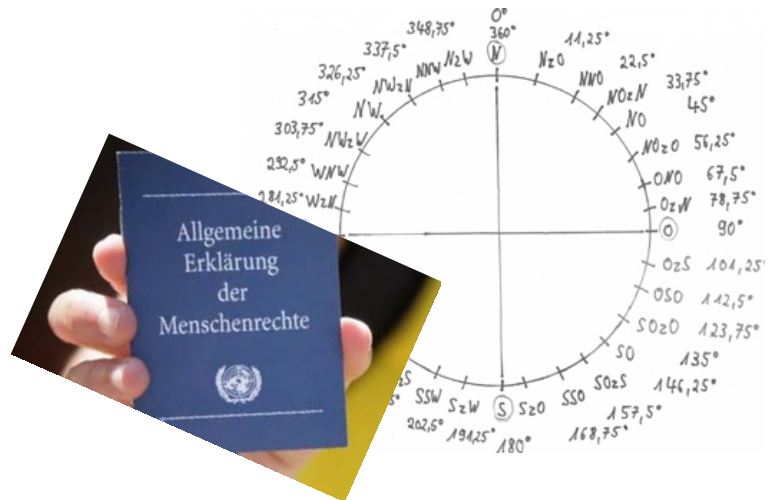


Without Map or Compass

Credit Suisse, UBS and
Human Rights

A Berne Declaration discussion paper



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BD

Berne Declaration
Déclaration de Berne
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Berne Declaration

Who we are

The Berne Declaration (BD) is an independent organization specializing in questions of development and financed for the most part by members and donors. BD is committed to global justice and addresses issues like:

- Corporate Social Responsibility (CSR)
- Economic relations and trade policy
- Financial markets and banks
- Agriculture, biodiversity and intellectual property
- Textile industry (Clean Clothes Campaign)

What we do

We seek to influence the debate on issues of development policy in Switzerland, inform the public about inequitable relations between South and North and intervene with international institutions of finance and economics. As a partner in a worldwide network of organizations for human rights, development and the environment we are committed to a globalization that respects justice and humanity. For more information go to www.evb.ch.

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Appendix 1: Examples of Human Rights and Related Cases of Reported Violations

Executive Summary

The Berne Declaration investigated the financial connections between the two largest Swiss banks, Credit Suisse and UBS and companies embroiled in serious controversies about human rights such as the right to life, the right to security, the right to health, the right to food and water. This paper gives an overview of concrete cases and violated rights. Elaborating on the reports of the UN Special Representative on business and human rights we show that for the banks the «corporate responsibility to respect» should mean nothing less than im-

plementing a comprehensive human rights due diligence.

The Berne Declaration urges Credit Suisse and UBS to develop a comprehensive human rights policy. Among other things this means assessing the potential impact on human rights of all proposed business transactions. The banks must implement the respect for human rights in their standards and processes. We also expect them to publish their policies and standards because the time for secrecy in banking and elsewhere is definitely over.

1. Introduction

Recognized the world over as the core documents of human rights, the Universal Declaration of Human Rights of 1948 along with the two binding covenants on «civil and political rights» and «economic, social and cultural rights» (both 1966) assign states and governments the primary responsibility to promote and protect human rights. Even the preamble of the Universal Declaration states, however, that «every individual and every organ of society» has the duty to uphold human rights – and that includes corporations. As a result of the dramatic rise of global corporations, serious human rights violations in the sphere of corporate responsibility and the activities of non-governmental organizations since the 1990s corporate responsibility has become a main focus of the human rights discussion.

Thanks to the activities of Professor John Ruggie, Special Representative of the Secretary General (SRSG) on the issue of human rights and transnational corporations and other business enterprises, the debate on the human rights obligations of corporations has picked up additional momentum in recent years. At issue is not just whether corporations abide by the law and commit no illegal acts. As the SRSG makes sufficiently clear corporate responsibility goes beyond that and the actual discussion on corporations and human rights revolves around

society's expectation for business to do the right thing: «The social license to operate is based in prevailing social norms that can be as important to the success of a business as legal norms. Of course social norms can vary by region and industry. But one term has acquired near-universal recognition by all stakeholders, namely the corporate responsibility to respect human rights, or, put it simply, to not infringe on the rights of others.»¹

The financial crisis, significantly triggered by the shortsighted high-risk behavior of banks, has had a serious negative impact on the actualization of the social and economic rights of countless human beings, especially in developing and emerging countries.² If anything, the crisis has increased the relevance of human rights for corporations in general and for banks in particular. In last year's report to the Human Rights Council the SRSG wrote: «Companies have had to acknowledge that business as usual is not good enough for anybody, including business itself, and that they must better integrate societal concerns into their long-term strategic goals. Society as a whole cries out for remedy where wrong has been done. The terms transparency and accountability resonate more widely than before. And calls for fairness are more insistent.»³

¹ A/HRC/11/13, para 46, p. 13.

² See the BankTrack-Position about the financial crisis: www.banktrack.org/download/bank_to_the_future_el_escorial_statement

³ A/HRC/11/13, para 10, p. 6.

2. Methodology and Case Studies

The goal and purpose of our research was to demonstrate the connection between individual banking transactions and the violation of a specific human right. With this rights-based approach we are putting the affected people and their universal rights front and center.

2.1 Methodology

Since the banks' involvement in human rights violations is usually indirect ("complicity") a

multi-step tracking process is needed to show all the connections. Fig.1 gives an overview of our methodology, which we explain in detail further on.

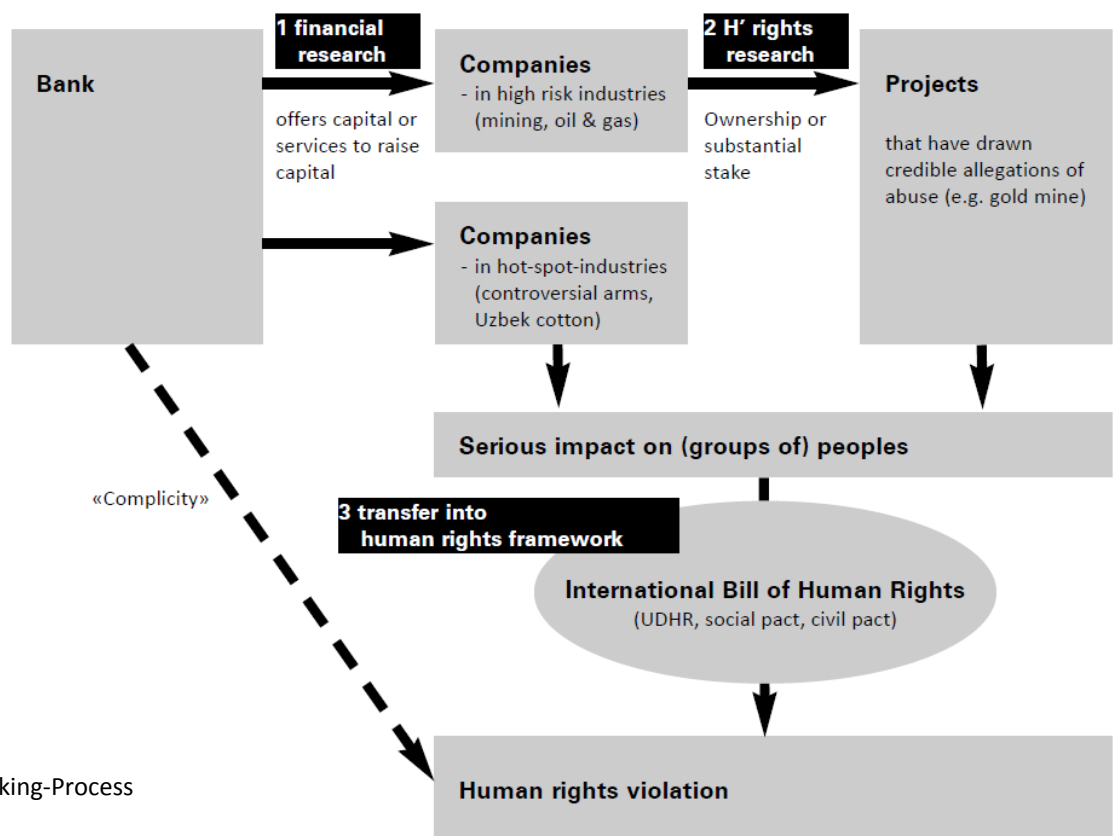


Fig. 1: Tracking-Process

2.2 Selection criteria

The 'finance initiative' of the UN-environmental program UNEP (abbr. UNEP FI) names three areas where financial institutions frequently confront human rights issues: clients and their activities, project finance and money laundering. For money laundering Switzerland has specific laws in effect. For non-recourse project finance the «Equator Principles» provide an industry standard (see 4.3) As a result our focus is on clients and their activities. UNEP FI identifies two specific risks in this area: «that

the client runs its business in a manner that leads to human rights violations or that the customers' products or services are used in a manner that causes or contributes to human rights violations».⁴

⁴ UNEP FI, CEO Briefing, Human rights, 2008, p. 4.

2.3 Financial research

As a background for this study and the BD campaign website

www.banksandhumanrights.ch, the Berne Declaration, with help from the economic research consultancy Profundo, examined the financial connections of the two largest Swiss banks, Credit Suisse and UBS, to over 80 companies accused of human rights abuses.⁵

We focused on important finance deals in corporate and investment banking (credits, issuance of bonds and shares) from 2004 to 2009.⁶ We did not consider small holdings of company shares or bonds (asset management) because they do not create a strong bond between bank and company.

By the same token, a single bank's decision to buy, sell, or not-buy a share or a bond barely affects the corporation. The connection between a corporation (sometime even an individual project) and a bank is much closer in corporate and investment banking. Without the helping hand of a bank a corporation could not do business as intended and would not be able to realize certain projects.

Most of the companies we investigated are active in mining, oil or gas production and in the agro fuel sector. Extractive industries are particularly susceptible to human rights violations, as the SRSG also concluded in an interim report in 2006. Of 65 reports about human rights abuses by corporations, two thirds concerned oil, gas and mining companies.⁷ According to data provided by Nostromo Research, Credit Suisse was the number three provider of credits and loans to the mining industry from 2000 to 2006, while UBS was ranked 11th.⁸ We also made exemplary inquiries into two human rights hot spots: the production of cluster bombs and the cotton industry of Uzbekistan. The Berne Declaration's investigation into the financial connections of the largest Swiss banks to clients facing human rights allegations is by no means complete. Human rights are basically relevant for all banking activities. Obviously there are other industries with human rights issues and even in the industries that we researched there are

aspects that we did not cover. Our main concern was to find examples that illustrate the problem as a whole.

2.4 Human Rights Research

After we completed our finance research, we moved on to human rights research. By limiting ourselves to the International Bill of Human Rights we chose a conservative yet almost universally accepted and accessible frame of reference,⁹ which also allows us to be generally consistent with «Human Rights Translated», the UN manual for business.¹⁰ Thus, in making the case for indigenous land rights – still insufficiently protected at the international level – we referred directly to the civil covenant (ICCPR) instead of basing our argument on the UN Declaration on the Rights of Indigenous Peoples which, while explicit, is also non-binding. In our view this frame of reference is the absolute minimum. Convincing due diligence processes are based on the totality of international human rights norms and keep up with their development.

In the case of mining, oil and gas production we specifically looked for projects that were embroiled in human rights controversies. Following the example of the «survey of the scope and patterns of alleged corporate-related human rights abuses» that the SRSG submitted to the Human Rights Council in 2008,¹¹ we collected credible allegations without drawing final conclusions about their merits. Actual case-by-case verification would require far more resources. As a starting point for our research we used the database at business-humanrights.org. In the words of the UN Special Representative, business-humanrights.org is «in the absence of a universal database that stores allegations of abuse, the most comprehensive, objective source available». Our second main source were the NGO-platform minesandcommunities.org and specialized NGOs on a local or international level, some linked to the Berne Declaration through shared international networks.

Finite resources limited the size of our sample to a fraction of all mining (11 of 27) and oil / gas companies (4 of 14). (The 31 cases from these

⁵ http://bankenundmenschenrechte.ch/downloads/Profundo_2010_Swiss_banks_and_human_rights.pdf

⁶ With our focus on corporate and investment banking our approach differs from the study of the Danish Institute for Human Rights, which primarily addresses Asset management, see Danish Institute for Human Rights, Values Added, The Challenge of Integrating Human Rights into the Financial Sector, 2010.

⁷ E/CN.4/2006/97, para. 25, p. 8.

⁸ Nostromo Research, From Money to Metals, http://moneytometal.org/index.php/From_Money_to_Metals

⁹ In our frame of reference we included the "General Comments" of the two expert panels who monitor the implementation of the social and civil covenants. These recommendations for the implementation of rights listed in the covenants, while lacking the binding character of legal provisions, nevertheless have considerable factual significance. Thus, in the respective „Comments“ the right to housing, the right to food and the right to water, based on Articles 11 and 12, are presented as separate rights.

¹⁰ http://www.ohchr.org/Documents/Publications/Human%20Rights%20Translated_web.pdf

¹¹ A/HRC/8/5/Add.2, p. 8

industries, listed in Annex 1, have their origins in 15 out of 41 corporations.) In a next step, we identified the human rights that appeared to have been violated in each case, based on the available complaints. Human rights, like a tightly woven net, are inextricably linked and cannot be neatly separated. In reality one grievance often affects several rights at once. However, the object was not to produce a complete human rights assessment of an

individual project but to present some meaningful case studies of the violation of **one right**. Cluster bombs, agrofuels and cotton production in Uzbekistan are not about individual projects but about industries, thus they were directly associated with a relevant human right. Added to the 31 cases in high risk industries, then, are 3 industry cases (see Table 1).

	Finance research	Human rights research	Controversial projects and industries
Industry	# of companies	# of companies	# of documented cases
Mining	27	11	25
Oil & Gas	14	4	6
Agro & Monoculture	9	7 ¹²	1 (entire industry = 1 case)
Controversial Weapons	22	5	1 (entire industry = 1 case)
Uzbekistan Cotton Trade	5	5	1 (entire industry = 1 case)
Private Prisons USA	3	0	0
Other Companies	1	0	0
Minus double counts	-3	-1	
Total	78	31	34

Table 1: Summary presentation of Sample and Case Studies

¹² Here, along with our own finance research, we used a Profundo study for Friends of the Earth: European financing of agrofuel production in Latin America, 2008.

3. Results: Affected Rights

The human rights addressed in the following overview and in the annex are the rights associated with the cases under investigation. They are no more relevant for banks than other human rights. John Ruggie convincingly dismisses the notion of business-specific human rights: «Companies can affect the entire spectrum of internationally recognized rights, not only a limited subset. (...) Therefore, the quest to construct *ex ante* a delimited list of business-specific rights for which companies would have some responsibility is a fool's errand. Virtually all rights are relevant, though some may be more so than others in particular circumstances. This fact needs to inform the policies of states and companies alike.»¹³

The researched cases could be associated with the following human rights: right to life, the ban on slavery and forced labor, right to personal security, right to a fair trial, right to equality before the law, right of minorities to preserve their identity, right to unionize and the right to strike, right to adequate housing, right to sufficient food, right to water, right to health. This selection constitutes a broad mix from the categories of labor rights, cultural rights, rights to a secure existence, procedural rights and protection of personal integrity. Two cases – the right to life and the ban on forced labor – will be presented in some detail below. The rest of the cases are listed in detail in Annex 1.

Case Study: Right to Life Violated

Credit Suisse and UBS participated in the financing of Lockheed Martin and Textron; Credit Suisse also in L-3 Communications and Alliant Techsystems. In April 2009, UBS Hana Asset Management, which is part of UBS, owned or managed 4.95% of the shares in Poongsan Corporation. All five companies are among the most important producers of cluster bombs or parts thereof.¹⁴ The Norwegian pension fund has blacklisted these companies.¹⁵ Cluster bombs are munitions containers that

release up to 2000 explosive charges in mid-air. Because many of these charges fail to detonate on impact they become in fact anti-personnel mines. Cluster bombs continue to kill people randomly long after the fighting has stopped. According to Handicap International 98 percent of cluster bomb victims are civilians.¹⁶ In December 2008, 94 countries, including Switzerland, signed a convention against cluster bombs in Oslo. Belgium, Ireland, Luxemburg and New Zealand prohibit investments in cluster munitions producers. Denmark, Germany, the Netherlands, Norway and Switzerland are at various stages of considering parliamentary action on investments.

Case Study: Violation of the Ban on Forced Labor

Uzbekistan is the world's third largest producer of cotton. Cotton production in this Central Asian nation rests on a state sponsored system of forced labor. In many instances that includes children. Each year during the cotton harvest the government closes schools, universities, hospitals and state offices. Employees and students are forced to work in the fields.¹⁷ According to a report of the International Crisis Group, the Tashkent branch of Credit Suisse provides foreign buyers of Uzbek cotton with credits to pre-finance the trade.¹⁸ Our own research shows that Credit Suisse has financial dealings with some of the most important buyers of Uzbek cotton, including companies such as Cargill, Daewoo International, Ecom Agroindustrial, Olam International and Paul Reinhart.

¹³ Opening Remarks by Professor John G. Ruggie, Consultation on operationalizing the framework for business and human rights presented by the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, Geneva 5-6 October 2009.

¹⁴ IKV Pax Christi and Netwerk Vlaanderen, Worldwide Investments in Cluster Munitions, 2009, p. 24 – 26.

¹⁵ <http://www.regjeringen.no/en/dep/fin/Selected-topics/the-government-pension-fund/responsible-investments/companies-excluded-from-the-investment-u.html?id=447122>

¹⁶ Handicap International: Fatal Footprint: The Global Human Impact of Cluster Munitions, 2006, p. 42.

¹⁷ See also e.g. the report of the US Department of State about human rights in Usbekistan: <http://www.state.gov/g/drl/rls/hrrpt/2009/sca/136096.htm>

¹⁸ International Crisis Group, The Curse of Cotton: Central Asia's Destructive Monoculture, Crisis Group Asia Report N°93, 28 February 2005, p.4

4. Human Rights Obligations of Banks

So far the UN Special Representative on business and human rights has not focused extensively on the features of particular industries, including the financial industry. But his comments about the human rights obligations of corporations apply to all companies, banks included.

4.1. «Corporate Responsibility to Respect»

The conceptual framework for business and human rights, presented by the SRSG in 2008, rests on three pillars:¹⁹

«**The state duty to protect**», i.e. the duty of the state/government to protect people from rights abuses by corporations.

«**The corporate responsibility to respect**», i.e. the duty of corporations to respect human rights and create the necessary structures and processes.

«**Access to remedy**», i.e. new and improved legal and extra-legal mechanisms to help the victims of human rights abuses claim their rights.

The corporate responsibility to respect human rights exists irrespective of the state and quality of public governance. Wherever national legislation lags behind the internationally agreed human rights standards corporations are obliged to act on their own to bridge this governance gap. And according to the UN Special Representative this obligation must be clearly separated from a company's humanitarian or charitable engagement: «(B)ecause the responsibility to respect is a baseline expectation, a company cannot compensate for human rights harm by performing good deeds elsewhere.»²⁰

4.2 «Due Diligence»

Responsible action with regard to human rights requires corporate due diligence, in the words of the Special Representative, a concept that «describes the steps a company must take to become aware of, prevent and address adverse human rights impacts.»²¹

At **the very least**, the due diligence process should cover all aspects of the International Bill of Human Rights of the United Nations (the Universal Declaration of Human Rights and the two covenants from 1966) and the ILO core labor standards. The SRSG mentions the

following core elements of the due diligence process:

A human rights **policy** and detailed provisions for its implementation.

Human rights impact assessment procedures to regularly update the measures for the prevention of human rights abuses.

The **integration** of human rights issues into the corporate culture and organization; this requires the involvement of top level management, sufficient capacities and training.

And finally, the **performance** of human rights-relevant procedures should be **tracked** (monitored and measured) and the resulting data used to improve the process.²²

All companies are duty-bound to respect human rights and should therefore develop due diligence processes relating to human rights: «(T)he responsibility to respect is the baseline expectation for all companies in all situations. (...) What is required is due diligence – a process whereby companies not only ensure compliance with national laws but also to manage the risk of human rights harm with a view to avoiding it.»²³ Next, a look at the special features of the banking sector.

4.3 Project Finance and Equator Principles

The SRSG once explicitly mentions banks in connection with a project loan:

«(B)anks do have human rights due diligence requirements in this context, and human rights risks related to the projects are also risks to the bank's liability, returns and reputation.»²⁴ The responsibility of banks involved in project finance is undisputed. For non-recourse project finance the Equator Principles provide an industry standard. Typically, in this form of project finance the participating banks cannot fall back on the project sponsors to service their loans and their commercial success is closely tied to the successful outcome of a specific project.

The Equator Principles are not human rights standard per se. They are based on the

¹⁹ A/HRC/8/5, para. 55, p. 17.

²⁰ A/HRC/8/5, para. 55, p. 17.

²¹ A/HRC/8/5, para. 56, p. 17.

²² A/HRC/8/5, paras. 60-63, p. 18. A summary of the debate over methods is found in: A/HRC/4/74; and: Aims for Human Rights, Guide to Corporate Human Rights Impact Assessment Tools, 2009.; Re: the development of a specific instrument for the finance sector: The Danish Institute for Human Rights, Values Added: The Challenge of Integrating Human Rights into the Financial Sector, 2010.

²³ A/HRC/8/5, para. 24/25, p. 9.

²⁴ A/HRC/11/13, para. 73, p. 18.

performance standards of the International Finance Corporation, IFC, which do not systematically incorporate human rights.²⁵ But the Equator Principles matter here because banks that have signed them recognize the necessity of an expanded due diligence for high-risk projects. Despite the prominence of the Equator Principles in the debate about the responsibility of banks many questions regarding their implementation remain unanswered in the eyes of civil society.²⁶ In any case, the effect of the Equator Principles will remain limited because they only apply to non-recourse project finance. This form of finance accounts for less than five percent of all corporate finance. UBS is not even active in project finance and has not signed the Equator Principles. None of the cases described above concern project finance but the Swiss banks are still involved financially as creditors, through trade finance and through the issuance of bonds and shares.

4.4. Responsibility for Indirect Involvement in Human Rights Violations

The UN Special Representative has given considerable thought to the responsibility of companies for human rights violations by third parties. For the Berne Declaration and its partner organizations in the BankTrack-Network financial operations belong in this category. A full 40 percent of the alleged corporate-related human rights abuses analyzed by the SRSG were cases of indirect involvement and of these 12 percent occurred in the finance sector (i.e. 8 percent of all cases).²⁷

He uses the term complicity when he talks about indirect involvement in human rights abuses. «(C)omplicity means that a company knowingly contributed to another's abuse of human rights.»²⁸ Preventing complicity in human rights abuses is the object of the second principle of the Global Compact. In the commentary the indirect nature of the offense is

also underlined: «The participation of the company need not actually cause the abuse. Rather, the company's assistance or encouragement has to be to a degree that without such participation, the abuses most probably would not have occurred to the same extent or in the same way.»²⁹ As a rule, finance is the kind of support without which a company could not continue the practices that cause human rights violations.

Avoiding complicity is an integral part of due diligence.³⁰ The SRSG's commentary about the scope of due diligence also shows that the banks must review the human rights relevance of their activities. One of three factors to watch, he says, is «whether and how the company might contribute to abuse through the relationships connected to its activities, such as with **business partners**, entities in the value chain, other non-State actors, and state agents.»³¹ The fact that companies, or in our case banks, cannot directly control the behavior of their business partners does not dispense them from due diligence. That is why due diligence must also include relationships to third parties: «A company should ensure that it is not implicated in third party harm to rights through its relationships with such parties. (...) Therefore a company needs to understand the track records of those entities with which it deals in order to assess whether it might contribute to or be associated with harm caused by entities with which it conducts, or is considering conducting business or other activities.»³²

The question of indirect benefits derived from human rights abuses is particularly significant for financial institutions, since any financial profit will be immediately evident for the bank. While the SRSG concedes that simply profiting from human rights abuses does not effect culpability in a strictly legal sense, there is this to consider: «(B)enefiting from abuses may carry negative implications for the company in the public.»³³

For the Berne Declaration and her partner organizations in the BankTrack-Network there can be no question that banks must develop human rights-specific due diligence processes in order to meet their obligation of respecting human rights.

In finance the degree of involvement and the opportunities for intervention vary greatly depending on the nature of the business at

²⁵ For an analysis of the human rights relevance of IFC-Performance Standards see: The International Finance Corporation's Performance Standards and the Equator Principles: Respecting Human Rights and Remediating Violations? A Submission to the U.N. Special Representative to the Secretary General on Human Rights and Transnational Corporations and other Business Enterprises. Bank Information Center, BankTrack, Center for International Environmental Law, Oxfam Australia, World Resources Institute, 2008.

²⁶ See also: http://www.banktrack.org/download/bold_steps_forward_towards_equator_principles_that_deliver_to_people_and_the_planet/100114_civil_society_call_equator_principles.pdf

²⁷ A/HRC/8/5/Add.2, p. 4 and para. 8 p. 8.

²⁸ A/HRC/8/16, para. 30, p. 9.

²⁹ <http://www.unglobalcompact.org/AboutTheGC/TheTenPrinciples/Principle2.html>

³⁰ A/HRC/8/16, para. 32, p. 10.

³¹ A/HRC/11/13, para. 50, p. 14.

³² A/HRC/8/16, para. 22, p. 7.

³³ A/HRC/8/5, para 78, p. 21.

hand. The responsibility of a bank in any one instance depends on two things:

One is the severity of the human rights violations and the questions are: What rights and how many people were affected? Are we hearing allegations or confronting substantiated human rights abuses? Is the company directly responsible or merely complicit? Are we looking at isolated incidents or systematic abuse of human rights? The other is the nature of the business transaction: what is the sum involved? At what point in time does the bank get involved? Is the bank establishing a lasting business relationship or conducting an isolated transaction with a clearly defined end (e.g. an IPO)? Does the bank provide financing alone or

as part of a syndicate? Does the bank play a leading role in the syndicate?

A bank's due diligence policies have to meet two basic requirements then: determine for each type of business (e.g. trade finance, fixed income trading, credit business, IPOs/capital increase, advising, fund management, private banking) when an in-depth due diligence audit for human rights needs to be initiated; create the specific capacities required to perform these audits and commit sufficient resources to the process so that the effects of the bank's activities on human rights can be assessed in all seriousness. (See chapter 6).

5. Human Rights Standards of Banks

In last year's report to the Human Rights Council the UN Special Representative on business and human rights stated that few businesses credibly implement their general commitment to human rights: «Company claims that they respect human rights are all well and good. But the Special Representative has asked whether companies have systems in place enabling them to demonstrate the claim with any degree of confidence. He has found that relatively few do so.»³⁴ As far as we're concerned he could have been speaking about Switzerland's two largest banks when he made that statement.

5.1. Human Rights at UBS and Credit Suisse

On its website, **Credit Suisse** professes its allegiance to the Universal Declaration of Human Rights and to the Global Compact, but gives scant indication of how it intends to implement this commitment in its core business. Talking about private clients under the heading «spheres of influence», the bank simply points to Switzerland's anti-money laundering laws. Regarding the business sector that produced the human rights abuses mentioned earlier, CS merely states: «As regards corporate clients, which may conduct business activities that potentially impact human rights, the bank-wide Reputational Risk Review Process needs to be applied to identify, assess and mitigate potential risks related to business transactions with such clients.»³⁵ However, very little information relating to this review process is made public. At Credit Suisse human rights issues are generally filed under 'social questions' and the tools used by the bank to assess risks – policies governing transactions with clients that are active in the forestry industry and in mining are mentioned – are not revealed.³⁶

The 1-page «UBS-Declaration of Human Rights» gets by without a single reference to the International Bill of Human Rights, while the Global Compact is mentioned in passing. A single generic sentence characterizes the bank's business activities: «We aim to promote the responsible use of our products and services by taking human rights standards into account when vetting prospective clients and executing

transactions.»³⁷ Rules on treating 'social risks' are supposedly included in sector guidelines about chemicals, natural gas and oil, energy, infrastructure, forestry and agrofuels, as well as mining and the production of metals. Sector guidelines are not public.

The two banks cannot substantiate their sweeping commitment to human rights because their key processes, standards and guidelines are not published. In this way they prevent a critical assessment and the quality of their standards cannot be discussed. Judging from the scant information available to the public, human rights do not appear to be a major independent category (along with environment and sustainability issues) in their due diligence processes. Instead, they are cast as mere reputational or social risks. This completely inverts the focus to where suddenly the process is only about the risks faced by the banks and no longer about the rights of people affected by the activities of bank clients.

A mere update of the environmental impact assessment doesn't do justice to the human rights issue, as the UN Special Representative also points out: «(A)n HRIA (human rights impact assessment) should not be merely an additional section in a ESIA (environmental and social impact assessment), or an ESIA reorganized under different headings. Rather, grounding an impact assessment in the human rights framework implies a different approach. HRIAs should deviate from the ESIA approach of examining a project's direct impacts and instead force consideration of how the project could possibly interact with each and every right.»³⁸

5.2. Human Rights Standards of Other International Banks

The finance industry is really just beginning to integrate human rights into its operations, as evidence from a recent study co-financed by the Swiss Foreign Ministry suggests. There, the Danish Institute for Human Rights concludes: «Financial sector actors have mixed understandings of the content of human rights and of their responsibility toward them (...) The majority of financial sector actors have weak in-house capacity to integrate human rights

³⁴ A/HRC/11/13, para. 49, p. 14.

³⁵ https://www.credit-suisse.com/citizenship/de/banking/human_rights.jsp

³⁶ https://www.credit-suisse.com/citizenship/de/banking/risk_review.jsp

³⁷ http://www.ubs.com/1/g/about/corp_responsibility/commitment_strategy/policies_guidelines/human_rights.html

³⁸ A/HRC/4/74, paras. 25-26, p. 6.

information into their decision making (...).»³⁹ Most international banks' human rights policies are similar to those of Credit Suisse and UBS in their sweeping generality.⁴⁰ Still, there are examples of more substantial efforts. The most comprehensive document is Rabobank's «Position Paper Human Rights» that accompanies a more general and shorter human rights statement. The Dutch bank's position paper makes explicit references to the Universal Declaration of Human Rights and the two binding covenants of 1966, the ILO-core labor standards and other human rights standards, including the ILO-convention 169 about the rights of indigenous peoples. Rabobank also elaborates at length about such issues as forced labor, child labor, working conditions and the rights of indigenous people.⁴¹ Barclays, the British bank, also bases its human rights statement on the major human rights standards. The four principles to which Barclays commits include the notion of restitution: «Where we discover, or are made

aware, that we have been associated with human rights violations we shall take steps to remedy the situation, taking account of the interests of those whose rights are being violated.»⁴² The termination of business relations is explicitly mentioned as a possible outcome.

Along with these two banks, Dutch banks Fortis and ABN AMRO also scored a 2 for human rights standards (on a scale from 0 to 5, with 5 at top) in the BankTrack-Network's benchmark study «Close the Gap».⁴³ This means their standards are more than vaguely worded declarations of intent and include at least half the elements that the BankTrack Network considers essential.

A number of other banks also publish their standards. The table below lists issue and sector standards. The latter are designed for industries where human rights issues are particularly relevant. All listed standards scored at least a 2 in the BankTrack-Network's benchmark study «Close the Gap».

Industry/Issue	Banks with published standards
Labor	ABN AMRO, Barclays, Rabobank
Mining	Rabobank
Forestry, pulp and paper	ANZ, Bank of America, Citigroup, Goldman Sachs, Morgan Stanley, HSBC, ING Group, JPMorgan Chase, Rabobank, Standard Chartered, WestLB
Indigenous peoples	Morgan Stanley, JPMorgan Chase, Rabobank
Agriculture	ANZ, Rabobank
Human rights	ABN AMRO, Barclays, Fortis Bank, Nederland, Rabobank
Oil and gas	Rabobank
Military industry and arms trade	Barclays, BBVA, BNP Paribas, Deutsche Bank, Fortis Bank Nederland, ING Group, Intesa Sanpaolo, KBC, Natixis, Rabobank, RBS, Royal Bank of Canada, Standard Chartered, UniCredit Group

³⁹ Danish Institute for Human Rights, Values Added, The Challenge of Integrating Human Rights into the Financial Sector, 2010, p. 4.

⁴⁰ See http://www.banktrack.org/show/focus/banks_and_human_rights under „documents“ for an overview.

⁴¹ http://www.rabobank.com/content/images/Position_paper_Human_Rights_tcm43-102014.pdf

⁴² <http://group.barclays.com/Sustainability/Citizenship/Human-rights>

⁴³ www.banktrack.org/download/close_the_gap/close_the_gap.pdf

6. What is Missing: Policy, Standards, Transparency and Implementation

As we have seen, Switzerland's largest banks Credit Suisse and UBS only skim over the human rights issue and look weak compared to other major banks. With their current policies they clearly fail their corporate duty to respect human rights. To change this they will need to put in place convincing procedures for a human rights-relevant due diligence. Unless each and every step is transparent and all documents publicly accessible they will never be credible. The following steps are necessary, according to the Berne Declaration.

6.1. A Substantial Human Rights Policy

«An explicit human rights policy is widely seen as a necessary starting point for demonstrating corporate commitment to the protection and promotion of human rights», reads the «CEO Briefing» of UNEP FI.⁴⁴ The Special Representative for business and human rights agrees: «Companies need to adopt a human rights policy.»⁴⁵

The human rights policy of Credit Suisse and UBS should meet the following minimal standards⁴⁶:

It is based on the International Bill of Human Rights (including the Universal Declaration of Human Rights, the covenants regarding (1) civil and political rights and (2) economic, social and cultural rights), to the core labor standards of the ILO as well as the ILO convention on indigenous peoples.

It demonstrates how the bank intends to respect human rights in every part of its business.

It excludes certain types of transactions categorically.⁴⁷ It conducts no business with very controversial companies, not even on behalf of bank clients.⁴⁸

⁴⁴ UNEP FI, CEO Briefing, Human rights, 2008, p. 7.

⁴⁵ A/HRC/8/5, para. 60, p. 18.

⁴⁶ For best practice and central elements of a human rights policy, see also: www.banktrack.org/download/close_the_gap/close_the_gap.pdf

⁴⁷ See: BankTrack, Human Rights, Banking Risks; Incorporating Human Rights Obligations in Bank Policies, p. 17.

⁴⁸ When the Berne Declaration and other NGOs criticised the fact that Credit Suisse and UBS held shares in the corporate operator of the planned Phulbari coalmine in Bangladesh, the banks replied that these were business transactions on behalf of clients. This project has already had such disastrous effects on human rights that responsible banks should not enter into a

It indicates how it intends to measure and report about the implementation of the policy.

6.2. Systematic Consideration of Human Rights in Sector Standards

A general human rights policy merely defines the issue and determines its importance for the corporate culture. Problems vary depending on the bank's activity. For this reason it is very important that Credit Suisse and UBS develop detailed standards for all human rights aspects. For every industry known to generate significant numbers of human rights violations new sector guidelines should be developed or existing standards radically reworked. Industries in this group include oil and gas production, mining, agro-industry, labor intensive production, armaments and controversial weapons.

These standards should have an explicit human rights focus and must avoid addressing unspecified «social risks» in general terms. At both banks these sector standards should eventually generate a practice that systematically examines potential business opportunities with regard to if and how they might affect the rights of people. If potential impacts are perceived as serious and the bank has no way to intervene (e.g. by means of specific covenants) the business relationship should be discontinued or not entered into in the first place.

6.3. Transparency

When NGOs confront the two large Swiss banks with information about their financial support for controversial companies, transactions, or projects, they are usually assured that the business transactions in question are being vetted or have already been vetted for their impact. In response to a query about the Phulbari coal mine in Bangladesh, Credit Suisse wrote: «Any direct involvement of Credit Suisse would have to be thoroughly assessed in our internal risk review process, which aims to ensure that business relationships that entail potential risks relating to human rights and the environment are examined in detail and subject to a special authorization process.»⁴⁹ And UBS wrote: «(A)ny acquisitions of securities by UBS on a proprietary basis would be subject to our

business relation with the operator on behalf of a third party.

⁴⁹ Letter from Credit Suisse of 16.9.2008.

customary due diligence procedures which, where relevant, would include environmental and social considerations.»⁵⁰

Since neither bank makes its sector guidelines and internal standards accessible to the public, civil society and the public have no alternative but to blindly trust them. Human rights standards are not sensitive with regard to the success of a business and there is no reason to assume that their publication would put the Swiss banks at a competitive disadvantage – no more than that it would invite a flood of legal action. No bank that published its sector guidelines was taken to court by investors or other agents.

Back in 2003, in the Collevocchio Declaration supported by more than a hundred organizations, civil society already clamored for a commitment to transparency: «Financial Institutions (FI's) must be transparent to stakeholders, not only through robust, regular and standardized disclosure, but also by being responsive to stakeholder needs for specialized information on FI's' policies, procedures and transactions. Commercial confidentiality should not be used as an excuse to deny stakeholders information.»⁵¹ In Sweden and Norway the national contact points (NCP) of the OECD-guidelines for multinational enterprises, in a statement that accompanied their 2008 complaint against the Nordea Bank, supported the demand for more transparency: «(The NCP encourages) Nordea and other actors in the financial sector to practice as much transparency and freedom of information as possible. In order to foster greater understanding among the general public for their activities, it is essential that companies be sensitive to the public's increasing demands for information.»⁵²

If Credit Suisse and UBS want the public to believe that they are serious about their respect for human rights they will not only have to develop a comprehensive human rights policy and adequate sectorial due diligence standards but they will actually have to allow the public to see them.

6.4. Implementation

Policies and Standards are only as good as their implementation. Giving human rights the attention they deserve at Credit Suisse and UBS

will require an effort – in terms of awareness and responsibility – that involves the entire organization. UNEP FI underlines the importance of senior management in this process: «Senior management – including the CEO – review is of particular importance for human rights given the relative novelty of human rights as a management issue.»⁵³ Incentives must be strategically deployed and the bonus system adjusted accordingly to prevent them from subverting the serious implementation of the standards. Continuing education and training for employees is very important as well. Key employees in all sectors must be made aware of the significance of human rights issues and the banks will need enough employees with a thorough knowledge of human rights issues to conduct its due diligence procedures.

To vet business transactions and (potential) clients other information than that supplied by the clients themselves will be necessary, as the following example of a sustainability assessment based mostly on ecological aspects nicely illustrates: In July 2009, Credit Suisse and UBS joined the French bank BNP Paribas in organizing a capital increase for the Indonesian palm oil corporation Golden Agri Resources (GAR, part of the Sinar Mas Group).⁵⁴ Comprehensive reports compiled by NGOs (e.g. Greenpeace), with evidence of unsustainable practices in the sector and by the company, were readily available. The banks did not contact the authors of the NGO studies and declared the transaction to be unobjectionable. Around the same time, Unilever decided to stop buying palm oil from Golden Agri Resources. After hiring specialized consultants who examined and ultimately confirmed the charges leveled by Greenpeace, Unilever terminated its business relationship with the GAR subsidiary PT smart.⁵⁵ Nestlé, too, claims to have stopped buying palm oil from Sinar Mas after reviewing a Greenpeace study (2009) about illegal deforestation.⁵⁶

In order to fulfill their duty and show their respect for human rights, Credit Suisse and UBS have to make a big effort to hear, listen and take seriously the voices of the people whose human rights have been violated.

⁵⁰ Letter from UBS of 12.9.2008.

⁵¹ http://www.banktrack.org/download/collevocchio_declaration_with_signatories/030401_collevocchio_declaration_with_signatories.pdf

⁵² Statement by the Swedish National Contact Point (NCP) for the OECD Guidelines for Multinational Enterprises – with the full support of Norway's NCP – in connection with a complaint from the Argentine environmental organisation CEDHA against Nordea. http://oecdwatch.org/cases/Case_123

⁵³ UNEP FI, CEO Briefing, Human rights, 2008, p. 8.

⁵⁴ See also: <http://www.evb.ch/p25016262.html>

⁵⁵ [http://www.unilever.com/images/sd_VerificationoftheGreenpeacereportBurning%20up%20Borneo\(2009\)_tcm13-196852.pdf](http://www.unilever.com/images/sd_VerificationoftheGreenpeacereportBurning%20up%20Borneo(2009)_tcm13-196852.pdf)

⁵⁶ http://www.nestle.com/MediaCenter/SpeechesAndStatements/AllSpeechesAndStatements/statement_Palm_oil.htm

7. Conclusion

The discussion about the human rights obligations of banks has only just started. UNEP-FI is encouraging banks to actively participate in the debate: «Work with clients, stakeholders and others in the finance industry to develop a clearer understanding of the human rights responsibilities of the sector (...) to develop tools such as human rights impact assessments and to develop a human rights reporting framework for the financial sector as a whole.»⁵⁷ With the publication of this paper and our ongoing work, the Berne Declaration hopes to advance the debate on this important issue. Along with our partner organizations in the BankTrack Network we will continue to use our campaigns, our research and our lobbying to make human rights a part of everyday banking.

⁵⁷ UNEP FI, CEO Briefing, Human rights, 2008, p. 9