

²⁷ See Principles 20 and 21

'deliberate, concrete and targeted steps, separately, and jointly through international cooperation, to create an international enabling environment conducive to the universal fulfilment of economic, social and cultural rights'.²⁸

5. Limitations of the Principles

There is no doubt that the Principles on Extraterritorial Obligations contain important provisions that can be useful in safeguarding socioeconomic rights in developing countries. The challenge, however, is that like most other 'soft law' they are not legally binding. It remains to be seen whether states, particularly those from developed regions, will take them seriously. This is more so when one considers that an initial attempt by the UN to impose obligations on MNCs for human rights violations committed outside their headquarters was met with resistance. The success or otherwise of these Principles will depend largely on the willingness of developed countries and MNCs to abide by their spirit and tenets. It should be noted, however, that similar non-binding documents such as the Limburg Principles on the Implementation of Socioeconomic Rights and the Maastricht Guidelines on Socioeconomic Rights have both commanded respect at the international level and are often cited as interpretative guide in clarifying the nature and content of socioeconomic rights.

One of the glaring short-comings of the Principles is the failure to establish any accountability mechanism to ensure proper compliance with their provisions. The Principles fail to create a body that will monitor compliance with the provisions contained therein. Given that the Principles are not legally binding one may understand the reason for not creating a body to monitor its implementation. However, it can be argued that the non-binding nature of the Principles does not preclude the establishment of an expert body made up of individuals, civil society organizations and representatives of MNCs to assume similar responsibilities like that of treaty monitoring bodies. This expert Committee should be charged with the duty of receiving complaints on human rights violations by MNCs, investigating and making findings on such violations. This will ensure that the laudable provisions of the Principles do not become mere paper promises. Such an expert Committee can be funded through funds raised from private donor agencies. Given that the Principles are not a treaty per se, it remains to be seen whether states or even MNCs will be willing to incorporate with any Committee set up to monitor compliance with the principles.

It can also be argued that the adoption of the concept of foreseeability known in the law of tort to determine state liability with regard to extraterritorial obligations of human rights violation can potentially weaken the efficacy of the Principles. Schutter *et al* (2012) have commended this approach arguing that it 'constitutes a strong incentive for states to assess the impact of their choices on the enjoyment of economic, social, and cultural rights abroad, because their international responsibility will be assessed on the basis of what their authorities knew or should have known'. However, since liability for the violations of human rights has always been based on strict liability, the foreseeability approach may give room for home states to raise excuses regarding human rights violations committed by MNCs. In fact the foreseeability approach would seem to contradict the due diligence approach earlier affirmed in the Principles.

6. Conclusion

For many years MNCs have continued to engage in activities inimical to the enjoyment of human rights, particularly socioeconomic rights, in many parts of developing countries. These violations have occurred with redress or remedy due to a number of factors. These include the fact that MNCs are not often regarded as subject of international law and in most cases they have their office of registration in another country different from where they operate. Moreover, because of the important roles MNCs play in the economic development of many developing countries, governments of these countries lack the political will muscle to take drastic actions to regulate the activities of MNCs. Even, when developing countries are willing to regulate the activities of the MNCs, it is sometimes difficult to do because of the fact that most MNCs are registered somewhere else. The adoption of the Maastricht Principles on the Extraterritoriality of Obligations on Socioeconomic Rights is no doubt a reinstatement at the international level to ensure that MNCs are responsible for human rights violations they commit outside their country of incorporation. The Principles provide a great opportunity to hold States (including MNCs) accountable for human rights violations committed outside of their jurisdiction.

Despite the potential of the Principles to impose extraterritorial obligation on states, however, the fact that there is no monitoring body establish to carry out this task and the non-binding nature of the Principles leaves much to be desired. The success or otherwise of these Principles depend largely on good will of states. This is not good enough as the promotion and protection of human rights are not a matter of charity but a legal responsibility of states. While the Principles can be commended for being the first step towards holding MNCs accountable for human rights violations

²⁸See Principle 29

committed outside their place of registration, it has become imperative that a binding instrument be adopted at the international level to address this very serious challenge.

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