

Human Rights, Banking Risks

***Incorporating Human Rights Obligations
in Bank Policies***

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Briefing paper written for BankTrack by Jan Cappelle (Proyecto Gato)

with additional edits and comments from: Adam McBeth, Andrea Baranes, Andreas Missbach, Dana Clark, David Barnden, Eric Allen Engle, Fergus MacKay, Inez Louwagie, Johan Frijns, Luc Weyn, Michelle Chan Fishel, Natalie Bridgeman Marie Soverosky, Martin Wagner, Marthe Reinette, Victorio Mattarozzi

BANKTrack

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I. Introduction

International law and jurisprudence recognize that corporations have legal personality, and therefore corresponding legal rights and obligations; they also have duties to refrain from assisting others in human rights abuses. In this respect, it is indisputable that private financial institutions (FIs), as a specific category of corporations, have human rights obligations and responsibilities.¹

Although financial institutions are rarely direct violators of human rights, they frequently *facilitate and enable* human rights violations by providing direct financing (e.g. project finance, or lending to a special purpose entity) or indirect financing (e.g. general loan to a company) to companies or activities which cause human rights violations.

An example of direct financing involves the Lafayette mining Project on Rapu Rapu island in the southeast of the Philippines. This is an open pit mine producing copper, zinc, gold and silver. The mine is directly financed by an international syndicate of banks (ABN AMRO, Standard Chartered, ANZ, amongst them). The project is fiercely opposed by local communities as a threat to their livelihoods as fishermen and farmers, and has led to the arrival of security forces and armed private guards to this once peaceful island.

An example of indirect financing involves India's state-owned National Hydroelectric Power Corporation (NHPC). NHPC has as its core business the development and operation of large, controversial, and often politically risky dam projects. The company has a notorious record of providing inadequate compensation to, and violating the rights of people displaced by these dams and also has a demonstrated history of resorting to repressive means of countering community resistance. An international syndicate of banks has provided NHPC with a corporate credit that represents about 10 percent of the company's assets. Through this general loan, the banks provide indirect financing for specific NHPC dams, including the Indira Sagar and Koel Karo projects, both of which have been associated with human rights violations.

Although banks in these situations may not directly carry out the human rights abuses, they are *complicit* in human rights violations, by profiting from or enabling transactions that may undermine the rights to life, property, home, health, livelihood and development of communities affected by the projects.

¹ This paper focuses on Private Financial Institutions, referred to as either Financial Institutions (FIs) or simply as banks.

A. Individual bank policies and the Equator Principles

In recent years, a small group of financial institutions have begun addressing the social and human rights impacts of their transactions by developing human rights-related financing policies, standards, and procedures.² Unfortunately, these human rights policies generally are not robust, nor do they prevent financiers from being complicit in human rights violations.

For example, financial services giant ING has developed its own bank-wide human rights policy. Despite the existence of this policy, ING was found to have invested over \$1.3 billion in companies with serious human rights problems.³ Similarly, ABN AMRO, Barclays and Standard Chartered all have created human rights policies, yet they have all financed the abovementioned Rapu Rapu and/or NHPC transactions.

One frequently-cited industry-wide financing norm is the Equator Principles (EPs), which have been adopted by over 40 FIs.⁴ The EPs were designed “to ensure that the projects they [banks] finance are developed in a manner that is socially responsible and reflect sound environmental management practices”⁵. While they are a positive step in enhancing the social and environmental sustainability of banks’ financing, they do not adequately address banks’ responsibilities regarding human rights.⁶

In many cases, the Principles do not represent international best practices. For example, the EPs do not require contract and revenue transparency for extractive industry projects, an emerging standard being promoted by the Extractive Industries Transparency Initiative and the Publish What You Pay coalition. In addition, the EPs only apply to project finance, which

² For instance, as of January 2006 only 9 banks had developed their own human rights policies, standards or statements: ABN AMRO, Barclays, Citigroup, HBOS, ING, Rabobank, Société Générale, Standard Chartered and Westpac.

³ Netwerk Vlaanderen, “Where do you draw the line? Research on financial links between five bank groups and companies involved in serious violations of human rights”. November 2005. This report found that collectively, the top five banks in Belgium (ING, Dexia, Fortis, AXA and KBC) invest over US\$8 billion in companies that are involved in serious human rights violation

⁴ Including one export credit agency, Eksport Kredit Fonden and a insurance company, Manulife.

⁵ Preamble of the Equator Principles, available at <http://www.equator-principles.com/principles.shtml>.

⁶ The Principles themselves, which are based on the new International Finance Corporation (IFC) Performance Standards (PS), include some human rights requirements, but the provisions are weaker than international law or standards, and not all international human rights standards are addressed in the Principles. For example, the PS resettlement standard categorizes displaced persons and provides differential policy protection for those with and without formal land title. This is lower than the recommendations by the Special Rapporteur on adequate housing in its *Basic principles and guidelines on development-based evictions and displacement*. Other examples relate to the notion of free, prior and informed consent (the Equator Principles only require free, prior and informed consultation) and the failure of the Performance Standards to incorporate all of the US-UK Voluntary Principles on Security and Human Rights. A more detailed analysis is available at <http://www.banktrack.org/>.

represents only a very small segment of bank financing activities⁷; therefore, Equator banks such as Dexia, Fortis, ING and KBC can continue to invest billions of dollars in human rights-violating companies and still comply with the EPs in their project finance business. Finally, the Equator Principles lack obligatory implementation and accountability systems; if banks finance projects that do not comply with the Principles, there is no recourse for communities. In practice, many Equator banks still finance projects with significant human rights problems, such as the Baku-Tblisi-Ceyhan pipeline or the Trans Thai-Malaysia pipeline.⁸

These transactions illustrate that currently, neither individual bank human rights policies nor the Equator Principles are adequate in preventing banks from being complicit in violating human rights.

C. Scope of this paper

This paper outlines what BankTrack, in a first exploration of the subject, considers the scope and status of the human rights obligations and responsibilities of financial institutions, particularly banks. It focuses on the actions banks should take in order to avoid being complicit in human rights abuses of their clients. The paper does not try to define the specific content for a FI human rights standard, but rather it identifies a general human rights framework.

In addition to avoiding complicity in human rights abuses through their financing activities, FIs also have human rights obligations and responsibilities with respect to their own workplace, joint ventures and subsidiaries (e.g. employee rights). These human rights obligations, which are at the centre of an FI's *sphere of influence*, are not specifically addressed in this paper, but are of course equally important for any bank to be aware of and take action on.

II. Basis for FIs human rights responsibilities

The responsibility of financial institutions to respect human rights is based on civil society's expectations, as well as obligations summarized in the 'UN Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights'.

A. Robust social expectations

Financial institutions can play an important role in promoting and respecting human rights by minimizing/preventing the social and environmental harm that may be caused by their transactions.

⁷ Project financing probably represents well under five percent of capital raised through commercial lending and investment banking services. Within an individual bank, project financing can represent as little as one or two percent of overall business.

⁸ See BankTrack, Principles, Profits or Just PR? June 24, 2004.

Civil society has expressed clear expectations regarding financial institutions' role and responsibility regarding human rights. For example, the *Collevocchio Declaration*⁹, which was launched in 2003 and endorsed by over 100 civil society organizations, called on financial institutions to take immediate steps to embrace and implement six basic commitments as a way for FIs to retain their social license to operate.

The Declaration clearly states how civil society expects FIs to embrace the issue of human rights in their operations: it states that 'FIs should commit to do no harm by preventing and minimizing the socially detrimental impacts of their portfolios and their operations. FIs should create policies, procedures and standards based on the Precautionary Principle to minimize social harm, improve social conditions where they and their clients operate, and avoid involvement in transactions that undermine sustainability'.

It further states that 'FIs should bear full responsibility for the social impacts of their transactions, and should not interfere with the human rights obligations of States and their role of promulgating laws and obligations'.

Following the six commitments framed in the *Collevocchio Declaration*, BankTrack, issued a new sustainable banking manual in November 2006 which outlines what banks should do to make their operations more sustainable.¹⁰ The manual explicitly called on banks to develop human rights financing standards based on the rights summarized in the UN Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights.

B. The 'UN Norms for Business'

In 2003, the UN Sub-Commission on the Promotion and Protection of Human Rights adopted the 'UN Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights'¹¹, usually referred to as 'the Norms'. The Norms also include a 'Commentary' which provides authoritative guidance on the meaning of specific terms, the scope of particular provisions, and the legal basis for

⁹ See <http://www.banktrack.org/?show=33&visitor=1>

¹⁰ Jan Willem van Gelder (Profundo), 'The dos and don'ts of Sustainable Banking, A BankTrack manual', BankTrack, 29 November 2006. BankTrack members have also published numerous analyses focused entirely or in part on financial institutions and human rights, including: 'Where do you draw the line? Research on financial links between five bank groups and companies involved in serious violations of human rights' (Netwerk Vlaanderen, November 2005), 'Explosive portfolios: banks and cluster munitions' (Netwerk Vlaanderen, July 2006) and 'Solidly Swiss? Credit Suisse, UBS and the global oil, mining and gas industry' (Berne Declaration, July 2006). These reports have found that financial institutions are routinely complicit in violating human rights, yet they operate with impunity-without accountability in the home country where they are based, or in the country where their transactions / the violations occur. All available on www.banktrack.org

¹¹ 'Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights', U.N. Doc. E/CN.4/Sub.2/2003/12/Rev.2 (2003).

different obligations. When adopting the UN Norms, the Sub-Commission also welcomed the Commentary.

The Norms set out in one document the specific human rights obligations that apply to transnational corporations and other business enterprises, using a number of laws and standards as well as more abstract notions such as 'the rule of law', the 'public interest'¹², and development objectives; and social, economic, and cultural policies including issues as transparency, accountability, and prohibition of corruption; and authority of the countries in which the enterprise operates.

The Norms state that the responsibilities of transnational corporations and other business include: ensuring equal opportunity and non-discrimination; not violating or benefiting from the violation of the security of persons; protecting workers' rights, including freedom from forced labour and exploitation of children, safe and healthy working environments, adequate remuneration, and freedom of association; avoiding corruption and maintaining transparency; respecting economic, social and cultural rights, including the collective and individual rights of indigenous peoples; and ensuring consumer protection, public safety, and environmental protection in business activities and marketing practices, including observance of the precautionary principle.

The Norms do not impose additional responsibilities on businesses which are not appropriate to them. Indeed, the Norms clearly state that "*within their respective spheres of activity and influence*, transnational corporations and other business enterprises have the obligation to promote, secure the fulfillment of, respect, ensure respect of and protect human rights recognized in international as well as national law, including the rights and interests of indigenous peoples and other vulnerable groups."¹³

The commentary on the Norms provides further clarification of what is companies' 'respective sphere of activity and influence':

'Transnational corporations and other business enterprises shall have the responsibility to use due diligence in ensuring that their activities do not contribute directly or indirectly to human rights abuses, and that they do not directly or indirectly benefit from abuses of which they were aware or ought to have been aware. Transnational corporations and other business enterprises shall further refrain from activities that would undermine the rule of law as well as governmental and other efforts to promote and ensure respect for human rights, and shall use their influence in order to help promote and ensure respect for human rights. Transnational corporations

¹² For instance, the Commentary clarifies that within their resources, businesses should encourage social progress and development by expanding economic opportunities, especially in developing and least developed countries.

¹³ General Obligations of the Norms. Emphasis added.

and other business enterprises shall inform themselves of the human rights impact of their principal activities and major proposed activities so that they can further avoid complicity in human rights abuses.’

Thus, the Norms include ‘positive’ and ‘negative’ corporate obligations. They provide a powerful and useful checklist for the financial institutions keen to ensure respect of human rights standards as set forth in international law. FIs should demonstrate a willingness to ‘road test’ the application of the UN Norms in their financing operations.

C. The obligation to respect human rights

Financial institutions have ‘negative obligations’ to respect human rights by refraining from activities which create or involve human rights violations. Where potential human rights violations are noticed, FIs must take measures in order to ensure effective protection of peoples’ rights. ‘Human rights’ are the sum of the rights enshrined in the international human rights law. Thus, it is not necessary that the rights are implemented in national law.

Financial institutions also have ‘positive obligations’: to engage in activities to secure the effective enjoyment of all human rights, i.e. ‘promoting’ and ‘fulfilling’ human rights. For example, the ‘obligation to fulfil’ could be in the form of providing assistance to local communities that seek such assistance in order to secure the right to education by building schools. Such positive obligations are not comprehensively addressed in this paper, but are equally relevant.

III. Range of Human Rights

At a minimum, financial institutions should respect the human rights elucidated in the International Bill of Human Rights and core human rights instruments, as well as peoples’ collective human rights.

A. International Bill of Rights and the core human rights instruments

The International Bill of Human Rights consists of the Universal Declaration of Human Rights, the International Covenant on Economic, Social and Cultural Rights (ICESCR), and the International Covenant on Civil and Political Rights (ICCPR).

The Universal Declaration of Human Rights (UDHR) provides for the promotion and protection of universally recognized human rights and fundamental freedoms. In its preamble, it proclaims the Declaration as a common standard of achievement for all peoples and all nations, to the end that *every individual and every organ of society*, keeping this Declaration

constantly in mind, shall strive by teaching and education to promote respect for these rights and freedoms and by progressive measures, national and international, to secure their universal and effective recognition and observance.

Furthermore, the Declaration recognizes non-State entities' duties by affirming that 'everyone has duties to the community'.¹⁴ Thus, the UDHR outlines duties for financial institutions, among other members of society. The UDHR is a declaration, and thus not directly binding, although it is widely accepted that most provisions in the UDHR have become customary international law.

The ICESCR and ICCPR serve to elaborate the Universal Declaration of Human Rights and entered into force in 1976. The ICCPR requires States to respect and ensure a range of civil and political rights including the right to personal bodily integrity; the right to a fair trial; the right to life; and rights to freedom of expression, religion and association.

The ICESCR requires States to progressively realise a range of substantive economic, social and cultural rights that establish the basic minimum conditions for a dignified life, including rights to health; education; adequate standard of living; housing; and food. The ICESCR also protects procedural rights that are not subject to progressive realisation, including the right to legal remedies if one's rights are violated, and the right to participation in the making of policies or laws that affect one's rights.¹⁵

Over 60 human rights treaties elaborate fundamental rights and freedoms contained in the International Bill of Human Rights, addressing concerns such as slavery, genocide, humanitarian law¹⁶, the administration of justice, social development, religious tolerance, cultural cooperation, discrimination, violence against women, and the status of refugees and minorities. The following five Conventions, relating to racial discrimination, torture, women, children, and migrant workers are considered core human rights treaties, together with the ICCPR and ICESCR:

- The International Convention on the Elimination of All Forms of Racial Discrimination (adopted in 1965/entry into force 1969) defines and prohibits racial discrimination.
- The Convention on the Elimination of All Forms of Discrimination against Women (1979/1981) specifies measures for the advancement and

¹⁴ Article 29 of the Universal Declaration of Human Rights.

¹⁵ Sara L. Seck, The legal obligations with respect to human rights and export credit agencies, working draft prepared for the ECA-Watch, Halifax Initiative Coalition and ESCR-Net, May 2006.

¹⁶ International humanitarian law is a set of rules which seek to limit the effects of armed conflict. It protects persons who are not or are no longer participating in the hostilities and restricts the means and methods of warfare. The main treaties are the four Geneva Conventions of 1949 and their Additional Protocols.

empowerment of women in private and public life, particularly in the areas of education, employment, health, marriage and the family.

- The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1984/1987) bans torture, rape and other forms of mistreatment.
- The Convention on the Rights of the Child (1989/1990) is the most universally ratified human rights Convention and protects children from economic and sexual exploitation, among other things.
- The International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families defines the range of rights that migrant workers and their families have.

It is undisputed that all human rights are indivisible, interdependent, interrelated and of equal importance for human dignity.¹⁷

B. Collective rights

The term *collective rights* refers to the group rights of peoples to be protected from attacks on their group identity and group interests. Examples are the right of self-determination, collective rights of indigenous peoples and of minorities, and group rights to be protected from the crime of genocide.

Collective rights are defined in international law and international human rights bodies and tribunal have consistently held that the collective rights must be recognized and protected. For instance, the collective rights of indigenous peoples are articulated in the Declaration on the Rights of Indigenous Peoples and are also typified by the language of article 27 of the International Covenant on Civil and Political Rights, which refers to 'persons belonging to minorities'.¹⁸

C. The responsibilities of non-state actors

A key question to address is whether banks, as so called *non-state actors*, have responsibilities under international human rights law. International criminal cases, drawing on customary international law, indicate that corporations are capable of violating international law. Examples are the I.G. Farben case¹⁹, Goering case²⁰ and the Furundzija case.²¹ Although

¹⁷ The Maastricht Guidelines on violations of the Economic, Social, and Cultural rights, January 22-26, 1997.

¹⁸ Article 27 of the ICCPR stipulates: "In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language".

¹⁹ The I.G. Farben Trial, the Nuremberg Proceeding, was tried by Military Tribunal VI, which had been created by the U.S. Military Government for Germany on August 8, 1947. The Nuremberg Tribunal was lacking jurisdiction to prosecute corporations directly, but did have authority to declare that an entity was a criminal organisation. This position is outlined in Lillian Manzella, The International Law Standard for Corporate Aiding and Abetting Liability, July 2006, p. 23. This paper was prepared by EarthRights International in collaboration with the University of Virginia International Human Rights Law Clinic

international tribunals have not had jurisdiction over corporations, they have commented on the responsibility of corporations.

Similar conclusions can be found in regional human rights systems. The obligations of non-State entities are directly entailed in the Charter of the Organization of American States. In particular, article 36 provides that 'transnational enterprises and foreign private investment shall be subject to the international treaties and agreements to which said countries are parties, and should conform to the development policies of the recipient countries.'²² The European Convention for the Protection of Human Rights and Fundamental Freedoms furthermore provides that States can be held responsible for human rights violations related to activities of companies.²³

There is also a growing recognition in the current state of development of international law that companies should take actions in order to achieve respect for the human rights enshrined in international law. Of particular interest are various comments by UN treaty-monitoring committees about the role of private actors. The Committee on Economic, Social and Cultural Rights has stated in respect to the right to food that:

'While only States are parties to the Covenant and are thus ultimately accountable for compliance with it, all members of society - individuals, families, local communities, non-governmental organizations, civil society organizations, as well as the private business sector - have responsibilities in the realization of the right to adequate food. The State should provide an environment that facilitates implementation of these responsibilities. The private business sector - national and transnational - should pursue its activities within the framework of a code of conduct conducive to respect of the right to adequate food, agreed upon jointly with the Government and civil society.'²⁴

²⁰ USA, France, UK, and USSR v. Hermann Goering et al., 1945-1946.

²¹ International Criminal Tribunal for the former Yugoslavia v Furundzija, 1998. The Amended Indictment, confirmed on 2 June 1998, alleged that Anto Furundzija was the local commander of a special unit of the military police force of the Croatian Defence Council (HVO) known as the "Jokers". On or about 15 May 1993, Furundzija interrogated a female Muslim civilian (Witness A) and a Croatian soldier, and was present while A was being raped and both A and the soldier were being beaten and did nothing to stop or curtail these actions.

²² Charter of the Organization of American States, Article 36.

²³ An example of a significant ruling made by the European Court of Human Rights is a judgment in the case of Ta kin and Others v. Turkey No. 46117/99, judgment of 10 November 2004, to be reported in ECHR 2004-X. The applicants were 10 Turkish nationals living in Bergama or the surrounding villages. The case concerns the granting of permits to operate a goldmine in Ovacik, in the district of Bergama (Izmir). In 1992 the company E.M. Eurogold Madencilik obtained the right to prospect for gold. The permit was valid for 10 years and also authorised use of the cyanide leaching process for gold extraction. In 1994, on the basis of an environmental-impact report, the Ministry of the Environment gave the company a permit to operate the goldmine at Ovacik. The Court held unanimously that the mine's operating permit was not consistent with the public interest on the applicants' effective enjoyment of the right to life and to a healthy environment. The European Court of Human Rights has not ordered closure of the mine, but it granted compensation to the plaintiffs for violation of their rights.

²⁴ Committee on Economic, Social and Cultural Rights, General Comment 12, Right to adequate food (Twentieth session, 1999), U.N. Doc. E/C.12/1999/5 (1999), para 20, reprinted in

The Committee has also included direct responsibility of non-state actors within the purview of the right to health: 'While only state parties are parties to the Covenant and thus ultimately accountable for compliance with it, all members of the society - individuals, including health professionals, local communities, inter-governmental and non-governmental organisations, civil society organisations, as well as the private business sector-have responsibilities regarding the realization of the right to health...'²⁵

Similarly, the UN Special Rapporteur on the Right to Adequate Housing, in developing 'basic principles and guidelines on development-based eviction and displacement' has noted that 'instances of forced eviction are *prima facie* incompatible with the requirements of the Covenant and can only be justified in the most exceptional circumstances, and in accordance with the relevant principles of international law.'²⁶ While the Principles and Guidelines are directed primarily at State actors, they also state that: 'Transnational corporations and other business enterprises must respect the human right to adequate housing, including the prohibition on forced evictions within their respective spheres of activity and influence.'²⁷

The Human Rights Committee states that the ICCPR does not assert direct duties on non-State entities.²⁸ Obligations imposed through this document on non-State entities at the international level are moral, rather than legal, in character.²⁹ The moral character does not mean, however, that the ICCPR is irrelevant to ensure respect of human rights enshrined in the covenant. First, the human rights norms may be applied indirectly through national courts and tribunals, and the horizontal application³⁰ is possible at this level.³¹ Second, human rights responsibilities for financial institutions could exist outside the terms of the treaties because customary international law might be directly binding on non-state entities. It is

Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. HRI/GEN/1/Rev.6 at 62 (2003).

²⁵ Committee on Economic, Social and Cultural Rights, General Comment 14, The right to the highest attainable standard of health (Twenty-second session, 2000), UN Doc. E/C.12/2000/4 (2000), para 42, reprinted in Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. HRI/GEN/1/Rev.6 at 85 (2003).

²⁶ Committee on Economic, Social and Cultural Rights, General Comment 4, Right to adequate housing, 13/12/91, para 18, [http://www.unhchr.ch/tbs/doc.nsf/\(symbol\)/CESCR+General+comment+4.En?OpenDocument](http://www.unhchr.ch/tbs/doc.nsf/(symbol)/CESCR+General+comment+4.En?OpenDocument).

²⁷ U.N. Economic and Social Council, Commission on Human Rights, E/CN.4/2006/41, 'Report of the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, and on the right to non-discrimination in this context,' p. 25, para. 72.

²⁸ The Human Rights Committee makes this clear by stating that "the article 2, paragraph 1, obligations are binding on States [Parties] and do not, as such, have direct horizontal effect as a matter of international law. The Covenant cannot be viewed as a substitute for domestic criminal or civil law."

²⁹ Tom Obokata, 'A human rights framework to address trafficking of human beings', Netherlands Quarterly of Human Rights, volume 24, No. 3 (2006).

³⁰ In other words: the human rights law is enforceable against non-State entities.

³¹ Tom Obokata, A human rights framework to address trafficking of human beings, Netherlands Quarterly of Human Rights, volume 24, No. 3 (2006).

uncertain whether articles 29 and 30 of the UDHR have acquired such status.

IV. Sphere of Influence

A. Definition

The UN Norms refer to a company's obligation to respect human rights within its 'sphere of influence'. The Office of the UN High Commissioner for Human Rights (OHCHR) explained the meaning of the term, which involves 'a certain political, contractual, economic, or geographic proximity.'³²

The OHCHR further notes that 'every company, both large and small, has a sphere of influence, though obviously the larger or more strategically significant the company, the larger that company's sphere of influence is likely to be.'³³ The OHCHR also observes that 'human rights issues may also confront a company as a result of the actions of one or more of its business partners, including joint venture partners, suppliers, contractors, sub-contractors or others with whom the company has a working relation.'³⁴

B. Sphere of influence of financial institutions

Within their respective spheres of activity and influence, FIs have the obligation to respect and ensure respect of human rights recognized in international as well as national law. While it is of crucial importance to understand and be able to define FIs' particular sphere of influence, some debate remains over its exact delineation.

This said, it is clear that all of a FI's clients and business partners lie within its sphere of influence. The clients of a FI may operate outside the national boundaries of the FI's home country. However, this does not limit the scope of the FI's sphere of influence. First, the sphere of influence of FIs involves the contractual proximity with the client, regardless of geographical location. Second, the UN Norms clearly note that 'global trends have increased the influence of transnational corporations and other business enterprises on the economies of most countries and in international economic relations, and of the growing number of other business enterprises which operate across national boundaries in a variety of arrangements resulting in economic activities beyond the actual capacities of any one national system.'³⁵

³²OHCHR Briefing Paper, 'The Global Compact and Human Rights: Understanding Sphere of Influence and Complicity, Office of the United Nations High Commissioner for Human Rights', p. 4.

³³ *Ibid.*

³⁴ *Ibid.*, p. 5.

³⁵ 'Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights', U.N. Doc. E/CN.4/Sub.2/2003/12/Rev.2 (2003), Preamble.

The Commentary on the Norms further explains: 'the obligation of transnational corporations and other business enterprises under these Norms applies equally to activities occurring in the home country or territory of the transnational corporation or other business enterprise, and in any country in which the business is engaged in activities.' Thus, clients are within a FI's sphere of influence, regardless of where the clients are based or operate.

It is important here to note that the South African Truth and Reconciliation Commission ³⁶ also indicated that financial institutions can be held responsible for violating international human rights law abroad. The Commission classified levels of culpability for businesses complicit in the apartheid regime. Companies that actively helped to design and implement apartheid policies, such as those in the mining industry, were guilty of first-order involvement. Those, such as banks, that knew their products or services would be used for repression, were guilty of second-order involvement.³⁷

The OCHCR notes that 'companies may also have direct and close connections with the companies' host and home Governments. Through the advocacy and lobbying activities of sectoral, national and international business associations of which a company is a member, its sphere of influence may furthermore extend to governmental and inter-governmental policy-making bodies.³⁸ Thus, human rights issues may also confront FIs as a result of their lobbying activities towards (home and host) governments.

A FI's sphere of influence may also extend to governments through their financial transactions. For example, a FI can undermine the ability of States to respect, protect and fulfil their human rights obligations when it finances a project with Host Government Agreements (HGAs) that include economic stabilisation clauses. HGAs, which create legal frameworks between investors and host governments in project finance transactions, often include economic stabilisation clauses and other provisions which are designed to reduce financial risks due to unexpected and significant changes in host government law. However, these provisions may also create a chilling effect on the development or implementation of social, environmental and human rights protections during the entire duration of the project (which can last anywhere from 20 or 70 years, for example).

³⁶ The South African Truth and Reconciliation Commission (TRC) was set up by the Government of National Unity to help dealing with what happened under apartheid. The conflict during this period resulted in violence and human rights abuses from all sides.

³⁷ Lilian Manzella, *The International Law Standard for Corporate Aiding and Abetting Liability*, July 2006, at p. 14.

³⁸ 'OHCHR Briefing Paper, *The Global Compact and Human Rights: Understanding Sphere of Influence and Complicity*', Office of the United Nations High Commissioner for Human Rights, p.4

Therefore, the United Nations Commission on Human Rights, Trade and Investment noted in July 2003 that:

'When broad interpretations of expropriation provisions could affect States' willingness or capacity to introduce new measures to promote and protect human rights, then the use and interpretation of expropriation provisions is a cause of concern. Specifically, it will be important to avoid a situation where the threat of litigation on the basis of broadly interpreted expropriation provisions has a 'chilling effect' on government regulatory capacity, conditioning State action to promote human rights and a healthy environment by the commercial concerns of foreign investors.'³⁹

Financial institutions should therefore refrain from providing financial services to projects where a requirement to pay compensation to investors might discourage States from taking action to protect human rights, including labour, worker health and safety, public health, and environmental rights.

C. Level of influence

Although all clients and business partners are within a FI's sphere of influence, a FI may still have varying levels of influence over these clients, depending on the particular relationship.

The 'level of influence' describes the probability that a FI may effectively influence its client or business partner, and may be closely connected with the product/service provided to the client or the legal agreement governing the relationship. For example, FIs that exercise a strategic role in project financing presumably have greater influence on that project than FIs that manage assets which are bought from specialized asset managers or brokers. 'Influencing factors' may include, but are not limited, to:

- The timing in the deal cycle, e.g. before or after an agreement between the FI and the client/business partner has been signed.
- The amount of the FI's investment or credit, e.g. a very small or a substantial proportion of the project's or the client's financing.
- The nature of the relationship with the client, e.g. structured financing for a special purpose entity where credits are to be used for a particular activity; general purpose loans where the client can use the credit for any purpose; private equity investment where the financier may have particular rights to govern the company, etc.
- The legal rights afforded to the FI vis-à-vis its contract(s) with the client or business partner

³⁹ United Nations Commission on Human Rights, Trade and Investment, E/CN.4/Sub.2/2003/9, 2 July 2003.

In some relationships, FIs have a substantial degree of influence over their clients/business partners and naturally should use this influence to ensure respect of human rights. But even in situations where the FI's capacity to influence its client/partner is relatively small, it may still have a proactive obligation to raise concerns about possible or actual human rights violations. The following examples explore varying levels of FI influence, and possible steps the FI should take to respect human rights:

- Asset managers and institutional investors can use their shareholder and/or voting rights to advance human rights policies in the companies they own. They can include human rights in their financial analysis, or exclude investing in specific types of securities (e.g. governmental bonds issued by or those financing activities owned, controlled and/or operated by dictatorial regimes). Furthermore, they can require vendors such as researchers, sub-advisors or brokers include stringent human rights analysis in their services.
- Project financiers can integrate a strong set of human rights standards in their due diligence. The project's human rights impact can be an important factor in deciding whether to lend money to a specific company or for a specific activity. Financial advisors and lenders can also require or encourage clients to ensure respect for the international human rights law through loan covenants.
- Commercial bankers can extend and/or price credit partly based on the human rights records of corporate or governmental borrowers.
- Insurers can refrain from extending political risk insurance, especially covering civil unrest, for transactions involving companies, sectors and/or countries associated with 'conflict resources'. In such cases, the provision of such insurance may create a moral hazard by enabling corporate activities that contribute to a cycle of violence and human rights abuses.

V. Complicity

A FI may be particularly complicit in human rights abuses when it has a client with a negative human rights track record, combined with a high level of influence over the client. The following sampling of legal systems and sources indicates a broad understanding of concept of complicity, as well as the scope of liability for complicity.

A. Aiding and abetting

International criminal cases, drawing on customary international law, provide a definition of complicity. Statements of Trial Judgements by the International Criminal Tribunal for the former Yugoslavia and the International Criminal Tribunal for Rwanda describe 'aiding' and 'abetting' as parts of 'complicity'. The customary aiding and abetting standard contains the following elements: the *actus reus* (or the 'guilty act') and the *mens rea* (or the 'guilty mind'). *Actus reus* is practical assistance,

encouragement, or moral support which has a substantial effect on the perpetration of the crime.⁴⁰ Financing is clearly one form of practical assistance. *Mens rea* is knowledge that one's actions assist the perpetrator in the commission of the crime.⁴¹

The international criminal law standards of complicity are very similar to those recently articulated in the UN Global Compact (Principle II) and the Commentary to the Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights⁴² and by the Office of the UN High Commissioner for Human Rights.⁴³

Although there is some variation of the scope of liability, domestic law and jurisprudence also provide liability in aiding and abetting the commission of human rights abuses.⁴⁴

B. Direct, indirect and silent complicity

Complicity in human rights violations can be divided in three categories: direct, indirect and silent. These categories of complicity are reflected in international law and jurisprudence, as well as the UN Global Compact and the OCHCR, and are explained here in terms of financial institutions.

Direct complicity occurs when a FI decides to intentionally participate through direct assistance in the commission of human rights abuses and that assistance contributes to the commission of the human rights abuses by another.

Indirect or beneficial complicity occurs when a FI takes an action that has a substantial effect on the abuses, even though it does not have a direct role. The notion of indirect or beneficial complicity in human rights abuses is not confined to direct involvement in the execution of human rights violations by others. For example, beneficial complicity occurs when a FI profits from human rights abuses committed by its client. It should be noted that even if a FI does not make a profit from a particular transaction, it can still benefit from the deal by preserving its client relationship, increasing market access, etc.

⁴⁰ Prosecutor v. Furundzija, ICTY Case No. IT-95-17/1-T (Trial Chamber Dec. 10, 1998), para 235.

⁴¹ *Ibid*, 236.

⁴² Commentary on the Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights, U.N. Doc. E/CN.4/Sub.2/2003/38/Rev.2 (2003), General Obligations.

⁴³ The OCHCR notes that "a company is complicit in human rights abuses if it authorises, tolerates, or knowingly ignores human rights abuses committed by an entity associated with it, or if the company knowingly provides practical assistance or encouragement that has a substantial effect on the penetration of human rights abuse". OHCHR Briefing Paper, The Global Compact and Human Rights: Understanding Sphere of Influence and Complicity, Office of the United Nations High Commissioner for Human Rights, p. 5.

⁴⁴ Lilian Manzella, 'The International Law Standard for Corporate Aiding and Abetting Liability', July 2006, p. 23.

The notion of *silent complicity* reflects the expectation that FIs should respond to human rights abuses by notifying the appropriate authorities or taking steps to object to and/or to try to prevent or stop the human rights violations, and/or withdrawing from their association with the abuse.⁴⁵ Jurisprudence from the International Criminal Tribunal for Rwanda supports the notion that if an individual is in a position of power, prolonged inaction may be tantamount to encouragement.⁴⁶

A FI's level of complicity may vary depending on a particular transaction, relationship or situation. For example, a FI may be more complicit when its client has a discernable pattern of human rights violations (that should have been identified during the due diligence process), than when its client has faced an unusual human rights problem. Similarly, a FI may be more complicit when it chooses to be silent during the entire course of its relationship with a problem client, compared to when it fails to intervene during one particular transaction of concern.

VI. Key elements of a Human Rights approach

The preceding section has examined the various ways in which a financial institution may be complicit in human rights abuses. Any FI should therefore take comprehensive steps towards ensuring respect for human rights, especially in its financing activities. Key elements of a robust human rights approach include overall human rights policies, specific procedures, and standards. This section examines some critical elements of a human rights approach.

A. Categorical exclusions

There are cases in which a financial institution needs to categorically exclude the possibility of financing a client or transaction, in order to avoid complicity in human rights abuses. Such clients or transactions may include:

- Activities that involve the production, trade or use of military material which may be deemed to be excessively injurious or to have indiscriminate effects⁴⁷ and the production of and trade in nuclear, chemical and biological weapons and cluster ammunition.

⁴⁵ OHCHR Briefing Paper, 'The Global Compact and Human Rights: Understanding Sphere of Influence and Complicity', Office of the United Nations High Commissioner for Human Rights, p. 5. See also A. Clapham & S. Jerbi, *Categories of Corporate Complicity in Human Rights Abuses*. Published in *Hastings International Comparative Law Review*, Vol. 24, pp. 339 - 341 (2001) and Lilian Manzella, *The International Law Standard for Corporate Aiding and Abetting Liability*, July 2006

⁴⁶ Lilian Manzella, 'The International Law Standard for Corporate Aiding and Abetting Liability', July 2006, at p. 12.

⁴⁷ The identification of the material is described in the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects and its 5 protocols.

- Activities that involve the use of forced or harmful child labour, within the meaning of ILO Convention 182 on the Worst Forms of Child Labour.
- Activities that involve forcible evictions.
- Activities that eliminate cultural properties⁴⁸
- Activities in areas where the local affected people cannot be adequately consulted, particularly in conflict areas where they are not free to express their opinions on a project, or in areas where the people live in voluntary isolation.
- Activities in areas where infringements of freedom of expression and other civil and political rights deny affected communities the possibility of raising concerns about the project or of participating in its planning or implementation.
- Activities that involve the production, trade or use of chemicals listed on the World Health Organization's Recommended Classification of Pesticides by Hazard and Guidelines to Classification; and projects in which the company cannot demonstrate protection of the workers' health when they have to use chemicals.
- Mandates that have not been won through open and transparent tender processes.
- Corporate clients that have been blacklisted for bribery or corruption.⁴⁹
- Loans or credits that increase the debt burden of developing countries to unsustainable levels.
- Transactions in which sponsors seek or have obtained economic stabilisation clauses in Host Government Agreements (whereby they seek exemptions or modifications of the host countries' law with the effect of weakening protection of human rights).

B. Due diligence

For those transactions that have not been categorically excluded, a thorough human rights-related due diligence should be conducted. The purpose of such human rights-focused due diligence is to find out everything that a financial institution needs to know about the potential human rights impacts of a project or the human rights track record of a potential client. This helps the financial institution to determine whether to proceed with a transaction, and how to manage human rights issues throughout its relationship with the client or project. A human rights due diligence process should include:

Basic due diligence. All applications for a product or service must be subject to a basic due diligence process which may vary depending on the financial product or service.

- *Products and services for general purposes:* When the transaction is not associated with a particular activity (such as the case with many

⁴⁸ Deviations may be justified where the loss of or damage to cultural property is justified by competent authorities to be unavoidable, minor or otherwise acceptable.

⁴⁹ For example, the World Bank's blacklist of corrupt companies

transactions in private banking, asset management, investment banking, etc.), FIs should analyse the human rights risks of the particular client. The FI should investigate proven or alleged human rights violations, including involvement in corruption or bribery; and the client's overall human rights record to determine whether there is a systemic problem with human rights violations.

- *Products and services for specific activities:* When the transaction relates to a specific activity (for example, project finance, trade finance, some kinds of political risk insurance, structured finance, etc.), additional due diligence must be performed on the direct and immediate human rights impacts of the activities, as well as the derivative, secondary and cumulative impacts. This includes the factors that impact human health and safety as well as the natural environment (such as air, water, soil, waste, accidents and water usage and communicable diseases such as HIV/AIDS). Due diligence should evaluate the potential for differential and adverse impacts on marginalized or vulnerable groups, including the landless, persons with disabilities, women, children, indigenous peoples, ethnic minorities, and others. Ideally the impacts should be continuously considered throughout the life cycle of the activities, as human rights concerns could materialize at any time during the duration of the activities.

Advanced due diligence, involving a full human rights impact assessment, may be necessary for some transactions, such as:

- Transactions that are in sectors that tend to be associated with relatively higher levels of human rights risks. Examples include large dams,⁵⁰ activities that involve large scale land conversion, activities that require resettlement of people, activities that occur in areas with indigenous peoples.
- Transactions that are in countries that tend to be associated with relatively higher levels of human rights risks. With transactions in higher risk categories, advanced due diligence efforts should be mandatory.
- Transactions involving clients, including companies or governments, that have problematic human rights records. In such cases, advanced due diligence should be mandatory.
- Those transactions where the basic due diligence process gives rise to the need for performing more detailed research. In these cases, a full human rights impact assessment may be needed.

C. Human rights impact assessment (HRIA)

Although this paper does not intend to detail what should be included in a Human Rights Impact Assessment, HRIAs should conform with some key principles.:

⁵⁰ Large dams are dams over a height of 15 m from its foundation as defined by the World Commission on Dams.

- The HRIA should be thorough and comprehensive, addressing all the rights contained in the International Bill of Rights and the core human rights treaties, International Labour Organization conventions, including ILO Convention 169, the UN Declaration on Indigenous Peoples' Rights and other relevant standards.
- The emphasis of the HRIA should be on anticipating and avoiding, rather than simply mitigating and compensating for, potential adverse human rights impacts.
- The methodology should reflect best practice, and should have as its starting point an assessment of the risks to, and rights of, communities. It should also determine the ability, capacity, and willingness of the client to manage human rights risks.
- The HRIA should evaluate immediate as well as longer-term human rights issues. For projects, the HRIA should address impacts throughout the lifecycle of the activity
- The process of developing the HRIA should be transparent; especially for project-specific transactions, the HRIA should involve affected people.
- The findings of the HRIA should be made public and in particular shared with affected people, relevant regulatory bodies, interested civil society organizations, and other FIs involved.
- The findings and recommendations of the HRIA should be embodied in a client/ project HR management and implementation plan.

For activities that have particularly significant potential adverse impacts or that are highly contentious, other processes may need to be initiated in order to reduce human rights risks, and ensure that the FI is not complicit in potential abuses. In particular, public participation may be critical, particularly processes to obtain free, prior, informed consent of indigenous communities. Additional processes or requirements could include: additional expert studies, the formation of expert committees, extra monitoring activities, culturally appropriate and independent grievance mechanisms that are responsive to the concerns of affected people, and the incorporation of specific covenants that bind clients to measures to prevent the violation of human rights.

D. Standards

Although this paper does not elaborate the details of what a human rights standard should include, clear standards are critical. Standards form the basis for accepting or declining transactions, and outline the minimum performance requirements to which a client must adhere.

A FI's human rights standards should encompass all the rights contained in the International Bill of Rights and the core human rights treaties, and the International Labour Organization conventions. In particular, they should embrace ILO Convention 169 and the UN Declaration on Indigenous Peoples' Rights by requiring that all activities which affect indigenous

peoples must secure the *free, prior, informed consent of those peoples*. In addition, standards should reflect industry best practice, for example, embracing the World Commission on Dams guidelines for large dam projects.

E. Financial covenants, monitoring and corrective action

Compliance with specific human rights management and implementation plans should be covenanted in financial agreements with the client. A FI's ongoing client monitoring activities should evaluate compliance with any such plans, and monitoring reports should be made public. In the event of non-compliance, the FI should make all possible efforts to bring the client back into compliance. If this proves unsuccessful, the transaction should be suspended or terminated based on breach of contract.

In addition, ongoing client monitoring activities should determine whether there are any changes in the client's human rights situation, and whether the client is respecting other relevant human rights standards that may not be explicitly covenanted in the financial agreement, such as those in existing or evolving national/international law.

Monitoring activities should not solely rely on client-provided information; rather, FIs should establish a channel of communication which allows local people and other stakeholders to alert them to potential human rights problems with a client or project. If a FI is informed by other parties that a client may be violating human rights standards, the allegation should be recorded, investigated, and if credible, forwarded to the proper authorities. The FI should actively monitor the status of the investigations and press for their proper resolution.

In sum, during the post-financing phase, FIs must be willing to take a number of actions to avoid complicity in human rights violations. FIs must actively monitor their clients for human rights problems, be willing to report human rights violations to the relevant authorities, and use their influence over the project or client to advocate for remedial measures. Ultimately, to avoid complicity a FI may need to sever relationships with clients that demonstrate a lack of willingness or ability to respect the human rights standards.

VII. Conclusion

In conclusion, each financial institution must develop its own detailed human rights policy which reflects its level of influence (though the various types of financial products and services it provides) and is appropriate to its particular client relationships. In this policy development process, a FI should:

- Identify its human rights risk profile, including critical business lines, clients, geographic exposures, etc.
- Develop human rights categorical exclusion criteria.
- Develop stringent basic and detailed due diligence procedures.
- Develop procedures to engage with clients of concern.
- Consult with civil society, human rights experts and relevant human rights committees.
- Publish a clear human rights policy with human rights standards, policies and procedures.
- Create a comprehensive and transparent management system to implement the policies and procedures.

Having such a policy in place is, of course, in itself no guarantee that a FI will not be complicit in human rights violations. For this to happen, a rigorous application culture must develop within the institution, with a willingness to forego tempting business opportunities to achieve a higher goal. If banks can be made to exercise their considerable influence to prevent human rights violations rather than enabling them, great progress will be made in the realisation of human rights and the alleviation of human suffering.

Appendix Case studies

A. Corporate liability of complicity in human rights abuses

Interesting case law has developed in the United States on the issue of corporate liability for complicity in (aiding and abetting) human rights abuses. These cases have arisen in state courts, as well as within the federal judicial system. Those brought in federal courts have been able to rely not only on federal and international laws and norms, but also the Alien Torts Claims Act, also known as the Alien Torts Statute (ATS) (28 U.S.C. § 1350).

The Unocal case

One of the most significant was a case brought against Unocal, a California-based oil company, in the Federal district court in Los Angeles. This case arose out of human rights violations – including forced labour and relocation, rape, torture and murder – which occurred during the construction of the Yadana gas pipeline which Unocal was building together with Total, a French oil company, in collaboration with the military regime of Burma/Myanmar. These abuses were perpetrated by the Burmese military, which the oil companies had hired to provide security for the project.

The District Court held that corporations, and their executive officers, could be held liable for complicity in human rights violations committed abroad under the ATS. However, the court considered that such liability would have required Unocal to have shared and supported the military's intent to commit these abuses. The plaintiffs appealed to the Ninth Circuit Federal Court of Appeals.⁵¹

The Appellate Court applied the *Furundzija* aiding and abetting standard.⁵² With respect to *actus reus* (required conduct), the court held that Unocal was shown to have provided substantial assistance and encouragement to the perpetration of human rights violations, including by taking advantage of the forced labour to build the pipeline. With respect to the required *mens rea* (required mental state), the court held that it is sufficient for an accused to be aware that a crime would probably be committed and that they knew, or should have known, that their conduct would assist or encourage that. Based on the known practices of the Burmese military, the court considered that Unocal met this standard. The court specifically held that it was not necessary for Unocal to have shared the intent to commit the crimes.

⁵¹ *Doe v. Unocal Corp.*, 395 F. 3d 932 (9th Circuit, 2002).

⁵² The Unocal case settled (in December 2004) before a court ruling was made. Similar aiding and abetting liability standards have been established or applied in other US-based cases such as *Presbyterian Church of Sudan v. Talisman Energy, Inc.* (Talisman I, 244 F. Supp. 2d 289 (S.D.N.Y. 2003) and *Talisman II*, 374 F. Supp. 2d 331 (S.D.N.Y. 2005)).

B. Examples of bank complicity and impunity in violating human rights

Botnia pulp and paper mill

The Botnia pulp and paper mill example illustrates how various standards (World Bank, Equator Principles, OECD Guidelines for Multinational Enterprises) are not preventing banks from being complicit in human rights violations.

Investment banks Nordea and Calyon are the lead arrangers for the controversial Botnia pulp mill project in Uruguay. The project is at the root of a major international dispute, and has already sparked the largest environmental protest in Uruguay history (100,000 people on one occasion). Findings by the International Finance Corporation's ombudsman revealed non-compliance with the IFC's social and environmental safeguards. This revelation, as well as an ongoing political dispute and doubts over compliance with international law, likely led ING Group (an Equator bank) to pull out of the \$480 million deal.

However, because the Equator Principles are voluntary and do not have a compliance mechanism, France-based Calyon (another Equator Bank) was able to easily replace ING in the transaction. The IFC's compliance mechanism also proved ineffective, as the IFC chose to ignore the findings of its own ombudsman and to proceed with the project; this "green light" allowed the private banks to follow suit. NGOs then filed an open complaint against Nordea for violating the OECD Guidelines for Multinational Enterprises on a number of counts, including failure to be transparent to stakeholder communities, and complicity, but again the bank nonetheless decided to proceed with the project.

Doubts continue to be raised over the project's compliance with international law, yet this has not seemed to dissuade the banks. Cases involving Botnia are open and undecided at the International Court of Justice and the Inter American Commission on Human Rights. Although these complaints are directed at the host country Uruguay, they result directly from the fear of environmental and social damage expected from the operation of the pulp factory, which will be one of the largest in the world. In this transaction, the financiers are seemingly prepared to ignore the findings of international tribunals, voluntary guidelines (such as the Equator Principles and the OECD Guidelines), potential human rights concerns, political conflict, and large scale social opposition.

Flextronics: Equity and debt underwriting, syndicated credit facilities.

The Flextronics case illustrates how banks can provide a wide range of non-project finance-related products and services to human rights violative activities.

Labour rights abuses among global electronics contract manufacturers is well-documented. One notable analysis includes the 2004 report *Clean up your computer. Working conditions in the electronics industry*, published by CAFOR, a British NGO. The investigation was based on fieldwork in Mexico, Thailand and China, and it documented labour rights violations at contract manufacturers supplying big brands like IBM, HP and Dell. The largest of these contract manufacturers are publicly-listed companies such as US-based Flextronics. According to the company, "the majority of [its] manufacturing capacity is located in low-cost regions such as Mexico, Brazil, Poland, Hungary, China, India, Malaysia and other parts of Asia."⁵³

Since its \$35 million initial public offering in 1994, made possible by Montgomery Securities and Cowen & Co,⁵⁴ Flextronics has grown rapidly with the backing of many investment and commercial banks. Investment banks have helped the company issue bonds, such as a \$150 million tranche of bonds which BancAmerica Robertson Stephens, BancBoston Securities, Donaldson Lufkin and Bear Stearns underwrote in 1997,⁵⁵ and a \$500 million convertible bond underwritten by Lehman Brothers, CSFB and Citigroup in 2003.

The company has also issued new stocks on several occasions, such as a \$89.3 million issue of new common stock underwritten by Montgomery Securities, Cowen & Co., Salomon Brothers (Citigroup) and UBS Securities in 1997,⁵⁶ and a \$260 million stock issue in 1998 underwritten by Nations Banc.⁵⁷ Other banks are often the biggest purchasers of Rolltronics stock – for example, as of June 2005, Belgium-based bank and insurance company AXA held an astounding 30.49% of Flextronics shares.⁵⁸

Finally, the company has also borrowed directly from banks, such as a 1997 BankBoston-led credit facility worth \$175 million.⁵⁹ Today, Flextronics, taps a \$1.35 billion revolving credit facility led by ABN AMRO. Other banks in the ABN AMRO-led syndicate include the Bank of Nova Scotia, Bank of America, Citicorp USA, Deutsche Bank, BNP Paribas, Credit Suisse, Merrill Lynch Capital Corporation, Skandinaviska Enskilda Banken, HSBC Bank USA, Barclays Bank PLC, KeyBank National Association, Royal Bank of Canada, UBS Securities.⁶⁰

⁵³ <http://www.flextronics.com/en/AboutUs/Backgrounder/tabid/62/Default.aspx#06>.

⁵⁴ "New Issues; Equity," Investment Dealer's Digest, March 28, 1994.

⁵⁵ "New Issues: October 9, 1997 - October 16, 1997; Debt," Investment Dealer's Digest, October 20, 1997.

⁵⁶ "New Issues; September 25, 1997 - October 2, 1997; Equity," Investment Dealer's Digest, October 6, 1997.

⁵⁷ "Nations leaves syndicate fuming in block deal," Investment Dealer's Digest, December 14, 1998.

⁵⁸ Network Vlaanderen, Where do you draw the line? Research on financial links between five bank groups and companies involved in serious violations of human rights. November 2005.

⁵⁹ Flextronics SEC Form S-1, May 21, 1998.

⁶⁰ Flextronics SEC Form 8-K, June 3, 2005.

Dangerous liaisons: Credit Suisse and China Poly Group

This example illustrates how business partners, and not just clients, are in a bank's sphere of influence, and how significant human rights concerns may arise through this relationship.

In January 2006 Credit Suisse announced that the bank signed an agreement with China Poly Group Corporation (Poly) to establish the Poly Finance Company Limited, in which Credit Suisse took an equity participation of 15%. This company provides financial management services exclusively to companies of the Poly Group. In its announcement Credit Suisse describes the activities of China Poly Group: "The Group's business activities include trading, real estate, culture and arts." Yet two important pieces of information are not given: Arms trading is another important activity of Poly, and the company has been described as "the PLA's (People's Liberation Army) commercial arm".⁶¹

China Poly Ventures Company, a Poly subsidiary, is believed by U.S. intelligence to have transferred production technology for Pakistan Ghauri medium range ballistic missiles in 1999, and possibly later as well.⁶² Although there has been a bureaucratic separation between Poly and the PLA in 1998/99, close links remain. All eight company directors are senior officers plucked from the PLA intelligence unit for extraordinary duty and remain active decision-makers within the military ranks. Poly's day-to-day activities are managed by Major General He Ping, the former head of Zong Chan Second Division, who is named in the annual report as the firm's current vice- chairman and a member of the Poly board. General He is married to the daughter of former Chinese leader Deng XiaoPing.⁶³

Poly also remains active in arms trading. A recent report by Amnesty International mentions "China Poly Group Corporation, which is one of the largest Chinese arms exporting companies".⁶⁴ On December 13th 2006, Poly announced record profits for the first ten months of 2006 and confirmed the important role arms trading plays in its business: "Focusing on the arms trade, the main trade business achieves the high record of contracted import and export amount during the recent years and thus plays the leading role in the domestic arms trade industry."⁶⁵

James Mulvenon, deputy director of the Defence Group at the Center for Intelligence Research and Analysis, identifies Poly's biggest current arms customers as Thailand, Burma, Iran and Pakistan. The company, Mulvenon

⁶¹ <http://www.bloomberg.com/apps/news?pid=10000080&sid=at2x93nkWSNo&refer=asia>

⁶² <http://www.fas.org/nuke/guide/china/com84.html>.

⁶³ <http://www.bloomberg.com/apps/news?pid=10000080&sid=at2x93nkWSNo&refer=asia>.

⁶⁴ <http://web.amnesty.org/library/Index/ENGASA170302006>.

⁶⁵ http://www.poly.com.cn/news/en/e_news_detail.asp?id=290.

says, remains the principal agent for Chinese arms purchases from Russia.⁶⁶

Since Poly Finance was set up to manage and possibly raise capital for the businesses of the Poly Group, an outstanding question is how Credit Suisse ensures that its money and services are not being used to facilitate arms sales to Burma's dictators, or other activities with questionable human rights impacts.

Lawsuit under the Alien Tort Claims Act against Arab Bank

This example illustrates how banks may be liable for human rights violations under the Alien Tort Claims Act.

In a written decision in federal court in Brooklyn, U.S. District Judge Nina Gershon upheld a lawsuit filed under the Alien Tort Claims Act by 1,600 plaintiffs against the Jordan-based Arab Bank "for knowingly providing banking and administrative services to various organizations identified by the U.S. government as terrorist organizations, that sponsored suicide bombings and other murderous attacks on innocent civilians in Israel."⁶⁷

The judge wrote: "In sum, in light of the universal condemnation of organized and systematic suicide bombings and other murderous acts intended to intimidate or coerce a civilian population, this court finds that such conduct violates an established norm of international law. The court further finds that the conduct alleged by plaintiffs is sufficiently specific and well-defined to be recognized as a claim under the ATS."⁶⁸

The question of whether Arab Bank is liable for its alleged conduct under the ATS, and whether the suicide bombings and attacks alleged by plaintiffs violate the law of nations, is addressed in international law. With respect to the first question, courts have found that private entities like Arab Bank can be liable for conduct under the ATS,⁶⁹ and that genocide and crimes against humanity are enforceable against non-state actors.⁷⁰ Regarding whether suicide bombings and other murderous attacks on civilians designed to intimidate or coerce a civilian population violate international law, there also appears to be no sound reason to believe that responsibility is limited to state actors.⁷¹

⁶⁶ <http://www.bloomberg.com/apps/news?pid=10000080&sid=at2x93nkWSNo&refer=asia>.

⁶⁷ Oran Almog, et al. v Arab Bank, PLC, 04-CV-5564 (NG)(VVP), page 1.

⁶⁸ *Ibid*, page 44.

⁶⁹ The court finds "that defendant is a private entity not acting under color of state law does not affect its liability. See generally *Sosa*, 542 U.S. at 732 n.20.

⁷⁰ *Kadic*, 70 F.3d at 239-44 (discussing liability of non-State actors for genocide and war crimes but not for torture and summary execution).

⁷¹ The prohibition of suicide bombings and other murderous attacks on civilians designed to intimidate or coerce a civilian population, also creates responsibility without regard to whether the actions are taken under color of state law. As with plaintiffs' genocide and crimes against humanity allegations, plaintiffs here allege widespread, organized and systematic attacks on civilians. There is no sound reason that a state action requirement be imposed on this norm any more than one is imposed on the genocide and crimes against humanity norms. Neither

In addition, international law establishes that entities, as well as individuals, may be held accountable. Article 5 of the Financing Convention expressly contemplates liability for “legal entities,”⁷² and case law holds that under ATS, banking institutions may be considered aiding and abetting and facilitating acts of genocide.⁷³ In fact, Arab Bank’s alleged conduct is exactly the type of conduct that the applicable Conventions and related U.S. laws are aimed at preventing. Both the Bombing and the Financing Conventions and the ATA highlight the enabling nature of such conduct in bringing about the underlying violations of international law.”⁷⁴

the Bombing Convention, the Financing Convention nor the other sources of international law which give rise to this norm require state action. *Cf. Kadic*, 70 F.3d at 243 (noting that the international law sources prohibiting torture define torture to require actions performed by State officials or under color of law).

⁷² Similarly, Resolution 1373 contemplates the liability of “entities.”

⁷³ See also *Bodner*, 114 F. Supp. 2d at 128

⁷⁴ *Ibid*, page 59, 60.

BANK *Track*

Boothstraat 1c

3512 BT Utrecht, the Netherlands

T: 31-30-2334343, F: 31-30- 2381112

E: coord@banktrack.org, www.banktrack.org