

# **Human Rights responsibilities of private sector banks**

**The policy required to “Respect” and provide “Access to remedy”**

**Submission to Professor John Ruggie,  
United Nations Special Representative of the Secretary-General on the issue of  
human rights and transnational corporations and other business enterprises**

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### **I. Introduction**

The duty of States “to protect against human rights abuses by third parties”, “the corporate responsibility to respect human rights, which means to act with due diligence to avoid infringing on the rights of others”, and the need for “greater access by victims to effective remedy, judicial and non-judicial[,]” are now clearly established.<sup>1</sup> This paper argues that the next submission of the UN Special Representative of the Secretary General for Business and

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<sup>1</sup> John Ruggie, Remarks by Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises [hereinafter SRS], “Engaging Export Credit Agencies in Respecting Human Rights”, OECD Export Credit Group’s “Common Approaches” Meeting, 3 (June 23, 2010), available at <http://198.170.85.29/Ruggie-remarks-to-OECD-re-export-credit-agencies-23-Jun-2010.pdf> (last visited July 1, 2010) [hereinafter SRS June 2010 Report]; see also International Finance Corporation (IFC), Global Compact, International Business Leaders Forum (IBLF), GUIDE TO HUMAN RIGHTS IMPACT ASSESSMENT AND MANAGEMENT (2010), available at <https://www.guidetohriam.org/guide/drawstep/pre-step1/human-rights-scenarios> (last visited July 1, 2010) (note that free registration is required for site access) [hereinafter HRIAM].

Human Rights to the Human Rights Council should specifically discuss the responsibility of private sector banks to meet the respect and remedy pillars of this “UN framework.”<sup>2</sup>

Although the Special Representative has discussed these responsibilities in previous reports to the extent that private banks are a subset of corporations,<sup>3</sup> the responsibilities of private sector banks must now be explicitly recognized.

Private sector banks have special and differentiated responsibilities with regard to their human rights obligations: even though human rights impacts of private sector banks are clear and regular, banks are often invisible players to affected communities or victims on the ground, and “but for” their financial role, many human rights abuses would not happen. The inverse is true as well: private sector banks can be powerful drivers of good practice to change corporate behavior on the ground. Their financial leverage can have a positive influence on the human rights impacts of their clients.

We call on the Special Representative to now specifically identify the responsibility of private sector banks to create and follow human rights policies that mandate due diligence at the beginning and throughout their activity, and to provide access to remedy. This paper proposes specific provisions that banks can incorporate into their human rights policies. Our recommendations for inclusion in the next Special Representative report to the Human Rights Council concur with and partly draw upon the recently released Guide to Human Rights Impact Assessment and Management,<sup>4</sup> and give guidance for private sector banks regarding specific language for due diligence and grievance mechanisms policies.

## **II. The upcoming report to the Human Rights Council must specifically identify private sector banks**

Private sector banks have a unique responsibility with regard to the “duty to respect” human rights. Private sector banks can, and do, enable human rights violations by financing

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<sup>2</sup> SRSG June 2010 Report, *supra* note 1.

<sup>3</sup> See SRSG, *Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises* [hereinafter *Report*], *Addendum, Corporate responsibility under international law and issues in extraterritorial regulation: summary of legal workshops*, ¶ 50, U.N. Doc. A/HRC/4/35/Add.2 (Feb. 15, 2007) [hereinafter *SRSG Feb. 15, 2007 Report*]; see generally, *SRSG Report, Protect, Respect and Remedy: a Framework for Business and Human Rights*, U.N. Doc. A/HRC/8/5 (Apr. 7, 2008) [hereinafter *SRSG April 7, 2008 Report*]; *SRSG, Report, Addendum, Summary of five multi-stakeholder consultations*, U.N. Doc. A/HRC/8/5/Add.1 (Apr. 23, 2008) [hereinafter *SRSG April 23, 2008 Report*]; *SRSG, Report, Clarifying the Concepts of “Sphere of influence” and “Complicity”*, U.N. Doc. A/HRC/8/16 (May 15, 2008) [hereinafter *SRSG May 15, 2008 Report*]; *SRSG, Report, Business and human rights: Towards operationalizing the “protect, respect and remedy” framework*, U.N. Doc. A/HRC/11/13 (Apr. 22, 2009) [hereinafter *SRSG April 22, 2009 Report*]; *SRSG, Report, Business and Human Rights: Further steps toward the operationalization of the “protect, respect and remedy” framework*, U.N. Doc. A/HRC/14/27 (Apr. 9, 2010) [hereinafter *SRSG April 9, 2010 Report*].

<sup>4</sup> HRIAM, *supra* note 1.

activities of clients that violate human rights directly,<sup>5</sup> or through support to clients who have a role in state action that violates human rights.<sup>6</sup>

Private sector banks must be singled out for the need for due diligence and ensuring access to remedy in their policies because there is insufficient movement by private sector banks to create explicit human rights policies with these components. Without identification of, acknowledgement of, and direction about these issues at the highest levels, we will not see the needed progress in development of these policies. While some private sector banks have developed human rights policy statements or codes of conduct with reference to human rights,<sup>7</sup> research for this report could not identify a single private sector bank that has a transparent policy containing *specific* due diligence procedures and corresponding grievance mechanism requirements.<sup>8</sup>

The need for high level guidance on specific due diligence and grievance mechanism language is demonstrated in the following examples of private sector banks that have had a role in human rights abuses, where adequate human rights policies of banks would have identified and prevented, or at least minimized these abuses, and would have provided a way to address resolution of disputes. The examples presented here were selected from many similar cases monitored by BankTrack<sup>9</sup> and other NGOs.

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<sup>5</sup> See Section II, *infra*.

<sup>6</sup> See e.g. Julia Kollewe, *Barclays faces apartheid court action*, The Independent, Jan. 21, 2006, available at <http://www.independent.co.uk/news/business/news/barclays-faces-apartheid-court-action-523883.html> (discussing *KHULUMANI V. BARCLAYS* (Docket Nos. 05-2141-cv, 05-2326-cv), where plaintiffs allege that Barclays, Citigroup and Deutsche Bank, not only benefited from business during apartheid in South Africa, but also directly supported apartheid by providing the financial support for “the expansion of the apartheid police and security apparatus”); *UNDUE DILIGENCE: HOW BANKS DO BUSINESS WITH CORRUPT REGIMES 68-81*, available at [http://www.undue-diligence.org/Pdf/GW\\_DueDilligence\\_FULL\\_lowres.pdf](http://www.undue-diligence.org/Pdf/GW_DueDilligence_FULL_lowres.pdf) (last visited July 6, 2010) (Citibank acted as a correspondent bank for two Liberian Banks, the Liberian Bank for Development and Investment and Ecobank, to utilize timber profits to support then-president Charles Taylor and his “appalling war crimes” which led to major human rights violations in the region).

<sup>7</sup> For an overview of human rights policies of major private sector banks, see the document section at [http://www.banktrack.org/show/pages/human\\_rights](http://www.banktrack.org/show/pages/human_rights) (last visited July 1, 2010).

<sup>8</sup> See BANKTRACK, *CLOSE THE GAP: BENCHMARKING INVESTMENT POLICIES OF INTERNATIONAL BANKS 69-71* (BankTrack ed., 2010) (April 2010), available at [http://www.banktrack.org/download/close\\_the\\_gap/close\\_the%20gap.pdf](http://www.banktrack.org/download/close_the_gap/close_the%20gap.pdf) (last visited July 1, 2010) [hereinafter *Close the Gap*] (finding that none of the 49 major banks surveyed had “developed its own policy” which “includes essential [human rights policy] elements in its lending[,] investment banking; [and] asset management[.]”). A follow-up June 2010 review conducted for this report of the private sector banks listed on the Business and Human Rights Resource Centre website, found that none of the 51 private sector banks we surveyed had a policy containing due diligence language and grievance procedures. See Business and Human Rights Resource Centre, *Company policy statements on human rights*, available at <http://www.business-humanrights.org/Documents/Policies> (last visited July 1, 2010).

<sup>9</sup> See BankTrack, *Dodgy Deals*, available at [http://www.banktrack.org/manage/ems\\_dodgydeals/dealslist](http://www.banktrack.org/manage/ems_dodgydeals/dealslist) (last visited July 1, 2010).

## Royal Bank of Scotland – Vedanta Resources Investment

Between 2007 and 2009, Vedanta Resources, through its subsidiaries Sterlite Industries and Vedanta Aluminium, sought formal approval to expand bauxite refining operations near the town of Lanjigarh and to begin opencast mining operations on Niyamgiri mountain, a sacred cultural and religious site for the Dongria Kondh people in the Indian state of Orissa.<sup>10</sup>

Vedanta has received corporate financing for these operations from the Royal Bank of Scotland (RBS) and other banks.<sup>11</sup> RBS financed Vedanta despite studies from Amnesty International, the Indian Ministry of Environment and Forests (MoEF), and the United Kingdom's OECD National Contact Point, indicating that Vedanta's mining and smelting operations were causing ongoing human rights abuses, including illegal deforestation, the destruction of protected local ecosystems, the disruption of key water sources, and the displacement of Dongria Kondh peoples.<sup>12</sup> Opposition to this project includes a lawsuit filed against the British Treasury by a consortium of environmental and human rights NGOs, and most recently, the Church of England's decision to sell its shares in Vedanta Resources following its growing concerns about Vedanta's human rights abuses.<sup>13</sup>

While RBS has a human rights policy that expresses its commitment to upholding the Universal Declaration of Human Rights, the United Nations Global Compact, and the Equator

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<sup>10</sup> See BankTrack, *Bauxite Mine Niyamgiri Hills*, available at [http://www.banktrack.org/show/dodgydeals/bauxite\\_mine\\_niyamgiri\\_hills](http://www.banktrack.org/show/dodgydeals/bauxite_mine_niyamgiri_hills) (last visited July 1, 2010) [hereinafter BankTrack, Bauxite Mine]; see also Amnesty Int'l, *Don't Mine Us Out of Existence: Bauxite Mine and Refinery Devastate Lives in India* 3-5, AI Index ASA 20/001/2010, 01 February 2010 [hereinafter Amnesty International Report].

<sup>11</sup> See Rob Edwards, *RBS Under Fire Over More 'Dirty' Investments*, THE HERALD SCOTLAND, Apr. 25, 2010, available at <http://www.heraldscotland.com/news/transport-environment/rbs-under-fire-over-more-dirty-investments-1.1022898> (last visited July 1, 2010); see also BankTrack, Bauxite Mine, *supra* note 10.

<sup>12</sup> See generally Amnesty International Report, *supra* note 10; see also Kathryn Hopkins, *Amnesty Report Slams Alumina Mine Run by Vedanta Subsidiary in India*, THE GUARDIAN, Feb. 9, 2010, available at <http://www.guardian.co.uk/business/2010/feb/09/amnesty-report-alumina-mine-vedanta> (last visited July 1, 2010); see also Amnesty Int'l Briefing Paper, *Vedanta's Operations Driving Human Rights Abuses in Orissa*, AI Index ASA 20/019/2009, 19 February 2010; see also Special Correspondent, *Vedanta Flouted Forest Conservation Norms, Says Report*, THE HINDU, Mar. 13, 2010, available at <http://beta.thehindu.com/news/national/article243927.ece> (last visited July 1, 2010) (regarding report by the Indian Ministry of Environment and Forestry); see also Gethin Chamberlain, *Vedanta Versus the Villagers: the Fight for the Sacred Mountain*, THE GUARDIAN, Oct. 12, 2009, available at <http://www.guardian.co.uk/business/2009/oct/12/vedanta-versus-the-villagers> (last visited July 1, 2010) (detailing long-standing evidence of environmental and social harms related to the Vedanta project); see also FINAL STATEMENT BY THE UK NATIONAL CONTACT POINT FOR THE OECD GUIDELINES FOR MULTINATIONAL ENTERPRISES: COMPLAINT FROM SURVIVAL INTERNATIONAL AGAINST VEDANTA RESOURCES PLC, available at [www.oecd.org/dataoecd/49/16/43884129.pdf](http://www.oecd.org/dataoecd/49/16/43884129.pdf) (last visited July 1, 2010) [hereinafter OECD REPORT].

<sup>13</sup> See 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> (last visited July 1, 2010) (regarding the lawsuit filed against the British Treasury by a consortium of environmental and human rights NGOs); see also Kathryn Hopkins, *Church of England Sells Vedanta Stake Over Human Rights Concerns*, THE GUARDIAN, Feb. 5, 2010, available at <http://www.guardian.co.uk/business/2010/feb/05/vedanta-niyamgiri-orissa-church-of-england> (last visited July 1, 2010).

Principles<sup>14</sup> --documents which make explicit reference to human rights protections-- the lack of specific guidance regarding due diligence and grievance mechanisms likely contributed to RBS's failure to properly account for and avoid the human rights risks associated with the Vedanta project. Even though RBS had specific risk management policies and procedures<sup>15</sup> in place to "take into account relevant social, ethical and environmental issues[,]"<sup>16</sup> these procedures did not mandate a human rights impact assessment, and failed to require evaluation of the accuracy or completeness of any assessments that were undertaken. Like Vedanta's own human rights policies and procedures, they were nothing more than a "paper policy."<sup>17</sup> There is no evidence that a human rights impact assessment was ever conducted in this case. The severity of the reactions to RBS' role in these alleged human rights violations demonstrates the "business case" for human rights due diligence.<sup>18</sup>

Furthermore, RBS's risk management policies failed to require a prompt, transparent, culturally appropriate, and readily accessible project-level grievance mechanism, which would have given RBS first hand knowledge of the very real human rights impacts involved in the Vedanta project. Indeed, such a mechanism could have triggered the avoidance of human rights abuses. RBS, similar to all other large private sector banks, also had no corporate-level accountability mechanism in place for its policy commitments.<sup>19</sup>

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<sup>14</sup> See RBS GROUP POSITION ON HUMAN RIGHTS 1, available at <http://www.rbs.com/about-rbs/g2/sustainability/our-policies.ashx> (last visited July 1, 2010) [hereinafter RBS HUMAN RIGHTS STATEMENT] ("The Royal Bank of Scotland Group is committed to respecting and upholding human rights in all areas of our operations and within our sphere of influence, as expressed in the Universal Declaration of Human . . . To ensure that we operate to consistent standards globally, the Group has adopted a number of internationally accepted codes, notably the Equator Principles and the UN Global Compact, which specifically address the management of human rights issues.").

<sup>15</sup> RBS HUMAN RIGHTS STATEMENT, *supra* note 14 ("We assess each lending, investment and services decision on an individual basis through our defined risk and credit committee procedures and take into account relevant social, ethical and environmental issues as a part of that process."); see also generally RBS BOARD RISK COMMITTEE: TERMS OF REFERENCE AND REPORTING LINE, available at [www.rbs.com/downloads/pdf/about\\_rbs/Terms\\_of\\_Reference.pdf](http://www.rbs.com/downloads/pdf/about_rbs/Terms_of_Reference.pdf) (last visited July 1, 2010) (regarding specific RBS risk management policies and procedures).

<sup>16</sup> See RBS HUMAN RIGHTS STATEMENT, *supra* note 14.

<sup>17</sup> OECD REPORT, *supra* note 12, at 23.

<sup>18</sup> See Identification: Social and Cultural Rights, HRIAM, available at <https://www.guidetohriam.org/guide/drawstep/step2/kpis-economic-social-and-cultural-rights> (last visited July 1, 2010) (discussing the factors companies should consider when assessing a host country's performance regarding economic, social and cultural rights); Identification: Potential Consequences for Companies: Civil and Political Rights, HRIAM, available at <https://www.guidetohriam.org/guide/drawstep/step2/examples-of-potential-consequences-for-companies-civil-> (last visited July 1, 2010) (offering human rights challenges that may create negative consequences for the companies involved).

<sup>19</sup> See SRSR April 7, 2008 Report, *supra* note 3 ("For multi-stakeholder or industry initiatives aiming to advance human rights standards in the practices of their corporate members, a grievance mechanism provides an important check on performance. *The same is true for financial institutions* seeking to ensure compliance with human rights standards in the conduct of the projects they support. In the absence of an effective grievance mechanism, the credibility of such initiatives and institutions may be questioned.") (emphasis added).

## **ANZ Banking Group Ltd. – OceanaGold Investment**

In 2006, OceanaGold, an Australian gold producer, acquired the Didipio mining project in Northern Luzon, Philippines.<sup>20</sup> The Didipio project represents one of the highest grade gold-copper development sites in the world and is held under a Financial & Technical Assistance Agreement (FTAA) with the Philippine government.<sup>21</sup> The ANZ Banking Group and an unnamed “consortium of banks” have financed the project since April 2006.<sup>22</sup>

Since assuming operations, OceanaGold has been accused by indigenous Filipinos of carrying out forced evictions, threats of violence, public misrepresentation, and the illegal demolition of the homes of indigenous peoples living near its proposed mining operations. In September 2007, Oxfam Australia detailed these allegations in a scathing report on OceanaGold’s operations in the Didipio mining project dating back to 2002.<sup>23</sup> In February 2008, a regional trial court instituted a temporary restraining order against OceanaGold’s demolition operations, stating that the mining firm’s activities had been “tainted with irregularities and contrary to law.”<sup>24</sup> Finally, in November 2009, the Philippine Human Rights Chairperson, Leila de Lima, personally investigated the Didipio allegations, finding that complaints filed with her office “were indeed true.”<sup>25</sup> A case against OceanaGold is currently proceeding in Philippine courts.<sup>26</sup>

While ANZ developed a more robust human rights policy statement in 2009,<sup>27</sup> their November 2006 human rights policy already asserted that ANZ’s operations “align[ed] with

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<sup>20</sup> See OceanaGold.com, *Our Business, Philippines*, available at [http://www.oceanagold.com/index.php?option=com\\_content&view=category&layout=blog&id=41&Itemid=172](http://www.oceanagold.com/index.php?option=com_content&view=category&layout=blog&id=41&Itemid=172) (last visited July 1, 2010).

<sup>21</sup> See OCEANAGOLD CORPORATION ANNUAL REPORT 2009: UNLOCKING EMBEDDED VALUE 10-11, available at [http://www.oceanagold.com/images/documents/oceanagold\\_annual\\_report\\_2009.pdf](http://www.oceanagold.com/images/documents/oceanagold_annual_report_2009.pdf) (last visited July 1, 2010) [hereinafter OCEANAGOLD 2009 ANNUAL REPORT].

<sup>22</sup> *Id.* at 67; see also OXFAM AUSTRALIA MINING OMBUDSMAN CASE REPORT: DIDIPIO GOLD AND COPPER MINE 11, available at <http://www.oxfam.org.au/explore/mining/our-work-with-communities/didipio-the-philippines> (last visited July 1, 2010) [hereinafter OXFAM REPORT].

<sup>23</sup> See generally OXFAM REPORT, *supra* note 22.

<sup>24</sup> See Floro Taguinod, *Human Rights Violations Against OceanaGold to be Aired in Court*, GMA NEWS.TV, Feb. 3, 2010, available at <http://www.minesandcommunities.org/article.php?a=9951&highlight=oceanagold> (last visited July 1, 2010); see also Ellen Teague, *Philippines: Mining Company Banned From Demolishing Homes of Indigenous People*, INDEPENDENT CATHOLIC NEWS, Mar. 27, 2010, available at <http://www.indcatholicnews.com/news.php?viewStory=15893> (last visited July 1, 2010).

<sup>25</sup> Press Release, *Philippines’ Human Rights Commissioner Investigates Didipio Complaints*, LEGAL RIGHTS AND NATURAL RESOURCES CENTER, Nov. 16, 2009, available at <http://www.minesandcommunities.org/article.php?a=9637> (last visited July 1, 2010).

<sup>26</sup> Press Release, *Legal Case Proceeds Against OceanaGold in the Philippines*, LEGAL RIGHTS AND NATURAL RESOURCES CENTER, Mar. 3, 2010, available at <http://www.minesandcommunities.org/article.php?a=9977> (last visited July 1, 2010).

<sup>27</sup> See ANZ.com, *About Us, Corporate Responsibility, 2009 performance*, available at <http://www.anz.com/about-us/corporate-responsibility/performance-reporting/performance/sustainable-development/> (last visited July 1, 2010) and ANZ and human rights, available at [http://www.banktrack.org/download/anz\\_and\\_human\\_rights\\_1/anz\\_and\\_human\\_rights\\_2009.pdf](http://www.banktrack.org/download/anz_and_human_rights_1/anz_and_human_rights_2009.pdf) (last visited July 1, 2010).

the OECD Guidelines for MNE's . . . especially [in the areas of] corporate governance and risk assessment."<sup>28</sup> Yet, ANZ financed OceanaGold's Didipio mining project in April 2006, and has continued financing it until today, despite available information that the project is in contravention of their own policy commitments both past and present.<sup>29</sup> Absent explicit due diligence standards and provision of "access to remedy" for violations of their policy, ANZ's human rights policy does not provide sufficient guidance for the bank itself and the people whose human rights it is intended to protect.

### **III. Human Rights policies for private sector banks must provide a roadmap for due diligence**

Just as with corporations generally, the responsibility of private sector banks "to respect human rights ... means to act with due diligence to avoid infringing on the rights of others[.]"<sup>30</sup> However, this responsibility to conduct due diligence is *amplified* with respect to private sector banks because their actions may "*facilitate and enable*" human rights violations with impacts that are strongly felt, but difficult to trace back to those bearing responsibility for them from the perspective of victims.<sup>31</sup>

Private sector banks require specific guidance, as offered in this section, regarding how to craft policies that will help them identify *when* human rights due diligence should be triggered and *how* that due diligence should be conducted.<sup>32</sup> They do not have to start from scratch developing their human rights policies. The recently released Guide to Human Rights Impact Assessment and Management (HRIAM) sponsored by the International Finance Corporation (IFC), The Global Compact and the International Business Leaders Forum (IBLF), establishes seven key stages in assessment and management of human rights impacts.<sup>33</sup> These stages are consistent with the four policy elements identified by the UN Special Representative as required for corporate human rights due diligence.<sup>34</sup> The seven

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<sup>28</sup> See REVIEW OF ANZ HUMAN RIGHTS POLICIES, PRACTICES AND MANAGEMENT SYSTEMS 2, *available at* [http://www.anz.com/aus/CorporateResponsibility2006/pdf/Human\\_Rights\\_D7.pdf](http://www.anz.com/aus/CorporateResponsibility2006/pdf/Human_Rights_D7.pdf) (last visited July 1, 2010).

<sup>29</sup> OCEANAGOLD 2009 ANNUAL REPORT, *supra* note 21 (revealing ANZ's continued financing of the OceanaGold Didipio project).

<sup>30</sup> See SRSR April 9, 2010 Report, *supra* note 3, at ¶ 1 (noted in the context of corporations generally); *see also* SRSR April 7, 2008 Report, *supra* note 3 at ¶ 40 (with regard to Export Credit Agencies); Jan Cappelle, Human Rights, Banking Risks: Incorporating Human Rights Obligations in Bank Policies 20 (Mar. 17, 2007) (briefing paper written for BankTrack, on file with BankTrack publications) [hereinafter Human Rights Obligations in Bank Policies].

<sup>31</sup> *See generally* Human Rights Obligations in Bank Policies, *supra* note 30 at 1 (emphasis original).

<sup>32</sup> SRSR April 9, 2010 Report, *supra* note 3, at ¶ 79 ("The appropriate corporate response to managing the risks of infringing the rights of others is to exercise human rights due diligence."); *see also* Human Rights Obligations in Bank Policies, *supra* note 30.

<sup>33</sup> *See* Introduction, HRIAM, *supra* note 1, *available at* <https://www.guidetohriam.org/guide/drawstep/introduction> (last visited July 1, 2010).

<sup>34</sup> *See* SRSR April 9, 2010 Report, *supra* note 3, at ¶ 83 (The four elements identified as required for corporate human rights due diligence include: "a statement of policy articulating the company's commitment to respect human rights; periodic assessment of actual and potential human rights impacts of company activities and relationships; integrating these commitments and assessments into internal control and oversight systems; and tracking and reporting performance.").

HRIAM stages are: Preparation, Identification, Engagement, Assessment, Mitigation, Management, and Evaluation.<sup>35</sup>

We recommend that the UN Special Representative's next report to the Human Rights Council highlight that these now well-established human rights policy components are relevant and applicable for *private sector banks policies in particular*.<sup>36</sup> Because private sector banks are influential in either causing or preventing human rights abuse, it is critical that the human rights risks present in their financed activities be recognized and addressed. Respect for human rights therefore requires that a private sector bank's due diligence procedures be at or above the global standard. This report draws on the seven HRIAM categories that apply to all companies – including banks – and specifically tailors them for use in developing human rights policies for private sector banks.

#### **a. Preparation: know your business**

Private sector banks have a unique duty to know how their activities impact human rights, who their clients are (so that they can identify the potential human rights impacts and policies of these clients), and how human rights impacts may affect the private sector bank's business operations. Using the HRIAM Due Diligence Mapping exercise allows a bank to gather this information needed to understand the scope and context of its human rights policy.<sup>37</sup>

When establishing a private sector bank's human rights policy, each bank should also identify its own legal, policy, and practical commitments, as well as the commitments and expectations of stakeholders.<sup>38</sup>

#### **b. Identification: setting policy and identifying risks and impacts**

A private sector bank's human rights policy should begin with a statement referencing the precise body of human rights standards it commits to apply in all of its activities and for

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<sup>35</sup> See Introduction, HRIAM, *supra* note 1, available at <https://www.guidetohriam.org/guide/drawstep/introduction> (last visited July 1, 2010).

<sup>36</sup> See Preparation: Human Rights Scenarios, HRIAM, *supra* note 1, available at <https://www.guidetohriam.org/guide/drawstep/pre-step1/human-rights-scenarios> (last visited July 1, 2010); see generally, Human Rights Obligations in Bank Policies, *supra* note 30.

<sup>37</sup> See Preparation: Determining a Company's Human Rights Due Diligence, HRIAM, *supra* note 1, available at <https://www.guidetohriam.org/guide/drawstep/pre-step1/determining-a-company-rsquo-s-human-rights-due-diligenc> (last visited July 1, 2010) (outlining effective due diligence language for company human rights policies).

<sup>38</sup> See Identification, HRIAM, *supra* note 1, available at <https://www.guidetohriam.org/guide/drawstep/step2> (last visited July 1, 2010) (suggesting that companies should identify key human rights risks associated with their activities); see also Identification: Contractors, HRIAM, *supra* note 1, available at <https://www.guidetohriam.org/guide/drawstep/step2/contractors> (last visited July 1, 2010) (advising contractual relationships should too, be examined for human rights risks); Identification: Suppliers, HRIAM, *supra* note 1, available at <https://www.guidetohriam.org/guide/drawstep/step2/suppliers> (last visited July 1, 2010) (highlighting that in instances where there are several layers of suppliers, companies have a duty to ascertain human rights risks associated with each supplier).

each decision at all levels.<sup>39</sup> After the “[broad] aspirational language... more detailed guidance in specific functional areas is necessary to give those commitments meaning.”<sup>40</sup> As described by the Special Representative, the minimal grouping of human rights that should be recognized is known as the “International Bill of Human Rights,” consisting of the Universal Declaration of Human Rights; the International Covenant on Civil and Political Rights; the International Covenant on Economic, Social and Cultural Rights; and the eight core International Labor Organization conventions.<sup>41</sup>

In addition, the policy statement ideally includes further commitment to follow other standards or norms that are considered part of the core international human rights conventions, or that are relevant to particular industries or risks.<sup>42</sup> For example, for private sector banks that invest heavily in areas with security risks or in conflict zones, the policy statement should include reference to the Voluntary Principles on Security and Human Rights.<sup>43</sup> To determine which set of human rights commitments the policy should reference,

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<sup>39</sup> See Management: Human Rights Policy Statement, HRIAM, *supra* note 1, available at <https://www.guidetohriam.org/guide/drawstep/step6/human-rights-policy-statement> (last visited July 1, 2010) (advocating companies develop an overarching human rights policy that is applicable to all aspects of their business); Corporate Duty to Respect, The Relevance of Private Finance 4 (Dec. 17, 2007) (BankTrack discussion paper, on file with BankTrack publications) [hereinafter Corporate Duty to Respect].

<sup>40</sup> SRSR April 7, 2008 Report, *supra* note 3, ¶ 60; see also Berne Declaration discussion paper, *Without Maps or Compass, Credit Suisse, UBS and Human Rights* 15-16, available at [http://www.banktrack.org/download/without\\_map\\_or\\_compass\\_credit\\_suisse\\_ubs\\_and\\_human\\_rights/berne\\_declaration\\_banks\\_human\\_rights\\_eng.pdf](http://www.banktrack.org/download/without_map_or_compass_credit_suisse_ubs_and_human_rights/berne_declaration_banks_human_rights_eng.pdf) (last visited July 1, 2010).

<sup>41</sup> See SRSR Apr. 9, 2010 Report, *supra* note 3, ¶ 60 (“companies should look to these instruments as authoritative lists of internationally recognized rights.”); see also Assessment: Establishing the Framework of the Assessment, HRIAM, *supra* note 1, available at <https://www.guidetohriam.org/guide/drawstep/step4/establishing-the-framework-of-the-assessment-> (last visited July 1, 2010) (suggesting that a framework of assessment should be formulated with respect to the various internationally agreed human rights standards).

<sup>42</sup> See Identification: Industry Sector, HRIAM, *supra* note 1, available at <https://www.guidetohriam.org/guide/drawstep/step2/industry-sector> (last visited July 1, 2010) (advising companies should research sector specific human rights risks and norms). The nine core international human rights conventions are (1) International Convention on the Elimination of All Forms of Racial Discrimination (1965, 173 parties); (2) International Covenant on Civil and Political Rights (1966, 160 parties); (3) International Covenant on Economic, Social and Cultural Rights (1966, 160 parties); (4) Convention on the Elimination of All Forms of Discrimination against Women (1979, 186 parties); (5) Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1984, 146 parties); (6) Convention on the Rights of the Child (1989, 193 parties); (7) International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (1990, 42 parties); (8) International Convention for the Protection of All Persons from Enforced Disappearance (2006, 13 parties); and (9) Convention on the Rights of Persons with Disabilities (2006, 65 parties).

<sup>43</sup> See Voluntary Principles on Security and Human Rights, available at <http://www.voluntaryprinciples.org/> (last visited July 1, 2010); OECD Risk Awareness Tool for Multinational Enterprises in Weak Governance Zones, available at [http://www.oecd.org/document/5/0,3343,en\\_2649\\_33765\\_36899994\\_1\\_1\\_1\\_1,00.html](http://www.oecd.org/document/5/0,3343,en_2649_33765_36899994_1_1_1_1,00.html) (last visited July 1, 2010); OECD Draft due diligence guidance for responsible supply chain management of minerals from conflict-affected and high-risk areas (April 28, 2010), available at [http://www.oecd.org/document/36/0,3343,en\\_2649\\_33765\\_44307940\\_1\\_1\\_1\\_1,00.html](http://www.oecd.org/document/36/0,3343,en_2649_33765_44307940_1_1_1_1,00.html) (last visited July 1, 2010) (“This project will clarify the nature of **due diligence in the mining and minerals sector** and develop **user-friendly practical guidance for due diligence in conflict-affected and high-risk areas.**”) (emphasis original).

the HRIAM provides a useful Human Rights Impact Assessment and Management Table<sup>44</sup> and set of hypothetical human rights scenarios that are useful to “[s]timulate thinking on potential and existing human rights challenges faced by companies, and [h]elp companies assess their capacity to address such challenges.”<sup>45</sup>

The statement of policy should be followed by an assessment of the degree of human rights due diligence required regarding a bank activity or proposed activity. This requires analysis of the type of banking function at issue to gauge the bank’s “sphere of influence” – or degree of impact – over the proposed activity.<sup>46</sup>

The bank’s functions may be viewed along a continuum with these two end points: instances in which (1) the bank’s activity has a high, even controlling degree of influence over an actual or potential human rights impact, and (2) the bank’s activity has no influence. Depending on its portfolio at any given moment, a private sector bank could be engaged in activities that fall along several different points of this continuum, for example, ranging from project finance in the extractive industries (wherein the institution would have clear, direct influence over human rights impacts), to personal banking and consumer credit cards (no, indirect, or unknown influence over human rights impacts).

Each bank should apply a ranking system for **each type of activity** it undertakes.<sup>47</sup> While the list of activities will differ among banks, the ranking for the same activity at different

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<sup>44</sup> See Assessment: Human Rights Impact Assessment and Management, HRIAM, *supra* note 1, available at <https://www.guidetohriam.org/hriamtable> (last visited July 1, 2010) (providing a guides to the basic human rights and how they may apply to various business circumstances).

<sup>45</sup> See Preparation: Human Rights Scenarios, HRIAM, *supra* note 1, available at <https://www.guidetohriam.org/guide/drawstep/pre-step1/human-rights-scenarios> (last visited July 1, 2010) (allowing companies to search various sectors and associated activities that may have human rights implications); see also Identification: Set the Baseline, HRIAM, *supra* note 1, available at <https://www.guidetohriam.org/guide/drawstep/step2/set-the-baseline> (last visited July 1, 2010) (suggesting companies set a human rights baseline for a given type of project that can be used as a barometer by which to measure project impact).

<sup>46</sup> United Nations Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights, U.N. Doc. E/CN.4/Sub.2/2003/12/Rev.2 (2003) (“Within their respective spheres of activity and influence, transnational corporations and other business enterprises have the obligation to promote, secure the fulfilment [sic] of, respect, ensure respect of and protect human rights recognized in international as well as national law, including the rights and interests of indigenous peoples and other vulnerable groups.”); see also OHCHR Briefing Paper, *The Global Compact and Human Rights: Understanding Sphere of Influence and Complicity*, Office of the United Nations High Commissioner for Human Rights 4 (explaining that the term involves “a certain political, contractual, economic, or geographic proximity”).

<sup>47</sup> See Identification: Business Relationships, HRIAM, *supra* note 1, available at <https://www.guidetohriam.org/guide/drawstep/step2/business-relationships> (last visited June 30, 2010) (highlighting the various business relationships that may impact human rights); see also Peter Frankental, *Consultation on Human Rights and the Financial Sector Before the United Nations High Commissioner on Human Rights: How Can Financial Institutions Strengthen the Role of International Human Rights Standards in Their Decision-Making?* (Feb. 16, 2007) (transcript on file with the author) (“[Human rights impact assessments (HRIA)] should apply to all investment projects, not just to major infrastructure projects, such as dams and oil pipelines. Any manufacturing plant, hotel or leisure centre, or significant operation of any kind that will have impacts on human rights should be accompanied by a HRIA.”).

banks should be the same. Increased transparency over private sector bank human rights commitments and practices will allow banks to cross reference their activity rankings with peer institutions.

The ranking of each activity should be agreed upon by senior officers of the bank and should be altered by their approval only, such that the categorization process happens only once (see examples below), and is only re-examined as the bank takes on new roles. The ranking should use the following list of categories, with Level I representing the highest degree of risk, impact, or leverage,<sup>48</sup> and Level III representing the lowest:<sup>49</sup>

**Level I** clear risk, clear impact, and/or high leverage over activities (such as project finance, advisory services, and certain types of credit facilities and corporate loans)

**Level II** some risk, some impact, and/or some leverage over activities (such as investment in a diversified mutual fund)

**Level III** no risk, no impact, and/or no leverage over activities (such as individual personal banking services)

For each type of activity ranked above, each of the risk factors below should be analyzed to determine *whether and what type of human rights impact assessment is required*. The risk factors include, but are not limited to:

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<sup>48</sup> See Identification: Determining the Company's Level of Control, HRIAM, *supra* note 1, available at <https://www.guidetohriam.org/guide/drawstep/step2/determining-the-company-s-level-of-control> (last visited July 1, 2010) (providing key questions to ask when determining the bank's level of control).

<sup>49</sup> These categorizations roughly follow the system used by the international financial institutions (IFIs) and Equator Principle Financial Institutions (EPFIs) to identify and separate levels of risk. The IFIs and EPFIs rank activities as Category A, B or C to identify levels of risk within project finance and advisory services and to assess the type of social and environmental due diligence required. The Int'l Finance Corporation [IFC], *Policy on Social and Environmental Sustainability*, ¶ 18 (2006), available at <http://www.ifc.org/ifcext/sustainability.nsf/Content/EnvSocStandards> (last visited July 1, 2010); [hereinafter IFC Policy on Social and Environmental Sustainability]; The Equator Principles: *A Financial Industry Benchmark for Determining, Assessing, and Managing Social & Environmental Risk in Project Financing*, Principle 2 (2006), available at [http://www.equator-principles.com/documents/Equator\\_Principles.pdf](http://www.equator-principles.com/documents/Equator_Principles.pdf) (last visited July 1, 2010) [hereinafter Equator Principles]; The World Bank Group, *Operational Policy [OP] 4.01: Environmental Assessment*, ¶ 8 (1999), available at <http://web.worldbank.org/WBSITE/EXTERNAL/PROJECTS/EXTPOLICIES/EXTOPMANUAL/0,,print:Y~isCURL:Y~contntMDK:20064724~menuPK:64701763~pagePK:64709096~piPK:64709108~theSitePK:502184.00.html> (last visited July 1, 2010) [hereinafter World Bank OP 4.01]; European Bank for Reconstruction & Dev. [EBRD], *Environmental and Social Policy*, ¶¶ 19-22 (2008), available at <http://press.ebrd.com/pages/about/principles/sustainability/policy.shtml> (last visited June 29, 2010) [hereinafter EBRD ESP]. While the Level I, II, III categories draw upon this concept, the Levels differ from the Categories in that they allow private sector banks to place *all of their activities* (not just project finance and advisory services) into these three areas of risk.

1. activity related to certain sectors such as agribusiness, chemicals, forestry, mining, munitions,<sup>50</sup> oil and gas, power, infrastructure, or water;<sup>51</sup>
2. activity impacting weak governance zones;<sup>52</sup>
3. activity impacting conflict zones;<sup>53</sup>
4. activity impacting “at risk” groups such as indigenous peoples, women and children or the disabled;<sup>54</sup>
5. activity impacting areas or entities with known labor rights issues;<sup>55</sup>
6. activity related to areas or entities with known human rights issues;<sup>56</sup> and
7. activity related to areas or entities with known environmental issues affecting communities.<sup>57</sup>

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<sup>50</sup> Where private sector banks are involved in sectors with high risk of human rights impacts, such as munitions, exclusion lists may be appropriate as a means of meeting policy commitments. See e.g., EBRD ESP, *supra* note 49, Appendix 2; IFC Exclusion List, <http://www.ifc.org/ifcext/sustainability.nsf/Content/IFCExclusionList> (last visited June 28, 2010); see also Human Rights Obligations, *supra* note 30, 16-17.

<sup>51</sup> See Identification: Industry Sector, HRIAM, *supra* note 1, available at <https://www.guidetohriam.org/guide/drawstep/step2/industry-sector> (last visited June 30, 2010) (highlighting the importance of assessing the particular sector of the business activity).

<sup>52</sup> See OECD Risk Awareness Tool for Multinational Enterprises in Weak Governance Zones, available at [http://www.oecd.org/document/5/0,3343,en\\_2649\\_33765\\_36899994\\_1\\_1\\_1\\_1,00.html](http://www.oecd.org/document/5/0,3343,en_2649_33765_36899994_1_1_1_1,00.html) (last visited July 1, 2010); OECD Draft due diligence guidance for responsible supply chain management of minerals from conflict-affected and high-risk areas (April 28, 2010), available at [http://www.oecd.org/document/36/0,3343,en\\_2649\\_33765\\_44307940\\_1\\_1\\_1\\_1,00.html](http://www.oecd.org/document/36/0,3343,en_2649_33765_44307940_1_1_1_1,00.html) (last visited July 1, 2010); see also Identification: Country of Operation, HRIAM, available at <https://www.guidetohriam.org/guide/drawstep/step2/country-of-operation> (last visited July 1, 2010) (advocating the importance of understanding and acknowledging the host country’s human rights record); Identification: Potential Consequences for Companies: Civil and Political Rights, HRIAM, *supra* note 1, available at <https://www.guidetohriam.org/guide/drawstep/step2/civil-and-political-rights> (last visited July 1, 2010) (highlighting the potential consequences to the company associated with specific human rights challenges); Identification: Set the Baseline, HRIAM, *supra* note 1, available at <https://www.guidetohriam.org/guide/drawstep/step2/set-the-baseline> (last visited July 1, 2010) (suggesting companies set a human rights baseline for a given type of project that can be used as a barometer by which to measure project impact).

<sup>53</sup> See Voluntary Principles on Security and Human Rights, available at <http://www.voluntaryprinciples.org/> (last visited July 1, 2010).

<sup>54</sup> SRSR April 9, 2010 Report, *supra* note 3, ¶ 97; see also Economic, Social and Cultural Rights, HRIAM, *supra* note 1, available at <https://www.guidetohriam.org/guide/drawstep/step2/economic-social-and-cultural-rights> (last visited July 1, 2010).

<sup>55</sup> Where an activity impacts areas or entities with known issues, the term “known” should include where a regulator or court has been involved in an ongoing case, complaint, or investigation.

<sup>56</sup> See *id.*; see also Identification: Potential Consequences for Companies: Civil and Political Rights, HRIAM, *supra* note 1, available at <https://www.guidetohriam.org/guide/drawstep/step2/civil-and-political-rights> (last visited July 1, 2010) (highlighting the potential consequences to the company associated with specific human rights challenges); see also Identification: Set the Baseline, HRIAM, *supra* note 1, available at <https://www.guidetohriam.org/guide/drawstep/step2/set-the-baseline> (last visited July 1, 2010) (suggesting companies set a human rights baseline for a given type of project that can be used as a barometer by which to measure project impact).

<sup>57</sup> See *supra* note 55.

The level of analysis of these risk factors depends on the ranking of the activity. For example, for a Level I activity, such as a general corporate loan, an in depth analysis of these factors is required and a human rights impact assessment is likely required. For a Level II activity, such as investment in a diversified mutual fund, an analysis of the risk factors may result in the requirement of a less searching impact assessment. For Level III activities, such as provision of automatic teller machines or extension of homeowner mortgages or consumer credit cards, the lowest degree of analysis is required and no further impact assessment may be needed. To assist in evaluation of these factors, a number of online tools are available.<sup>58</sup>

As an example of the risk factor analysis, take the above example of the corporate loan that RBS gave to Vedanta Resources. In that case, applying the proposed human rights policy analysis above, if RBS is making a general corporate loan in Vedanta, such an activity would be a Level I because there could be significant leverage, influence or impact over human rights on the ground as a result of the activity. Running through the risk factors using answer choices “yes, no, or maybe” regarding possibility of such risk in this example, the following rankings might be appropriate:

- (1) yes – because Vedanta is an extractive industry company,
- (2) maybe – because Vedanta operates in India, Zambia and Australia and there are weak governance zones in some of these areas,
- (3) maybe – there are conflict zones in some of these areas,
- (4) maybe – there are “at risk” groups in areas where Vedanta operates,
- (5) maybe – labor issues are known in areas where Vedanta operates,
- (6) maybe – human rights issues are known in areas where Vedanta operates, and
- (7) maybe – environmental issues affect communities in areas where Vedanta operates.

In the case of activities ranked as Level I, where there are any “yes” or “maybe” responses to the risk factors as is the case with this example, further human rights due diligence in the form of a human rights impact assessment (HRIA) is required. The scope and depth of the HRIA will depend on how many “yes” or “maybe” responses there are. In the case of a Level I project, this type of analysis should be conducted by a banker with direct knowledge of the potential investment or activity, along with involvement of internal or external experts.<sup>59</sup>

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<sup>58</sup> See Danish Institute for Human Rights, *Country Risk Assessment Reports*, available at [http://humanrightsbusiness.org/?f=country\\_risk](http://humanrightsbusiness.org/?f=country_risk) (last visited June 28, 2010) (“The Country Risk Assessment is the most comprehensive available report on the human rights risks to business. As well as in-depth descriptions of legal protections and violation risks in practice, the report includes detailed recommendations, topic-specific focal areas and extensive background information on the country in question.”). The Danish Institute has begun work on a HRCA tool that is specifically for financial institutions. See RITA ROCA & FRANCESCA MANTA, *VALUES ADDED: THE CHALLENGE OF INTEGRATING HUMAN RIGHTS INTO THE FINANCIAL SECTOR 2* (The Danish Inst. for Human Rights ed., 2010), available at <http://humanrightsbusiness.org/?f=publications> (last visited July 1, 2010). See also HRIAM, *supra* note 1; U.S. Department of State Human Rights Reports, available at <http://www.state.gov/g/drl/rls/hrrpt/> (last visited July 1, 2010).

<sup>59</sup> See Equator Principles, *supra* note 49, at Principle 7 (“For all Category A projects and, as appropriate, for Category B projects, an independent social or environmental expert not directly associated with the borrower will

The analysis would need to be carried out again where a decision is made about a general corporate loan where a change is possible with regard to one or more of the risk factors.

In the case of a Level III activity, an example is personal banking services such as placement of a new ATM machine in London. The risk factor analysis for that type of activity would be “no” for factors (1) through (7), such that no analysis is needed for future such activities of the bank. The result of uniform answers of “no” for a Level III project would mean that no further human rights due diligence is required. In the case of a Level III activity, this also means no further analysis would be necessary for similar future decisions about that activity. Table 1 illustrates the examples:

<b>Examples of the Financial Service</b>	<b>Categorization</b>	<b>Activity</b>	<b>Risk Assessment</b>	<b>Result</b>
General corporate loan to extractive industry company	Level I	clear risk, clear impact, and/or high leverage over activities	1. yes 2. maybe 3. maybe 4. maybe 5. maybe 6. maybe 7. maybe	At least one “yes” and/or “maybe” response, therefore conduct of an HRIA is required.
Investment in a diversified mutual fund	Level II	some risk, some impact, and/or some leverage over activities	1. maybe 2. maybe 3. maybe 4. maybe 5. maybe 6. maybe 7. maybe	At least one “yes” and/or “maybe” response, therefore conduct of an HRIA is required ( <i>i.e.</i> more information about the fund is required).
Personal banking services for individuals in OECD countries	Level III	no risk, no impact, and/or no leverage over activities	1. no 2. no 3. no 4. no 5. no 6. no 7. no	No “yes” and/or “maybe” responses, therefore no HRIA is required.

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review the Assessment, AP and consultation process documentation in order to assist EPFI's due diligence, and assess Equator Principles compliance.”); *see also* EBRD ESP, *supra* note 49, at ¶¶ 13, 36 (stating that periodic audits and general monitoring is done, generally speaking, by independent specialists); *see also id.* at Performance Requirement ¶ 10 (describing that higher potential environmental and social risks might necessitate independent auditing), *and* Performance Requirement ¶ 12 (stating that Category C projects do not need appraisal by independent auditors because they have “minimal or no adverse impacts [on social or environmental factors]”), *and* Performance Requirement ¶ 20 (stating that Category A projects need periodic audits by “qualified and experienced specialists”); *see also* World Bank OP 4.01, *supra* note 49, at ¶ 4 (stating that only Category A projects must be assessed by an independent expert); IFC Policy on Social and Environmental Sustainability, *supra* note 49, at ¶ 10, 15 (stating that the client handles the assessment, with the IFC potentially requiring an external expert if the client’s assessment appears inadequate).

In sum, the conduct of a full HRIA is triggered where a scoping exercise determines that *one or more risk factors are applicable* and the bank's guidance as to analysis of these factors triggers further assessment.

### **c. Assessment: due diligence scoping**

Where the analysis of risk factors trigger the need for a HRIA, the private sector bank's human rights policy should identify the elements required in the HRIA analysis itself, drawing on what are now well-developed standards.<sup>60</sup> Where an HRIA is required, it should minimally conform with the following principles:

- comprehensive scoping of applicable standards;<sup>61</sup>
- focus on anticipating and avoiding potential adverse human rights impacts;
- best practice methodology assessing risks to and rights of communities;
- determination of willingness of client to manage risks;
- evaluation of short-, medium-, and long-term human rights impacts and the cumulative nature of impacts (i.e. if a project adds to or exacerbates existing impacts);<sup>62</sup>
- a transparent and consultative process;
- publicly released findings, with specific timely notice to affected people; and
- findings and recommendations that are embodied in a management and implementation plan agreed upon by the client and all relevant stakeholders.<sup>63</sup>

In addition to application of these HRIA principles, where "significant potential adverse impacts" are identified, "other processes may need to be initiated in order to reduce human rights risks, and ensure that the [financial institution] is not complicit in potential abuses."<sup>64</sup>

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<sup>60</sup> See Assessment, HRIAM, *supra* note 1, available at <https://www.guidetohriam.org/guide/drawstep/step4> (last visited July 1, 2010) (suggesting companies understand the context of their business activity by drawing from established research and standards); THE DANISH INSTITUTE FOR HUMAN RIGHTS, STRATEGIC FRAMEWORK 2009-2010, 26 (2009) [hereinafter DI Framework]; Principles for Social Impact Assessment, available at <http://www.iaia.org/publicdocuments/special-publications/SP2.pdf> (last visited June 30, 2010) (the Principles were prepared over a five year period through workshops and conferences on six continents and are meant to represent best practice); see also Human Rights Obligations, *supra* note 30, 18-19.

<sup>61</sup> See Defining the Scope of the Assessment, HRIAM, *supra* note 1, available at <https://www.guidetohriam.org/guide/drawstep/step4/defining-the-scope-of-the-assessment> (last visited June 30, 2010) (providing five main criteria to consider in a human rights assessment: (1) the human rights risks of the country of operations; (2) the human rights risks of the key business relationships, including both associated and third party organizations; (3) the human rights risks of the business activity itself; (4) the human rights risks of the business with respect to the various stakeholders both potentially and actually affected and directly or indirectly affected; and (5) the human rights risks of the each of the key stages of the project/business).

<sup>62</sup> See Assessment: Assessing the Human Rights Risks and Impacts, HRIAM, *supra* note 1, available at <https://www.guidetohriam.org/guide/drawstep/step4/assessing-the-human-rights-risks-and-impacts> (last visited June 30, 2010) (suggesting companies should identify the key stages of the project lifecycle and subsequently identify each stage's potential human rights impact).

<sup>63</sup> See Human Rights Obligations, *supra* note 30 at 19.

The Danish Institute for Human Rights is an established resource for HRIA, having developed a Human Rights Compliance Assessment (HRCA) tool with approximately 350 questions and over 1,000 indicators that would be an appropriate tool for HRIA when a full assessment is needed.<sup>65</sup> Private sector bank human rights policies may wish to explicitly adopt an individualized form of assessment, or may adopt a reputable outside service, such as the Danish Institute's tool.

#### **d. Mitigation: action plans**

Where risks are identified through the HRIA process, a human rights action plan may be required.<sup>66</sup> In some cases, the HRIA may identify impacts that are so large or so challenging to mitigate that *refraining from taking on the activity* is the only acceptable next step that will allow adherence to the bank's policy.<sup>67</sup> For a private sector bank's human rights policy to have meaning, 'refraining from involvement' must be an explicit option to consider.

Where creation of an action plan and moving forward with the activity is the appropriate and defensible response, the policy must require the bank or client to disclose all identified human rights risks to potentially affected communities, and consult with these affected communities regarding actions "necessary to implement the various sets of mitigation

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<sup>64</sup> *Id.* ("Additional processes or requirements could include: additional expert studies, the formation of expert committees, extra monitoring activities, culturally appropriate and independent grievance mechanisms that are responsive to the concerns of affected people, and the incorporation of specific covenants that bind clients to measures to prevent the violation of human rights.").

<sup>65</sup> DI Framework, *supra* note 60 at 26.

<sup>66</sup> For examples of actions plans required in policies in the non-human rights context, see Equator Principles, *supra* note 49, Principle 4 ("The AP [Action Plan] will describe and prioritize the actions needed to implement mitigation measures, corrective actions and monitoring measures necessary to manage the impacts and risks identified in the Assessment."); IFC Performance Standards on Social and Environmental Sustainability, PS 1, ¶ 16 *available at* [http://www.ifc.org/ifcext/sustainability.nsf/AttachmentsByTitle/pol\\_PerformanceStandards2006\\_full/\\$FILE/IFC+Performance+Standards.pdf](http://www.ifc.org/ifcext/sustainability.nsf/AttachmentsByTitle/pol_PerformanceStandards2006_full/$FILE/IFC+Performance+Standards.pdf) (last visited July 1, 2010) ("Where the client identifies specific mitigation measures and actions necessary for the project to comply with applicable laws and regulations and to meet the requirements of the Performance Standards 1 through 8, the client will prepare an Action Plan. These measures and actions will reflect the outcomes of consultation on social and environmental risks and adverse impacts") [hereinafter IFC PS]; EBRD ESP, *supra* note 49, at ¶ 29 ("If a proposed business activity to be financed by the EBRD relates to existing facilities that do not meet the PRs [Project Requirements]...the client will be required to adopt and implement an Environmental and Social Action Plan (ESAP)"); World Bank OP 4.01, *Annex C: Environmental Management Plan*, ¶ 1 (1999), *available at* [http://web.worldbank.org/WBSITE/EXTERNAL/PROJECTS/EXTPOLICIES/EXTOPMANUAL/0,,contentMDK:20065218~menuPK:64701763~pagePK:64709096~piPK:64709108~theSitePK:502184\\_00.html](http://web.worldbank.org/WBSITE/EXTERNAL/PROJECTS/EXTPOLICIES/EXTOPMANUAL/0,,contentMDK:20065218~menuPK:64701763~pagePK:64709096~piPK:64709108~theSitePK:502184_00.html) (last visited July 1, 2010) ("A project's environmental management plan (EMP) consists of the set of mitigation, monitoring, and institutional measures to be taken during implementation and operation to eliminate adverse environmental and social impacts, offset them, or reduce them to acceptable levels."); *see also* Mitigation, HRIAM, *supra* note 1, *available at* <https://www.guidetohriam.org/guide/drawstep/step5> (last visited July 1, 2010).

<sup>67</sup> *See* Mitigation: Mitigation Hierarchy, HRIAM, *supra* note 1, *available at* <https://www.guidetohriam.org/guide/drawstep/step5/developing-appropriate-mitigation-action-plans> (last visited June 30, 2010) (providing four options for mitigation, including complete avoidance of the activity).

measures or corrective actions to be undertaken[.]”<sup>68</sup> Action plans impacting indigenous communities are required to be based on the principle of “free, prior informed consent.”<sup>69</sup> The action plan should include “prioritization” of actions, a “time-line for their implementation”, and a plan for reporting on the implementation of the actions.<sup>70</sup>

#### **e. Management and evaluation: monitoring and reporting**

In the case where a private sector bank moves forward with lending activities after conducting a full HRIA, monitoring of the implementation of the outcomes from the HRIA and reporting on that monitoring will be required.<sup>71</sup> This follow-up will depend on the scale and scope of the findings of the HRIA and any corresponding action plan. To the extent an in-depth action plan is implemented, an independent bi-annual review and report on implementation is best practice.<sup>72</sup> To the extent that only a minimal action plan is necessary to meet the bank’s policy, annual reporting may be sufficient.<sup>73</sup>

Two key components of monitoring and reporting regarding implementation of action plans that result from HRIAs are that affected parties themselves participate in the monitoring and as sources of information for reports, and that reports are publicly disclosed and actively disseminated to affected parties identified in the HRIA.<sup>74</sup>

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<sup>68</sup> IFC PS, *supra* note 66, PS 1, ¶ 16.

<sup>69</sup> See Declaration on the Rights of Indigenous Peoples, G.A. Res. 61/295, at art. 32, U.N. Doc. A/RES/61/295 (Sept. 13, 2007); Rodolfo Stavenhagen, Report of the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People, ¶ 66, submitted in accordance with Commission resolution 2001/65, U.N. Doc. E/CN.4/2003/90 (Jan. 21, 2003) (providing that “[f]ree, prior and informed consent is essential for the [protection of] human rights of indigenous peoples in relation to major development projects”); Case of the Saramaka People v. Suriname, 2007 Inter-Am. Ct. H.R. (ser. C) No. 172, at ¶ 137 (Nov. 28, 2007) (noting the internationally-recognized right to “free, prior and informed consent”); see also *Western Sahara*, Advisory Opinion, 1975 I.C.J. 12 (Oct. 16); see also M. Janis, *The International Court of Justice: Advisory Opinion on the Western Sahara*, 17 HARV. INT’L L.J. 609, 61 (1976).

<sup>70</sup> IFC PS, *supra* note 66, PS 1, ¶ 16.

<sup>71</sup> SRSF April 9, 2010 Report, *supra* note 3, ¶ 83; see also Equator Principles, *supra* note 49, at Principle 9.

<sup>72</sup> See IFC PS, *supra* note 66, PS 1, ¶¶ 25-26 (requiring “periodic assessments of the effectiveness of the management program,” and requiring mandatory reporting); CAO Advisory Note, Improving IFC’s and MIGA’s Local Development Impact Reporting at the Project Level 28 (2008), <http://www.cao-ombudsman.org/howwework/advisor/> (last visited July 1, 2010) (recommending that “[c]ompanies should monitor project impacts... and report monitoring results regularly[.]”).

<sup>73</sup> The Equator Principles, *supra* note 49, Principle 10 (“Each EPFI adopting the Equator Principles commits to reporting at least annually about its Equator Principles implementation processes and experience”); IFC PS, *supra* note 66, PS 1, ¶ 26 (regarding external reporting, “[t]he frequency of these reports will be proportionate to the concerns of affected communities, but no less than annually”); EBRD ESP, *supra* note 49, ¶ 36 (“Monitoring mechanisms include...review of periodic reports submitted by the client[-] at a minimum, annually[-] on the implementation of ESAPs [Environmental and Social Action Plans]”).

<sup>74</sup> See Improving IFC’s and MIGA’s Local Development Impact Reporting at the Project Level 23-31, Advisory Note, CAO (2008), available at <http://www.cao-ombudsman.org/howwework/advisor/> (recommending a community-company coalition to identify the local development impact and subsequently mandating that together, the parties find a solution mitigating the impact).

#### **IV. Human Rights policies for private banks must ensure access to remedies**

As the third pillar of the UN Framework, “access to remedy” calls for “greater access by victims to effective remedy, judicial and non-judicial.”<sup>75</sup> As part of their duty to protect, States are required to take appropriate steps to investigate, punish and redress corporate-related abuse of the rights of individuals within their territory. Governments often refer to their criminal and civil law systems to provide such access to remedy to individuals whose human rights are violated by corporate operations. This in turn requires that possible obstacles for individuals to access the judicial system are identified and removed.

In practice, such obstacles to access to the judicial system may prove insurmountable for affected individuals, especially for “at risk” or vulnerable groups, which may include women, children and indigenous peoples, as well as those marginalized for other reasons in their interactions with companies. Judicial grievance mechanisms may also not be the most effective way for them to have their rights restored.

In addition to judicial grievance mechanisms, business has the obligation to establish non-judicial grievance mechanisms for high risk situations. In addition to this, private sector banks have the obligation to provide non-judicial remedy at two levels. The first is with regard to imposing the establishment of project-level grievance mechanisms for high risk operations financed by them. The second relates to the need to establish -internal or external based- accountability mechanisms to hold themselves accountable for possible activities with a negative impacts on human rights.

##### **A. Project-level grievance mechanisms**

Private sector banks must ensure access to remedy at the level of impact when human rights risks are identified.<sup>76</sup> Client-created project-level grievance mechanisms, provided they are designed so that they are legitimate, accessible, predictable, equitable, rights compatible and transparent, and that they are operated in a manner that ensures independence from the company or project sponsor, may provide people impacted by private sector bank activities with the ability to raise grievances and have them addressed promptly so as to avoid, or avoid escalation of, human rights (and other) issues. If well designed, they may also provide the private sector bank staff and their corporate client information regarding allegations of violations of their human rights policies so that such information feeds into improved assessment, decision-making, and even improved policy.

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<sup>75</sup> SRSR April 9, 2010 Report, *supra* note 3, ¶ 1.

<sup>76</sup> See Engagement: Develop a Grievance Mechanism that Considers Human Rights Issues, HRIAM, *supra* note 1, available at <https://www.guidetohriam.org/guide/drawstep/step3-engagement/develop-a-grievance-mechanism-that-considers-human-right> (last visited July 1, 2010) (advocating that companies should develop a grievance mechanism at the project level that takes into account human rights issues); Corporate Duty to Respect, *supra* note 39, 5-6.

With respect to project finance and advisory services that raise significant social and environmental risks, project-level grievance mechanisms are now mainstream requirements.<sup>77</sup> Human rights policies for private sector banks should adopt similar standards for project-level grievance mechanisms that are applicable to activities bank-wide, not just for project finance and advisory services, as human rights impacts are not limited to these two types of banking activities.<sup>78</sup>

Detailed guides regarding how to create and operate project-level grievance mechanisms could be incorporated by reference into a bank's human rights policy.<sup>79</sup>

## **B. Accountability mechanisms**

In order to bring credibility and legitimacy to their human rights policies, private sector banks must provide a forum for challenges to adherence with those policies. The purpose of such a forum, or accountability mechanism, is not only to serve the bank's board of directors as a tool of ensuring compliance with bank policy, but is equally important as a tool for resolution of grievances by those affected by the bank's human rights practices.

Development and implementation of a human rights policy for which the private sector bank is held accountable is not only implicitly required under the UN Framework (and must now be made explicit), but provides an effective risk management tool for banks where there is otherwise no channel for management of dissent. As the UN Special Representative has stated, "Company-level grievance mechanisms perform two functions: under the tracking and reporting component of due diligence, they provide the company with feedback that helps identify risks and avoid escalation of disputes; they can also provide remedy[.]"<sup>80</sup>

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<sup>77</sup> Clients of the Equator Principle Financial Institutions (EPFIs) and clients of the International Finance Corporation (IFC) are required to develop project-level grievance mechanisms for such projects. See e.g., Equator Principles, *supra* note 49, Principle 6; IFC PS, *supra* note 66 at PS 1, ¶ 23 (2006), available at <http://www.ifc.org/ifcext/sustainability.nsf/Content/PerformanceStandards> (last visited June 30, 2010) [hereinafter IFC PS]; see also Engagement: Develop a Grievance Mechanism that Considers Human Rights Issues, HRIAM, *supra* note 1, available at <https://www.guidetohriam.org/guide/drawstep/step3-engagement/develop-a-grievance-mechanism-that-considers-human-righ> (last visited July 1, 2010) (advocating that companies should develop a grievance mechanism at the project level that takes into account human rights issues); see also Corporate Duty to Respect, *supra* note 39, 5-6.

<sup>78</sup> The July 1, 2010 Equator Principle Governance Rules recognize this limitation of the Principles by creating a category for "Associates." Associates are financial institutions seeking to abide by the Principles, but which are not engaged in project finance. The Equator Principle Association Governance Rules (July 1, 2010), available at [http://www.equator-principles.com/documents/EP\\_Governance\\_Rules\\_April\\_2010.pdf](http://www.equator-principles.com/documents/EP_Governance_Rules_April_2010.pdf) (last visited July 1, 2010).

<sup>79</sup> CAO Guide, *supra* note 80; see also IFC Good Practice Note, Addressing Grievances from Project-Affected Communities, available at [http://www.ifc.org/ifcext/sustainability.nsf/AttachmentsByTitle/p\\_GrievanceMechanisms/\\$FILE/IFC+Grievance+Mechanisms.pdf](http://www.ifc.org/ifcext/sustainability.nsf/AttachmentsByTitle/p_GrievanceMechanisms/$FILE/IFC+Grievance+Mechanisms.pdf) (last visited July 1, 2010).

<sup>80</sup> SRSR April 9, 2010 Report, *supra* note 3, ¶ 83.

Private sector banks could create institution level mechanisms that govern their corporate entity alone, include such a mechanism within the framework of a voluntary standard such as the Equator Principles or could pool resources to establish a new, altogether freestanding grievance mechanism.<sup>81</sup> In order to be useful and accepted by both the private sector bank and the would-be users of the mechanism, any mechanism that is developed must be independent, transparent, professional, fair, accessible and effective.<sup>82</sup> While independence would be enhanced if banks pool resources and create a joint and external accountability mechanism, even an internally-housed mechanism could be sufficiently independent if given staff without conflicts-of-interest, budgetary resource constraints, and the ability to report directly to the bank's risk committees, senior management and board of directors.

There are a number of effective models for accountability mechanisms, including within banks that serve private sector clients. For example, the World Bank Group's International Finance Corporation (IFC) and Multilateral Investment Guarantee Agency (MIGA) have a Compliance Advisor/ Ombudsman (CAO) that is tasked with responding to complaints about IFC and MIGA activities by auditing for compliance with IFC and MIGA policy and providing dispute resolution services between clients and third-party affected people.<sup>83</sup>

## **V. Conclusion and further recommendations**

Human rights policies for private sector banks are required because of the responsibility of all business enterprises – including private sector banks – under the UN Framework to “respect” human rights and provide “access to remedy.”

As the examples in this report show, without action on the part of private sector banks to ‘pull the breaks’ on companies and projects where human rights risks are real, those risks become reality: people are forcibly displaced and evicted from their land, threats of violence are used, and the right to life is violated by destruction of resources used to sustain life.

As of now, there has been no explicit call on private sector banks to establish human rights policies in UN Special Representative reports to the Human Rights Council. BankTrack respectfully call on the Special Representative to make this responsibility explicit in the upcoming report and to include the following recommendations in his final report:

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<sup>81</sup> See generally, Natalie L. Bridgeman and David B. Hunter, *Narrowing the Accountability Gap: Toward a New Foreign Investor Accountability Mechanism*, 20 GEO. INT'L ENVTL. L. REV. 187 (2008).

<sup>82</sup> *Id.* at 225; c.f. SRSR April 9, 2010 Report, *supra* note 3, ¶ 94 (the UN Special Representative's statement that grievance mechanisms much adhere to the following minimal principles: “legitimacy, accessibility, predictability, equitability, rights-compatibility and transparency. A seventh principle specifically for company-level mechanisms is that they should operate through dialogue and engagement rather than the company itself acting as adjudicator.”) (citing SRSR April 7, 2008 Report, *supra* note 3, ¶ 99).

<sup>83</sup> For a description of the CAO's compliance and dispute resolution roles, see the CAO Website, available at <http://www.cao-ombudsman.org/> (last visited July 1, 2010); see also the compliance and problem-solving roles of the European Bank for Reconstruction and Development (EBRD) Project Complaint Mechanism (PCM), available at <http://www.ebrd.org/pages/about/principles/integrity/pcm/about.shtml> (last visited June 28, 2010).

- Private sector banks have a special and differentiated responsibility to create and meaningfully implement human rights policies because the leverage they wield can enable –or prevent– human rights abuses. Private sector banks have a unique duty to know how their activities impact human rights, who their clients are (so that they can identify their human rights impacts and policies), and how human rights impacts may affect the private sector bank’s business operations.
- A private sector bank’s human rights policy should begin with a statement referencing the human rights standards it commits to follow with all of its activities and each decision at all levels. The statement of policy should be followed by an assessment of the degree of human rights due diligence required regarding a bank activity or proposed activity. Each bank should apply a ranking system for each type of activity it undertakes.
- “Knowing and showing” should guide private sector bank’s human rights policies and practices. Therefore transparency and the publication of policies are key. Furthermore transparency on private sector bank’s human rights policies and practices will allow banks to cross reference their activity rankings with peer institutions.
- Where the analysis of risk factors trigger the need for a HRIA, the private sector bank’s human rights policy should identify the elements required in the HRIA analysis itself, drawing on what are now well-developed standards.
- Where risks are identified through the HRIA process, a human rights action plan may be required. Where creation of an action plan and movement forward with the activity is the appropriate response, the policy must require the bank or client to disclose identified risks to potentially affected communities, and consult with these affected communities. Action plans impacting indigenous communities are required to be based on the principle of “free, prior informed consent.”
- In some cases, the HRIA may identify impacts that are so large or so challenging to mitigate that refraining from taking on the activity is the only acceptable next step that will allow adherence to the bank’s policy. For a private sector bank’s human rights policy to have meaning, ‘refrain from involvement’ must be an explicit option for consideration.
- Private sector banks have a crucial role in providing non-judicial remedy at two levels. The first is with regard to project-level grievance mechanisms. The second relates to the need to establish accountability mechanisms.
- Private sector banks must ensure access to remedy at the level of impact when human rights risks are identified. Client-created project-level grievance

mechanisms provide people impacted by private sector bank activities with the ability to raise grievances and have them addressed promptly so as to avoid, or avoid escalation of, human rights issues. The credibility and trust-building components of a project-level grievance mechanism depend on the private sector bank's requirement that the bank or its client enlist community support in helping to design and create the mechanism.

- In order to bring credibility and legitimacy to their human rights policies, private sector banks must provide a forum for challenges to adherence with those policies. The purpose of such a forum, or accountability mechanism, is not only to serve the bank's board of directors as a tool of ensuring compliance with bank policy, but is equally important as a tool for resolution of grievances by those affected by the bank's practices.
- Private sector banks could create individual accountability mechanisms that govern their corporate entity alone, within the framework of a voluntary standard such as the Equator Principles or could pool resources to establish a new, altogether freestanding mechanism. In order to be useful and accepted by both the private sector bank and the would-be users of the mechanism, any mechanism that is developed must be independent, transparent, professional, fair, accessible and effective.

BankTrack, in turn, urges private sector banks themselves to adopt these policies without waiting for leadership from the OECD, IFC, or other standard setting bodies that are on the verge of establishing human rights policies. Once established, implementation activities for human rights policies must be adequately resourced and prioritized. Furthermore, they must be valued as the risk management tool that they surely are.

As the Special Representative stated in April 2010, "companies must understand that the responsibility to respect human rights is not a one-time transactional activity, but is ongoing and dynamic ... because human rights concern affected individuals and communities, managing human rights risks needs to involve meaningful engagement and dialogue with them ... because a main purpose of human rights due diligence is enabling companies to demonstrate that they respect rights, a measure of transparency and accessibility to stakeholders will be required."<sup>84</sup>

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<sup>84</sup> SRSR April 9, 2010 Report, *supra* note 3, ¶ 84.