BANKS AND HUMAN RIGHTS:

A LEGAL ANALYSIS

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Foley Hoag LLP

Foley Hoag was the first law firm in the United States to establish a practice group devoted exclusively to Corporate Social Responsibility ("CSR"). The CSR practice was launched in 2000, and provides counsel to multinational companies, governments, non-governmental organizations ("NGOs"), and multilateral institutions regarding social, political, and environmental challenges. The attorneys in the CSR practice group have significant experience advising companies on implementation of CSR initiatives, including designing human rights policies, conducting human rights due diligence, conducting human rights risk and impact assessments, designing and implementing stakeholder engagement programs, and working with socially responsible investors and NGOs to help companies demonstrate respect for internationally recognized human rights. Foley Hoag has offices in Washington, D.C., Boston, New York, and Paris.

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The United Nations Environment Programme Finance Initiative ("UNEP FI") is a partnership between UNEP and the global financial sector created in the wake of the 1992 Earth Summit with a mission to promote sustainable finance. UNEP FI works with more than 200 members from the banking, investment and insurance sectors, to understand how environmental, social and governance challenges interact with finance, and how to actively participate in addressing them.

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ABBREVIATIONS

AML	Anti-money laundering
ATS	Alien Tort Statute
CSR	Corporate Social Responsibility
ECA	Export Credit Agency
EP	Equator Principles
EPFI	Equator Principles Financial Institutions
ICC	International Criminal Court
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the former Yugoslavia
IFC	International Finance Corporation
IFC Performance Standards	The IFC Environmental and Social Performance Standards
ILO	International Labour Organization
NCP	National Contact Point
NVG	National Voluntary Guidelines
OECD	Organization for Economic Cooperation and Development
OECD Common Approaches	OECD Common Approaches for Export Credit Agencies
OECD Guidelines	2011 OECD Guidelines for Multinational Enterprises
OHCHR	Office of the High Commissioner for Human Rights
UNEP FI	United Nations Environment Programme Finance Initiative
UN Guiding Principles	United Nations Guiding Principles on Business and Human Rights
UN Women	United Nations Entity for Gender Equality and the Empowerment of Women
UNODC	United Nations Office on Drugs and Crime

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REPORT SCOPE AND METHODOLOGY

The primary aim of this report is to provide an overview of the United Nations Guiding Principles on Business and Human Rights ("UN Guiding Principles") and explore their implications for the banking sector. In 2011, the United Nations Human Rights Council endorsed the UN Guiding Principles, the first global standard approved by governments that addresses the role of business with respect to human rights. The UN Guiding Principles represented the culmination of six years of research and consultations that the then UN Special Representative on business and human rights held with governments, companies, civil society, labor unions, and other stakeholders. The UN Guiding Principles rest on three pillars: the duty of States to protect human rights from abuses by third parties, including companies; the corporate responsibility to respect human rights, meaning not to infringe upon them; and access to effective remedy. This report focuses primarily on the second pillar.

The report also considers the extent to which "hard" domestic and international legal obligations apply to banks, and whether and when banks or their officers might be held liable in domestic or international courts for impacts on human rights. It explores national regulations requiring companies, including banks, to report on their approach to managing human rights or social impacts. Additionally, the report examines existing soft law and voluntary guidelines relevant to banks, and the possibility that they could harden into binding obligations.

The report seeks to focus the analysis on activities beyond project finance. The analysis does not extend to investment activities except where guidance related to investment seems directly relevant for other banking products and services.

The report is not intended as a guide to operationalizing the UN Guiding Principles but rather as a resource to better understand their content and implications. The report seeks to avoid duplicating the work of other organizations, such as the Organization for Economic Cooperation and Development ("OECD") and Thun Group of Banks, which focus on practical steps that banks can take to identify and mitigate adverse human rights impacts in their various products and services. The report was developed under the auspices of the United Nations Environment Programme Finance Initiative ("UNEP FI"). Foley Hoag conducted significant research in order to develop this report, and members of UNEP FI and other experts assisted Foley Hoag in its efforts.

Chapter One focuses on the UN Guiding Principles and more immediate human rights impacts related to banking, rather than systemic effects arising from global economic crises. The Foley Hoag team sought to reflect existing statements from international organizations rather than develop new expectations for the banking sector.

Chapter Two covers both international and certain national hard law pertinent to banking and human rights. The report covers only national laws and causes of action that specifically use the language of human rights. It does not include coverage of a number of environmental, health, safety, non-discrimination, and other important national laws that help protect against adverse human rights impacts but do not use the language of human rights. These laws are too extensive and diverse to feasibly be covered in detail in this report but, since they are vital for the protection of rights in domestic systems, this chapter references them briefly. Foley Hoag attorneys reviewed international criminal law jurisprudence and law review articles for cases involving allegations that banks were involved in adverse human rights impacts. Foley Hoag attorneys also reviewed legal articles on international criminal and human rights law and corporations to identify cases in domestic courts that involved banks. Foley Hoag's Paris office looked for relevant lawsuits and causes of action in Europe and Latin America, while Foley Hoag's

US-based offices focused on identifying causes of action in North America, Asia, and Africa, including by contacting prosecutors and lawyers in several jurisdictions in order to obtain more accurate information about ongoing cases. UNEP FI members also shared information regarding lawsuits in their regions of operation. Foley Hoag and UNEP FI Secretariat conducted research to identify reporting requirements that include human rights in jurisdictions around the world.

Chapter Three examines soft law and voluntary initiatives relevant to banking and human rights. Foley Hoag worked with UNEP FI members to identify guidelines and initiatives relevant to banking and human rights. Foley Hoag also considered non-judicial grievance mechanisms that are linked to soft law guidelines and identified any pronouncements they have made on banking or finance and human rights. The chapter also considers voluntary guidelines that banks themselves have developed.

EXECUTIVE SUMMARY

Businesses generally, including banks, face evolving expectations regarding their approach to human rights. The UN Human Rights Council helped create this shift when it endorsed the UN Guiding Principles on Business and Human Rights in 2011. The debate over whether businesses, including banks, have human rights responsibilities has shifted to a conversation aimed at better understanding the nature of those responsibilities and what steps businesses should take to meet them. This report is focused on the implications of these developments for banks.

I. THE UN GUIDING PRINCIPLES ON BUSINESS AND HUMAN RIGHTS, AND THEIR IMPLICATIONS FOR BANKS

The UN Guiding Principles stipulate that all business enterprises, including banks, should "respect" human rights – meaning to avoid infringing upon the human rights of others and to address adverse human rights impacts with which they are involved. They should accomplish this through a management system approach by (1) developing a human rights policy; (2) conducting human rights "due diligence" that includes assessing actual and potential human rights impacts, acting on the findings, tracking the effectiveness of the response, and communicating regarding that process; and (3) creating processes to remediate impacts that they cause or to which they contribute.

Companies are expected to conduct due diligence to identify whether they cause an adverse impact; contribute to it; or whether their operations, products, or services are directly linked to an adverse impact through their business relationships. For banks, this means that their due diligence could potentially extend across a wide range of activities and actors, including borrowers such as project finance developers, retail and commercial banking clients, and clients that they advise.

To make due diligence over this universe of business relationships, products, and services feasible, companies may have to prioritize due diligence on areas where the risk of adverse impacts seems likely to be the most substantial, such as risks associated with particular sectors, products or services, or high-risk contexts. Indicators of a high-risk context may include association with recent conflict; areas where there is weak, non-existent, or corrupt governance; or undemocratic government.

Banks may usefully conduct due diligence by building on existing anti-money laundering ("AML"), anti-corruption, and sanctions compliance systems, as well as relevant risk management frameworks such as the Equator Principles ("EPs"). These processes already identify actors and contexts that may also be linked to significant adverse human rights impacts.

While traditional commercial due diligence focuses primarily on the risk to the company, the due diligence approach contained in the UN Guiding Principles adds an additional layer by emphasizing the need to identify and address adverse human rights impacts on rights holders. If companies identify a large number of potential or actual impacts — making it necessary to prioritize actions to address them — the UN Guiding Principles provide that companies should first seek to prevent or mitigate the impacts that are the most severe for the individuals or communities affected, based on gravity, number of individuals affected, and whether the impacts are irremediable. Banks of course may decide to also prioritize action in relation to additional impacts for reputational or reasons.

Where actual or potential adverse impacts have been identified, the UN Guiding Principles stipulate that businesses take appropriate action in response. What constitutes appropriate action will depend on how they are related to the impact. Where a company finds that it causes or contributes to an adverse human rights impact, it is expected to cease or prevent its role in those impacts and address them, including through providing for, or cooperating in, remediation. In contrast, if a company did not cause or contribute to the adverse impact but this impact is directly linked to its operations, products or services through its business relationships, it should seek to prevent or mitigate such impact but is not expected to remediate the harm. The exact form and outcome of such efforts will depend on its leverage with the entity causing the impacts and on the severity of the impacts.

Few detailed criteria exist to help companies determine in specific factual situations whether they have contributed to or are directly linked to an adverse impact. Many of the alleged impacts related to banks would be directly linked to their operations, products or services through their business relationships, such as through the provision of financial services.

Finally, companies are expected under the UN Guiding Principles to not only know but also show that they respect human rights. This involves being prepared to communicate to external stakeholders about how they are addressing actual and potential human rights impacts. Such communications would protect information that reasonably can be considered to be confidential and commercially sensitive. It is not proposed that a company should reveal publicly all the issues identified in its ongoing assessments of human rights impact or the steps it takes to mitigate every risk identified. It is first and foremost about being able to communicate its general approaches to addressing its human rights risks, and may include, in some instances, communication on its specific responses to a particular human rights impact.

II. HARD LAW RELEVANT TO BANKING AND HUMAN RIGHTS

Companies faced potential liabilities related to human rights long before the UN Guiding Principles were established, primarily through domestic causes of action. The UN Guiding Principles have the potential to influence the continued evolution of hard law and have helped focus attention on the development of domestic laws and regulations relevant to companies and their human rights impacts.

Under domestic laws, companies, including banks, have long faced potential liability for adverse human rights impacts, although these are not typically framed as such. For example, laws in many countries forbid banks, or any company, from discriminating against customers or employees and impose health and safety standards on them. This report focuses on regulations and causes of action that are framed in the language of human rights, and therefore does not discuss these long-standing domestic labor, health and safety, and anti-discrimination laws in detail. Nevertheless, these laws can provide a useful vehicle through which individuals who believe banks have adversely impacted their rights can seek redress.

International human rights treaties, many of which were developed in the aftermath of World War II, assign duties to States, not companies. In part due to the effect of such treaties, many international human rights are enshrined in national law, although as discussed above, they are often framed as labor or non-discrimination laws or protection of free speech.

International tribunals have almost never extended jurisdiction over legal persons, such as companies. For instance, the International Criminal Court's statute does not permit jurisdiction over corporations. Moreover, company officials, including bank officers, have only in rare instances been held liable at international tribunals for complicity in international crimes that occurred during significant conflicts. These instances included knowingly holding pillaged goods and knowingly financing businesses involved in international crimes, such as the systematic use of forced labor. Such cases have been extremely rare and have only arisen in the aftermath of conflicts involving severe and widespread violations of human rights, such as World War II and the associated genocide.

Generally, companies have been far more likely to face cases in national courts alleging their involvement in adverse human rights impacts. In recent decades, plaintiffs have sought to hold banks liable under domestic causes of action that enable allegations of involvement in gross human rights abuses. To date, most of these cases have been dismissed or settled. These cases have assumed a number of forms. For example, plaintiffs are seeking to use administrative law to hold multinational banks liable for funding a regime that employed forced disappearances on a large scale. In another instance, plaintiffs joined banks to a case against a dictator accused of involvement in gross human rights abuses, alleging that the banks illicitly hid his funds. The majority of such cases have arisen in the US under the Alien Tort Statute, which allows plaintiffs to bring cases against corporations for alleged complicity in international crimes. Many of these cases have recently been dismissed due to the US Supreme Court's ruling that Alien Tort Statute claims must "touch and concern the territory of the United States" with sufficient force to displace a presumption against extraterritorial application of the law. Cases have been dismissed, for example, when they related to acts occurring outside the US and when the abuses were allegedly committed by companies with little or no US presence.

In some instances, money laundering cases against banks have included human rights complaints. Due to AML laws, anti-corruption statutes, and sanctions, banks already carry out substantial compliance efforts that contribute to their ability to avoid association with adverse human rights impacts. There can be a correlation between entities and countries flagged by AML and anti-corruption laws or sanctions and those involved in human rights abuses. Existing banking systems focus on compliance with AML laws, anti-corruption statutes, sanctions, and other laws, an approach that may provide one building block for bank efforts to identify and avoid involvement in severe adverse human rights impacts.

More recently, in addition to voluntary reporting mechanisms such as the Global Reporting Initiative and the Human Rights Reporting and Assurance Framework Initiative, some countries have passed laws requiring companies to report on their social and environmental risks, performance or management systems. In a handful of countries, such reporting requirements are aimed specifically at financial institutions. These laws reflect the increasing interest of regulators, investors, and the public in the non-financial performance of companies — and a growing belief that social and environmental practices can have financial implications. Such laws exist in a variety of countries in Latin America, Africa, North America, Europe, and Asia.

These laws have important implications for corporate compliance efforts. For instance, in the UK, the Companies Act of 2006 made it an obligation for directors of a company to pay due regard to company impacts on communities. A failure to do so could lead to legal consequences for the directors. In France, courts can compel companies to publish information on their social and environmental practices if they do not meet mandatory reporting requirements. As these laws are relatively new, and few - if any - cases have been brought, it is difficult to assess how courts will interpret them. It is likely that non-investors, as a general rule, would lack standing to bring such cases.

III. SOFT LAW AND VOLUNTARY GUIDELINES

Soft law can be understood as an expression of societal expectations, but may also indicate trends in hard law. Soft law and voluntary guidelines relevant to banking and human rights are evolving in many guises, including an array of non-binding or voluntary principles, resolutions, standards, recommendations and codes of conduct. These have been developed by a range of groups, including companies, industry groups, and non-governmental organizations ("NGOs"), in addition to governments, and can help set normative standards and frameworks.

Both soft law and voluntary guidelines are non-binding from the perspective of international law, but they may have the potential to harden over time. For example, national court systems might draw upon them to support their legal reasoning; parliaments might incorporate elements of them into regulations; they might become the basis for an international treaty; and they can be included as binding clauses in private party contracts.

The UN Guiding Principles have helped articulate evolving expectations for companies, and concepts in them might harden to some degree either through national requirements or international hard law. As part of its Corporate Social Responsibility ("CSR") Strategy framework, the European Commission stipulates that member governments should develop National Action Plans to implement the UN Guiding Principles. The National Action Plans are likely to include a mix of legal requirements– such as new regulations related to business and human rights — and non-legal approaches. Additionally, in June 2014, the UN Human Rights Council approved the establishment of a process to negotiate a treaty on business and human rights, although this process is expected to take a number of years. Until a treaty is negotiated, the UN Guiding Principles will continue to be the authoritative global framework for business and human rights.

In recent years, other soft law initiatives have also helped develop expectations related to the responsibilities of companies in the context of human rights. For example, the 2011 OECD Guidelines for Multinational Enterprises (the "OECD Guidelines") for the first time included an entire section on human rights. The new section incorporated the same framework as the UN Guiding Principles, including the corporate responsibility to respect human rights.

The OECD Guidelines also provide a means for third parties to bring complaints called "specific instances" regarding the human rights performance of companies (in addition to other types of impacts on matters covered by the Guidelines - unless specifically excluded). Each OECD country is required to set up a non-judicial complaints mechanism known as an OECD National Contact Point ("NCP"). In some countries, the OECD NCPs issue findings, which can have reputational effects for companies, if the Contact Points are unable to resolve the complaints through negotiations. The OECD NCPs have reviewed several cases related to financial institutions, including banks. Notably, they found that minority investors have a responsibility to conduct human rights due diligence and to seek to address significant impacts that they identify, even if they have little leverage over the companies in which they invest. Although that finding was related specifically to investors, it is relevant to other types of financial activities because it implied that in some instances, NCPs might expect financial institutions to conduct human rights due diligence for products and services even when they do not have significant leverage over the entities involved. Moreover, the OECD Common Approaches for Export Credit Agencies ("OECD Common Approaches") call for them to take into account NCP statements when deciding whether to extend support to potential clients.

The financial sector itself has created a number of voluntary standards that help define best practice, including in areas related to human rights. In 2003, a group of banks established the Equator Principles, which apply to project finance, related advisory services, project-related corporate loans, and bridge loans. The EPs use the IFC Performance Standards as a minimum benchmark, and include requirements related to indigenous peoples, labor rights, community consultation, and other human rights issues. The most recent version of the EPs requires banks themselves to carry out due diligence, and bank clients to conduct additional human rights due diligence in specific high-risk circumstances. Currently, 81 large financial institutions have adopted the EPs, covering over 70% of international project finance in emerging markets. The EPs are incorporated into project loan documentation via covenants, which lends them legal weight.

The banking industry has also begun to consider how a wider range of products and services can affect human rights. A number of banks formed the "Thun Group," which in 2013 released a report that explores the responsibilities of banks under the UN Guiding Principles with respect to specific activities, such as retail and private banking, corporate and investment banking, and asset management. The report concludes that banks should consider creating risk management models for human rights that encompass a wide array of services and products. Banks can conduct a high level assessment and then carry out enhanced due diligence for products and services related to high-risk contexts, sectors, or vulnerable populations.

Finally, a number of United Nations ("UN") entities, such as the Office of the High Commissioner for Human Rights ("OHCHR"), the UN Children's Fund ("UNICEF"), the UN Global Compact, and the UNEP FI provide guidance to financial institutions, including banks, to support them in implementing various aspects of the UN Guiding Principles.

IV. CONCLUSION

The landscape for banks as well as other companies with regard to human rights is changing. New standards such as the UN Guiding Principles have shifted the discussion from one focused on whether companies have any responsibility for human rights to a dialogue regarding the scope and practical consequences of such a responsibility. Banks face challenges when trying to identify how they might be connected to adverse human rights impacts – particularly those arising via their myriad client relationships – and where the resulting parameters of responsibility lie. Despite these uncertainties, the UN Guiding Principles provide a useful framework to help banks identify their impacts and work to address them.

CHAPTER 1: THE UN GUIDING PRINCIPLES ON BUSINESS AND HUMAN RIGHTS AND THEIR IMPLICATIONS FOR BANKS

This chapter provides a detailed overview of the UN Guiding Principles and explores their implications for the banking sector.

Until the endorsement of the UN Guiding Principles by the UN Human Rights Council, there was no authoritative global framework articulating expectations for business with respect to human rights. There was widespread confusion regarding whether businesses already had direct human rights duties under international law and, if so, what those obligations might encompass. Meanwhile, certain industries and multi-stakeholder groups had already developed voluntary initiatives that included human rights provisions. The UN Guiding Principles built on these existing efforts in the process of articulating the responsibilities of business with regard to human rights.

The UN Guiding Principles were unanimously endorsed by the UN Human Rights Council in 2011 and constitute the authoritative global framework for managing human rights risks related to business activities. They apply to all States as well as to all business enterprises regardless of their sector[1] and therefore to financial institutions, such as banks.[2]

They do not create new legal obligations for States, but refer to and derive from States' existing obligations under international law. National legislation often already exists or may be required to ensure that these obligations are effectively implemented and enforced. This means that the Guiding Principles may be reflected in domestic law regulating business activities.

The UN Guiding Principles stipulate that all business enterprises, including banks, should "respect" human rights – which means to avoid infringing on the human rights of others and to address adverse human rights impacts with which they are involved.[3] More specifically, companies can be involved with adverse human rights impacts "through their own activities or as a result of their business relationships with other parties."[4] Companies can be related to adverse human rights impacts both through their actions and their omissions.

1. Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises (John Ruggie), *Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework*, Principle 14, UN Doc.A/HRC/17/31 (March 21, 2011) [hereinafter Guiding Principles].
2. The UN Guiding Principles apply to all types of business enterprises, including financial institutions. Guiding Principles, supra note 1, at Principle 14. Specifically, with respect to the financial sector, see guidance letter from the Office of the High Commissioner on Human Rights ("OHCHR") to the Centre for Research on Multinational Corporations("SOMO"), OHCHR (April 26, 2013), available at http://www.ohchr.org/Documents/Issues/Business/LetterSOMO.pdf [hereinafter OHCHR Letter to SOMO].
3. "Respect" is a term of art in human rights law. Respecting rights means not to infringe upon them. In contrast, States have a duty not only to respect but also to protect human rights against infringement by third parties, and to fulfill those rights by facilitating the increased enjoyment of them. *What are Human Rights?*, OHCHR, available at http://www.ohchr.org/EN/Issues/Pages/WhatareHumanRights.aspx
4. *Guiding Principles*, *supra* note 1, at Principle 13.

The appropriate response by a business enterprise involved in an adverse human rights impact will depend on whether it (a) causes an adverse impact; (b) contributes to an adverse human rights impact; or (c) its operations, products, or services are directly linked to an adverse human rights impact through a business relationship.

The expectation that companies should identify the potential and actual human rights impacts that might arise from their activities, including through their business relationships, creates a particular challenge for the banking industry. This is because banks have a multitude of customers that might adversely affect human rights, and that could be connected to the banks through a variety of services and products.

The different ways in which banks can be connected to adverse human rights impacts is discussed in greater depth in Section III.

The UN Guiding Principles provide that business enterprises should respect all internationally recognized human rights. This includes at a minimum those rights expressed in the International Bill of Human Rights[5] and the principles concerning fundamental rights set forth in the International Labour Organization ("ILO") Declaration on Fundamental Principles and Rights at Work.[6]

The UN Guiding Principles' focus is on managing human rights risks to people in the context of business activities. This outcome-oriented approach reflects what the UN Special Representative on Business and Human Rights, John Ruggie, called "principled pragmatism." States can put in place a smart mix of regulatory and policy measures to fulfill their duty to protect human rights, while companies may need to go beyond legal compliance to meet their responsibility to respect human rights. The different approaches ranging from formally binding (hard) law to non-binding rules such as codes of conduct or soft law, will be discussed further in Chapters II and III of the report.

I. THE SCOPE OF THE RESPONSIBILITY TO RESPECT HUMAN RIGHTS AND DUE DILIGENCE

The responsibility to respect human rights applies across all company activities and relationships, wherever they operate. It exists independently of the ability or willingness of States to fulfill their own human rights obligations, and it exists apart from compliance with national laws and regulations related to human rights. This means that mere compliance with national law is just one element of the UN Guiding Principles' holistic set of expectations that businesses are called upon to satisfy.

To meet their responsibility to respect human rights as set out in the UN Guiding Principles, companies should have in place policies and processes appropriate to their size and circumstances to identify, prevent, mitigate, and account for human rights impacts arising from their activities and their business relationships."[7] More specifically, under the UN Guiding Principles, all companies, including banks, are expected to:

5. The "International Bill of Human Rights" is an informal term that refers to the rights guaranteed by the Universal Declaration of Human Rights (1948), the International Covenant on Civil and Political Rights (1966) with its two Optional Protocols, and the International Covenant on Economic, Social and Cultural Rights (1966).

6. *Guiding Principles*, *supra* note 1, at Principle 12. Depending on the circumstances, business enterprises may need to consider additional standards.

7. *Id. at Principles 13, 15.*

1. Express their commitment to respect human rights in a **statement of policy**. This policy commitment should cover the breadth of the company's activities.[8]
2. Conduct **human rights due diligence**, to identify, prevent, mitigate, and account for how they address any adverse impact human rights. Such human rights due diligence encompasses:
   - Assessing actual and potential human rights impacts;
   - Integrating and acting upon the findings;
   - Tracking the effectiveness of responses; and
   - Communicating how impacts are identified and addressed.[9]
3. Provide for or participate in processes to **enable the remedy** of impacts that they cause or to which they contribute.[10]

Like any other type of business enterprise, the UN Guiding Principles expect[11] banks to conduct due diligence to identify:

1. Any actual or potential human rights impacts they might **cause**, both as employers and in their various activities and operations;
2. Any actual or potential human rights impacts to which they might **contribute**, both as employers and in their various activities and operations; and
3. Any actual or potential human rights impacts that might be **directly linked** to their operations, products or services through their business relationships.[12]

"Business relationships" include business partners, entities in the value chain,[13] and any other State or non-State entities directly linked to a company's business operations, products, or services.[14] Business relationships may include relationships beyond the first tier – or any prescribed number of tiers – in a value chain.[15] For banks, "business relationships" include relationships with borrowers, project partners, retail and commercial banking clients, and other entities, potentially including some more distant in the value chain.[16] The existence of a business relationship does not depend on the size or longevity of the commercial relationship – although this might affect the options available to prevent and mitigate particular adverse human rights impacts, as discussed in Section IV.[17]

8. *Id.* at Principle 16, Commentary.
9. *Id.* at Principle 17. Principle 17 lays out the fundamental elements of due diligence identified here. Later sections of the UN Guiding Principles provide more detail as to their precise contours.
10. *Id.* at Principle 22.
11. *Id.* at Principle 17.
12. *Id.* at Principle 17 (a). "Human Rights due diligence should cover adverse human rights impacts that the business enterprise may cause or contribute to through its own activities or which may be directly linked to its operations, products or services by a business relationship."
13. The concept of the value chain, developed by Michael Porter, includes the raw materials that companies receive, the processes through which they and their suppliers add value to materials, and continues through to the sale of finished products. Michael E. Porter, Competitive Advantage: Creating and Sustaining Superior Performance, Free Press (1985), pgs. 11-15.
14. *Guiding Principles,* at Principle 13, Commentary. See also *The Corporate Responsibility to Respect Human Rights: an Interpretive Guide*, OHCHR, 42 HR/PUB/12/02 (2012), p. 5. [hereinafter OHCHR Interpretive Guide]. OECD National Contact Points ("NCPs") have opined that minority investments should be part of a company's human rights due diligence, as discussed in Chapter 3.
15. *Letter from OHCHR to the Organization for Economic Cooperation and Development* ("OECD"), OHCHR (Nov. 27, 2013), available at http://www.ohchr.org/Documents/Issues/Business/LetterOECD.pdf, page 3 [hereinafter *OHCHR Letter to OECD*].
16. *Id.*
17. Similarly, for investors, the relative size or percentage of the share an investor holds in a company is not a factor in determining whether there is a business relationship. *Id.* See also *OHCHR Letter to SOMO, supra* note 2.

In addition to expecting due diligence across a variety of relationships, the UN Guiding Principles expect companies to identify those risks to rights-holders that are associated with their services and activities, which may go beyond traditional approaches to identifying reputational or commercial risk.[18] This is because the fundamental aim of human rights due diligence is to manage the human rights risks to people affected by business activities and not only to manage reputational, financial, or even legal risk to the company, although it often has such benefits. Rather, its aim is to avoid adverse human rights impacts on others, whether or not such impacts are likely to lead to negative consequences for the company.

II. HUMAN RIGHTS DUE DILIGENCE ON BUSINESS RELATIONSHIPS

Business enterprises are expected to conduct human rights due diligence against all internationally recognized human rights across all their activities and operations. This means that banks should, as a starting point, conduct due diligence on their own activities and operations to ensure that they are not causing or contributing to adverse human rights impacts. Banks might already have a number of systems in place to accomplish this. For example, banks generally review their compliance with internal policies on non-discrimination and equal opportunity in the workplace. They typically also monitor their compliance with policies aimed at preventing discrimination in the provision of products and services with regard to race, religion, gender, or other status.

Under the UN Guiding Principles, banks are also expected to conduct human rights due diligence across their business relationships. This is a critical element of the UN Guiding Principles for banks, as allegations that they are involved in adverse human rights impacts often are related to the actions of entities in their value chains, such as customers and clients. The UN Guiding Principles provide guidance to help prioritize due diligence for companies such as large banks that have millions of entities in their value chains, ranging from suppliers and contractors to customers, as discussed below.

The corporate responsibility to respect human rights embodied in the UN Guiding Principles is a standard of conduct, not outcome. It calls on companies to show that they conducted the expected due diligence and took all reasonable steps to avoid, address, or mitigate their impacts, even as it acknowledges that adverse human rights impacts might still occur despite such due diligence.

A. Focusing Initial Scoping

The UN Guiding Principles recognize that it may be unreasonably difficult for companies with large numbers of entities in their value chain – such as large multinational banks – to conduct detailed due diligence on all of them.[19] In such cases, the UN Guiding Principles suggest that business enterprises should pursue initial scoping that identifies general areas in which the risk of adverse impacts is most significant.[20]

18. *UN Guiding Principles on Business and Human Rights: Discussion Paper for Banks on Implications of Principles 16-21* 9 (Oct. 2013), The Thun Group of Banks, available at http://www.business-humanrights.org/media/documents/thun-group-discussion-paper-final-2-oct-2013.pdf [hereinafter *Thun Group Discussion Paper*].

19. *Guiding Principles*, *supra* note 1, at Principle 17.

20. *Id.* at Principle 17, Commentary.

In order to conduct this initial scoping so that subsequent efforts focus on preventing or mitigating the most severe human rights impacts, the UN Guiding Principles suggest that companies consider whether:

- Their clients, suppliers, contractors, or other entities in their value chain are in high-risk **sectors;**
- Certain clients' **products or services** are more likely to be implicated in severe human rights impacts; or
- They or their clients operate or provide products and services in **high-risk contexts** in which human rights abuses are relatively common.[21] Factors indicating high-risk contexts could include, but are not limited to, whether social, environmental, and labor laws are enforced, as well as whether the country is in or emerging from conflict, or suffers from particularly high levels of corruption that affect the enjoyment of human rights.

In order to effectively identify such concerns, banks can use widely available and credible sources focused on thematic or country-related human rights challenges and, in some cases, those relevant to business and even particular sectors.

Often, companies might need to consider how these factors interact in a particular context. For instance, large scale agricultural activities that are relatively low risk in one operating environment might lead to significant adverse human rights impacts in a country undergoing contested land reforms or in which child labor is frequently used on farms.

As part of this initial scoping, banks could consider creating screens to identify instances in which products might support companies operating in high-risk industries or contexts and conduct further due diligence on them. These screens could be added to existing AML, anti-corruption, or sanctions compliance systems, if appropriate. Such screens could take into account potential impacts arising in particular suppliers' or clients' operating contexts, the particular operations, products or services involved, or other relevant considerations.[22]

After identifying products, services, or geographic regions where the risk of adverse impacts is most significant, companies should identify the potential and actual adverse impacts arising from those activities.

B. Responding to Impacts Based on Severity

After banks have identified and assessed potential or actual adverse human rights impacts with which they may be involved, they can prioritize taking action to address the risks based on the **severity of the impact to the rights-holder**. The commentary to the UN Guiding Principles defines severe human rights impacts with reference to their:

- Scale or gravity;
- Scope in terms of the number of individuals affected; and
- Whether the impacts are irremediable[23] — meaning that limits exist on the ability to restore those affected to a situation at least equivalent to their situation before the adverse impact.[24]

21. *Id.*
22. *Id.*
23. *Id.* at Principle 14, Commentary. See also *Interpretive Guide, supra* note 14, at 19.
24. *Interpretive Guide, supra* note 14, at 8.

When companies have to prioritize which impacts to address, they should focus on actual and potential impacts that are most severe.[25] This guidance is highly relevant for banks, which may be associated with a broad range of human rights impacts through their business relationships.

C. Sources of Information for Human Rights Due Diligence

The UN Guiding Principles create expectations as to the types of entities from which companies, including banks, should seek information during due diligence – both at the initial scoping stage and during more in-depth due diligence. They call for companies to draw on internal and/or external independent human rights expertise and engage in meaningful consultation with potentially affected groups, as appropriate to the nature and context of the operation.[26]

When banks have identified a risk of human rights impacts, they could consider consulting with human rights experts directly or through third parties to better understand the situation and whether and how they could help ameliorate it.

Engaging with potentially affected groups would be extremely challenging for banks to carry out when a deal has not been finalized, due to concerns about confidentiality and even violations of securities laws. However, where relevant, banks might be able to embed expectations that the clients will engage with potentially affected groups in loan documentation. Indeed, the EPs already call for such guarantees to be included in loan documentation for project finance.

III. CATEGORIES OF INVOLVEMENT WITH ADVERSE IMPACTS

As outlined above, the UN Guiding Principles identify three ways in which companies might be involved in adverse human rights impacts:

- Category 1: The company **causes** an impact through its own activities.
- Category 2: The company **contributes** to the impact through its own activities – either directly or through some outside entity (government, business, or other).[27]
- Category 3: The company does not cause or contribute to the impact, but it has a **business relationship** with an entity that is causing the impact, **and** the impact is **directly linked** to the company's own operations, products, or services.[28]

These categorizations acknowledge that a company can be involved in adverse human rights impacts in different ways, and sets out a differentiated responsibility to address the impact, depending on the nature of the involvement. Consequently, when a bank is identifying actual or potential impacts, it should identify the nature of the involvement in order to understand what steps it will be expected to take in response.

Some of the most common human rights allegations against banks are those where the banks may not have caused or contributed to the impact, but an impact is instead directly linked to their products or services through their business relationships. These are sometimes the most challenging issues to resolve because the banks do not typically control the actor involved in the adverse impacts.

25. *Guiding Principles, supra* note 1, at Principle 24.

26. Typically, such consultation is carried out by the entity directly involved. For example, a company carrying out an infrastructure project would typically be the party expected to carry out such consultation, rather than the lender.

27. *Interpretive Guide, supra* note 14, at 15.

28. *Guiding Principles, supra* note 1, at Principle 13.

In some instances, it might be difficult to categorize with certainty the nature of a company's involvement with an adverse impact, particularly when it comes to determining whether a company is contributing to or directly linked to an adverse impact. A robust due diligence process should, however, enable the company to demonstrate how it has determined the manner of its involvement with an adverse impact and what appropriate action it has taken in response. The following hypothetical examples may assist companies in applying the principles although, in real-life situations, each case will need to be assessed according to its particular context and circumstances.

As noted above, the UN Guiding Principles are distinct from issues of legal liability and enforcement.[29] The fact that an impact falls within a particular category under the UN Guiding Principles does not necessarily imply a particular level or type of legal liability.

Category 1: The bank causes an impact through its own activities

This category covers instances in which a bank's policies and/or activities – including both actions and omissions – might be deemed to cause an adverse human rights impact. For instance:

- **Example:** A bank might not promote certain staff members due to their ethnicity or religion; refuse to allow employees to join a trade union; or exceed international limitations on working hours.

Category 2: The bank contributes to the impact through its activities

In this category, the bank itself is not the main actor involved in the abuse. A bank could contribute to an adverse human rights impact by assisting, facilitating, or incentivizing the conduct of another entity that leads to an adverse impact. The bank does not have to be the immediate cause of the impact to be considered to contribute to it.

- **Example:** A bank places unexpected and excessive demands on a call center (a contracted service provider) during a holiday season, leading to a situation in which the call center can only respond to the call volume through the use of excessive employee overtime.[30]

The UN Guiding Principles' definition of "contributing" is related to, albeit distinct from, the legal doctrine of complicity.[31] As a matter of international law, the relevant standard for complicity (aiding and abetting) is knowingly providing practical assistance or encouragement that has a substantial effect on the commission of a crime.[32] The UN Guiding Principles describe contributing to an adverse human rights impact more broadly than this legal definition. As a result, the fact that a company might contribute to an adverse human rights impact from a UN Guiding Principles perspective does not mean that it would necessarily meet the legal definition of aiding and abetting liability or other forms of legal complicity. In many cases, companies that would be considered to contribute to human rights impacts under the UN Guiding Principles would not be found legally liable under current legal definitions. Indeed, as explored in Chapter II, banks rarely are subject to legal liability for contributing to human rights impacts.

29. Indeed, they were not intended to track existing definitions of corporate liability for involvement in human rights impacts. Definitions of legal liability for involvement in adverse human rights impacts vary by jurisdiction, so precisely tracking such definitions would be difficult or impossible. For example, even within the United States, definitions of corporate aiding and abetting liability vary in different federal circuits.

30. For a similar example, see *Note on Due Diligence for the Financial Sector: Adverse Impacts Directly Linked to Financial Sector Operations, Products, or Services by a Business Relationship*, OECD, p. 4, available at https://mneguidelines.oecd.org/globalforumonresponsiblebusinessconduct/GFRBC-2014-financial-sector-document-1.pdf [hereinafter *OECD Note on Due Diligence*]. "Contributing to the adverse impact: the bank sets an unrealistic timetable for a construction firm to build offices for the bank, resulting in labour abuses." See also the example of "contributing" in the *OHCHR Interpretive Guide*: "Changing product requirements for suppliers at the eleventh hour without adjusting production deadlines and prices, thus pushing suppliers to breach labour standards in order to deliver." *OHCHR Interpretive Guide, supra* note 14.

31. *Guiding Principles, supra* note 1, at Principle 17, Commentary.

32. *Id.*

Category 3: The bank is directly linked to an impact through its operations, services, or products by its business relationships, but does not cause or contribute to that impact

Most common human rights allegations against banks are those linked to their products or services through their business relationships. A significant percentage of adverse impacts associated with banks are therefore likely to fall into this category.

Impacts falling into this category must meet two conditions:

- The impact must be directly linked to the bank's operations, services, or products; and
- The bank must be connected to the entity committing the abuses through its business relationships.[33]

A bank's operations, products, or services might be deemed to be directly linked to an adverse impact through a business relationship in the below instances. These instances aim to illustrate the different degrees of proximity between a bank and the adverse impacts they might be directly linked to through their business relationships, irrespective of any action taken to safeguard against such impacts.

- **Example:** A bank participates in a loan to a company that will use the funds for the construction of a dam. Communities along the river claim that the dam has affected their ability to earn a livelihood and obtain food from the river, and the project proponent has not provided alternative livelihood options.
- **Example:** A bank provides a general corporate loan to a company that buys and trades tin from suppliers in a conflict area, and the proceeds from tin sales in that area are alleged to fund the activities of armed groups involved in human rights abuses.

To clarify what is *not* considered to be directly linked, a company would likely *not* be considered to be directly linked through its business relationships (nor contributing) and would not be expected to take steps to mitigate adverse human rights impacts if:

- **Example:** A bank provided a loan to a company specifically for its operations in country Y, and the same company was implicated in adverse human rights impacts in country Z. In this case, the bank would not be directly linked through its business relationships to the adverse impacts in country Z.[34] Similarly, a bank that provided a company with a loan for one project would not be directly linked to human rights impacts arising in another project.

Each instance of direct linkage should be evaluated on a case-by-case basis so that the company's degree of proximity can be assessed, as linkage may vary from clear association to extremely remote.

33. See, e.g., *Letter from OHCHR to the OECD, supra* note 15, at 6.

34. *Id.* at 4. See also *OHCHR Interpretive Guide, supra* note 14, at. 17.

IV. RESPONDING TO ADVERSE IMPACTS

Categorizing company involvement with adverse impacts is useful because the UN Guiding Principles stipulate that the actions companies should take to remedy impacts vary according to the three categories described above. The UN Guiding Principles state that:

- When a company **causes** impacts, it is expected to **cease or prevent** the actions causing impacts and provide for or cooperate in remediation of any harms that do occur.[35] This expectation is based on the assumption that a company can typically control its involvement in impacts that it causes.
- When a company **contributes** to impacts, it is also expected to **cease or prevent its contribution** to the impacts and provide for, or cooperate in, remediation of any harms that do occur.[36] This assumes that a company can typically control its involvement in impacts to which it contributes or exert some leverage to mitigate those impacts.
- If a company is **directly linked** through its business relationships but does not cause or contribute to the impact, it should seek to **prevent** or **mitigate** the impact.[37] This softer language reflects the fact that the company did not cause or contribute to the adverse impact and therefore is not expected to provide remedy for harms that result.[38]

Although such categorization can be useful, companies can focus excessively on categorizing how they may be involved with human rights impacts. If an impact is difficult to categorize, this should not prevent action. Rather, it is important for companies to first focus on avoiding or mitigating the adverse impact and demonstrating that they have done so.

A. Leverage

According to the UN Guiding Principles, the appropriate response to potential or ongoing human rights abuses through a business relationship depends on a number of other factors, primarily that of leverage, a term that is defined in the Interpretive Guide to the Guiding Principles in the following way:

"Leverage…may reflect one or more of the following factors: whether the company controls the entity; the terms of contract between the company and entity; the proportion of business the company represents for the entity; the ability of the company to incentivize the entity; the benefits to the entity of working with the company and harm to its reputation if the relationship ends; the ability of the enterprise to encourage other entities to improve their human rights performance; and the ability of the company to cause local governments to more closely regulate the entity and thus improve its human rights performance." [39]

The Guiding Principles suggest that if a company lacks leverage, it should seek to increase it in order to influence the behavior of the party causing the adverse impact.[40] If the company fails in its attempt to prevent or mitigate the impact, it may consider other options. Typically, if impacts are likely to be severe or irremediable, companies should prioritize responding to such impacts — including potentially ending the relationship.[41]

35. *Guiding Principles, supra* note 1, at Principles 13, 22.
36. *Id.*
37. *Id.*
38. Additionally, the ability of the company to prevent or remediate the impact is often, although not always, lower when it is directly linked to it.
39. *Interpretive Guide, supra* note 14, at 49.
40. *Id.* at 49-50. For example, if a coalition of banks provide a project finance loan, they might work together to pressure the client to improve its practices.
41. *Id.* at 50.

For banks, the amount of leverage available as a single institution is likely to vary significantly depending on the type of product, service, or operation at stake. For instance, in project finance, banks often have greater leverage, particularly prior to the start of a project. This is also more likely to be the case for a loan for a specific subsidiary or business unit, or where the application of funds is for a specific and known purpose. In contrast, when banks engage in general banking activities, such as providing a general corporate loan or arranging financing for a merger or acquisition, they often have more limited leverage. When banks underwrite a public offering or issuance of bonds, their leverage and the times at which they can exercise it are also different. This limited leverage does not relieve banks of the responsibility to seek to prevent or mitigate adverse human rights impacts; it simply affects how this responsibility can be exercised.

Leverage is not static; it could be increased through the use of contractual language and other means. Several companies can approach an entity in their value chain together to request that the entity end its adverse impacts, a strategy that investors already use.[42] A company can also incentivize changes in behavior by the entity through capacity building or threatening to withhold future business – a practice that some members of the apparel industry have implemented vis-à-vis their suppliers for many years. A company can remind the entity that its reputation will suffer if the company ends its relationship with the entity. For instance, if a bank withdraws its funding from a company or project, this might lead to a public perception that the company or project suffers from significant human rights challenges. A company can also engage in multi-stakeholder initiatives or other collective action, which over time can create general industry expectations for suppliers, clients, and other entities in the value chain.[43] For example, the Voluntary Principles on Security and Human Rights stipulate that extractive companies should require their private security contractors to follow certain practices. Private security contractors now seek to obtain business by advertising their abilities to meet those standards – demonstrating the potential power of a collective approach over time.

B. Remediation and Grievance Mechanisms

The categorization of involvement with human rights impacts also helps determine when a company is expected to provide remediation. When a company identifies that it has caused or contributed to adverse impacts, the UN Guiding Principles indicate that it is expected to provide for, or cooperate in, remediation of the impacts – meaning the provision of remedy to those harmed – through a legitimate process.[44]

A non-judicial grievance mechanism is one – although not the only – mechanism through which a bank can provide remedy for impacts that it causes or to which it contributes.[45] The UN Guiding Principles specifically address grievance mechanisms because they are an important avenue both to provide remedy for adverse human rights impacts and to identify such adverse impacts in the first place so that they are addressed early before they escalate into more serious harm. The UN Guiding Principles stipulate that, in order for grievances to be addressed early on and remedied, all business enterprises should establish or participate in effective operational-level grievance mechanisms for individuals and communities who may be adversely impacted. In order to ensure their effectiveness, non-judicial grievance mechanisms – including operational-level grievance mechanisms – should comply with the effectiveness criteria set out in the Guiding Principles.[46]

Many banks already provide operational-level grievance mechanisms. For instance, many banks have in place complaints mechanisms for employees, customers and clients, and

42. *POSCO Case Final Statement*, Dutch National Contact Point for the OECD Guidelines for Multinational Enterprises, Sept. 18, 2013, available at http://www.oesorichtlijnen.nl/sites/www.oesorichtlijnen.nl/files/final-statement-somo-bothends-apg-abp.pdf. [hereinafter *POSCO Final Statement*].

43. *OHCHR Letter to SOMO, supra* note 2

44. *Guiding Principles, supra* note 2, at Principle 22.

45. *Id.* at Principle 29.

46. *Id.* at Principle 31.

even contractors. These mechanisms might already address certain human rights issues, such as labor and privacy rights, among others.

Under the UN Guiding Principles, a business is not expected to provide remedy for impacts to which it does not cause or contribute but that are instead directly linked to it through its operations, services, or products. Banks might, however, encourage the entity causing the harm to provide remedy, including through a grievance mechanism. By way of analogy, the Dutch pension fund, APG, worked with a coalition of investors to encourage the Korean steelmaker POSCO to adopt a grievance mechanism and address alleged adverse human rights impacts.[47] Exemplifying an alternative approach, multilateral financial agencies sometimes might have Ombudsmen or other grievance mechanisms in place, given the nature of such organizations. The UN Guiding Principles do not clearly point to such practices. Rather, they emphasize that companies should establish or participate in effective grievance mechanisms at their own operational level.

C. Not Just Knowing, but Showing

The UN Guiding Principles call for all companies, including banks, to "know and show" that they respect human rights in practice. They cannot do so unless they conduct human rights due diligence, since this helps them identify whether they are addressing their human rights impacts in a systematic fashion and thus "know." To "show" means being prepared to communicate externally, particularly when concerns are raised by or on behalf of affected stakeholders.[48] This "showing" should help both affected groups and other stakeholders, such as investors, understand the steps that the company is taking to address its human rights impacts. This communication can occur through many fora, ranging from annual reports to stakeholder meetings to one-on-one engagement. Notably, the UN Guiding Principles stipulate that formal reporting is expected when there is a risk of severe human rights impacts.

47. *POSCO Final Statement, supra* note 42.

48. See *Guiding Principles, supra* note 1, at Principle 21.

V. SUMMARY

- The UN Guiding Principles apply to all enterprises in all sectors, including banks. They define the scope of the corporate responsibility to include its own impacts and potentially those arising from its business relationships. In order to respect human rights, companies should: (1) avoid causing adverse human rights impacts; (2) avoid contributing to adverse human rights impacts; and (3) seek to prevent or mitigate impacts that are linked to their operations, products or services through their business relationships.
- Companies implementing the UN Guiding Principles are likely to identify a more diverse set of risks than those that they would have identified through traditional legal or reputational risk analysis. The UN Guiding Principles call on companies to consider potential impacts to the human rights of individuals, which may in some cases overlap with risks to the business. Company policies, screening, monitoring, and corrective actions should cover this broader range of impacts.
- Companies should bear in mind that the UN Guiding Principles were not intended to mirror existing definitions of corporate legal liability for human rights, but rather to help companies address their adverse human rights impacts. The UN Guiding Principles can help manage legal risk because they help identify the company's role in adverse human rights impacts, but they cover a broader range of impacts than those that would lead to legal liability at present. Indeed, the UN Guiding Principles clarify that the corporate responsibility to respect human rights exists in parallel with compliance with national law.
- Although the scope of due diligence is broad, companies can render such due diligence more feasible by prioritizing products, services, operations, and business partners that are likely to have the most severe impacts on human rights, or have impacts that are not remediable. This is highly relevant for banks, since many adverse impacts will be found in their value chain – e.g. be directly linked to their operations, products, or services through their business relationships. Because most banks have a very large number of business relationships, this makes initial scoping particularly important.
- In the frequent instances in which adverse impacts are directly linked to banks through business relationships, they may or may not have significant leverage over the entity causing the impacts, and their ability to convince the entity to prevent such impacts may vary. This does not obviate the need to identify and help prevent or mitigate the risk of such impacts, however. Rather, the level of leverage affects the opportunities the company will have to address the impact effectively.
- The UN Guiding Principles create an expectation that banks, like other companies, will conduct due diligence to identify and address their own impacts, as well as those to which they contribute or to which they are directly linked through business relationships. Trying to determine whether a bank took all reasonable steps to avoid, address, or mitigate human rights impacts will depend on how it is involved with the impact, the severity of the risk or impact, and the extent of the bank's leverage.

CHAPTER 2: HARD LAW RELEVANT TO BANKING AND HUMAN RIGHTS

This chapter addresses the extent to which hard law regulates the behavior of banks with regard to adverse human rights impacts.[49]

It first considers the relevance of international human rights treaties and labor conventions to corporations, including banks. These international human rights instruments impose duties on States, which are expected to enact implementing legislation that can be binding on companies and individuals alike. The chapter also briefly notes the wide array of national laws and regulations that have long regulated corporate behavior with regard to workplace rights, discrimination in lending, and other rights, typically brought as tort claims or under labor law administrative systems. Typically, these regulations are not framed in the language of international human rights, but they are among the most commonly used means of enforcing certain human rights standards in domestic courts. This chapter does not explore these causes of action in depth because they are indeed so myriad, but they nonetheless form a vital framework for the realization of human rights in a domestic setting.[50] To maintain a manageable scope, the chapter primarily explores domestic legal cases brought against banks that use the language of international human rights.

The chapter next reviews the limited jurisprudence of international criminal tribunals that have addressed the potential liability of bank officers for contributing to the commission of international crimes. The chapter also identifies the few civil and criminal cases in which national courts have applied international criminal law to banks or otherwise explored whether banks can be liable for abuses of international human rights. The instances in which civil and criminal cases have been brought against banks or their officers on the explicit grounds that they were involved in adverse human rights impacts are relatively rare. To date, these types of claims against banks have involved instances of gross human rights abuses, such as crimes against humanity, war crimes, genocide, or forced labor.

The chapter then explores the relevance of AML laws and sanctions to human rights and banking. Bank systems intended to prevent money laundering or sanctions violations help identify some – although not all – situations in which banks might otherwise undertake transactions with individuals or governmental entities involved in severe human rights abuses.

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49. International hard law includes international treaties and conventions, as well as customary international law and so-called general principles of law. Soft law is considered to include international declarations, conventions, and arguably standards established by multi-stakeholder initiatives which do not have the force of law, although some soft law "hardens" over time into customary international law, or through incorporation into treaty law. See Gregory C. Shaffer & Mark A. Pollack, *Hard vs. Soft Law: Alternatives, Complements, and Antagonists in International Governance*, 2 B.C.L. Rev. 1147, 712-717 (2011) for a discussion regarding the definitions of hard law and soft law.

50. Additionally, the report does not address the systemic effects of the global banking system. Some commentators have recently expressed concerns regarding the systemic human rights impacts of banks during the 2008 financial crisis. See, e.g., Mary Dowell-Jones & David Kinley, *The Monster Under the Bed: Financial Services and the Ruggie Framework*, in The UN Guiding Principles on Business and Human Rights: Foundations and Implementations, 193-216 (Radu Mares, ed., 2012); Sydney Law School Research Paper No. 11/61. Such impacts, while relevant to banks, are not the chief focus of this report.

Finally, the chapter concludes with a discussion of certain national laws and regulations that require companies generally, and banks specifically, to report on their social and human rights policies, practices, or impacts. These laws indicate that regulators are increasingly interested in the human rights impacts of business. In some instances, civil or criminal penalties might attach if companies fail to report on social or human rights-related risks.

I. INTERNATIONAL HUMAN RIGHTS TREATIES

As observed in Chapter 1, and explored in greater length in Chapter 3, the UN Guiding Principles set forth the expectation that companies should operate with respect for all internationally recognized human rights, which include, at a minimum, the International Bill of Rights and the fundamental rights set forth in the ILO's Declaration on Fundamental Principles and Rights at Work. As the UN Guiding Principles note, other international human rights standards may also be relevant. These instruments and standards serve as the primary benchmark against which the human rights impacts of banks will be assessed.

International human rights law generally does not explicitly provide for the liability or sanctioning of private actors.[51] That said, in order to meet their duty to protect human rights, States typically put into place domestic measures and legislation compatible with their treaty obligations. This includes forbidding third parties from abusing rights and providing access to legal remedies. For example, States have passed anti-discrimination laws that prohibit banks and other businesses from withholding services and employment opportunities from individuals in a discriminatory manner. Committees of international experts who monitor the implementation of these treaties, known collectively as the UN treaty bodies,[52] have further elaborated how States should implement human rights treaties in the context of regulating and influencing the behavior of private actors, including companies.

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51. Some recent treaties now more explicitly consider the potential liability of legal persons, presumably including corporations. It is not generally assumed, however, that this creates direct liability for companies under the treaty. Rather, the relevant UN Treaty Body still envisages that States will meet their duty to protect by creating liability for companies. "Newer treaties, in particular the Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography and the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, seem at a minimum to contemplate liability for business enterprises." *Report of the UN Special Representative of the Secretary-General on Business the issue of human rights and Human Rights transnational corporations and other business enterprises, Addendum: State responsibilities to regulate and adjudicate corporate activities under the United Nations core human rights treaties: an overview of treaty body commentaries*, A/HRC/4/35/Add.1, Feb. 13, 2007, http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G07/108/52/PDF/G0710852.pdf?OpenElement [hereinafter *Report of the UN Special Representative of the Secretary-General on Business the issue of human rights and Human Rights transnational corporations and other business enterprises, Addendum: State responsibilities: an overview of treaty body commentaries*]. For further discussion, see State Responsibilities to Regulate and Adjudicate Corporate Activities under the United Nations' *Core Human Rights Treaties: Individual Report on the Convention on the Rights of the Child*, UN Special Representative on Business and Human Rights, July 2007, available at http://business-humanrights.org/sites/default/files/media/bhr/files/Ruggie-report-Convention-on-Rights-of-Child-Jul-2007.pdf

52. A study issued by the former UN Special Representative on Business and Human Rights explores the conditions that the UN treaty bodies called for States to impose on companies. *Report of the UN Special Representative of the Secretary-General on Business the issue of human rights and Human Rights transnational corporations and other business enterprises, Addendum: State responsibilities: an overview of treaty body commentaries, supra* note 51.

II. NATIONAL LAWS INCLUDING WORKPLACE RIGHTS, NON-DISCRIMINATION, AND CORPORATE CRIMES

National laws have long protected a number of human rights that companies can affect, although such laws often do not explicitly refer to international instruments or human rights. For instance, many countries' national laws have long protected labor rights such as freedom from discrimination (banks have been sued for alleged discrimination in the provision of mortgages and loans) and the right to form trade unions and strike. These national laws often reflect the government's commitment to the ILO's treaties. Governments also regulate health, safety, and the environment through laws and regulations that in some instances reflect international law. Typically, national laws enable suits directly against companies for violations of labor, health, or safety regulations. As a result, companies have long conducted due diligence on and sought to comply with such laws. The UN Guiding Principles suggest that companies also should consider whether those national laws reflect international standards, and seek to meet the latter.

National laws create causes of action against corporations for adverse human rights impacts in other areas as well. For instance, the UK has defined corporate manslaughter, thus protecting the right to life from infringement by corporate actors.[53] Indeed, national laws protect human rights against the adverse impacts of corporate actors in many important ways specific to particular jurisdictions, and it is well beyond the scope of this report to outline them all. As a result, this report focuses primarily on hard law that incorporates the language of human rights and international law, rather than focusing on the extensive web of national law and regulation that requires companies to meet certain human rights standards, but does not use the language of international law.

In certain instances, banks and other private actors may find that national law conflicts with international human rights law, such as in countries in which women are discriminatorily denied property rights, or certain groups are systematically denied employment opportunities. Banks should consider how to meet international standards when national law either falls below them or conflicts with them.

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53. *Corporate Manslaughter and Corporate Homicide Act 2007*, Government of the United Kingdom, available at http://www.legislation.gov.uk/ukpga/2007/19/contents.

III. LIABILITY FOR INTERNATIONAL CRIMES

International criminal law imposes penalties for participation in international crimes. It was one of the first bodies of international law to address severe human rights impacts of businesses, including banks. International crimes include war crimes, crimes against humanity, genocide, and the crime of aggression[54] – a limited subset of internationally recognized human rights.

Following World War II, international criminal tribunals held individual bank officers responsible for aiding and abetting crimes against humanity or war crimes. Also rarely, banks as organizations have faced lawsuits in national courts for the alleged violation of international human rights or humanitarian law. This chapter therefore examines not only international hard law, but also provides examples of how this body of law has led to lawsuits against banks in national legal systems.[55] The claimants in such lawsuits have met with limited success to date.

A. International Criminal Tribunals

Since the end of the Second World War, international criminal courts and tribunals — including the Nuremberg Tribunals, the International Criminal Tribunal for the former Yugoslavia ("ICTY"), the International Criminal Tribunal for Rwanda ("ICTR"), the Special Court for Sierra Leone, and the International Criminal Court ("ICC") — have helped define the scope of liability for international crimes, including when and how third party liability can be attributed.

Although the statutes of modern-day tribunals do not contain provisions on corporate responsibility, nothing in international criminal law inherently precludes corporations from being held liable. However, to date, international prosecutors have only brought cases against the officers of corporations (including banks), rather than the corporations themselves.[56] Moreover, negotiators decided not to permit prosecutions of corporations themselves in the ICC's Rome Statute, so no international venue is currently available. In theory, the Rome Statute could be altered to permit corporate liability. Similarly, the UN Security Council, which creates *ad hoc* international criminal tribunals like the ICTY and ICTR, could allow companies to be held liable in front of a new tribunal.

The best-known international prosecution of corporate officers for involvement in international crimes took place in the context of the Nuremberg Trials after World War II. They are also the only examples where bank officers have been brought before an international criminal tribunal. Three bank officers stood trial for involvement in war crimes, crimes against humanity, spoliation and plunder, forced labor, and genocide.

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54. Crimes against humanity include torture, forced labor, murder, forced disappearance, systematic persecution of a group, and a number of other violations. War crimes encompass but are not limited to intentionally attacking civilians, pillage, conscription of children, forced population transfers, and the unnecessary destruction or seizure of property. Genocide can occur through killing, serious bodily harm, or other measures intended to destroy a group in whole or in part. The Rome Statute provides a list of many violations of international criminal law. *Rome Statute of the International Criminal Court*, UN Doc. A/CONF. 183/9; 37 ILM 1002 (1998); 2187 UNTS 90.

55. This report does not include examples of cases brought under national civil rights or employment law, such as non-discrimination laws, but rather considers those actions that are couched in the terminology of international human rights.

56. Most international crimes do not require state action for liability to attach. Thus, private actors could be held liable even when they were acting independently and not complicit in state action. See Kadic v. Karadzic, 70 F.3d 232, 239 (2d Cir. N.Y. 1995). A robust discussion related to potential corporate liability under the Rome Statute surrounded the establishment of the ICC. Ultimately, the States Parties to the Rome Statute chose to exclude corporate liability, but the very discussion suggests that States Parties could renegotiate this issue in the future and extend the ICC's jurisdiction to include corporations. In 2003, former ICC Chief Prosecutor Luis Moreno Ocampo said he was considering investigating companies for their role in fomenting conflicts such as the one in the Eastern Democratic Republic of the Congo. See *Second Assembly of States Parties to the Rome Statute of the International Criminal Court: Report of the Prosecutor of the ICC, Mr. Luis Moreno-Ocampo,* 4 (Sept. 8, 2003). The ICC does not have jurisdiction over corporations, but could prosecute corporate officers for their business dealings with war criminals. See *Information Regarding the Potential Liability of Business Persons for Atrocity Crimes Under the Rome Statute*, The American Non-Governmental Organizations Coalition for the International Criminal Court (2004).

Certain of the defendants represented state-owned enterprises, arguably making it particularly easy for the tribunal to impute that they had knowledge that they were assisting state crimes.[57] However, national courts have drawn upon the Nuremberg judgments in cases where ordinary commercial banks were involved, suggesting that the jurisprudence may be used in a broader set of cases.

The Nuremberg prosecutors relied on legal theories that are commonly known as "aiding and abetting liability" and "joint enterprise liability" when trying corporate officers.[58] Like other crimes, aiding and abetting liability is defined in terms of a *mens rea* – or mental state – and an *actus reus* – the required wrongful action. Most, but not all, courts and tribunals have held that the *mens rea* requirement is satisfied when the defendant has knowledge of or the specific intent to commit an international crime. The *actus reus* requirement, meanwhile, is typically understood to be "practical assistance, encouragement, or moral support which has a substantial effect on the perpetration of the crime."[59] Such assistance need not be indispensable to the commission of the crime for liability to exist. Indeed, courts have ruled that an act of assistance can have a "substantial effect" even when the underlying crime could have been committed by some other means or with the assistance of some other person.[60]

The Nuremberg Trials demonstrate that bank officials can be tried and sometimes held liable for knowingly receiving, storing, and converting looted goods and funds; providing loans to companies using forced labor; and facilitating the sale of assets plundered during the war at reduced prices — which were considered to constitute the aiding and abetting or other involvement in war crimes, crimes against humanity, spoliation and plunder, forced labor, and genocide.[61]

Although these decisions are sometimes inconsistent in their reasoning, when national or international courts hear cases alleging the complicity of banks or their officers in international crimes or gross human rights abuses, they are very likely to turn to the Nuremberg Trials for guidance and jurisprudence that supports their conclusions, for lack of other precedent. Judges are likely to also draw upon significant developments in international criminal law since the Nuremberg Trials, primarily found in the jurisprudence of the ICTY and the ICTR and, increasingly, in the law and jurisprudence of the ICC. The jurisprudence of these tribunals helps form the current understanding of concepts such as aiding and abetting and joint enterprise liability, as well as superior

57. Two bank officials were tried and convicted in the Ministries Case for assisting international crimes. Nuremberg, Report XIV (United States v. Von Weizsacker ("The Ministries Case"), in *14 Trials of War Criminals Before the Nuremberg Military Tribunals* (1950)). A third bank official was convicted in a separate case. See International Military Tribunal, Judgment of 1 October 1946, in *The Trial of German Major War Criminals. Proceedings of the International Military Tribunal sitting at Nuremberg, Germany*, Part 22 (22nd August, 1946 to 1st October, 1946) at p. 504. Indeed, the extent to which the fact that some of the bank officers worked at state-owned enterprises or had high level government connections affected the outcome of the Nuremberg cases is not clear from the judgments themselves. See, e.g. Sabine Michalowski, *No Complicity for Funding Gross Human Rights Violations?*, 30 Berkeley J. Int'l Law 451 (2012) at 478, noting that it is not evident that the fact that certain defendants worked at state-owned enterprises or had other government connections factored into the tribunal's decision. "There is…no indication in the case law as to the importance, if any, that might have been attached to the fact that Rasche was a private banker while Funk was the president of the Reichsbank, a bank owned and controlled by the state, and an important member of the Nazi government, and Puhl the deputy president of the Reichsbank." *Id.*

58. These concepts were not well developed in international criminal law at the time, leading to judgments with vague reasoning that were sometimes contradictory. Although they are based on thousands of pages of archived evidence, the brevity of the judgments and the sometimes-conflicting conclusions they reach make it challenging for modern-day courts to rely on this jurisprudence as precedent. Indeed, different courts and scholars have reached significantly different understandings as to the implications of the Nuremberg judgments for corporate liability.

59. Prosecutor v. Furundzija, Case no. IT-95-17/1, Trial Chamber Judgment, para. 235 (Dec. 10, 1998).

60. Prosecutor v. Tadic, Case no. IT-94-1-T, Trial Chamber Judgment, para. 688 (May 7, 1997).

61. For an excellent discussion of complicity liability and the Nuremberg Trials, see Michalowski, *supra* note 57.

responsibility.[62] These definitions influence national courts, where cases against corporations or corporate officers for alleged involvement in gross abuses are more likely to be heard.

Other legal developments might affect how courts today treat the Nuremberg jurisprudence. For example, the notion posited in one of the Nuremberg cases that banks cannot be held liable for knowingly providing loans to illicit organizations is no longer good law. Today, statutory bans on money laundering and the strict enforcement of sanctions indicate that persons and companies can indeed be found guilty for conducting ordinary commercial activities with unlawful enterprises.

Overall, the Nuremberg Trials underline the fact that international tribunals can find bank officials liable for knowingly assisting international crimes in rare circumstances. Bank officials were found guilty for their involvement in typical banking activities such as the provision of loans or holding of goods or money. Yet, although such assistance consisted of seemingly ordinary business activities, it involved knowingly conducting business with actors engaged in extraordinary activities – namely, actors committing the worst kinds of atrocities during a conflict.

B. National Court Applications of International Criminal Law

Banks or their officers are far more likely to face allegations that they violated international criminal law in a national court as opposed to an international tribunal, although such cases are still rare for the banking sector. As the UN Special Representative on Business and Human Rights noted:

"[C]orporate responsibility is being shaped through the interplay of two developments: one is the expansion and refinement of individual responsibility by the international *ad hoc* criminal tribunals and the ICC Statute; the other is the extension of responsibility for international crimes to corporations under domestic law. The complex interaction between the two is creating an expanding web of potential corporate liability for international crimes – imposed through national courts."[63]

This section surveys cases in front of national courts that have extended the web of potential corporate liability for violations of international criminal or human rights law and specifically involve banks as opposed to other sectors. Some are criminal cases, while others are civil cases for damages that allege violations of international criminal or human rights law.

In some countries, banks or their officers could theoretically be held liable for aiding and abetting international crimes due, for example, to a nation's ratification of the ICC's Rome Statute. New causes of action were incidentally created in the domestic courts of a number of States Parties due to their incorporation of the Rome Statute into their national law upon ratification, thereby making genocide, crimes against humanity, and war crimes illegal as a matter of domestic law.[64] In most jurisdictions, aiding and abetting liability or similar doctrines enable attribution of guilt to individuals, including corporate officers, who contribute to the commission of crimes. Moreover, in a number of

62. Under the theory of superior responsibility, a superior can be held liable for the crimes of his subordinates if he [or she] is recklessly negligent or has a criminal intent. The International Criminal Tribunal for Rwanda explored this theory as the basis for the liability of the head of a Rwandan parastatal company for genocide and other international crimes. See, e.g., The Prosecutor v. Alfred Musema, Case No. ICTR-96-13-A (January 27, 2000), at paras. 131-133. For a discussion of the theory of command responsibility and related theories such as enterprise liability, see also Valerie Oosterveld and Alejandra C. Flah, *Holding Leaders Liable for Torture by Others: Command Responsibility and Respondeat Superior as Frameworks for Derivative Civil Liability*, Ch. 16, TORTURE AS TORT, ed. Craig Scott (2001).

63. *Business and Human Rights: Mapping International Standards of Responsibility and Accountability*, UN Human Rights Council, UN Doc. A/HRC/4/035, (Feb. 9, 2007), para. 22.

64. For a more fulsome discussion of how Rome Statute ratification created corporate liability for international crimes under national law, see Anita Ramasastry & Robert C. Thompson, *Commerce, Crime and Conflict: Legal Remedies for Private Sector Liability for Grave Breaches of International Law*, FAFO Report (September 2006) available at http://www.fafo.no/pub/rapp/536/536.pdf.

States, corporations themselves can be held liable for crimes. Thus, an incidental effect of the ratification of the Rome Statute was that corporations could suddenly, at least in principle, be prosecuted for involvement in international crimes in certain jurisdictions around the world that ratified the Rome Statute and allow corporate criminal liability.[65]

Although some causes of action against corporations based on the incorporation of the Rome Statute now exist, neither government prosecutors nor private plaintiffs have brought any such cases against banks or any other companies based on the domestic incorporation of the Rome Statute as of the writing of this report.[66] This may in part be due to legal doctrines that make such litigation difficult as a practical matter, such as standing, forum non conveniens, or allocation of attorney's fees to plaintiffs that lose their cases. Whether and how plaintiffs will employ this litigation tactic remains to be seen.

However, banks have faced a handful of cases alleging their complicity in human rights abuses brought under other legal theories in a number of jurisdictions, including Argentina, Spain, and Switzerland.[67] In each of the cases discussed below, the plaintiffs explicitly claimed that the banks in question violated human rights law, although the facts of several of the cases are similar to more traditional money laundering claims.

1. Spain

In Spain, bank officials were joined to the highly publicized human rights case brought against former Chilean dictator Augusto Pinochet.[68] The criminal case, based on a Spanish statute vesting the country's courts with jurisdiction to prosecute human rights violations anywhere in the world, accused Pinochet of involvement in gross human rights abuses as well as corruption in Chile.[69] Private plaintiffs — who can initiate or intervene in criminal cases in Spain[70] — added officers of Riggs Bank to the complaint, claiming that the bank had transferred approximately $8 million of Pinochet's money after a court froze his assets.[71] The directors of Riggs Bank reached a settlement agreement of $8 million with the plaintiffs, which was the first time that an entity or person other than the Chilean government compensated victims of the Pinochet regime.[72]

2. Argentina

In Argentina, several cases have been pending since 2010 against international banks for their alleged complicity in gross human rights abuses carried out by the military

65. All of the cases identified below were brought after the ICC Statute was adopted, but some began before it entered into force, suggesting that in some jurisdictions, relevant causes of action existed before ratification of the Rome Statute. For more regarding causes of action against corporations under domestic law for gross human rights abuses, see Jennifer Zerk, *Corporate Liability for Gross Human Rights Abuses*, Prepared for the OHCHR, available at http://www.ohchr.org/Documents/Issues/Business/DomesticLawRemedies/StudyDomesticeLawRemedies.pdf.

66. In some countries, private citizens can initiate criminal lawsuits, or join civil claims to existing criminal prosecutions, enhancing the likelihood of claims against banks and other corporations for violations of the ICC Statute – as in the Spanish case outlined in this section.

67. In fact, the UN Special Rapporteur on the Situation of Human Rights in the Palestinian Territories Occupied Since 1967 urged NGOs and governments to bring such cases. The Special Rapporteur issued a report in 2012 alleging the complicity of a number of companies, including banks, in pillage of the West Bank through their material support for Israeli settlement there. The Special Rapporteur urged the bringing of cases against companies for such complicity, based on the possibility of applying international criminal law to companies in national courts. See *Report of the UN Special Rapporteur on the Situation of Human Rights in the Palestinian Territories Occupied Since 1967: Human Rights Situation in Palestine and other Occupied Arab Territories*, UN Doc. A/67/379 (Sept. 19, 2012).

68. Terrence O'Hara, *Allbrittons, Riggs to Pay Victims of Pinochet*, Wash. Post, Feb. 26, 2005, at A01.

69. *Id.* The doctrine of universal jurisdiction allows national courts to try cases of the gravest crimes against humanity, even if the crimes are not committed within the national territory. See *Universal Jurisdiction*, Global Policy Forum, available at http://www.globalpolicy.org/international-justice/universal-jurisdiction-6-31.html.

70. In Spain, private parties can initiate or intervene in criminal cases and add complaints to them, either as a private injured party or on behalf of the public interest. *Country Report: Spain, Euro Justice*, available at http://www.euro-justice.com/member_states/spain/country_report/631/.

71. O'Hara, see *supra* note 68.

72. *Id.*

junta that ruled the country in the 1970s and early 1980s.[73] The families of those who disappeared or were tortured under the regime filed cases seeking damages, claiming that the banks provided vital loans that enabled the regime to survive.[74]

For example, in one case,[75] the plaintiff alleged that international banks had approved loans to the Argentine junta knowing that it was sponsoring terrorism and crimes against humanity, and that those loans assisted in the commission of such crimes. In August 2013, the Administrative Court issued a decision holding that federal courts could exercise jurisdiction over the plaintiff's claims, even though the defendant banks were not Argentinian.[76] The Court has yet to decide the merits of the plaintiff's claims against the defendant banks.[77] An additional case related to loans provided to the military is also pending.[78]

Although the outcomes of the Argentinean cases are still to be decided, the cases highlight the fact that banks can face lawsuits for their alleged complicity in gross human rights abuses years after the events occurred.

3. Switzerland

In 2013, an NGO asked the Swiss authorities to launch a criminal investigation against a metal refiner that allegedly knowingly received and processed gold from militias in the eastern Democratic Republic of the Congo.[79] The NGO claimed that the refiner had violated Swiss and international law by assisting the militias in perpetrating human rights abuses, although it is not clear whether the entities that sold gold to the refiner were listed on sanctions lists at the time of the alleged transaction.[80]

The case does not involve a bank, but the allegations are similar to those made against banks for the receipt and conversion of Nazi gold. It serves as an indicator of how banks could be accused of aiding pillage in the modern era were they to receive and launder funds or goods from regimes, militias, or guerilla groups involved in pillage in a conflict zone. As discussed below, banks' existing due diligence systems are likely to help mitigate this risk when employed robustly.

In 2015, the prosecutor decided not to pursue the case due to a lack of evidence that the company was aware of the criminal origin of the gold.[81]

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73. Similarly, the Brazil National Truth Commission has stated that it will investigate the role of banks in supporting the former dictatorship in Brazil. See *Paulo Abrão: Comissão da Verdade deve investigar empresas que financiaram a ditadura*, Viomundo (Oct. 17, 2011), available at http://www.viomundo.com.br/politica/paulo-abraocomissao-da-verdade-deve-investigar-empresas-que-financiaram-a-ditadura.html; see also *Evando Eboli, Prioridade da Comissão da Verdade é localizar desaparecidos*, O Globo (Feb. 03, 2012), available at http://oglobo.globo.com/pais/prioridade-da-comissao-da-verdade-localizar-desaparecidos-4129759.

74. *Argentina, a un Paso de Investigar a Bancos por Creditos a la Dictadura*, Tiempo Argentina Sept. 9, 2013.

75. Garramone v. Citibank, Federal Administrative Law Court (Judiciary) No. 8, Clerkship No. 15 (Oct. 2010).

76. *Id.*

77. *Id.*

78. In *Leandro Manuel Ibanez*, the plaintiff sought preliminary measures from the Ministry of Finance and the Central Bank pursuant to Article 323 of the Federal Civil and Commercial Procedural Code, seeking an order requiring the Ministry and the Central Bank to report the amounts lent by international financial institutions to the military regime between 1976 and 1983. In November 2010, the court denied request for preliminary measures but did not make any ruling regarding the substance of the plaintiff's claims. Leandro Manuel Ibanez, Preliminary Measures No. 95019/09 - Juzgado Nacional de Primera Instancia en lo Civil n° 34 (National Court of First Instance) (Nov. 2010).

79. Kerry A. Dolan, *Swiss Gold Refiner Accused Of Abetting Congo War Via Money Laundering*, Forbes (Nov. 4, 2013), available at http://www.forbes.com/sites/kerryadolan/2013/11/04/swiss-gold-refinery-accused-of-abetting-congo-war-via-money-laundering/.

80. *Id.*

81. *Argor-Heraeus Investigation (re Dem. Rep. of Congo)*, Business and Human Rights Resource Center, available at http://business-humanrights.org/en/argor-heraeus-investigation-re-dem-rep-of-congo.

4. United States

The majority of cases brought against banks for their alleged involvement in human rights abuses have arisen in US courts. This is due to the availability of unique causes of action in the US, as well as a relatively plaintiff-friendly legal system. In the US, litigation regarding the human rights impacts of banks has arisen primarily under the Alien Tort Statute ("ATS"), a law from 1790 that allows civil cases to be brought for violations of the "law of nations" – a concept that a number of US courts have interpreted to include war crimes, crimes against humanity, genocide, and forced labor.[82] The ATS jurisprudence relies in part on the decisions of international courts and tribunals (including the Nuremberg Tribunals) regarding what crimes are cognizable under international law. The ATS permits the imposition of civil liability when violations take place in times of peace as well as conflict if they rise to the level of international crimes. Currently, only a small number of ATS cases have addressed the role of commercial banks in alleged complicity in gross human rights abuses, as discussed below.[83]

The continuing availability of US courts to hear such cases is in some doubt following the US Supreme Court's decision in *Kiobel v. Royal Dutch Petroleum,* 133 S.Ct. 1659 (2013), which required that "where the claims touch and concern the territory of the United States, they must do so with sufficient force to displace the presumption against extraterritorial application."[84] Recent appellate court decisions seem to suggest that it will be difficult, although not impossible, for plaintiffs to demonstrate that their claims "touch and concern the territory of the United States." For example, the Ninth Circuit Court of Appeals affirmed the dismissal of claims filed against Occidental Petroleum and AirScan in *Mujica v. AirScan*.[85] The Ninth Circuit held that plaintiffs' claims did not rebut the presumption against extraterritorial application of ATS, as the plaintiffs' assertions that certain conduct, including the establishment of contracts between the parties, took place in the US was purely speculative.[86] In contrast, in *Mwani, et al. v. Al Qaeda*, the US District Court for the District of Columbia held that the court had jurisdiction under the ATS because the events at issue (the attack on the US Embassy in Nairobi in 1998) "were directed at the United States government, with the intention of harming this country and its citizens."[87] As a result of the increased likelihood of dismissal, litigation might shift to other jurisdictions. Nevertheless, the ATS jurisprudence provides insight into how US courts might address claims in cases against corporations with substantial ties to the US, as well as how courts in other countries might approach such claims in the future.

a. Receipt and Conversion of Stolen or Looted Goods

Among the most significant ATS cases are the three class actions filed in 1996 against banks to recover assets belonging to Holocaust survivors and

82. The "law of nations" is "composed only of those rules that States universally abide by, or accede to, out of a sense of legal obligation and mutual concern." Flores v. S. Peru Copper Corp., 414 F.3d 233, 248 (2d Cir. N.Y. 2003); see also Sosa v. Alvarez-Machain, 542 US 692 (US 2004).

83. Khulumani v. Barclays Nat'l Bank Ltd., 504 F.3d 254 (2d Cir. N.Y. 2007).

84. Kiobel v. Royal Dutch Petroleum, Kiobel v. Royal Dutch Petroleum Co., 133 S.Ct. 1659 (2013).

85. Mujica v. AirScan Inc., 771 F.3d 580 (9th Cir. Nov. 12. 2014).

86. *Id.*

87. Mwani v. Al Qaeda, 2014 US Dist. LEXIS 135599 (D.D.C. Sept. 25, 2014).

Holocaust victims' heirs.[88] The *Holocaust Cases*[89] sought redress from banks that allegedly received and stored the assets of many Jews as the Nazis rose to power, but made it impossible for survivors or their families to recover these assets after the war.[90] The banks were also alleged to have received looted Nazi gold and items produced through forced labor with the knowledge that these items had been obtained pursuant to genocide, wholesale and systematic looting of personal and business property, and slave labor.[91]

The case settled for $1.25 billion[92] amidst a highly politically charged atmosphere. Since the *Holocaust Cases* were settled, no verdict resulted that could establish a binding legal precedent applicable to future cases. Even so, the cases make it clear that plaintiffs will in rare instances take legal action even decades after the fact to seek to hold banks liable for allegedly receiving and holding money or goods obtained through large scale human rights violations.[93]

b. Providing Bank Accounts for Entities Involved in International Crimes

Several other cases address the potential liability of banks for providing bank accounts and related services to entities involved in significant human rights abuses. The legal actions against Arab Bank are of particular interest because of the crimes alleged, the large number of litigants, and the potential for similar litigation. Over 6,500 plaintiffs brought claims for damages against Arab Bank under the Anti-Terrorism Act and the Alien Tort Statute. The plaintiffs alleged that Arab Bank knowingly and intentionally facilitated terrorist attacks carried out by Hamas and other organizations by "soliciting, collecting, transmitting, disbursing and providing the financial resources that allowed those organizations to flourish and to engage in a campaign of terror, genocide, and crimes against humanity in an attempt to eradicate the Israeli presence from the Middle East landscape."[94] A judge imposed discovery sanctions against Arab Bank for failure to comply with a District Court order to produce documents. The sanctions included a jury instruction "permitting the jury to infer that (1) the Bank provided financial services to foreign terrorist organizations, and (2) it did so knowingly and purposefully."[95]

88. The high profile of the cases derives in part from the fact that the US government had launched a major investigation into the role of banks in World War Two, which culminated in the "Eizenstat Reports" in 1997 and 1998. These reports provided substantial factual background on the role of the banks in and shortly after World War II. For more background on the history preceding the Holocaust litigation, see Jeffrey Mickletz, *An Analysis of the $1.25 Billion Settlement Between the Swiss Banks and Holocaust Survivors and Holocaust Victims' Heirs*, 18 Dick. J. Int'l L. 199 ,(1999-2000.). See also Anita Ramasastry, *Secrets and Lies? Swiss Banks and International Human Rights*, 31 Vand. J. Transnat'l L. 325 (1998).

89. The third case rested on similar facts, but did not explicitly rest on a cause of action related to violations of international human rights. The case made claims of conversion and unjust enrichment, and claimed that both unlawful acts resulted from violations of international law and human rights. Amended Complaint, at 39-43, Weisshaus v. Union Bank of Switzerland, No. 96-4849 (E.D.N.Y. July 30, 1997).

90. See In re Holocaust Victim Assets Litig., 105 F. Supp. 2d 139, 141 (E.D.N.Y. 2000).

91. *Id.*

92. *Swiss banks' Holocaust fund paid out $1.24 billion to victims, heirs*, Fox News (July 15, 2013), at http://www.foxnews.com/world/2013/07/15/swiss-banks-holocaust-fund-paid-out-124-bn/.

93. In 1997, a similar case was filed against a number of banks accused of unjust enrichment owing to their receipt of goods looted during Second World War and their subsequent refusal to return the goods to their owners. The court refused to dismiss the claims, but it eventually settled. Bodner v. Banque Paribas, 114 F. Supp.2d 117 (2000). The court rejected a motion by the defendants to dismiss the lawsuit, finding that the plaintiffs had made a cognizable claim under international law for the confiscation and plunder of private property, for aiding and abetting genocide, and for conspiracy to plunder and transact in plundered property. The case was ultimately settled in 2001. *Id.*

94. Linde v. Arab Bank, PLC, 269 F.R.D. 186 (E.D.N.Y. July 12, 2010).

95. *Id.*

On September 22, 2014, a federal jury found Arab Bank liable for knowingly supporting terrorist activities during the second Palestinian uprising.[96] Three days before a jury trial to assess damages was to take place, the bank settled the case for an undisclosed figure.[97] On December 8, 2015, the Second Circuit dismissed the ATS claims because in that circuit, case law holds that the ATS does not provide for corporate liability.[98]

c. Providing General Loans to Entities Involved in International Crimes

Finally, in *In re South African Apartheid Litigation*, twenty multinational companies, including two banks, were accused of complicity in the South African government's policy of apartheid and other international crimes, such as forced denationalization and cruel, inhuman, and degrading treatment, based on their conduct of business in apartheid-era South Africa.[99] The plaintiffs claimed[100] that the banks aided and abetted violations of the laws of nations by financially supporting the apartheid regime and its security forces by purchasing bonds and lending to these entities.[101]

The District Court sought to avoid imposing liability on companies for merely conducting ordinary business in the country.[102] To that end, the court forged new ground in defining liability based on complicity. The court noted that assistance need not be "necessary" for the crime to occur in order for it to have a substantial effect, and thus meet the *actus reus* requirement. The Court then created a new standard, requiring that: (1) commercial goods or services must be specifically tailored to assist in violations of international law in order to meet the required *actus reus*; and (2) those goods or services must be one of the direct means through which the violation was perpetrated.[103]

The District Court dismissed the claims against the banks for lending to the apartheid government since "supplying a violator of the law of nations with funds – even funds that could not have been obtained but for those

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96. Linde v. Arab Bank, PLC, 1:04 cv 02799 (E.D.N.Y. Sept. 22, 2014) (verdict form).

97. *Arab Bank Reaches Settlement in Suit Accusing It of Financing Terrorism,* New York Times, (Aug. 14, 2015), available at http://www.nytimes.com/2015/08/15/nyregion/arab-bank-reaches-settlement-in-suit-accusing-it-of-financing-terrorism.html?_r=0. Similar cases seeking to hold banks liable for handling funds used in terrorist acts are pending in US courts. See, e.g., Freeman et al v. HSBC Holdings PLC et al, 1:14-cv-06601 (E.D.N.Y. Nov. 10, 2014). For more information, see also The Big Bet to Hold Banks Liable for Terrorism, Bloomberg Businessweek (Feb. 19, 2015), available at http://www.bloomberg.com/news/articles/2015-02-19/are-credit-suisse-rbs-standard-chartered-hsbc-and-barclays-terrorist-banks-.

98. In re Arab Bank, PLC Alien Tort Statute Litig., No. 13-3605, 2015 U.S. App. LEXIS 21242 (2d Cir. N.Y. Dec. 8, 2015

99. Khulumani v. Barclays Nat'l Bank Ltd., 504 F.3d 254, 258 (2d Cir. N.Y. 2007).

100. See *id.* dissent by Justice Korman for a discussion of plaintiff's claims, at 293-94.

101. The District Court initially granted motions by the defendants to dismiss the case, but the US Court of Appeals reversed the District Court and reinstated the case Khulumani v. Barclays Nat'l Bank Ltd, supra note 99. The US Supreme Court initially agreed to hear an appeal but was unable to muster the required quorum to hear the case due to the number of justices with conflicts of interest. Am. Isuzu Motors, Inc. v. Ntsebeza, 553 US 1028 (2008). The case then returned to the District Court, which dismissed the claims against Barclays Bank and indeed all but five of the defendant companies. In re S. African Apartheid Litig., 617 F. Supp. 2d 228 (S.D.N.Y. 2009). The District Court ultimately dismissed claims against all 20 defendants in August 2013, finding that the facts of the case did not overcome the presumption against extraterritorial application that the Kiobel case established. Ntsebeza v. Ford Motor Co. (In re South African Apartheid Litig.), 2014 US Dist. LEXIS 121005 (S.D.N.Y Aug. 28, 2014).

102. Focusing on the *actus reus*, the Court began its analysis by stating that "[i]t is (or should be) undisputed that simply doing business with a state or individual who violates the law of nations is insufficient to create liability under customary international law." In re S. African Apartheid Litig, *supra* note 101 at 257.

103. *Id.* at 264-65. The court found several examples of goods and services that met this new test for the *actus reus*. For example, the court refused to dismiss the claims against automotive manufacturers that created custom vehicles for the security services that were used to carry out human rights abuses. The court also determined that the development of specialized computers and software that produced identity documents and thus helped denationalize black South Africans met the *actus reus* requirement. *Id.* In contrast, the court found that providing specialized computers that helped the security forces target individuals did not meet the *actus reus* requirement because the computers were not the direct means by which the cruel, inhuman, or degrading treatment was perpetrated. *Id.* at 269.

loans – is not sufficiently connected to the primary violation to fulfill the *actus reus* requirement of aiding and abetting a violation of the law of nations."[104] In so concluding, the Court relied heavily upon the dictum from one of the Nuremberg judgments that held that liability for war crimes and crimes against humanity could not attach simply due to loans or the sale of commodities to unlawful enterprises,[105] without considering several other Nuremberg judgments that are more nuanced in their analysis of this point.

The *In re South African Apartheid Litigation* District Court decision reflects the ongoing struggle of courts, dating back to Nuremberg, to define aiding and abetting liability for the provision of routine services such as general loans. The case also grapples with the fact that money or bank accounts are highly unlikely to be the physical instrument through which human rights abuses are committed, with the possible exception of the holding or conversion of plundered goods. It is too early to know whether other courts will adopt the reasoning of this case.

Indeed, it is likely that courts will continue to struggle with how to differentiate between banking services that have a minimal effect on the ability of a perpetrator to commit an international crime, versus those that significantly enable it – subjecting banks and other service industries to unpredictable outcomes.

IV. THE HUMAN RIGHTS RELEVANCE OF ANTI-MONEY LAUNDERING AND SANCTIONS REGIMES

International law indirectly addresses some human rights impacts of banks through AML conventions and international sanctions, which are implemented through national law. This occurs through several avenues.

Global AML efforts are defined through a web of international hard law, soft law, and national law. The most important international legal instruments addressing AML include the UN Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (1988), the UN Convention for the Suppression of the Financing of Terrorism (1999), the UN Convention Against Transnational Crime (2000), and the UN Convention Against Corruption (2003). Groups such as the Financial Action Task Force ("FATF") – established by governments to develop guidance regarding money laundering – have promulgated influential soft law guidance. National laws and regional approaches help translate these UN instruments and soft law guidance into national law.[106] For example, at the European level, the European Parliament recently backed stronger rules to combat money laundering and terrorism financing, by approving the Fourth European Anti-Money Laundering Directive[107]; the Directive, which entered into force in June 2015, is accompanied by the EU Regulation on information on the payer accompanying transfers of funds, aiming to make fund transfers more transparent.[108]

In an effort to prevent transnational organized crime, international AML instruments forbid financial institutions from accepting funds that are obtained through criminal

104. *Id.* at 269.

105. *Id.* at 258.

106. For a summary of key international legal instruments and soft law guidance, see *An Overview of the UN Conventions and the International Standards Concerning Anti-Money Laundering Legislation*, UN Off. On Drugs and Crime, Feb. 2004.

107. *European Parliament backs stronger rules to combat money laundering and terrorism financing*, European Commission Press Release, May 2,2015, available at http://europa.eu/rapid/press-release_IP-15-5001_en.htm.

108. *Legislative Proposals on Financial Crime,* European Commission, available at http://ec.europa.eu/justice/civil/financial-crime/applying-legislation/index_en.htm.

activity.[109] The primary targets of such restrictions are organized criminal syndicates and terrorist groups. Due to the linkages that terrorist groups and organized crime often have to human rights abuses, such AML requirements help diminish the risk that banks will transact with entities involved in human rights abuses.

AML laws can also restrict the ability of banks to accept deposits of funds or other valuables from rogue regimes or armed groups because such items have often been acquired in violation of law. Domestic AML laws typically prohibit criminals from profiting from certain defined crimes, which in some instances include crimes such as murder that would constitute human rights abuses.[110] As a result, assisting in the receipt or transfer of funds obtained through certain crimes that are also human rights abuses constitutes money laundering. Few countries have brought money laundering charges on the explicit basis of receiving or transferring funds of those involved in human rights abuses (or murder or other crimes that might be human rights abuses), but it is in principle possible in some jurisdictions.

Although AML compliance incidentally helps limit transactions with entities involved in human rights abuses, this is neither the primary purpose of AML laws nor usually the objective of prosecutors identifying money laundering cases to pursue. As a result, compliance with AML laws is helpful but not necessarily sufficient to prevent banks from incidentally assisting human rights abusers through the provision of financial services.

International and domestic sanctions also target certain regimes and armed groups associated with gross human rights abuses, in some cases because they are linked to terrorism or international crime, but sometimes due to conflicts directly causing human rights abuses. For instance, the UN Security Council can issue sanctions against actors that threaten international peace and security.[111]

Generally, banks are expected to put into place Know Your Customer due diligence systems to comply with AML law and sanctions. Know Your Customer due diligence identifies whether potential customers are linked to international crime or terrorism and enables banks to avoid transacting with them and thus avoid violations of AML laws or sanctions. To comply with international and national law, banks develop comprehensive processes to review their customers, including reviewing lists provided by governments of corrupt officials as well as of entities and persons involved in international organized crime.[112] Banks often apply particular scrutiny to accounts that belong to individuals or that receive funds from countries known for inadequate AML protections or corruption. Typically, banks also apply heightened due diligence to government officials, politicians, and their families. Banks are expected to report suspicious activities to their national regulator and, in some instances, are exempt from liability if they do so.[113]

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109. Some national regimes define more specifically which criminal offenses can lead to the generation of funds that would be considered laundered. For further discussion, see Charles Doyle, *Money Laundering: An Overview of 18 U.S.C. 1956 and Related Federal Criminal Law*, Congressional Research Service, Feb. 8, 2012, available at https://www.fas.org/sgp/crs/misc/RL33315.pdf. Other governments provide more general definitions that could be interpreted to include criminal activities that are human rights violations. For the latter, see the United Kingdom's *Proceeds of Crimes Act* (2002 (c.29)), Section 7, available at http://www.legislation.gov.uk/ukpga/2002/29/part/7/crossheading/offences.

110. For example, murder is often a predicate offense – meaning it is an offense that could lead to liability under money laundering laws in certain circumstances. Murder of course can be a human rights abuse, although it is not usually described using a human rights-based terminology.

111. *Security Council Sanctions Committees: an overview,* UN Security Council, available at http://www.un.org/sc/committees/index.shtml.

112. AML encompasses corruption because bribery or theft of public funds are typically predicate offenses for money laundering charges. *Money Laundering, CleanGovBiz Toolkit,* OECD, available at http://www.oecd.org/cleangovbiz/toolkit/moneylaundering.htm.

113. Indeed, the UNODC/IMF Model Legislation on Money Laundering and Financing of Terrorism specifically recommends such an exemption. *Model Legislation on Money Laundering and Financing of Terrorism*: UN Office on Drugs and Crime & International Monetary Fund, (Dec. 1, 2005), Ch. 3, available at http://www.unodc.org/documents/money-laundering/2005%20UNODC%20and%20IMF%20Model%20Legislation.pdf.

Robust AML due diligence programs conforming to industry best practices may help banks identify and avoid conducting business with human rights abusers. There are at least two reasons why this is so, although banks should take note that AML due diligence is probably not sufficient on its own to comprehensively identify such risks. First, many countries that are highly corrupt also experience significant human rights abuses.[114] Due to this correlation, AML due diligence can help banks avoid doing business with officials that are both corrupt and involved in human rights abuses. Second, many armed groups engaged in gross human rights abuses are also involved in drug trafficking or other organized criminal activities to finance their activities. AML due diligence helps banks identify and avoid conducting business with such armed groups.

International and national sanctions regimes also limit the likelihood that banks would engage in transactions with gross human rights abusers. The UN Security Council imposes sanctions against some countries in conflict through its powers under Chapter VII of the UN Charter. The sanctions that the Security Council can impose range from travel bans and arms embargoes to restrictions on trade and economic transactions. The Security Council sometimes specifically prohibits certain transactions with named persons and entities in countries subject to sanctions. National governments then translate these sanctions into their domestic law, sometimes broadening their scope by adding individuals or entities to their lists, or prohibiting additional transactions with those regimes.

Measures forbidding all financial transactions with a country are among the most restrictive forms of sanctions, as such measures effectively prevent the sanctioned country from conducting business with most external actors. Such broad and severe sanctions are rarely authorized by the UN but can be an important instrument in a country's foreign policy toolkit.[115] In other instances, banks are forbidden from carrying out business with specified individuals or entities, sometimes including those involved in armed conflicts and human rights abuses related to such conflicts.[116] Banks play a key role in ensuring the success of financial sanctions, and bank compliance with sanctions measures can help to protect banks from the risk that they will be linked to human rights abuses by entities that have been targeted by sanctions.

Yet such sanctions prohibitions on conducting business with countries or specific individuals or entities certainly do not capture all of the places around the world where gross human rights abuses are occurring. The UN keeps no list of all ongoing international and internal conflicts, although some are identified when the UN imposes sanctions or sends peacekeepers. Were a bank to define zones of conflict — and thus the risk of lending to actors involved in severe human rights abuses — based only on such parameters, the list would be under-inclusive.

Indeed, some state- and non-state actors engaged in severe human rights abuses might not appear on sanctions or AML lists. Such actors might operate in countries that are not currently on sanctions lists, meaning that such actors are less likely to be identified and sanctioned for their roles in conflicts. Additionally, they might not be involved in transnational crime or corruption, or at least have escaped detection.

In sum, sanctions lists are under-inclusive for the purposes of banks seeking to avoid transactions with individuals and entities engaged in serious human rights abuses. AML

114. The worst performers on Transparency International's annual *Corruption Perceptions Index* ("CPI") almost inevitably include the governments that most severely abuse human rights. See *Corruption Perceptions Index 2013*, Transparency International, available at http://www.transparency.org/cpi2013/results, for complete rankings. Banks' efforts to comply with anti-corruption laws also, indirectly, help them avoid transactions with some human rights abusers. Thus, compliance not only with AML laws, but also with the Foreign Corrupt Practices Act, limits to some degree the likelihood that banks would provide services to government officials involved in human rights abuses.

115. For instance, in 2003 the US imposed sanctions that forbade financial transactions with Burma (Myanmar), effectively blocking virtually all Western companies from conducting business activities with Burma. Exec. Order. No. 13310, 68 Fed. Reg. 44853 (July 28, 2003).

116. Governments also include on their sanctions lists individuals and entities involved in terrorism, drug trafficking, and other transnational crime.

and sanctions based due diligence help limit the number and range of transactions that banks might conduct with gross human rights abusers, but such processes probably do not capture all individuals and entities involved in such abuses, since they are not expressly intended to do so. As a result, banks could possibly be subject to liability even if they carefully follow AML and sanctions requirements. For instance, banks might not identify transactions with a customer depositing the proceeds of gross human rights abuses – such as forced labor or gold looted from a conflict zone — when that individual or entity does not appear on AML or sanctions lists. Business dealings with such an entity could lead to allegations that the bank aided and abetted a known human rights abuser by laundering its funds, particularly if the bank "should have known" about the human rights record of the individual or entity in question.

Banks therefore might consider creating due diligence procedures that are specifically designed to identify human rights risk factors in order to avoid this potential for liability. Existing due diligence and compliance procedures might be leveraged in this regard, but the fact remains that specific consideration needs to be given to human rights risk factors if the due diligence is to be effective.[117] The extent to which these forms of due diligence capture individuals and entities involved in serious human rights violations requires further study to assess when banks should conduct additional, human rights-specific due diligence – a process that some banks have begun.[118]

V. NATIONAL REPORTING FRAMEWORKS, DIRECTORS' DUTIES, AND POTENTIAL LIABILITIES

Relatively few laws or regulations at the national level directly address the nexus between banking and human rights, although the number is increasing. Certain countries require companies or, more specifically, banks to report on their social and/or human rights policies and impacts. These reporting requirements demonstrate a growing regulatory interest in the social impacts of companies, including the banking sector, complementing voluntary reporting mechanisms such as the Global Reporting Initiative[119] and the more recent UN Guiding Principles Reporting Framework.[120] Such requirements are found in Africa, Asia, Latin America, Europe, and North America. Corporate law in at least one country requires that directors pay due care to human rights issues.

This section identifies such standards in each region of the world, although the examples are not exhaustive. It also considers potential liabilities that banks or their officers might face. These include both those arising from a failure to report, as well as the potential liability of directors for failing to take into account human rights or social impacts.

117. Plaintiffs or prosecutors could also argue that the bank violated AML laws because it should have suspected that the entity was involved in criminal activities, which in some instances would include human rights abuses described as a domestic crime, such as murder. Plaintiffs could only bring such criminal charges in countries that allow private citizens to bring such claims. The success of AML allegations would depend on whether a national jurisdiction limited the predicate offenses for money laundering, or rather simply applied AML measures to the proceeds of all criminal activities. Some jurisdictions are also less likely to impose liability when banks can demonstrate that they conducted adequate due diligence.

118. One bank interviewed for the report identified gaps from a human rights perspective in its AML and sanctions compliance, and added additional factors to close those gaps when developing its list of "no-go" countries, high-risk countries, and so forth.

119. The Global Reporting Initiative is an international independent organization that helps businesses, governments and other organizations understand and communicate the impact of business on critical issues, including human rights. More information is available at https://www.globalreporting.org/information/a.

120. *UN Guiding Principles Reporting Framework*, Shift and Mazars, available at http://www.ungpreporting.org/. See also *Human Rights Reporting and Assurance Framework Initiative*, Shift, available at http://www.shiftproject.org/project/human-rights-reporting-and-assurance-frameworks-initiative-rafi.

A. Regulations Addressing Social and Environmental Reporting

In April 2014, the Central Bank of Brazil issued a resolution requiring banks to describe how they consider environmental and social risk in their risk management processes.[121] The resolution states that banks should have in place an Environmental and Social Responsibility Policy that contains guidelines describing how banks consider social and environmental issues in their actions and in their stakeholder relations. The policies are expected to be: 1) proportional to the nature of the financial institution and the complexity of its activities, services, and products; and 2) relevant because they consider the degree of exposure to environmental and social risk arising from the particular institution's activities and operations. This approach allows for variation depending on the bank's activities. The resolution is the result of an extensive stakeholder engagement process that began in 2011.

A similar set of principles is currently under discussion in Peru. In response to the frequent outbreaks of social unrest that have plagued many large economic projects in that country, the Peruvian Superintendent of Banks, Insurers, and Private Pension Funds is currently preparing a set of draft regulations that would require banks to evaluate the social and environmental risks associated with financing large projects, including the quality of company-community relationships in higher-risk projects.[122]

In July 2012, the Nigerian Bankers' Committee – a group of representatives from the leading Nigerian commercial banks –- adopted the Nigerian Sustainable Banking Principles.[123] These Principles, which encompass commitments to both environmental sustainability and respect for human rights, were given force of law in September 2012 when the Nigerian Central Bank directed all financial institutions to adopt and implement them.[124] Among other items, the nine Principles require banks to respect human rights in their business activities, to promote financial inclusion and women's economic empowerment, and to integrate environmental and social considerations into all bank decision-making processes. Banks are required to measure and report their progress toward implementing the Principles on a regular basis.

In Japan, the Government implemented in 2011 a set of voluntarily enforced guidelines entitled *Principles for Financial Action towards a Sustainable Society*.[125] These principles, which apply to all Japanese financial institutions, provide for a specific standard for financial institutions to follow with regard to various issues that affect human rights. These issues include matters such as the disclosure of corporate information, environmental and social risks, and supporting small and medium enterprises, as well as steps taken to maintain Japan's environmental performance and disaster readiness. Specifically, there are seven guidelines that provide general goals towards which Japanese financial institutions should strive. These include items such as contributing "towards shaping a sustainable society," forming "a sustainable global society" and raising "awareness of environmental and societal issues."[126] The financial institutions are expected to develop guidelines to meet these goals.

121. See, e.g., Stability and *Sustainability in Banking Reform*, UNEPFI and University of Cambridge Institute for Sustainability Leadership, p. 18, available at http://www.unepfi.org/fileadmin/documents/StabilitySustainability.pdf.

122. *Advising the Peruvian Financial Regulator on Improved Corporate Management of Social Conflict*, Shift, available at http://www.shiftproject.org/project/advising-peruvian-financial-regulator-improved-corporate-management-social-conflict.

123. Central Bank of Nigeria, *Circular to All banks, Discount Houses and Development Finance Institutes*, FPR/DIR/CIR/GEN/01/33 (Sept. 24, 2012), available at http://www.cenbank.org/out/2012/ccd/circular-nsbp.pdf.

124. *Id.*

125. Japanese Ministry of the Environment, *Principles for Financial Action towards a Sustainable Society*, available at http://www.env.go.jp/en/policy/finance/principles/financial_action.pdf.

126. *Id.*

B. Regulations Addressing Companies Generally, Including Banks

A number of European countries make it mandatory for companies to report on their approach to human rights.[127] For example, in 2001, the French Government adopted a then-pioneering Law on New Economic Regulations ("NRE Act") requiring that listed companies disclose information in their annual report about measures they undertake to address the environmental and social impacts of their activities. Several years later, and building on the results of a lengthy stakeholder consultation process, the French Parliament adopted the Grenelle Acts (2010 and 2011), which made the production of an annual report on CSR matters mandatory for all large companies with activities in France, including those that are not listed.[128] In 2012, the French government published an implementation decree.[129] It widened the array of companies required to submit reports to those with over 500 employees. It also broadened the categories of information on which companies must report to 40 subjects, including human rights obligations.[130] If the report does not include such specified information, any interested person may request a presiding judge acting in summary proceedings to order the board of directors or the executive board, as appropriate, to provide this information or to fine them. Where an application for this action is granted, the directors or members of the executive board are expected to pay the fine and the cost of the proceedings. Other causes of action are also available.[131]

Under a 2013 amendment to the UK Companies Act 2006, listed companies are expected to issue an annual strategic report that encompasses social, community, and human rights issues, including information about any policies of the company in relation to those matters and the effectiveness of those policies, to the extent necessary for an understanding of the company's business.[132] The UK Financial Reporting Council issued guidance noting that the strategic report must include such information if it is of a nature and magnitude that is relevant to shareholders.[133]

Company directors in the UK may face civil or even criminal liability for failure to disclose information related to human rights. All strategic reports must be approved

127. Norway and Denmark also require companies to report on their approaches to human rights. In Norway, under a 2013 amendment to the Accounting Act, large companies must disclose information on the integration of a number of considerations, including for human rights, labor rights and social issues in their business strategies, daily operations, and their relations with their stakeholders. *Accounting Act*, Government of Norway, Section 3.3, effective June 2013. In Denmark, the Danish Financial Statements Act was amended in 2012 to require Danish companies to report on human rights policies and how these are translated into action, or state that the company will not take such steps. For more information, see *Legislation*, Government of Denmark, available at http://csrgov.dk/legislation.

128. Loi 2010-788 du 12 juillet 2010 portant engagement national pour l'environnement, art. 225, Government of France.

129. Décret 2012-557 du 24 avril 2012 relatif aux obligations de transparence des entreprises en matière sociale et environnementale, Government of France.

130. *Extra financial reporting made mandatory for large companies in a view of a standardization of European standards*, France Diplomatie, available at http://www.diplomatie.gouv.fr/en/french-foreign-policy-1/economic-diplomacy/corporate-social-responsibility/france-s-domestic-csr-policy/article/extra-financial-reporting-made.

131. Article L. 225-102-1 of the French Commercial Code provides that the last two paragraphs of Article L. 225-102 of the Commercial Code apply to the reporting of environmental and social information. Article L. 225-102 establishes that when the annual report does not include such specified information, any interested person may request a presiding judge acting in summary proceedings, to order the Board of Directors or the Executive Board, as appropriate, to provide this information or to fine them. Where an application for this action is granted, the fine and the cost of the proceedings are payable by the directors or members of the executive board, as applicable. The French Commercial Code also provides for civil or criminal liability due to various misrepresentations and omissions in such reporting. See Article L 22-251 of the Commercial Code for civil penalties and Article L 465-1 for information on criminal penalties.

132. The Companies Act 2006, Government of the United Kingdom, Section 414C (7), as amended by the Strategic Report Regulations.

133. See, e.g. Anna Triponel and Caroline Rees, *The Rising Tide of Human Rights Reporting Requirements*, Shift , available at http://www.shiftproject.org/article/rising-tide-human-rights-reporting-requirements. "The FRC, however, recommends that companies include human rights-related information 'if its omission from or misrepresentation in the strategic report might reasonably be expected to influence the economic decisions shareholders make on the basis of the annual report as a whole.' It notes that materiality is based on the nature or magnitude (or both) of the actual or potential effect of the matter in question." *Id.*

by the board of directors. A director will be considered to have committed an offense if a strategic report is approved but the director knew that it did not comply with the content requirements, or was reckless as to whether it complied, and failed to take reasonable steps to secure compliance with those requirements or to prevent the report from being approved.[134] The director must compensate the company for any losses that were incurred as a result.[135] The director will only be liable if "(a) he knew the statement to be untrue or misleading or was reckless as to whether it was untrue or misleading, or (b) he knew the omission to be dishonest concealment of a material fact."[136] If a director is found to have committed an offense due to inaccuracies in the company's disclosure to auditors regarding the contents of the directors' report, a director can be liable for a fine or imprisonment up to two years.[137] To date, at least one human rights-related case has been brought against a company under the provisions of the Company Act, in which petitioners unsuccessfully requested that the UK High Court review the investment decision of a bank partially owned by the state, due to the social and environmental impacts of the bank's client.[138]

Building on these national legal developments, the European Parliament voted in April 2014 to require most companies with over 500 employees listed on a European stock exchange to publish an annual report regarding their environmental, social, employee, human rights, anti-corruption, and anti-bribery policies.[139] Companies must explain their due diligence procedures pertaining to these matters and state the material risks that the company's products, services, and business relationships pose in each of these areas. The new measure was adopted in April 2014, and companies are expected to report for fiscal year 2017.[140]

In South Africa, the third report on corporate governance (King III), which became effective in March 2010, recommended that companies integrate sustainability reporting and disclosure with financial reporting. In particular, companies are to assess their impact on the economic life of the community and how they intended to enhance those positive aspects and eradicate or ameliorate the negative impacts. Strong emphasis has been placed on the notion of sustainability, and the core requirement for integrated reporting of financial issues of social, economic and environmental impacts.[141] The report also recommended that all entities disclose which principles and/or practices they decided not to apply and explain why.[142]

Chinese law contains requirements related to corporate social and environmental disclosure.[143] In 2008, the Shanghai Stock Exchange released the "Guide on Environmental Information Disclosure for Companies Listed on the Shanghai Stock Exchange" and the "Notice on Strengthening Social Responsibility of Listed Companies."[144] Under

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134. Companies Act 2006, supra note 132, Sections 414 D(2) and (3).

135. *Id.* The director must compensate the company for "(a) any untrue or misleading statement in a report to which this section applies, or (b) the omission from a report to which this section applies of anything required to be included in it."

136. *Id.*

137. *Id.* at Section 418.

138. Sarah A. Altschuller, Amy K. Lehr, Suzanne A. Spears, *Corporate Social Responsibility*, 44 Int'l Law. 213 2010, at 215. See also Terry Macalister, *Treasury Taken to Court for RBS Loans to Vedanta Resources*, The Guardian (Oct. 18, 2009), available at http://www.guardian.co.uk/business/2009/oct/18/rbs-vedanta-loan-court-case.

139. *European Union Moves Closer to Mandatory Social and Environmental Reporting*, Foley Hoag LLP, available at http://www.csrandthelaw.com/2014/04/25/european-union-moves-closer-to-mandatory-social-and-environmental-reporting/.

140. *Disclosure of non-financial information: Europe's largest companies to be more transparent on social and environmental issues*, European Commission, Sept. 29, 2014, available at http://europa.eu/rapid/press-release_STATEMENT-14-291_en.htm

141. *Corporate Governance & King 3* (2009), KPMG, p 2.

142. *Draft Code of Governance - Principles for South Africa* - 2009, King Committee on Governance, Feb. 25, 2009, p.19.

143. Li-Wen Lin, *Corporate Social Responsibility in China: Window Dressing or Structural Change*, 29 Berkeley J. Int'l Law 64, 75 (2010).

144. *Id.* at 76.

these regulations, companies in the financial sector and companies that list shares overseas are required to disclose environmental information and all companies are encouraged to include information related to corporate social responsibility in their annual financial reports.[145] Moreover, in 2008, the Shanghai Stock Exchange mandated that certain listed companies issue CSR reports.[146] It is unclear what legal ramifications, if any, would result in a failure to disclose.[147]

India's National Voluntary Guidelines ("NVGs") create an expectation that companies operating in India will respect human rights, including through their management systems. The NVGs framework calls for companies to report on their human rights policy, as well as complaints filed against them regarding human rights violations.[148] The NVGs framework is voluntary for many companies. In 2011, however, the Securities and Exchange Board of India passed a resolution requiring the 100 largest listed companies to report in a framework based on the NVGs as part of their annual reporting.[149]

C. Directors' Duties

The UK 2006 Companies Act is perhaps the most noteworthy law that addresses the relationship between directors and a company's social impact. In addition to the reporting obligations described above, the Act created a duty for directors of a company to pay due regard to "the impact of the company's operations on the community and the environment."[150] The law is often considered to have clarified existing directors' duties by explicitly acknowledging that social factors can affect shareholder value and the success of the company.[151] Commentators suggest that directors who pay appropriate attention to impacts on the community and environment will have met their duty.[152] They also note that, in order for directors to pay appropriate attention to such issues, the company arguably must have in place management systems that elevate significant social impacts and risks to the board level.[153]

Directors' duties in the US provide an example of a more ambiguous approach. In the US, boards have no specific legal obligations with regard to the social and environmental impacts of company operations. However, the board has a general role in overseeing risk management, which arguably could include monitoring whether the adverse social or environmental impacts of a company's activities pose significant legal or reputational risks to the company.[154] Shareholders who feel that a board of directors has breached its fiduciary duties have a right to file a derivative action on behalf of the company against the board, although cases related to human rights are extremely rare to date.[155] As long as directors actually exercise their judgment through a process of assessing and responding to material issues facing the company, US courts will generally presume

145. Li-Wen Lin, *Corporate Social and Environmental Disclosure in Emerging Securities Markets*, 35 N.C.J. Int'l L. & Com. Reg. 101, 123 (2009).

146. Li-Wen Lin, supra note 143, at 77.

147. *Id.* at 96.

148. *NVGs: Business Responsibility Report: Suggested Framework*, Ministry of Corporate Affairs, Government of India, p. 38, available at http://www.mca.gov.in/Ministry/latestnews/National_Voluntary_Guidelines_2011_12jul2011.pdf.

149. *Preparedness of Indian Public Equities for Business Sustainability (Environmental, Social and Governance) Disclosure and Reporting*, cKinetics, December 2011, p. 1, 10, available at http://www.ckinetics.com/publications/Preparedness_of_India_inc_for_NVG.pdf.

150. Companies Act 2006, *supra* note 132, at Section 172(1)(d).

151. Gordon L. Clark and Eric R.W. Knight, *Implications of the UK Companies Act 2006 for Institutional Investors and the Market for Corporate Social Responsibility*, 11 U. Pa. J. Bus. L. 259 2008-2009, at 278.

152. David Chivers, QC, *The Companies Act 2006: Directors' Duties Guidance, Corporate Responsibility Coalition*, p. 7, available at corporate-responsibility.org/wp-content/.../directors_guidance_final.pdf.

153. *Id.* at 7.

154. For a discussion of whether US director's duties require consideration of social and human rights risk, see Bloomberg BNA Corporate Practice Portfolio Series No. 93, Corporate Social Responsibility (Oct. 2013). See also Virginia Harper Ho, 52 Colum. J. Transnat'l L. 113 2013-2014, at 147.

155. Shareholders filed several derivative suits against the officers and directors of Chiquita Brands International after the company's public admission in 2007 that it had provided payments to the United Self-Defense Forces of Colombia, a paramilitary group. See Stipulation and Agreement of Settlement, In re Chiquita Brands Int'l Inc. Alien Tort Statute and S'holder Derivative Litig., 792 F. Supp. 2d 1301 (S.D. Fla. 2010) (No. 08-1916).

that boards of directors have exercised their obligations, in an informed and prudent manner, which in turn protects them under the business judgment rule.[156]

VI. SUMMARY

- National law has long regulated banks and other corporate actors with regard to a number of human rights issues, although these laws are typically not couched in human rights terms. For example, national laws protect labor rights and the health and safety of workers, prohibit discrimination in the provisions of services, and provide penalties for corporate manslaughter.
- In the aftermath of World War II, several cases were brought in international fora against bank officers for alleged involvement in international human rights abuses. None of these cases were against the banks as corporate entities, and the ICC currently offers no jurisdiction over claims against corporations, only against their officials.
- Subsequently, national courts have considered a small number of cases alleging the complicity of banks in international crimes, such as genocide, crimes against humanity, and war crimes. Few of these cases have resulted in a final judgment, meaning that the jurisprudence is limited. The jurisprudence is also contradictory, with some courts holding that banks cannot be liable for merely providing loans, and others finding the opposite. Incorporation of the ICC's Rome Statute into national law may in some countries enable cases against corporations themselves for violations of the crimes enumerated in the Rome Statute.
- The cases demonstrate a certain pattern: legal allegations against banks typically involve fact patterns where they conducted business with governments or non-state actors involved in gross human rights abuses rising to the level of international crimes – abuses that were commonly known at the time.
- AML laws and sanctions are a starting point for banks to avoid conducting business with certain entities involved in serious human rights abuses. Neither AML nor sanctions compliance are specifically aimed at identifying actors linked to human rights allegations. They are therefore helpful but probably not adequate to identify all potential transactions with entities involved in gross human rights abuses.
- National laws increasingly require companies – sometimes specifically banks – to report on their approaches to social and/or human rights issues and risks. Countries as diverse as South Africa, Japan, Brazil, and France have passed such laws. These help create an expectation that banks and their directors will proactively manage their approach to human rights.
- In certain jurisdictions, banks or their directors could in principle be held civilly or criminally liable for failing to report or adequately take into account human rights impacts, although research does not reveal any successful cases to date. The laws imposing such requirements are new, and it is too early to know how they will be interpreted.

156. A shareholder alleging that a board has breached its fiduciary duties must generally show a fundamental failure of the board to exercise its responsibilities in good faith. In the US, the business judgment rule protects corporate officers by creating "a presumption that in making a business decision the directors of a corporation acted on an informed basis, in good faith and in the honest belief that the action taken was in the best interests of the company." Aronson v. Lewis, 473 A.2d 805, 812 (Del. 1984). In 1996, in In re Caremark International Inc., the Delaware Court of Chancery found that directors' obligations includes a duty to attempt, in good faith, to ensure that adequate information and reporting systems exist to provide them with the information they need to monitor and oversee corporate operations effectively. In re Caremark Int'l Inc., 698 A.2d 959 (Del. Ch. 1996). In 2006, in Stone v. Ritter, the Delaware Supreme Court affirmed that Caremark provides the standard for director duties with respect to corporate compliance issues, and that directors may be liable if they fail to implement a reporting or information system or controls or "having implemented such a system or controls, consciously failed to monitor or oversee its operations, thus disabling themselves from being informed of risks or problems requiring their attention. Stone v. Ritter, 911 A.2d 362, 370 (Del. 2006).

CHAPTER 3: SOFT LAW AND VOLUNTARY GUIDELINES

Governments and intergovernmental organizations produce a range of non-binding declarations, resolutions, and other statements." In addition, private sector organizations and multi-stakeholder initiatives produce voluntary guidelines intended to guide corporate behavior. These soft law standards and industry guidelines serve as important indicators of emerging expectations for banks in the context of human rights.

Although the expectations set forth in soft law may not be legally enforceable, soft law sometimes "hardens" through: incorporation into national laws, inclusion in treaties, use by judges as a standard of care in legal decisions, incorporation in contracts, or development into customary international law, as discussed below. Moreover, the fact that many soft law initiatives and voluntary guidelines are not legally enforceable does not minimize their importance for companies. They reflect societal expectations, and a failure to meet such standards can adversely affect corporate reputation or even deter investors. Moreover, because environmental and social risks are increasingly seen to be material risks, soft law can also help banks identify and manage such risks.

The notable increase in soft law and voluntary guidelines pertaining to banking and human rights highlights a broader societal focus on the impacts of the financial sector on human rights, and further underscores their responsibility for human rights impacts associated with their products and services – even in circumstances in which they have limited control or leverage over relevant related parties.

This chapter explores key developments in soft law and voluntary guidelines, which reflect evolving understandings of the appropriate role of banks. It also discusses the processes by which soft law can transform into international and national hard law requirements in some instances.

I. SOFT LAW AND VOLUNTARY GUIDELINES RELEVANT TO THE BANKING SECTOR

A. Soft Law Developed by Governments and Intergovernmental Bodies

1. The UN Guiding Principles on Business and Human Rights

As described in Chapter 1, the UN Guiding Principles are the first UN-endorsed global guidelines addressing the relationship between business and human rights. They have helped drive and influence recent developments in both soft law and voluntary standards. For instance, as discussed below, the OECD Guidelines, the IFC Policy on Environmental and Social Sustainability and related Performance Standards Guidance Notes, and the EPs all reference the responsibility to respect human rights set forth in the UN Guiding Principles. Moreover, EU Member States are expected to develop action plans setting forth their intended efforts to operate consistently with the UN Guiding Principles, including through legal and regulatory mechanisms, and other countries such as the US are following suit.

The UN Guiding Principles are an instrument of a mixed nature: on the one hand they confirm existing legal obligations of States, and on the other, they encompass expectations that have not been framed in hard law.[157] For example, they call upon States to meet their "duty to protect against human rights abuses by third parties, including business enterprises, through appropriate policies, regulation, and adjudication," which is grounded in hard law. The State duty to protect discussed in the UN Guiding Principles restates existing international human rights standards established through the International Bill of Human Rights and other international instruments and treaties. These obligations include, "States must protect against human rights abuse within their territory and/or jurisdiction by third parties, including business enterprises."[158]

In the context of the UN Guiding Principles, the corporate responsibility to respect is called a "responsibility" rather than a "duty" to differentiate it from mandatory "duties" under hard law. Although a number of human rights instruments consider the conduct of organizations, the State retains the legal obligation to regulate their conduct. For example, the International Convention on the Elimination of All Forms of Racial Discrimination addresses racial discrimination by organizations in Article 2 and Article 4.[159] The convention, however, does not address organizations directly. Rather, States are obligated "to prohibit and bring to an end, by all appropriate means, including legislation as required by circumstances, racial discrimination by any persons, group or *organization.*"[160] This reflects the fact that in international law only States are considered full subjects and virtually all international human rights law instruments address States directly, imposing on them an obligation to regulate corporate conduct, rather than placing direct legal obligations on corporations.[161]

The extent to which the corporate responsibility to respect human rights encompasses certain international hard law obligations is under discussion. Some scholars and commentators suggest that corporations already are subject to a limited set of direct hard law obligations under international law.[162]

Not least due to these controversial discussions, the UN Guiding Principles apply a different approach by creating a formally non-binding responsibility for companies to respect the International Bill of Human Rights.

The UN Guiding Principles are significant not only because they specify that companies have a responsibility to focus on a wider set of internationally recognized human rights beyond international crimes, but because they draw their attention to impacts arising through their business relationships as well as those that the companies directly cause. As a result, under the UN Guiding Principles, banks are expected to consider and address human rights impacts linked to them

157. *Guiding Principles, supra* note 1, Principle 1, Commentary.

158. *Id.* at Principle 1.

159. *International Convention on the Elimination of All Forms of Racial Discrimination*, G.A. Res. 2106 (December 21, 1965).

160. *Id.* Art. 2(1)(d) (emphasis added).

161. In a few instances, regional human rights courts have interpreted regional human rights instruments constituting hard law to apply directly to corporations. For example, the European Court of Justice found that provisions of the Treaty of Rome, including the prohibition against discrimination based on gender or nationality, apply directly to corporations. Steven R. Ratner, *Corporations and Human Rights: A Theory of Legal Responsibility*, 111 Yale L. J. 443, 471 (2001). Others have also asserted that corporations are directly bound by international conventions, specifically the Genocide Convention. Michael J. Kelly, *Prosecuting Corporations for Genocide Under International Law*, 6 Harvard L & Pol. R. 339. For more discussion of how States are expected to implement their human rights duties as laid out by the UN Treaty Bodies, see Report of the Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, Addendum: State responsibilities to regulate and adjudicate corporate activities under the United Nations core human rights treaties: an overview of treaty body commentaries, http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G07/108/52/PDF/G0710852.pdf?OpenElement.Special

162. For example, some have asserted that corporations are directly bound by international conventions, specifically the Genocide Convention. See, e.g., Michael J. Kelly, Prosecuting Corporations for Genocide Under International Law, 6 HARVARD L & POL. R. 339.

through their business relationships, regardless of whether the link is through a bank account, a corporate or personal loan, advisory services, or another product or service. This has resulted in banks shifting from their traditional focus on business risks, to integrating a human rights perspective and related human rights due diligence into their business operations as a whole. Several other non-binding instruments complement the UN Guiding Principles and help banks address the human rights impacts of this fuller set of activities.

2. The OECD Guidelines for Multinational Enterprises

The OECD Guidelines are one of the longest established soft law standards addressing the relationship between companies and their social impacts, including human rights.[163] In contrast to many of the legal instruments described in Chapter 2, which apply only to States, the OECD Guidelines are recommendations by OECD Member States, addressed to businesses directly. Specifically, companies registered in OECD countries and other adhering countries are expected to follow the OECD Guidelines. In addition to having been formally adopted by OECD Member States as well as several non-members, the Guidelines have received widespread support from all stakeholders, including the business sector.

The OECD Guidelines cover a range of issues, including labor and human rights, bribery and corruption, and the environment.

a. Expansion of Application of Human Rights

The OECD Guidelines were last revised in 2011, and the changes have several important implications for banks. First, human rights are central to the new OECD Guidelines. The former version of the OECD Guidelines included a short reference to the Universal Declaration of Human Rights in its preamble, while the revised Guidelines devote an entire chapter to human rights, while maintaining a separate chapter on labor rights.[164]

Notably, the revised OECD Guidelines directly incorporate the "Protect, Respect, Remedy" Framework that was first proposed by the UN Special Representative on Business and Human Rights in 2008, and further elaborated in the UN Guiding Principles. The OECD Guidelines call for companies to respect human rights, taking the same steps as set out in the UN Guiding Principles: respect human rights by developing a policy commitment to respect human rights; carrying out human rights due diligence; and remedying impacts that they have caused or to which they have contributed. Such steps should be applied not only to impacts that companies cause or to which they contribute, but also those directly linked to them through their business relationships (except with respect to remedy).

b. Broader Coverage of Human Rights Impacts in the Value Chain

The 2011 revisions significantly expanded the range of company activities that could be understood to follow or infringe on the OECD Guidelines, with implications for banks. The previous version of the OECD Guidelines had required an "investment nexus" for events occurring in a company's value chain to be considered a responsibility of the company. The OECD

163. Organization for Economic Co-operation and Development, Guidelines for Multinational Enterprises, 2011 Edition (May 25, 2011), http://www.oecd.org/daf/inv/mne/48004323.pdf [hereinafter OECD Guidelines].

164. For more information on the update to the OECD Guidelines, see OECD, 2011 Update of the OECD Guidelines for Multinational Enterprises: Comparative table of changes made to the 2000 text, available at http://www.oecd.org/corporate/mne/49744860.pdf.

Committee on International Investment and Multinational Enterprises provided some basic parameters to evaluate whether an investment nexus existed. Specifically, a company was required to have an "investment like relationship" in which it had influence over the party involved in wrongdoing.[165]

The 2011 revisions broadened the scope of application of the OECD Guidelines to include a broader range of impacts linked to relationships, in language that is almost identical to that in the UN Guiding Principles. Under the revised provisions, companies should address human rights impacts that their own activities cause, or to which they contribute, and also to "seek ways to prevent or mitigate adverse human rights impacts that are directly linked to their business operations, products, or services by a business relationship, even if they do not contribute to those impacts."[166] Through this language, which mirrors the UN Guiding Principles, the revised OECD Guidelines expect companies to consider potential and actual human rights impacts, including those occurring in their value chain.[167] An "investment nexus" is no longer required.

c. Grievance Mechanisms Pursuant to the OECD Guidelines

Although the OECD Guidelines are non-binding and are not linked to a formal, legal enforcement mechanism, Member States have to provide for a non-judicial procedure before an appointed National Contact Point ("NCP"), through which concerns — "specific instances" in the OECD terminology — regarding alleged non-observance of the Guidelines[168] may be raised. This mechanism has been open to all interested parties – individuals, NGOs, trade unions, and communities - since its inception.[169] Because the revised OECD Guidelines now incorporate the corporate responsibility to respect human rights set out in the UN Guiding Principles, the NCPs may in essence serve as a forum where perceived failures to follow the human rights chapter in the OECD Guidelines – and thereby indirectly compliance with the UN Guiding Principles -– may be discussed.

As a rule, a case should be filed with the NCP in the country in which the alleged non-compliance with the OECD Guidelines occurred. If that country is not a member of the OECD and does not adhere to the Guidelines, the NCP of the enterprise's home country can be seized with the matter. If several NCPs are addressed simultaneously, they will co-ordinate their activities. NCPs may offer to mediate specific instances and reach negotiated resolutions to disputes, but if this proves impossible, depending on the applicable national law, they may issue determinations that often involve analyses of compliance with the OECD Guidelines.

Technically, there is no sanction for companies found in non-compliance with the OECD Guidelines. The key issue is reputation, since the initiating parties will often make the cases public. Depending on the rules of procedure for a specific NCP, its findings may be published, which may result in reputational

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165. OECD, Guidelines for multinational enterprises, Scope of the Guidelines and the Investment nexus, Statement by the Committee, available at http://www.oecd.org/daf/inv/mne/scopeoftheguidelinesandtheinvestmentnexus.htm.

166. OECD Guidelines, *supra* note 11, at 31.

167. See footnote 15 to Chapter 1 for a definition of value chains.

168. OECD Guidelines for Multinational Enterprises, Chapter II, paragraph A10; "The recommendation in paragraph A10 applies to those matters covered by the *Guidelines* that are related to adverse impacts. It does not apply to the chapters on Science and Technology, Competition and Taxation."

169. For an example of the process that NCPs use to receive and address complaints, see UK National Contact Point Department for Business Innovation & Skills, National Contact Point Procedures for Dealing with Complaints Brought Under the OECD Guidelines for Multinational Enterprises, available at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/31822/11-1092-uk-ncp-procedures-for-complaints-oecd.pdf.

damage for a company judged to be in violation of the Guidelines. Moreover, under the OECD Common Approaches — discussed further below — the Export Credit Agencies ("ECAs") are supposed to "consider any statements or reports made publicly available by their National Contact Points (NCPs) at the conclusion of a specific instance procedure under the OECD Guidelines for Multinational Enterprises."[170]

Civil society organizations and trade unions have brought a series of complaints to the NCPs focusing on the role of banks. Early complaints were related to project finance,[171] but more recent complaints also focus on investors acting as minority shareholders. Although this report does not generally focus on investment, these NCP specific instances help identify how the OECD Guidelines (and, by extension, the UN Guiding Principles) might apply to banks' services. In the spring of 2013, both the Dutch and Norwegian NCPs issued final statements indicating that companies that are minority shareholders have a responsibility under the OECD Guidelines to conduct human rights due diligence and, as part of that, to engage with the entity with which they are linked (the company in which they are invested) and that is causing the adverse impacts to prompt a response to allegations of human rights abuses committed by their portfolio companies.[172] The NCPs found that this requirement could be met regardless of whether the investor has a majority or minority interest. The complainants in the two specific instances had alleged that the Norwegian national pension fund and a Dutch pension fund had not conducted adequate human rights due diligence as is required under the OECD Guidelines. The pension funds were minority shareholders in the Korean steel company POSCO, which in turn was the majority shareholder in a large iron mining and steel plant project in India that was linked to alleged human rights abuses.

170. 'Recommendation of the Council on Common Approaches for Officially Supported Export Credits and Environmental and Social Due Diligence', adopted by the OECD Council on 28 June 2012, TAD/ECG(2012)5, Section V (15), http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=TAD/ECG%282012%295&doclanguage=en.

171. For example, in a case that applied the older version of the OECD Guidelines, requiring an investment nexus, a case was brought to the UK NCP that involved a bank that had refinanced a bridge loan for a major investor in a company responsible for an oil project in Russia. The NCP found that the link between the bank and the company was only indirect, since it was mediated through the controlling shareholder, and thus there was no investment nexus. Under the new OECD Guidelines, the NCP might have reached a different conclusion as to whether the transaction was covered. Initial Assessment by the UK NCP for the OECD Guidelines for Multinational Enterprises, Complaint From a Civil Society Organization Against a UK Bank (A) in Respect of a Business Relationship with a Company in Russia, December 2012. More recently, organizations brought a specific instance against Australia New Zealand Banking Group ("ANZ") to the Australian National Contact Point, alleging breaches of the OECD Guidelines' General Policies and Human Rights Chapter. ANZ provided a loan to a Cambodian sugar company that allegedly forcibly evicted 115 families, illegally seized land, employed the military and police to convince villagers to give up their land without adequate compensation, and other allegations. The Australian NCP has not yet issued a statement on the specific instance. Specific Instance under the OECD Guidelines for Multinational Enterprises submitted to the Australian National Contact Point for the OECD Guidelines by Inclusive Development International and Equitable Cambodia Against Australia New Zealand Banking Group, http://www.inclusivedevelopment.net/wp-content/uploads/2014/10/Specific-Instance-against-ANZ-FINAL.pdf.

172. See, e.g., Norway NCP, NBIM Specific Instance, p. 26.

According to the NCPs, the percentage interest that the investor holds is not relevant to whether the responsibility to respect human rights exists - they found it does. Instead, the percentage holding may affect what leverage the investor has to address or mitigate impacts. The Norwegian NCP noted that companies invested in thousands of enterprises might need to prioritize their due diligence screening based on the severity of the potential human rights impacts. These in turn could be identified through an examination of the operating context, the operations, services, or products involved, and the portfolio company's human rights track record.[173] In some instances, the companies might have limited leverage, but the NCPs recommended that they seek to increase their leverage. For example, in the Dutch NCP specific instance, which came to a negotiated settlement, the NCP noted approvingly that the Dutch pension fund had brought together a coalition of investors in an effort to increase its leverage and improve the human rights practices of the portfolio company.[174]

The OECD has confirmed the NCPs' findings in a note that emphasized that: (1) the OECD Guidelines apply to commercial financial institutions; and (2) human rights due diligence – under both the UN Guiding Principles and the OECD Guidelines – applies to all business relationships through which a financial institution's operations, products or services are directly linked to human rights impacts. The Working Party on Responsible Business Conduct emphasized that business relationships can include business relationships in a company's value chain, beyond the first tier, and minority as well as majority shareholding positions.[175]

The OECD's work has clarified that the OECD Guidelines – and thus the UN Guiding Principles – apply to private financial institutions, including banks, and are applicable to instances in which banks might have little leverage, provided that the impact is directly linked to their operations, products or services.[176] This suggests that banks should conduct due diligence on a variety of activities, even though the banks might have little leverage over the actor causing the harm, and seek to address the impacts that are most severe.

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173. *Id.* at 30. These factors draw on the UN Guiding Principles (II (B) (16), Commentary, and the OECD Guidelines, Ch. IV, Commentary, para. 40."Scope and Application of 'Business Relationships' in the Financial Sector Under the OECD Guidelines for Multinational Enterprises." OECD Investment Committee, Directorate for Financial and Enterprise Affairs, DAF/INV/RBC (2013) 2/Rev 1. Nov. 21, 2013, p. 33.

174. Netherlands NCP, ADB Specific Instance, Jan. 18, 2103.

175. OECD Working Party on Responsbile Business Conduct, Directorate for Financial and Enterprise Affairs, *Scope and Application of 'Business Relationships' in the Financial Sector Under the OECD Guidelines for Multinational Enterprises.*, DAF/INV/RBC (2013) 2/Rev 1 final, 2013 June 27, 2014, p. 4.

176. The OHCHR and the former UN Special Representative on Business and Human Rights both weighed in to support the OECD's conclusions, and also note that they are equally applicable to the UN Guiding Principles. The UN Working Group on Business and Human Rights and the Office of the High Commissioner for Human Rights also publicly supported the Investment Committee's view. See UN Working Group on Business and Human Rights, Letter to OECD Investment Committee: Request for guidance on specific aspects the Guiding Principles and their meaning in the context of financial transactions and institutions, Dec. 3, 2013, available at http://www.ohchr.org/Documents/Issues/Business/LetterResponseToOECD.pdf. See also Office of the High Commissioner for Human Rights, Letter to the OECD Investment Committee, Nov. 27, 2013, available at http://www.ohchr.org/Documents/Issues/Business/LetterOECD.pdf.

3. OECD Common Approaches for Export Credit Agencies

Another important OECD effort related to finance and human rights relates to the OECD Common Approaches[177], which sit at the crossroads between private and public financing. The Common Approaches were embedded in an OECD Council recommendation from 2012, and build on a series of previous recommendations on this issue. While an OECD Recommendation is legally non-binding, it expresses the common position or will of the whole OECD membership and therefore is considered to be an important political commitment for Member governments.[178] The OECD Secretariat monitors higher risk investments that the ECAs make.[179]

The Common Approaches provide a shared method for "undertaking environmental and social due diligence to identify, consider, and address the potential environmental and social impacts and risks relating to applications for officially supported export credits as an integral part of Members' decision-making and risk management systems."[180] The 2012 Recommendation specifically mentions the UN Guiding Principles, recognizing that Members have obligations to protect human rights and fundamental freedoms, and that business enterprises have the responsibility to respect human rights.[181] The recommendation calls for ECAs to "encourage protection and respect for human rights, particularly in situations where the potential impacts from projects or existing operations pose risks to human rights."[182]

4. OECD Projects Related to Financial Institutions, including Banks

The OECD has supported a number of projects related to the financial sector and human rights, in part due to the "difficulties associated with the search for clarity on how this terminology [regarding business relationships] relates to the financial sector."[183] For instance, the Government of The Netherlands commissioned a report to support the work of the OECD Working Party on Responsible Business Conduct entitled, "Environmental and Social Risk Due Diligence in the Financial Sector."[184]

The report, issued in 2013, describes the environmental and social due diligence that financial institutions, including banks, currently undertake. It examines a range of activities, such as asset-based finance, capital markets, corporate lending, insurance, and investment, though notably not retail banking. The study identified different ways in which financial institutions have integrated social factors into

177. "Recommendation of the Council on Common Approaches for Officially Supported Export Credits and Environmental and Social Due Diligence," adopted by the OECD Council on 28 June 2012, TAD/ECG(2012)5, http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=TAD/ECG%282012%295&doclanguage=en.

178. Environmental and Social Due Diligence, OECD, http://www.oecd.org/tad/xcred/environmentalandsocialduediligence.htm.

179. *Id.*

180. *Id.*

181. "Recommendation of the Council on Common Approaches for Officially Supported Export Credits and Environmental and Social Due Diligence," adopted by the OECD Council on 28 June 2012, TAD/ECG(2012)5, Preamble, http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=TAD/ECG%282012%295&doclanguage=en.

182. *Id.* The Common Approaches also call for ECAs to give further consideration to human rights, including "relevant standards, due diligence tools and other implementation issues, with the aim of reviewing how project-related human rights impacts are being addressed and/or might be further addressed in relation to the provision of officially supported export credits. Members shall report to the ECG on their work not later than two years from the date of adoption of this Recommendation." *Id.* at Section VIII (44).

183. Global Forum on Responsible Business Conduct, 26-27 June, Expert Letters and Statements on the Application of the OECD Guidelines for Multinational Enterprises and UN Guiding Principles on Business and Human Rights in the Context of the Financial Sector, Note by the Chair of the Negotiations on the 2011 Revision of the Guidelines, Regarding the Terminology on "Directly Linked."

184. Environmental and Social Risk Due Diligence in the Financial Sector: Current Approaches and Practices, Report Commissioned by the Netherlands in support of the Proactive Agenda of the OECD Working Party on Responsible Business Conduct, Sustainable Finance Advisory, 2013.

their due diligence, as well as indicators that they use to determine heightened risk. The report also found that a number of financial institutions had limited knowledge of the UN Guiding Principles or how to implement them.[185] The report does not constitute formal OECD guidance and as such has no legal authority.

The OECD has continued to explore and offer guidance with regard to the human rights responsibilities of the financial sector. For instance, the OECD Secretariat recently issued a document entitled "Due Diligence in the Financial Sector: Adverse Impacts Directly Linked to Financial Sector Operations, Products or Services by a Business Relationship," clarifying how the OECD Guidelines and UN Guiding Principles apply to adverse impacts directly linked to financial sector operations, products, or services.[186] The document provides several examples of whether impacts would be categorized as contributing or directly linked.[187] It also provides additional information regarding the due diligence that financial institutions should undertake, including how they should respond to incidents.[188]

Based on the studies by the Working Party on Responsible Business Conduct, the OECD is currently developing guidance that will clarify the potential approaches for application of due diligence in the financial sector.[189]

5. IFC Environmental and Social Performance Standards

The IFC Environmental and Social Performance Standards ("IFC Performance Standards") apply to the institution's provision of project finance, bridge loans, advisory services to clients, and other activities.[190] They are relevant to banks that are IFC clients, as well as to banks that are signatories to the EPs, which incorporate the IFC Performance Standards. The IFC Performance Standards provide guidance on how to identify, avoid, mitigate and manage environmental and social risks and impacts as a way of doing sustainable business.

In 2012, IFC updated its 2006 version of the IFC Performance Standards to reflect global developments, including the UN Guiding Principles. The 2012 IFC Performance Standards note that business has a responsibility to respect human rights, meaning to avoid infringing upon them and to address adverse human rights impacts to which business may cause or contribute, and that the application of the Performance Standards support this business responsibility.[191] They also suggest that "In limited high-risk circumstances, it may be appropriate for the client to complement its environmental and social risks and impacts identification process with specific human rights due diligence as relevant to the particular business."[192]

185. *Id.* at 23.

186. Due Diligence in the Financial Sector: Adverse Impacts Directly Linked to Financial Sector Operations, Products or Services by a Business Relationship, Note from the OECD Secretariat, June 26-27, 2014, http://mneguidelines.oecd.org/globalforumonresponsiblebusinessconduct/GFRBC-2014-financial-sector-document-1.pdf.

187. *Id.* at p. 3.

188. *Id.* at p. 7.

189. OECD Guidelines for Multinational Enterprises, responsible business conduct in the financial sector https://mneguidelines.oecd.org/rbc-financial-sector.htm

190. Activities supported and financed by IFC include a wide range of investment and advisory products. Investment products with longer tenor include (i) direct lending to private sector companies (including corporate and project finance); (ii) lending to various types of FIs as well as through funds and facilities; (iii)minority equity stakes in companies, including in financial institutions; and (iv) guarantee facilities, municipal finance, as well as investments managed by IFC's Asset Management Company or any other IFC subsidiary. Investment products with shorter tenor include short-term loans, guarantees, and trade finance products, with maturities of up to three years. Proposed investments that are determined to have moderate to high levels of social risk or the potential for adverse environmental and/or social impacts will be carried out in accordance with the requirements of the Performance Standards. IFC Policy on Environmental and Social Sustainability, para. 3, available at http://www.ifc.org/wps/wcm/connect/7540778049a792dcb87efaa8c6a8312a/SP_English_2012.pdf?MOD=AJPERES.

191. IFC Performance Standards, p. 1.

192. IFC Performance Standards, p. 10, footnote 11.

The IFC Performance Standards are legally enforceable when they are incorporated into loan agreements/covenants. This provides the IFC with leverage to require its clients to follow the IFC Performance Standards or, in extremely rare cases, end its involvement in particularly problematic projects.

6. UN Guidance Tools on Human Rights for Businesses, Including Banks

A number of UN agencies and programs have developed guidance for businesses, including banks, on human rights issues. This guidance is sometimes applicable to all businesses, or specific to the finance sector or particular topics.

The OHCHR together with the Working Group on the Issue of Human Rights and Transnational Corporations and other Business Enterprises, has the mandate to lead the business and human rights agenda within the UN system, and promote the implementation of the major human rights treaties and respect for the rule of law. To fulfill this mission, the OHCHR and the Working Group emit guidance notes, and also offer country information and specific tools (including an Interpretive Guide and Frequently Asked Questions) to facilitate the implementation of the UN Guiding Principles.[193]

The UNEP FI Human Rights Guidance Tool for the Financial Sector,[194] serves as a resource for financial institutions, in particular banks, seeking to incorporate human rights considerations in their financial decision-making and operations. The tool was launched in 2007, and was fully updated in 2011 and 2014, to reflect the evolving agenda on business and human rights, and its relevance for the financial sector. The tool makes the business case for financial institutions to take into account human rights; addresses human rights by sectors and by topic; and provides resources that financial institutions may want to consult to deepen their knowledge on the issue.

The first two principles of the UN Global Compact indicate that businesses should support and respect the protection of internationally proclaimed human rights; and that they should make sure that they are not complicit in human rights abuses.[195] To help businesses meet these two principles, the UN Global Compact prepared the Human Rights and Business Dilemmas Forum, which explores 25 business and human rights themes, some of which are directly relevant for the finance sector.[196]

Additional UN guidance addresses human rights issues in the context of vulnerable groups. Examples include the Children's Rights and Business Principles,[197] and implementation guidance, developed by UNICEF, the UN Global Compact, and Save the Children; the UN Global Compact Business Reference Guide to the UN Declaration on the Rights of Indigenous Peoples;[198] and the Women's Empowerment Principles,[199] jointly developed by the UN Global Compact and the UN Entity for Gender Equality and the Empowerment of Women ("UN Women"), and adapted from the Calvert Women's Principles.

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193. *OHCHR Business and Human Rights*, available at http://www.ohchr.org/EN/Issues/Business/Pages/BusinessIndex.aspx http://www.ohchr.org/Documents/Publications/FAQ_PrinciplesBussinessHR.pdf
194. *UNEP FI Human Rights Guidance Tool for the Financial Sector*, available at http://unepfi.org/humanrightstoolkit/
195. *United Nations Global Compact Human Rights*, available at https://www.unglobalcompact.org/Issues/human_rights/index.html
196. *Human Rights and Business Dilemmas Forum* available at http://hrbdf.org/
197. *Children's Rights and Business Principles* available at http://childrenandbusiness.org/
198. *Business Reference Guide to the UN Declaration on the Rights of Indigenous Peoples*, available at https://www.unglobalcompact.org/Issues/human_rights/indigenous_peoples_rights.html
199. *Women's Empowerment Principles*, available at http://weprinciples.org/Site/PrincipleOverview/

These guidance tools and resources reflect the specific expertise and mandates of their host UN institutions. Together they help enhance a shared understanding of human rights expectations vis-à-vis banks.

B. Private Sector Voluntary Guidelines and Initiatives

1. The Equator Principles

Banks themselves have developed a number of voluntary standards that address their social performance, including human rights. One of the first was the Equator Principles which relate specifically to project related finance, a service that not all banks provide. The EPs are a set of principles created by the financial industry and designed to assist banks in determining, assessing, and managing environmental and social risk – including human rights-related risk – related to potential or current projects.[200] The EPs use the IFC Performance Standards as a minimum benchmark. Like the IFC, financial institutions that have adopted the EPs ("EPFIs") typically include covenants in their project finance agreements.

The EPs have been highly influential, in part due to the substantial bank participation they have attracted. There are currently 81 EPFIs in 36 countries, covering a significant percentage of project finance debt in emerging markets – although such financing represents only a small percentage of total global financing for business activities.[201]

The EPs' scope of application was initially limited to project financing over $50 million.[202] In project financing, banks provide critical loans that cover a significant percentage of the costs of a large project. Therefore, the EPs applied to instances in which banks had leverage over the entity receiving the loan, including the ability to impose particular requirements as a condition of financing – a degree of influence that is not present in many other banking activities. Moreover, the number of projects that a bank finances at any one time is relatively limited compared to the number of account holders or retail borrowers. Again, this small scale enables banks to more systematically oversee such loans.

EPFIs are expected to require project proponents (i.e., the entity developing the project) seeking financing to demonstrate that they have in place systems to manage social and environmental risks, and to report on the implementation of such systems. The EPs also state that project proponents must engage in consultations with project-affected communities and disclose all material risks and impacts facing such communities. At a minimum, these expectations require project proponents to address social impacts, including those related to human rights. Over time, such requirements may help to create changes in company management systems and enhance overall awareness of the potential practical effects of adversely impacting human rights.

The revised EPs III, issued in 2013, include two changes of particular salience to banking and human rights. First, although the EPs always incorporated specific human rights, such as those of indigenous peoples and labor rights, the EPs III make an explicit commitment to a broader scope of rights. The preamble of the EPs III requires EPFIs to undertake due diligence referencing the UN Guiding

200. The EPs have always required project proponents to address a number of core human rights, including labor rights, land rights, and the rights of indigenous peoples. As discussed below, a more recent version of the EPs covers a broader range of human rights. Most of the substantive requirements of the EPs are taken directly from the IFC Environmental and Social Performance Standards, which companies that receive certain types of financing from the IFC are required to implement.

201. See Equator Principles, About the Equator Principles, available at http://www.equator-principles.com/index.php/about.

202. The *Equator Principles* (June 2013), available at: http://www.equator-principles.com/resources/equator_principles_III.pdf. The latest formulation of the Equator Principles (Equator Principles III) took effect in June 2013. Recent revisions are discussed in Section II-A.

Principles, in line with the updated IFC Performance Standards. The EPs III also require project proponents to undertake specific, additional human rights due diligence in high-risk areas.[203] The EPs III consider human rights to be one aspect of a broader due diligence process to identify environmental and social risk factors.[204]

The EPs III revisions not only place a greater priority on human rights, but also broaden the scope of the original EPs to cover a wider range of financial instruments and services. For example, the EPs III apply not only to project finance, but also to project finance advisory services (where total project capital costs are 10 million USD or more); project-related corporate loans (subject to four criteria related to loan purpose, amount, duration, and individual commitment); and bridge loans (with a tenure of less than two years).[205] Although this expansion in scope was cited as a significant development, the EPs continue to apply only to a narrow range of activities related specifically to project finance. For example, most general corporate loans are beyond the scope of the EPs III.

The fact that the EPs III focus on project finance and related loans and services makes it more feasible for banks to carry them out robustly. It is easier to identify the potential impacts linked to a mine, power plant, or other project – which would be supported by project finance or a project-related corporate loan – than is the case for other financial products and services. The approach to dealing with human rights impacts embodied in the EPs III is not as practical for bank services and products involving large numbers of transactions and where banks possess limited leverage, suggesting a need for additional methodologies. The EPs, in their current state, cover only a small portion of banking services relating to project finance (indeed some banks are not involved in project finance at all so operate outside the scope of the EPs). Therefore, banks who consider that implementing the EPs alone will address their human rights impacts are likely to overlook significant impacts to which they are linked through their other products and services.

The EPs are voluntary guidelines for the financial institutions that ascribe to them. However, they are legally enforceable against the loan recipients when incorporated into the loan agreement. For instance, EPFIs must require loan recipients to sign covenants or other contractual clauses agreeing to implement the EPs. Should a loan recipient subsequently violate its commitment to implement the EPs, the EPFI that issued the loan could first delay payments until the loan recipient comes back into compliance. If that is unsuccessful, the EPFI could potentially sue the loan recipient for breach of contract in the courts of the country whose law governs the loan agreement.

203. *Id.* at 5.

204. *Id.* at 20.

205. *Id.* at 3.

2. The Thun Group of Banks

In October 2013, a voluntary consortium of seven European banks called the Thun Group of Banks issued a discussion paper discussing the relevance of the UN Guiding Principles for commercial banks.[206] The discussion paper focused on the human rights implications arising from banks' business relationships with clients, and not on the broader, systemic impacts of the banking industry on society.[207] The Thun Group suggests that banks should consider developing a risk management model that goes beyond traditional parameters and identifies, manages, and mitigates human rights risks to external stakeholders. This model should ensure awareness of human rights issues and responsibilities within the bank at all levels and across all disciplines.[208]

The discussion paper recognizes that banks will not be able to undertake an in-depth human rights assessment for every business arrangement. Rather, the Thun Group suggests that banks undertake an initial, high level assessment of their projects and services to identify instances in which the potential for adverse human rights impacts is high. If further due diligence is warranted due to the risk of severe impacts, this due diligence should then be tailored to address the degree and type of risk. The discussion paper suggests a number of factors that should trigger enhanced due diligence based upon the risk of significant human rights impacts. These situations include:

- When considering financing a project in a conflict zone;
- When providing financial services to a sector with strong human rights sensitivities; and
- When developing financial products associated with vulnerable client segments.[209]

The Thun Group also identified the need for heightened due diligence when operating in a market or geography subject to international sanctions or characterized by high levels of corruption, political instability, violent repression of minority groups or dissidents, non-democratic government, poverty, discrimination, or weak governance.[210]

The Thun Group observed that the ability of a bank to successfully address the human rights impacts to which it is linked through its business relationships depends significantly on leverage, as acknowledged by the UN Guiding Principles. If a bank is engaged in a one-off transaction, it typically will have a limited ability to obtain human rights or other information about the entity with which it is transacting, unless the deal is very large and the entity might otherwise have difficulty obtaining funding – such as in the project finance context. In contrast, if a bank is interacting with a long-term client, it typically will have more information regarding the client's approach to human rights risk management and a greater ability to influence the client.[211]

The Thun Group discussion paper is one of the first reports – if not the first report – to acknowledge the change in perspective with regard to risk by including risks relevant to affected people in addition to traditional business risks, and to consider how different business lines within financial institutions can implement

206. The Thun Group of Banks, *UN Guiding Principles on Business and Human Rights: A Discussion Paper for Banks on Implications of Principles* 16-21 (Oct. 2013)available at http://www.business-humanrights.org/media/documents/thun-group-discussion-paper-final-2-oct-2013.pdf. [hereinafter "Thun Group Discussion Paper"],

207. *Id.* at 3.

208. *Id.* at 5.

209. *Id.* at 9.

210. *Id.* at 10.

211. *Id.*

human rights due diligence, including retail and private banking, corporate and investment banking, and asset management. It was also one of the first reports prepared by any industry group to discuss how the UN Guiding Principles applies to a broad range of that industry's activities. The discussion paper identifies:

- How a particular banking business line is most likely to impact human rights;
- Existing due diligence processes for each business line and how human rights could be integrated into those systems; and
- Risk indicators.

The Thun Group discussion paper provides limited discussion regarding how human rights impacts can best be mitigated. The paper states, "[t]he mitigation measures that a bank can put in place will depend on the type of financial products or services as well as on the nature of the business relationship with the client."[212] It also provides two criteria for determining which identified impacts to address: (1) the extent of the impact on the rights holders (severity and number of affected people); and (2) the bank's connection to the adverse impacts.[213] The discussion paper adds that banks should give heightened attention to groups that are particularly vulnerable to human rights violations in a specific context, even if the bank's connection to those violations is remote.

The Thun Group paper did not yet explore the issue of remedy as defined in Principle 22 of the UN Guiding Principles, a gap that organizations such as BankTrack critiqued.[214] The banks intend to offer further commentary on UN Guiding Principle No. 22, which addresses what companies should do when they have identified that they have caused or contributed to adverse human rights impacts.

Looking ahead, the Thun Group intends to continue to serve as a think tank and to conduct additional stakeholder engagement activities.

3. Investing the Rights Way – A Report on Investment

Some reports and guidelines have addressed human rights as they relate to other, related financial activities. For example, *Investing the Rights Way* was published in 2013 by the Institute for Human Rights and Business, with significant contributions from Calvert Investments and the Interfaith Center on Corporate Responsibility.[215] It identifies how investors can use the UN Guiding Principles as a due diligence and risk assessment framework to assess human rights-related risk across their portfolios. *Investing the Rights Way* specifically helps investors assess whether companies in their portfolio are implementing the UN Guiding Principles and thus addressing human rights risks. It could be argued that *Investing the Rights Way* is more directive than the UN Guiding Principles, because the latter does not explicitly suggest that companies should ensure their business partners are conducting human rights due diligence. Rather, the UN Guiding Principles indicate that companies should find ways of their own to seek to address any potential or actual human rights impacts to which their products or services may be linked through such business relationships. *Investing the Rights Way* draws on this general language in the UN Guiding Principles and applies it specifically to the investment context.

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212. Thun Group Discussion Paper, *supra* note 41 at 14.

213. *Id.* at 10.

214. NGO BankTrack welcomed the report, but also criticized it for failing to take into account the additional focus of the UN Guiding Principles on grievance mechanisms and remedy. BankTrack, *BankTrack welcomes Thun Group paper on banks and human rights* (Oct. 11, 2013), available at http://www.banktrack.org/show/news/banktrack_welcomes_thun_group_paper_on_banks_and_human_rights .

215. Institute for Human Rights and Business, Investing the Rights Way: A Guide for Investors on Business and Human Rights, available at http://www.ihrb.org/pdf/Investing-the-Rights-Way/Investing-the-Rights-Way.pdf.

Investing the Rights Way proposes establishing a robust mechanism to ensure that investments are not made in companies engaging in human rights abuses. If portfolio companies can demonstrate that they have in place policies and procedures to identify and avoid or mitigate their human rights impacts, it seems likely that they will more successfully manage human rights issues. Presumably, investors with limited capacity or engaged with numerous portfolio companies could focus their efforts on companies engaged in high-risk activities or geographies.

Although *Investing the Rights Way* focused on investment and not the banking activities that are in the scope of this report, it is a useful resource for banks engaged in asset management. Moreover, it contains helpful guidance regarding how banks might identify and address human rights impacts when they have limited leverage.

II. SOFT LAW AND ITS RELATIONSHIP TO HARD LAW

In assessing the importance of soft law and voluntary guidelines, banks should consider the extent to which non-binding expectations may harden into mandatory requirements over time. Voluntary standards applicable to corporations, whether drafted by intergovernmental organizations or private industry groups, often reflect emerging stakeholder expectations that are frequently predictive of future legal and regulatory requirements.

The "hardening" of soft law into hard law can happen in a number of ways.

Soft law can be incorporated into national hard law through several mechanisms. One is by including soft law standards in new legislation that is binding. In the US, for example, a number of recent legislative and regulatory developments have incorporated the expectations of human rights due diligence and transparency found in the UN Guiding Principles. These developments include the enactment of the California Transparency in Supply Chains Act,[216] which requires certain companies to make public disclosures regarding what actions, if any, they are taking to address the risks of human trafficking and slavery in their product supply chains. This reflects the due diligence approach that the UN Guiding Principles outline. The UK Government has enacted similar legislation via the Modern Slavery Act that also places a requirement on larger companies to report on measures taken to prevent human trafficking in their businesses and supply chains. Another example is Section 1502 of the Dodd-Frank Wall Street Reform and Consumer Protection Act, which directed the Securities and Exchange Commission to issue a rule defining disclosure requirements for securities issuers who use certain "conflict minerals," with a view to limiting the role played by such minerals in fuelling the ongoing conflict in the Democratic Republic of Congo.[217] The issuers were required to report on the "due diligence" they undertook to identify whether such minerals entered their supply chains, which helped harden the concept that companies should conduct due diligence on certain human rights issues. Finally, the Reporting Requirements on Responsible Investment in Burma[218] require that U.S companies doing business in that country submit an annual public report to the US State Department including information on the policies and procedures they have in place to manage human rights.[219] The reporting requirements suggest that companies examine the UN Guiding Principles and the human rights provisions of the OECD Guidelines in order to develop such policies and procedures.

In the EU, the European Commission has called on EU Member States to develop national action plans for implementing the UN Guiding Principles. The UK, The

216. California Transparency in Supply Chains Act of 2010, CAL. CIV. CODE SECTION 1714.43 (2010).

217. Dodd-Frank Wall Street Reform and Consumer Protection Act, section 1502, Pub. L. No. 111-203, 124 Stat. 1376 (2010).

218. US DEPARTMENT OF STATE, Reporting Requirements on Responsible Investment in Burma (July 11, 2012), available at www.humanrights.gov/wp-content/uploads/2012/07/Burma-Responsible-Investment-Reporting-Reqs.pdf.

219. US companies must also submit annual information regarding the human rights risks or impacts identified during due diligence processes and the steps that the company has taken to mitigate them, although this information will not be made public.

Netherlands, Italy, Finland, Lithuania, Norway, Sweden, and Denmark have already developed such plans,[220] and the EU has reported that a large number of countries intend to develop such plans in due course.[221] Indeed, 26 additional countries, including a number outside the EU, have drafted or announced their intention to develop national action plans. [222] These action plans reflect the duty of governments to protect human rights in part through the establishment of laws and regulations governing business activities. In the UK's plan, the Government notes that "[t]he UK has specific laws protecting human rights and governing business activities. …Like all States we need to continually re-assess whether the current mix is right, what gaps there might be and what improvements we can make."[223] One way in which the UK has sought to address perceived "gaps" is to issue new regulations requiring listed companies to make disclosures addressing "social, community, and human rights issues" in public strategic reports.[224]

Soft law and voluntary guidelines may also harden by informing judicial decisions in such a way as to become a standard of conduct that defines liability. One example of this is the Ontario Superior Court of Justice's recent decision in *Choc v. Hudbay Minerals Inc.*[225] This decision, while only preliminary, signaled a willingness to allow Canadian businesses to be held liable in Canadian courts for human rights abuses committed outside of Canada. In doing so, and without yet reaching the merits of the case, the Court cited the UN Guiding Principles, the OECD Guidelines for Multinational Enterprises, and the Voluntary Principles on Security and Human Rights in its discussion of "international norms, authorities and standards" that "support the view that a duty of care may exist in circumstances where a company's subsidiary is alleged to be involved in gross human rights abuses."[226] Observers frequently cite this decision as an example of how soft law may inform how courts define the duty of care when determining questions of liability.

Soft law influences legal analysis in other ways, particularly in civil law jurisdictions, and can affect the outcome of rulings, thus creating new hard law. For example, the Supreme Court of Belize ordered the government to obtain the consent of affected indigenous peoples before it issued concessions for natural resource extraction on their land. The Supreme Court's reasoning relied heavily on the UN Declaration on the Rights of Indigenous Peoples – generally considered to be soft law – and, to a lesser degree, ILO Convention 169, even though Belize has not ratified the latter.[227]

Companies themselves can cause soft law to harden in specific instances. For example, when EPFIs and the IFC incorporate voluntary standards into project finance contracts, their "voluntary" standards become mandatory for the loan recipients.

At the international level, soft law can harden through incorporation into treaties. Notably, in June 2014, the UN Human Rights Council adopted a proposal, originally put forward by Ecuador, and co-sponsored by Bolivia, Cuba, South Africa, and Venezuela, to establish an intergovernmental working group to negotiate a treaty on business and

220. European Commission, *Business and Human Rights, National Action Plans*, available at http://ec.europa.eu/enterprise/policies/sustainable-business/corporate-social-responsibility/human-rights/.

221. Statement by the European Union, UN Human Right Council Forum on Business and Human Rights (Geneva, 3 December 2013), available at http://eeas.europa.eu/delegations/un_geneva/documents/eu_statments/human_right/2013-1203_forum_buz_hr-panel-i.pdf.

222. For an up-to-date list, see National Action Plans, Business and Human Rights Resource Centre, available at http://business-humanrights.org/en/un-guiding-principles/implementation-tools-examples/implementation-by-governments/by-type-of-initiative/national-action-plans.

223. Her Majesty's Government, Good Business – Implementing the UN Guiding Principles on Business and Human Rights (September 2013), available at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/236901/BHR_Action_Plan_-_final_online_version_1_.pdf.

224. The Companies Act 2006 (Strategic Report and Directors' Report) Regulations 2013, available at http://www.legislation.gov.uk/ukdsi/2013/9780111540169.

225. Choc v. Hudbay Minerals Inc.*, 2013 ONSC 1414.*

226. *Id.* at 32.

227. Cal v. Attorney General of Belize, Nos. 171 & 172, (Belize 18 Oct. 2007), available at https://www.law.arizona.edu/depts/iplp/adovaccy/maya_belize/documents/ClaimsNos171and172of2007.pdf.

human rights. The mandate of the working group is to "to elaborate an international legally binding instrument to regulate, in international human rights law, the activities of transnational corporations and other business enterprises."[228] Although several EU Member States, the US, and a number of other countries voted against the proposal, the initiation of the process reflects ongoing international concern regarding the human rights responsibilities of companies. Such a treaty instrument would reflect a significant "hardening" of the soft law normative expectations and standards discussed in this Chapter.

The process through which international soft law and voluntary guidelines harden – or do not – is not linear or fixed. The recent developments in US regulations, EU national action plans, and the UN Human Rights Council's approval of a process to negotiate a treaty on business and human rights suggest that one of the primary concepts in the UN Guiding Principles is hardening at least slightly — namely, that companies should identify and address their human rights impacts.

III. SUMMARY

- A multitude of non-binding guidelines relevant to banking and human rights has recently evolved. For example, the UN Guiding Principles and the 2011 OECD Guidelines clarified that banks should consider the human rights impacts of their activities and apply human rights due diligence within their business operations. The OECD plans to provide additional guidance to the financial sector regarding how the OECD Guidelines — and, implicitly, the UN Guiding Principles — apply to the financial sector.
- A number of UN agencies have developed guidance to help businesses, including financial institutions, better understand and integrate human rights considerations into their decision-making processes and business operations.
- Banks themselves have helped develop a number of important guidelines for the sector. For example, the EPs III require participating financial institutions to conduct due diligence in accordance with the UN Guiding Principles in the context of project-related financing and advisory services. In high-risk circumstances, project proponents are themselves expected to conduct human rights due diligence.
- More recently, the Thun Group of Banks released a report identifying how the UN Guiding Principles are relevant to a broad array of financial products and services, and will continue to explore this theme.
- The soft law and voluntary guidelines related to business and human rights have the potential to harden. Soft law can harden through incorporation into national law, domestic court rulings, or international treaties. In some instances, courts incorporate voluntary industry guidelines as standards of care in negligence cases as well, and this has indeed occurred in the context of business and human rights, although not specifically related to banking.

228. Human Rights Council, Bolivia (Plurinational State of), Cuba, Ecuador, South Africa, Venezuela (Bolivarian Republic of): draft resolution, …Elaboration of an international legally binding instrument on transnational corporation and other business enterprises with respect to human rights, June 25, 2014, UN Document A/HRC/26/L.22/Rev. 1, 26th Sess., Agenda item 3.

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