ESSAYS

BANKS AND HUMAN RIGHTS: A SOUTH AFRICAN EXPERIMENT

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• *How facilitating dialogue between banks* •
and the human rights sector results in gains for all

ABSTRACT

Human rights actors have increasingly turned their attention to the role of multinational corporations (MNCs) and their ability to promote or impede the fulfilment of economic, social and cultural rights. This discussion requires an analysis of all relevant players, including those who finance the operations of MNCs. Banks can have significant influence over the operations of MNCs and their role needs to be the subject of greater interrogation, in theory, policy and practice. This article records and analyses some of the policy-oriented initiatives undertaken in South Africa towards the creation of standards for banks operating in the region. Experts and practitioners in Africa have come together to determine the realities faced by the banks of major development projects in the region. This resulted in the Draft Johannesburg Principles of 2011– yet to be adopted by industry – which speak to the overall protection of human rights by banks.

KEYWORDS

Human rights | Multinational corporations | Banks | Johannesburg Principles | Business and human rights

1 • Introduction

International law and the regulation of multinational corporations is a rapidly developing and highly contested area of law. For the most part, there is agreement that there is a need for some type of global standardisation of multinational corporate activity to prevent human rights violations. This is reflected in the UN's Framework (and accompanying Guiding Principles) on Business and Human Rights.[1] The Guiding Principles consider three players: affected communities (or victims); business enterprises; and states. Their focus, as well as the thrust of the global debate, oscillates around the corporation as an entity undertaking potentially harmful operations. A narrower concern, however, is slowly emerging.

In this article we propose that banks are a key, and under-discussed, entity in achieving human rights-centred business operations. Banks provide the capital with which large-scale development projects are funded and are at the heart of most economies worldwide. Their role, therefore, requires a most specific and detailed analysis.

During the course of 2011, the School of Law at the University of the Witwatersrand (Wits) held two roundtables regarding banks and human rights to facilitate better understanding between financial agents and human rights actors. The roundtables provided the basis for the formulation of the so-called Draft Johannesburg Principles - *A New Framework for South Africa: Financial Institutions, Human Rights and International Best Practices (Draft Johannesburg Principles)*, in November 2011.[2] The seminars brought together representatives from three different sectors: human rights activists; academics; and those working in public and private banking sectors. Each participant in the seminar brought a unique insight and breadth of knowledge, and allowed the group to develop an approach that took account of the difficulties encountered by the banking sector while ensuring that it met the concerns of human rights activists. At the time of writing, the Draft Johannesburg Principles are being refined and negotiated with a view to engaging banks in South Africa.

The Draft Johannesburg Principles, and the discussions which informed them, are a useful point of reference to consider the role and responsibilities of banks in the developing area of business and human rights law. This article discusses the genesis and development of the Draft Johannesburg Principles, with a focus on their implications for the role of banks in the business and human rights debate. In particular, the authors focus on the impact and role of banks that emanate from or operate in sub-Saharan Africa. The focus is on this area for two reasons.

The first is that the majority of the work in international law on business and human rights is developed by academics and policy makers in the Global North. This is not to say that the Global South is absent or silent in global law making. Rather, our proposition is that the Global South can and must increase its contributions to international law discourse. There is a wide body of literature discussing the global hegemony in international law and the way that the actors of the Global North tend to drive global policies.[3] This is relevant to the outcome of global policies, which tend to be influenced by the dominant interests and/

or experiences of such actors. For example, the Rome Statute of the International Criminal Court contains three crimes: genocide, crimes against humanity and war crimes (with the crime of aggression still to be developed). It is noteworthy that the crime of illegally dumping toxic waste, for example, was not included in the Statute. There are many reasons for this and we do not seek to address them here. Rather, we note that the *effect* of its omission is that one of the most significant forms of harm affecting developing economies – and a practice that protects developed economies from having to live with toxic waste – is not a global crime. There is a correlation (not necessarily causation) between the harm criminalised in the Rome Statute, which is harm committed often by African heads of state, and the omission of harm committed by the developed world through toxic waste dumping.

In the same way, there is at least a correlation between the current international law principles (or the lack thereof) regulating banks and the Global North's economic strength, which is fortified in part by the current status quo vis-à-vis banks' operations. The same deficiencies exist in respect to existing principles regarding project finance in Africa, such as the Equator Principles,[4] which speak mainly to best practice and compliance with *environmental* standards and speak less to human rights - although human rights standards were inserted into the third iteration of the Equator Principles in 2011.[5] The same is true of the OECD Guidelines, which are recommendations addressed by governments to multinational enterprises operating in or from adhering countries (the 34 OECD countries plus 8 non-OECD countries: Argentina, Brazil, Egypt, Latvia, Lithuania, Morocco, Peru and Romania).[6] The majority of the signatories hail from the Global North.

It is also significant to note that the harm we propose to address is moored in the structure of poverty. In the context of global economic inequality, the phenomenon that is most often under-discussed in the business and human rights debate is that of poverty; poverty represents a range of human rights violations. Banks have a role, albeit limited, to promote corporate activity that has the potential to alleviate poverty through wealth creation and (crucially) wealth distribution. The inverse is also true: banks have a role to ensure that corporate activity does not profess to alleviate poverty when, in fact, it entrenches structural poverty in the areas of operation.

The second reason for this approach is that sub-Saharan Africa is the location of a peculiar co-existence of increasing wealth and increasing poverty, particularly in the case of South Africa. South Africa is both the recipient *and* perpetrator of harmful transnational corporate conduct. As is the case with most BRICS countries, this bifurcated character manifests itself in a developing economy housing a stubbornly high proportion of indigent peoples.[7] This anomaly is not entirely new but its coexistence with the development of business and human rights principles in international law is. These two reasons are at the heart of our focus on the Global South and sub-Saharan Africa.

The remainder of this article is divided into two parts. In the next part, we contextualise the role of banks in the reality of global governance gaps that exacerbate poverty in the

Global South. In the final part of the article we describe the practical proposals for a regulatory regime that would facilitate banks' responsiveness to human rights violations by the multinational corporations in which they invest.

2 • Business, Human Rights and Banks: The Absent Regulator

Given the significant power of banks, especially in the developing world, it is interesting to note that relatively little attention has been paid to this category of actor in the international law debates regarding human rights and business. The debate regarding the extractive industry and human rights, for example, rarely includes an assessment of banks that provide the capital for mining. Of course there is a great deal of discussion regarding trade, financing and investment from a developmental point of view;[8] but the intersection of a fiscal analysis and international human rights law is a relatively new and under-explored enquiry.[9]

The link between banks and human rights has a particular resonance for the BRICS economies. BRICS states, such as South Africa, are poised at a unique historic moment where they are both growing their own economies and contributing to the growth of other less developed economies. This is particularly true of South Africa, which is both a target jurisdiction for foreign financial activity and has its own financial sector that is targeting surrounding developing African states.[10] This duality as an emerging economy provides a seminal moment in financial development, where a regulatory system could be developed to protect human rights standards both within the jurisdiction of the BRICS state and in surrounding states. Appropriate regulation could well protect a country, such as South Africa, from harmful and exploitative investment practices from foreign investment; it could also ensure that South Africa's growing financial sector applies similarly protective standards when investing outside of South Africa, and in particular, in the broader African region.

It was in response to this opportunity that the Draft Johannesburg Principles were formulated. The Wits University roundtables envisaged three objectives. The first was to bring together entities that rarely engage with one another, and when they do, appear to "speak" in different languages. The concept that perhaps draws "finance" and "human rights" closest is that of "risk" and its avoidance and management. Here, there can be a shared aim that, for example, a proposed investment not be compromised by legal or social instability triggered by human rights violations. Typically, the delineation of these two camps has, over the decades, created entrenched positions that are seen as alien and mutually exclusive. It was time to bridge this divide.

The second objective was to develop a regionally relevant framework for the integration of human rights considerations into the operations of banks that take account of the unique situation in which South Africa finds itself, namely, as one of the largest financial markets in Africa.

The third objective was to avoid the traditional North-South development of standards. This was an opportunity to pre-empt a situation where standards are developed in the Global North and then applied to the Global South. Banks in the South African environment face both similar and different constraints to banks in Europe and the United States. As such, the roundtables sought to allow South Africa to lead the way in ensuring appropriate standards for lending in its own context.

Why would banks and human rights advocates come to the same party? As the workshops progressed, a distinct focus on project finance emerged (namely, the long-term financing of large-scale infrastructure or industrial projects), with human rights issues and responsibilities in transactions coming out most clearly in project financing roles. In preparing the seminars, two questions came to the fore. The first was why banks matter to the implementation of human rights and, in particular, economic, social and cultural (ESC) rights. The second question was why ESC rights considerations in particular would matter to banks.

The first question - why project financing matters to human rights law - reveals the obscure and often hidden role of banks. When the idea of coalescing project financing and human rights was first mooted, many human rights activists raised the proverbial eyebrow in surprise. Companies generally operate in the public realm, with reputational considerations that often (although not always) affect their bottom line. An oil spill, mass eviction, or chemical contamination, is "low hanging fruit" in this regard: easily discernable and with a clear nexus between the corporate conduct and the harmful outcome. This nexus, however, is less clear when considering the responsibilities of banks who provide capital to corporations that commit human rights violations. Their invisibility has obfuscated seminal questions that must be asked by human rights activists, especially following the financial crisis. Are such banks complicit in the harmful actions of the multinational corporations that they fund; do banks have an obligation to take steps to help prevent the violation of human rights by the corporations in which they invest; and finally, is it unlawful for banks to profit from the operations of multinational corporations that are complicit in, or commit, human rights violations?

The legal answers to these questions are, at best, unclear. The strategic answers, however, are all resounding "yeses": the role of banks matters enormously to the protection of human rights. Without investment and finance, corporate activity is blunt. In addition, in the absence of a comprehensive global legal framework governing the role of multinational corporations, banks become themselves potential regulators of sorts. Simply by choosing whether or not to invest in corporations and by imposing investment conditions, banks can compel multinational corporations to comply with international human rights and environmental standards. Banks are thus potentially regulators themselves - *in loco custodis*, as it were - in the absence of home state and/or host state controls.

But why would banks worry about human rights standards? Banks often dismiss human rights considerations as the responsibility of states, not private actors. Such considerations are typically viewed as extraneous to – or indeed, fundamentally incompatible with – the profit-making mandate of banks. Exceptionally, there are those in finance who argue that human rights considerations are imperative to sound fiscal decision-making. The Thun Group of Bank's 2013 Discussion Paper on the application of the UN Guiding Principles to the banking sector exhibits both sides of this divide when it proclaims that "this is a complex issue for banks as most of their human rights impacts arise via the actions of their clients and are addressed through influence, leverage and dialogue rather than through direct action from the banks themselves."[11]

Notwithstanding this divide between project finance and human rights, there are several reasons why human rights considerations ought to be seen as integral to the operation of banks. The first is that human rights considerations are helpful indicators of the stability and long-term value of a project. A rights-inclusive analysis may unearth important information regarding investment returns and risk-management, and for this reason it has been argued that responsible lending represents a financial benefit, rather than a financial cost.[12] The European Commission confirms this, noting that socially and environmentally responsible policies "provide investors with a good indication of sound internal and external management. They contribute to minimising risks by anticipating and preventing crises that can affect reputation and cause dramatic drops in share prices."[13]

The second reason why a rights-inclusive assessment makes for prudent investment is the evident monetary value of a corporation's reputation, which in turn will affect a bank's return on its investment. There has been a dramatic increase in the financial value of corporations' reputations, which will inevitably affect their profitability in the longer term. For example, the reputational capital of Coca-Cola in 2005 was said to be $52bn; and $12bn for Gillette in the same year.[14] The historic Ford Pinto Memo revealed that the Ford Motor Company knew that the Pinto had design flaws that could result in a fuel tank explosion when the vehicle was subject to a rear-end collision. Ford decided, based on a cost-benefit analysis, that it would be cheaper to settle the legal claims of those who suffered death and disability as a result of the design flaw rather than to recall all Pinto models. It took Ford decades to recoup its reputational – and financial – losses.[15] Similarly, the oil spill in the Gulf of Mexico – and the threat of litigation – has had a dire impact on the share price of BP.[16]

A counter example is Johnson and Johnsons' Tylenol crisis in 1982, which although over three decades ago, is still one of the most relevant lessons in reputational protection. When seven people in the Chicago area in the United States died after ingesting Extra Strength Tylenol medicine capsules which had been laced with potassium cyanide poison, Johnson and Johnson recalled every package of Tylenol worldwide. This show of honesty – and Johnson and Johnsons' invention of the first inherently tamper-proof capsule – restored the company's reputation and the company's stock returned to the 52 week high at which it had been trading immediately before the crisis.[17]

Banks, therefore, should be taking the reputational value of their portfolio corporations into account.[18] The human rights and environmental impact and practices of corporations particularly are not extraneous considerations or non-monetary factors, as is sometimes claimed.[19] Human rights violations are, indeed, not good for business.[20] The devastating strikes at the Marikana-based Lonmin platinum mine in South Africa on 16 August 2012 revealed a shuddering fault line underlying the platinum industry.[21] That business model is clearly unsustainable, a message that had emanated from the human rights community mere days prior to the massacre.[22]

The real question is not *if* banks have a role to play in human rights compliance but rather *what* role banks ought to be playing. The Wits University roundtables were an opportunity to harness this question and provide an analysis that is rooted in reality and informed by inter-disciplinary expertise.

3 • Bridging the Gap: The Draft Johannesburg Principles and Practical Steps for Banks

3.1. Roundtables

The financial crisis exposes the links between lax financial practices and human rights violations.[23] When the banking industry errs, individuals and communities suffer. Propelled by the adoption of the UN's Guiding Principles, the financial sector faced the challenge of establishing standards that would mitigate the sector's contribution to human rights violations. There has been considerable progress in this regard. The International Finance Corporation (IFC) Performance Standards and the OECD Guidelines on Multinational Enterprises, for example, require the financial sector to meet certain human rights and environmental standards.[24] Both the IFC Standards and OECD Guidelines were revised in 2011 to include specific references to the UN Guiding Principles.

The problem that remains is the issue of specificity. While the IFC has led the way with its 2010 *Guide to Human Rights Impact Assessment and Management*[25] and, more recently, with its study on the UN Guiding Principles on Business and Human Rights and IFC Sustainability Framework these initiatives provide little guidance for responsible lending for South African banks.[26] Indeed, the barometer for responsible lending, which is still a vague and amorphous concept for many banks, remains Basel III, the international regulatory framework for banks that focuses on governance matters relating to minimal capital requirements, rather than the broader concerns of the social impacts (still less human rights) of banks.[27] Banks clearly need specificity. If they are to be compelled to play a role in assessing and managing human rights violations, they need to know what such violations look like, which are relevant to them, and the manner and form of their responsibility. To any human rights lawyer, the question is strange: human rights standards inhere in international human rights law. However, for banks, human rights standards are vague, indeterminable and often unidentifiable.

In this context it was apparent that the South African financial sector could be in a position to contribute to these developments by way of creating home-grown, contextually relevant standards of practice. The objective of the roundtables was to discuss: the content of these standards; how they apply to the work of the South African financial sector; the utilisation of these standards within a commercial context; and the ideal role the finance sector should play in respecting human rights in South Africa, as well as Africa as a whole. The discussion was within the framework of risk mitigation, utilising an approach based on human rights.

The first-named author initiated two roundtables, in partnership with local and international organisations. The meetings brought together experts and representatives from banks, the private sector, the academy, the public interest sector, and government and regulatory officials. Discussions were structured around what, in real and practical terms, banks need to do to comply with international and domestic human rights standards and, importantly, what they are *able* to do, given the regulatory constraints within which they operate. Four themes emerged.

3.2. Four Themes

The first theme focused on the pre-contractual obligations of banks in respect of human rights assessment. The second considered the extent to which a bank has responsibility for the promotion and protection of human rights during the life of a project (the "in-contract" obligations of banks). The third theme related to South African banks' responsibility for human rights compliance in projects outside South Africa. The final area focused on the consequences of borrowers' non-compliance with national, regional and international human rights standards.

3.2.1. The pre-contractual obligations of banks

The pre-contractual consultation process - also known as due diligence – is a seminal stage in determining whether or not a proposed project will have harmful social, economic or environmental consequences. The following practical issues are potential hindrances to the pre-contractual assessment of human rights standards in a project: (i) lack of community consultation; (ii) inadequate transparency, especially as a result of the commodification of corporate information; (iii) the question of who undertakes the bank's due diligence and at whose cost; and (iv) the task of determining which factors are taken into account in assessing the efficacy and impact of the proposed project, and when such assessment should occur.

i – Due Diligence: The project assessment and the process of consultation

Consultation is a critical aspect of project finance due diligence. Banks may seek to consult with both potentially affected communities and the project sponsor. In keeping with the Equator Principles, most signatory banks adopt a policy of "effective stakeholder engagement" with the borrower to construct solutions to any potential violation of communal rights.[28] This forms part of a project's due diligence process, which has a number of objectives, including, but not only, an assessment of the rate of return (i.e. the extent to which a bank's loan will be repaid at an interest rate that contributes to the bank's profit). This process also ensures that a responsible bank works in partnership with a borrower to prevent social disruption and human rights violations. Effective and meaningful participation in the project at an early stage ensures a common understanding of the goals of the project. This is necessary for respecting communities' dignity and right to choose; it also secures community buy-in if the consultation is successful— an essential ingredient for ensuring the implementation and long-term success of a project.

Notwithstanding the importance of pre-contractual consultation, this process raises one of the more contested areas of business and human rights, namely, the extent to which business is required to consult with the communities in whose geographical surrounds they intend to operate. The large body of research and literature around free, prior and informed consent is relevant in this context.[29] Banks face the same "consult versus consent" paradigm of their portfolio companies but with little guidance about how to approach community engagement and the extent to which this is the role of the bank. It is not clear, for example, what the objective of the consultation process is. Is the process about consultation to share information or is it negotiation to achieve consent? Do international standards of free, prior and informed consent apply to the banks or only the borrowers? Must a bank assess the risk of investment alone or also the risk of *not* financing the project? What happens if the community rejects the project but the government approves it?[30] With whom should the bank consult, noting that a community is not homogenous and often includes groups with varying degrees of power and vulnerability?[31] As is evident from this array of questions, there is no doubt as to the importance of consultation but there remains a great deal of uncertainty regarding the scope and content of a pre-contractual human rights assessment of financed projects.

ii – Transparency

The extent to which a due diligence process can be fully transparent is equally challenging. How transparent can and should the due diligence – and by extension the consultation – be? The consultation is likely to yield market sensitive material, which is both confidential and economically valuable. The protection of this information as a commodity imposes confidentiality constraints that mitigate the extent to which banks can be transparent about their decisions. How should banks manage the imperative of confidentiality versus the imperative of transparency in pursuing a rights-inspired consultation process?

iii – Consultants and Equality of Arms

A key concern expressed by representatives of the banking sector is that of the role of consultants who undertake the human rights and environmental impact assessments. Consultants are costly (borne, for the most part, by the banks themselves) and often do not produce reports that are rigorous and sufficiently in-depth. This is not an issue only for banks but also for the majority of business enterprises, which seek to outsource this specialised skill of community engagement. The private sector, as a whole needs to improve its monitoring and evaluation of consultants and to ensure that such consultants have the requisite knowledge and expertise relating to human rights.

This process is also compounded by the fact that there is seldom "equality of arms" in the consultation – that is, ensuring that the community has adequate (let alone equal) legal representation, knowledge of their rights and technical information about the consequences of the project.[32] This often impedes a full and equal consultative process, which is exacerbated by other related factors such as language and cultural dissonance.

iv – A long-term, holistic analysis

The thrust and parry of financing often creates a context of short-termism, with a view to maximising profit in the shortest period of time. This is often antithetical to the long-term impact of project financing on social and environmental factors. This was one of the first and probably most obvious points of discord between the theory of rights protection and the reality of making financing decisions. A human rights assessment requires an analysis not only of a contract's short-term financial impact, but also its long-term environmental, social and cultural impact. Although this might be contrary to the historic trend of looking at the short-term profits to be gained from a project, this dual approach has clear commercial advantages.[33]

The adoption of a holistic and long-term approach to financing demands a shift in the nature of investment decision-making and an elongation of market expectations. These are changes that will not come naturally or easily to the financial sector, and certainly not without a legal imperative to move it along. However, the roundtable participants did recognise the possibility of including long-term considerations in the consultation and assessment processes that precede the conclusion of the investment contract.

It is clear that pre-contractual due diligence processes are essential, but the detailed manifestation of how they are implemented suffers from more questions than clarity. The proposals that constitute the Draft Johannesburg Principles in respect of pre-contractual human rights assessment seek to create more specificity in an otherwise vague requirement.

3.2.2. The in-contract obligations of banks

i – Human rights standards as terms and conditions of the loan agreement

Typically banks impose "in-contract" obligations to ensure that the project in which they invest operates in accordance with legal and other regulatory requirements. The same is true of human rights standards. The due diligence stage is obviously the stage when the bank would have the greatest control in assessing risk potential. However, that obligation does not end when the project begins. It is precisely at this point that a lender can exercise the type of regulatory control that states may be unable to provide. That said, it is understood that banks are not government regulatory bodies, nor can we expect them to be so. They are, however, powerful watchdogs with the potential to pull funding if non-compliance with human rights standards is a term of the financing arrangement. That much can and should be expected of them.

Clear contractual terms and conditions are an effective method of enforcing human rights obligations by the borrower. If a borrower violates a condition of the loan agreement relating to human rights standards, it would be in default of the loan agreement (either in part or in whole). Current contractual conditions include, as a matter of practice, prohibitions against illegal conduct. However, the Wits roundtables evinced a clear consensus that it is necessary to go beyond merely avoiding what is illegal under national law (such as child labour) to ensure that contracts do not infringe regional or international human rights standards.

ii – Degree of monitoring and intervention: Staggered Loans

A key question for banks, however, is the extent to which it is their core business actively to monitor the projects that they finance. During the currency of a contract, banks are reluctant to become involved in the monitoring of projects, not least because such involvement in the day-to-day practice of the borrower's project may expose banks to liability. On the other hand, an absent lender may well be accused of complicity if its investment is associated with human rights abuses.[34]

A common-sense balance should be struck, whereby banks can insist on human rights standards forming part of their financial instruments. Such standards, however, can only be enforced where banks retain leverage. Typically, banks pay the full loan to the borrower, with a repayment schedule during the life of the project. This impedes leverage and weakens the bank's ability to hold a corporation to account. Staggered lending, i.e. providing the loan in instalments rather than in a full, upfront payment, therefore, is a seminal – and entirely practicable – mechanism by which to hold a borrower to account. Banks will have little or no clout where the entire loan has been paid. The deployment of staggered loans is therefore preferred, allowing subsequent portions of the loans to be used as leverage to enforce contractual conditions.

iii – The consequences of borrowers committing human rights abuses during the contract term: Looming Liability

Apart from identifying relevant and applicable human rights considerations, perhaps one of the greatest difficulties facing the financial sector is what it should do if and when a human rights abuse is identified, either in the pre-contractual due diligence phase or during the life of the project. The increasing trend on the part of banks is to engage the borrower to stop abuse, rather than terminate the financial arrangement.[35] Suspension and termination of financial contracts are extreme options, utilised only as a final step. These steps should be used with caution, not only because of the financial implications, but also because they may have a detrimental effect on the community in which the project is based. The unintended consequences of exiting from a project, at all stages of its development, should not be understated.

As always, however, there is a competing value. As much as banks must exercise caution in determining their approach to human rights violations by their borrowers, they must also be prudent to protect against their own liability. Banks may operate behind the scenes in relative obscurity but increasingly they have liability for conduct associated with human rights violations. Such liability will depend on a number of factors, including proximity to the deal, the extent to which the bank did or should have retained control over the project and the seriousness of the harm. When banks are close to the violation, or have power over the operation of the contract, they may be a liable party. The more significant the injury sustained by the affected parties, the more likely liability will arise. A standard of negligence may well apply. If a bank is negligent, and does not comply with the reasonableness standard in due diligence and monitoring of the contract, then the prospect of punitive liability may loom.

Where a borrower directly or indirectly commits, or is complicit in the commission of, a human rights abuse, banks should take the following steps:

- in accordance with international standards such as Principle 5 of the Equator Principles III and Principle 22 of the UN Guidelines on Business and Human Rights, *engage* with the borrower to stop the abuse, ensure its non-recurrence and commit to remediation;
- where a borrower fails to re-establish compliance, *delay, suspend or cancel* the loan, where possible; and
- always *consider* the unintended consequences of any remedial action, such as the loss of income to the local community, before effecting the cancellation of a contract.

The attainment of a human rights-focused approach to financing requires the integration of human rights and environmental specialists into all operations of banks. Management, shareholders and depositors should be encouraged to support these endeavours. This is necessary for the sake of the profitability of the investment but also because of the need to attenuate liability for human rights violations. The future, therefore, is clear. The nature of liability for banks is changing and the sector should pre-empt and inform this change.

3.2.3. Extraterritoriality: Responsibility for human rights compliance in projects outside South Africa

As noted earlier, one of the greatest challenges for the implementation of ESC rights is the extent to which corporations may have a negative impact on the implementation of these rights in jurisdictions outside of the state in which they are incorporated or have their primary place of business. Many argue that the rules governing a corporation in its home state should apply equally to its activities outside that state.[36] This is an equally important consideration for banks, particularly those operating in BRICS jurisdictions where the developmental project positions banks as entities that simultaneously demand fair standards and from whom fair standards are being demanded.

This is particularly true of South Africa, which is poised to become the veritable "United States of Africa" within the region. The project finance opportunities on the African continent are vast and South Africa is one of the financial headquarters for this development. And yet, South African banks operate in a twilight zone of an emerging economy. Will South African banks apply human rights standards to the projects they fund throughout the continent or will they too become participants in the exploitation of loosely regulated states?

A complicating factor for banks is the fact that national jurisdictions may have different human rights standards from an international or regional regime. In accordance with state standards for extra-territorial conduct, as well as current best practices by South African banks, the roundtable participants agreed that the standards of the state would take precedence *so long as* those standards meet the basic international best practices. Therefore, if the standards required by the host state are higher than international standards, those standards must apply.

4 • Conclusion

This article analyses some of the broad-based human rights considerations that impact on finance, as well as certain policy-oriented initiatives undertaken in South Africa towards the creation of standards for banks operating in the region. Activists, lawyers, academics and banks (both public and private) across the globe are wrestling with the exceptional characteristics and circumstances of modern finance in a business and human rights context that, as yet, barely recognises, let alone understands the demands that must be made of the finance sector to make it more conducive to the protection and promotion of human rights.

The Draft Johannesburg Principles initiative has brought together stakeholders in the South African context in an effort to determine the financial and human rights realities faced by the banks of major development projects in the region. The objective has been to integrate the demands of human rights standards with the vicissitudes facing banks. The resultant Principles are not an end in themselves, but rather are intended to generate further discussion and collaboration between human rights actors, bankers, government and academics, that might yield a human rights-founded approach to financing that makes sense of business and for the people operating them.

From the Wits roundtables the Draft Johannesburg Principles were formulated and disseminated for further discussion with, and input from, the financial sector in South Africa. The next stage of the project will be to host a series of engagements with banks and their representative bodies throughout 2015 and 2016 intended to reach agreement among participants formally to adopt the Principles. That fact notwithstanding, the Principles remain the subject of ongoing engagement and analysis. They speak to the protection from corporate abuse of human rights generally and ESC rights in particular, and they constitute a summary of the development of a framework for the practicable protection of human rights by banks. They constitute the distillation of the opinions of a range of stakeholders, and also seek to set boundaries and provide guidance for banks regarding the role that human rights considerations should play in their strategic thinking, policymaking and operational management.

NOTES

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4 • Equator Principles Financial Institutions, *The Equator Principles III* (Equator: The Equator Principles Association, June 2013, accessed November 6, 2015, http://www.equator-principles.com/resources/equator_principles_III.pdf.

5 • The second-named author of this article chaired a session on Finance and UN Human Rights at the Office of the High Commissioner for Human Rights "Forum on Business and Human Rights", 5 December 2012, during which Ola Mestad, Chair of the Council of Ethics, of the Norwegian Sovereign Wealth Fund, made this very suggestion.

6 • OECD, OECD *Guidelines for Multinational Enterprises* (Paris: OECD, 2008), accessed November 6, 2015, http://www.oecd.org/corporate/mne/1922428.pdf.

7 • The most recent survey of South Africa undertaken for the purposes of the Multidimensional Poverty Index (MPI) was in 2012. The MPI is calculated by reference to ten poverty indicators across three equally weighted dimensions: education, health, and standard of living. Multidimensional poverty is defined as deprivation in at least one third of the weighted indicators. 11.1% of South Africa's population is classed as being in multidimensional poverty. Further, 17.9% is vulnerable to poverty (that is, deprived in 20-33.3% of the weighted indicators), 1.3% are in severe poverty (deprived in 50% or more), and 1% are destitute (deprived in at least one third of more extreme indicators). The MPI index contrasts against other lower thresholds of poverty, such as the percentage of income poor on $1.25 a day (13.8%) and $2.00 a day (31.3%). The National Poverty Line puts the percentage of South Africa's poor at 23%. To contextualise these statistics, South Africa has a Gini Index of 0.631, which denotes extreme disparity in income across the population (Oxford, *Oxford Poverty and Human Development Initiative* (OPHI), 2014).

8 • See, for example, United Nations Economic ad Social Council Economic Commission for Africa, "Financing for Development: A progress report on the implementation of the Monterrey Consensus", Meeting of the Committee of Experts on the 5th Joint Annual Meetings of the AU Conference of African Ministers of Finance, Planning and Economic Development, Addis Ababa, Ethiopia, 22-25 March 2012, E/ECA/COE31/10; AU/CAMEF/EXP/10(VII), noting the need to improve Africa's development finance framework.

9 • Mary Dowell-Jones and David Kinley, "The Monster Under the Bed: Financial Services and the Ruggie

Framework," in *The UN Guiding Principles on Business and Human Rights: Foundations and Implementation*, ed. Radu Mares (The Hague: Brill, 2012), 183.

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26 • Nor, it might be added, do the Maastricht Principles on Extraterritorial Obligations of States in the area of Economic, Social and Cultural Rights (adopted in September 2011), which though raised in discussion during the Roundtables, are in fact almost completely silent on states' particular responsibilities regarding the extra-territorial human rights impacts of banks and other finance institutions.

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31 • While it may be clear that a certain community may be affected by a project, it is not clear whom in that community should be consulted. Communities are not uniform or homogeneous entities. As such, community members may have different views on a proposed project. Ideally, the consultation process should ensure that the views of the various sub-groups within the community are heard. Particular attention should be paid to the views of women and other sub-groups within communities (who are often excluded from official representative bodies). For a discussion regarding communal engagement see the Centre for Applied Legal Studies (CALS), *Community Engagement Policy* (Johannesburg: University of the Witwatersrand, 2014), accessed November 6, 2015, http://www.wits.ac.za/files/25gim_168271001427097717.pdf.

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