

Financial Institutions and the respect for human rights throughout its services: the debate

Instituições Financeiras e o respeito pelos direitos humanos através de seus serviços: o debate

Flora Saraiva Rebello Arduini

LL.M. Globalization and Law specialization in Human Rights cum laude at Maastricht University Faculty of Law and Bachelor degree in International Science and European Institutions specialization in International Organizations at the Università Statale di Milano. Currently researcher at the Sustainability Center of Fundação Getúlio Vargas (GVces/FGV-EAESP) in São Paulo-Brazil at the Local Development Program. Email: florasra@gmail.com



ABSTRACT

This paper introduces the debate surrounding financial institutions and human rights with special focus on the challenges in translating international frameworks on business and human rights, to this specific industry. The paper outlines the main responsibilities and concerns of the financial sector regarding these instruments, its challenges and the responsibility that this industry plays in the new global scenario of responsible business and accountability for human rights abuses perpetrated by the private sector around the world.

KEY WORDS

Financial institutions – Human rights due diligence – Responsibility – Leverage power

RESUMO

Este artigo apresenta o debate em torno das instituições financeiras e o respeito pelos direitos humanos, com especial atenção sobre os desafios em traduzir diretrizes internacionais sobre direitos humanos e empresas para esta indústria em específico. O artigo descreve as principais responsabilidades e preocupações do sector financeiro em relação a esses instrumentos, seus desafios e o papel que o setor desempenha no novo cenário global de negócios e prestação de contas por abusos dos direitos humanos perpetrados pelo setor privado em todo o mundo.

PALAVRAS-CHAVE

Instituições financeiras – Devida diligência em direitos humanos – Responsabilidade – Poder de influência.

Introduction

Even though there is little to any doubt that the private sector regardless the industry, should respect human rights (HR), we still face many challenges to implement the several guidelines and frameworks on the subject in a concrete and effective way into daily business operations. Challenges are more visible when regarding the financial sector, since most of the human rights violations surrounding its operations are directly perpetuated by its clients through their local operations. Questions like how to control where clients will engage the money loaned, and how to perform human rights due diligence on the financial sector; are just a few questions surrounding this industry.

This paper seeks to analyse the expected role of Financial Institutions (FIs) with respect to human rights issues according to the most important instruments on the subject including specific challenges and possible ways to overcome at least some of these.

This paper is structured as follows. The first part will briefly illustrate the central responsibilities rising from the three most relevant instruments on business and human rights, the United Nations Global Compact, OECD Guidelines for Multinational Companies and United Nations Guiding Principles on Business and Human Rights are reviewed. The second part will present a discussion regarding what human rights due diligence means for financial institutions, its challenges, available recommendations and finally, the third part will present the debate regarding FIs leverage and its exercise over clients committing human rights abuses, which includes several particulars to this sort of business relationship.



I. CSR and Human Rights Frameworks

Before analyzing and discussing the theme regarding Financial Institutions (FIs) and Human Rights (HR), it is important to comprehend the most prominent developments taking place regarding human rights accountability, which are translated specially through international guidelines and frameworks in the attempt to standardize the private sector behavior wherever they operate in the globe. Importance to notice is that these guidelines are relevant to but *not binding* on businesses, which ultimately decide whether they will adopt them or not.

In this section I will make an effort to extract the main responsibilities those instruments impose over companies, which include all kind of business, including financial institutions.

The United Nations Global Compact (GC): The 2000 United Nations GC is not a recent initiative, but is considered the benchmark regarding business community and responsible business at global level. It has been adopted after the business community, experts and the United Nations (UN) agencies decided to share their experiences regarding the implementation of the universal human rights principles.¹

The GC was the result after a call advanced from the UN Secretary-General Kofi Annan in 1999 at the World Economic Forum in Davos.² The GC is a voluntary initiative and a non-regulatory instrument and has two operational objectives, first is to make the compact and its principles part of business strategy and operations (day-to-day operations) everywhere, secondly offering an effective platform for multi-stakeholder solution finding.³

The Compact sets Ten Principles but the most relevant for this article are Principles 1 and 2 which both address human rights directly:

Principle 1: Businesses should support and respect the protection of internationally proclaimed human rights; and

Principle 2: Business should make sure that they are not complicit in human rights abuses.

The other 8 principles relate to labour conditions, environment and corruption.⁴ The initiative also requires companies to issue an annual Communication on Progress (COP) detailing the progress made in implementing the ten principles and in supporting the broader UN development goals.⁵ The greatest aim is to be a hub to share positive experiences but also the challenges faced in business management regarding the implementation of



1. The Dovenschmidt Quarterly (June 2013), *Business Enterprises and the Environment*, The Netherlands, p.2.

2. Kofi Annan speech (31st January 1999), Switzerland, SG/SM/6881 of 1st February 1999. Available at: <http://www.un.org/News/Press/docs/1999/19990201.sgm6881.html>. Accessed on 02.10.2013.

3. See Claude Fussler, Aron Cramer, Sebastian van der Vegt (2004), *Raising the Bar Creating Value with the United Nations Global Compact*, Greenleaf Publishing, p.7.

4. The other Principles are the Labour (Principles 3-6); Environment (Principles 7-9) and Corruption (Principle 10). Available at: <http://www.unglobalcompact.org/AboutTheGC/TheTenPrinciples/index.html>. Accessed on 18.09.2013

5. For more information on the Communication on Progress (COP) procedures, visit: <http://www.unglobalcompact.org/COP/index.html>. Accessed on 18.09.2013.

these principles. This platform was established on the business communities own initiative and currently around 10,000 companies participate.

The United Nations Guiding Principles on Business and Human Rights (UNGPR)

The UNGP are directed towards businesses and aim to ensure that they implement the 2011 United Nations ‘Protect, Respect and Remedy’ Framework, also known as the Ruggie Framework. The Principles are the result of research conducted by Professor John Ruggie during his mandate – starting in 2005 – to address business and human rights as Special Representative of the Secretary-General of the United Nations. The Framework was unanimously endorsed on June 16th 2011 by the United Nations Human Rights Council, and was the first authoritative guidance the UN had ever issued on how to meet the complex global challenges of business and human rights.⁶

However, this Framework was not the first UN attempt to address this specific subject. John Ruggie’s mandate was established immediately following the UN Sub-Commission on the Promotion and Protection of Human Rights failed attempt to approve the ‘Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights’ (Norms) in August 2003.⁷

The Norms attempted to extend the already accepted human rights duties that States owed to individuals, to the corporations themselves but clearly reaffirmed that the primary obligation to ensure respect for human rights was still owed by States.⁸ The Norms were not endorsed by the already extinct Human Rights Commission –replaced by the Human Rights Council-which mandate was abolished after a proposal advanced by the UN Secretary General Kofi Annan in 2005, due the various doubts regarding its efficiency and the member’s independence from their sending governments.⁹ Back in that time, neither business nor governments appreciated



6. Human Rights Council (21 March 2011), Un Doc. A/HRC/17/31. Available at: http://www.ohchr.org/Documents/Issues/Business/A-HRC-17-31_AEV.pdf. Accessed on 05.08.2015.

7. Sub-Commission on the Promotion and Protection of Human Rights (26 August 2003), *Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights* (hereafter the ‘Norms’), UN Doc. E/CN.4/Sub.2/2003/12/Rev. Available at: <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G03/160/08/PDF/G0316008.pdf?OpenElement>. Accessed 17.09.2013.

8. M.T. Kamminga (17 August 2004), Paper presented at the 71st Conference of the International Law Association, plenary session on Corporate Social Responsibility and International Law, Berlin, United Nation High Commissioner for Human Rights (OHCHR), see p.05.

9. The Human Rights Commission was therefore replaced by the Human Rights Council. See Christian Tomuschat (2008), *Human Rights Between Idealism and Realism*, Oxford University Press, Second Edition, pp.134-137.

the idea of endorsing a document that could develop into something more stringent over companies due its strong language, i.e. '[...] each transnational corporation or other business enterprise shall apply and incorporate these Norms in their contracts or other arrangements and dealings [...] that enter into any agreement with the transnational corporation or business enterprise [...]' (Norms, para.15-16). The abandonment of the Norms, which was heavily criticized by several NGOs,¹⁰ was probably the consequence of the perception from States that it would represent a threat to their sovereignty and economic interests, added to the strong business lobby against it.¹¹

Ruggie also was not in favour of the Norms; he stated that "it is impossible to demand that companies respect human rights in the same level as States, simply because corporations are different entities and don't possess the same structure and capacity as States, and that the Norms would cause confusion about the boundaries of responsibilities, which would lead to a fight over who should do what and to what extent".¹² Therefore, it is not surprising that Ruggie pursued a different approach and published a document that leaves no doubts about its *no* binding nature. It reads 'nothing in these Guiding Principles should be read as creating new international law obligations' (UNGP, 2011).

The three basic pillars of the UNGP are as follow:

I. The State duty to Protect human rights: the explanatory commentary reads that a 'State's international human rights law obligations require that they respect, protect and fulfil the human rights of individuals within their territory and or jurisdiction' (UNGP, 2011, Principle 1). The most important conventions that are considered the core of all human rights possessed by individuals are known as the Bill of Rights, which have been ratified by almost every State in the world.¹³ This special set of treaties includes: The 1966 International Covenant on Civil and Political Rights (ICCPR), the 1966 International Covenant on Economic, Social and Cultural Rights (ICESCR) and



10. See Joint Civil Society Statement on the draft Guiding Principles on Business and Human Rights (January 2011), endorsed by Amnesty International, Human Rights Watch, CIDSE, International Network for Economic, Social and Cultural Rights, International Federation for Human Rights, International Commission of Jurists and Rights and Accountability in Development. Available at: http://www.fidh.org/IMG/pdf/Joint_CS0_Statement_on_GPs.pdf. Accessed in 02.10.2013.

11. M.T. Kamminga (17 August 2004), Paper presented at the 71st Conference of the International Law Association, plenary session on Corporate Social Responsibility and International Law, Berlin, *United Nation High Commissioner for Human Rights (OHCHR)*, see p.02;05-06.

12. Ethical Corp podcast with John Ruggie. Available at: <http://www.ethicalcorp.com/business-strategy/podcasts/next-steps-business-and-human-rights-exclusive-podcast-john-ruggie>. Accessed on 17.12.2013.

13. David P. Forsythe (2012), *Human Rights in International Relations*, Cambridge University Press, Third Edition, pp.50-52.

the 1948 United Nations Universal Declaration on Human Rights. Therefore, the so called Bill of Rights and the main International Labour Organization conventions regarding labour rights, form the UNGP's basic framework.

II. The Corporate responsibility to Respect human rights: it reads '[...] it is expected [from companies] independently of State's abilities or willingness to fulfil their own human rights obligations' (UNGP, 2011, p.13). This has been further specified in various principles along the document. For example, Principle 13 states 'To respect human rights, companies should avoid causing or contributing to adverse human rights impacts and seek to prevent or mitigate adverse human rights impacts that are directly linked to their operations, products or services by their business relationship, even if they have not contributed to those impacts' (UNGP, 2011, p.15).

The major milestone of the Framework is the introduction of the concept of 'human rights due diligence' as part of the prevention and mitigation process. Principle 17 explains that the process consists of a) assessing actual and potential human rights impacts, b) integrating and acting upon the findings, c) tracking responses, and d) communicating how impacts are addressed.

To elaborate on this point, the authors commentary explicitly states that human rights due diligence 'goes beyond simply identifying and managing material risks to the company itself, to include risks to right-holders' (UNGP, 2011, p.18).

Finally, if companies identified they have caused or contributed to adverse human rights impacts, they should provide for a remediation process (grievance mechanisms), considering also cooperation with other actors (UNGP, 2011, p.24).

III. Access to Remedy: the third pillar of the Framework makes clear that States should 'ensure, through judicial, administrative, legislative or other appropriate means, that when such abuses occur within their territory and /or jurisdiction those affected have access to effective remedy'. Such mechanisms might be state and non-state-based and judicial or non-judicial (UNGP, 2011, p.24-35).

The 2011 OECD Guidelines for Multinational Companies (OECD Guidelines): '[...] The OECD Guidelines are recommendations addressed by governments to multinational enterprises operating in or from adhering



countries. They provide non-binding standards for responsible business conduct' (OECD Guidelines, 2011, p.3). In 2011 the Guidelines were revised and the most relevant changes have been the strengthening of the National Contact Points (NCPs), the inclusion of a chapter dedicated to human rights including the principle on human rights due diligence and a more complete approach for due diligence and responsible chain management.

The Guidelines are not *per se* binding on companies, meaning that there is no legal consequence if a company breach its principles. However, ratifying governments are bound by the commitment to disseminate and promote the Guidelines and to establish the NCP in their territory (OECD Guidelines, 2011, Procedural Guidance 1-1.A).

What greatly differentiates the OECD Guidelines from other instruments is the possibility for stakeholders to start a complaint before the NCPs (named 'specific instance') for alleged breaches of the Guidelines by a company located within an adhering country, as a form of a complaint mechanism of the Guidelines.

The NCP will offer a forum for discussion, which comprises good offices and mediation between the parties. However, the greatest potential of these NCPs is that when the parties do not reach an agreement through mediation, the NCP is obliged to publish a statement describing the issues raised, reasons for further examination and where applicable, make recommendations for the parties.¹⁴

The public statements of NCPs, even though are not legally binding, have in some occasions caused great reputational damage, as was the case involving the airline company Das Air, in 2008. The British NCP stated that during its controversial activities in Democratic Republic of Congo, the company lacked enough due diligence of its suppliers and breached several international treaties on civil aviation (UK National Contact Point, Das Air case, 2008). After this final statement was made public, the company was the target of a public investigation by the British authorities and was forbidden by the European Commission to fly over the European airspace for over a year.¹⁵

14. For detailed information's regarding the NCP's process, and the criteria for filling a Instance see OECD Guidelines, Implementation in Specific Instances, C-C.5.

15. European Commission (5th March 2007), Brussels. Available at: http://europa.eu/rapid/press-release_IP-07-278_en.htm?locale=en#fn1. Accessed on 20.01.2014



This provides an example that the NCPs do offer a quite effective mechanism for stakeholders to directly engage against a company related issues.

However, critics argue that because several terms of the Guidelines are not yet clearly defined, it gives space for different interpretations by the NCPs, which compromise a consistent and homogeneous implementation of the Guidelines around the globe.

It is important to underline that even though different, most of these above mentioned instruments have quite some overlap in content and also prove to be complementary in other areas. They all tackle similar points on human rights using different approaches. The following table does provide some insight into differences and similarities between the Global Compact and the Guiding Principles:

Ruggie and Global Compact: Complementary Frameworks

	Protect, Respect and Remedy Framework	Global Compact
Core Terminology	Respect human rights	Respect and support human rights (ie. Ruggie+)
Applies to	All companies, everywhere	GC signatories
Nature of Expectation	Baseline	Baseline + beyond minimum (aspirational)
Scope	1. Country context 2. Own activities 3. Relationships	Sphere of influence
Wording	Companies have a responsibility to respect human rights, which means to avoid infringing on the rights of others; Companies can avoid complicity by employing human rights due diligence.	1. Businesses should support and respect the protection of internationally proclaimed human rights; and 2. Make sure that they are not complicit in human rights abuses.
Expected Actions	Human rights due diligence, consisting off: a. Statement of policy; b. Assessing impacts; c. Integration; d. Tracking and reporting performance; Companies should also have in place an effective grievance mechanism.	Embrace, support and enact (within their sphere of influence) the GC Principles by: 1. Making them an integral part of business; 2. Incorporating them in decision-making; 3. Contributing through partnerships; 4. "Communication on Progress;" 5. Advocacy and active outreach.



Figure 1 Ruggie Framework and Global Compact: Complementary Frameworks¹⁶

16. Business & Human Rights Initiative (2010), How to do business with respect for human rights: a Guidance Tool for Companies, The Hague, Global Compact Netherland, p.138.

For instance, in a case whereas a financial institution is not directly linked to a negative human rights impact (therefore the harm is not directly linked to the operations, services or products offered) but committed by a business relation (i.e. a client), the UNGP simply does not apply. This was reinsured by an important statement given by the Officer of the High Commissioner for Human Rights: ‘there is either a direct link between the adverse impact and the products or services a financial institution provides to clients [...] or there is no link’ (Officer of the High Commissioner for Human Rights, 2013, p.2-7).

However, on GC this premise is not relevant since it states that if a company has leverage over the abuse perpetrator, it should exercise it as an attempt to stop the illegality.

The UNGP does detail the process of human rights due diligence more than the GC, but the latter does expect a corporate *conduct* in a broader sense (advocacy and active outreach) than the UNGP.

It is common knowledge that these instruments are still very broad and put several doubts on how to implement them. However, it is also expected that a company might be capable to comprehend and map the impacts it might produce in each dimension (social, environmental, economic, governance), the issues connected with them (poor local laws, footprint, etc.) and the aspects it must bear in mind (employees, customers, market share, etc.). Therefore, once those dimensions, aspects and issues are identified, applying the procedures detailed in these international instruments will be less challenging.¹⁷

Are these instruments applicable to financial institutions?

This doubt was raised in 2013 during a specific instance brought before the Dutch NCP involving a bank. The response was made very clear whereas ‘the NCP would like to emphasise that the OECD Guidelines are applicable to financial institutions and to investors, including minority shareholders. The NCP finds that the term ‘business relationship’, as referred to by the Guidelines, is applicable to financial relationships. [...] The fact that the

17. Sybren Christiann de Hoo (20th October 2011), In pursuit of corporate Sustainability and Responsibility: Past Cracking Perceptions and Creating Codes, Inaugural Lecture, Maastricht, see Appendix 1, p.69



term [...] is not specifically defined for various types of financial relations does not mean that the Guidelines do not apply to them' (Dutch National Contact Point, 2013).

These new perspectives on demanding accountability from FIs operations was made practical when a specific instance was set against several banks and pension funds that had business with POSCO, a huge South Korean steel company, which allegedly impacted negatively on the human rights of communities by its joint venture in India.¹⁸

The Norwegian NCP held the Norwegian Pension Fund (NPF) in breach of the Guidelines due its constant refusal to collaborate with the NCP and issued strong recommendations.

The greatest gain of these recommendations is that the NCP made an effort to clarify the Guidelines for FIs in general, into practical terms. Hereby, I selected the most important suggestions on how to implement the duty to respect human rights according to financial institutions' business nature (Norwegian National Contact Point, 2013):

- The Guidelines recognise that for companies such as portfolio investors that have a large number of business relationships, it may not be possible to assess potential impacts to each business relationship in advance, and on a pragmatic approach they are encouraged to identify general areas where the risk of adverse impacts is most significant and, based on this risk assessment prioritise suppliers for due diligence;
- Companies should use a risk-based approach that focuses due diligence on situations in which the severity and likelihood of adverse impacts are most significant. Considerations could be: i) operating context (i.e. countries, regions); ii) particular operations, products or services involved (with typical human rights risks associated with them); iii) other relevant considerations (i.e. company's poor track on human rights performance
- Companies that are directly linked to but do not cause or contribute to human right impacts typically do not exercise control over the party



18. POSCO allegedly " [failed] to seek to prevent human rights abuses and carry out comprehensive human rights and environmental studies for its proposed iron mine, steel plant and associated infrastructure in the State of Odisha, India." OECD Watch, available at: http://oecdwatch.org/cases/Case_261. Accessed on 14/10/2013.

[i.e. banks' clients portfolio], but this does not relieve them of a responsibility to take steps to influence the situation once they are in a business relationship. The responsibility to respect human rights applies not only to impacts created through an enterprise's own actions, but also to the impacts from products, services or operations of business relationships that are directly linked to it;

- Three basic steps to help ensure a company is respecting human rights: i) have a policy commitment, ii) carry out human rights due diligence; and iii) provide for or cooperate in remediation of adverse human rights;
- Human rights due diligence is not a one-size-fits-all approach. It should be carried out as appropriate for [the enterprise] size, the nature and context of operations and the severity of the risks of adverse human rights impacts;
- The human rights due diligence is the identification and assessment of potential or actual human rights through a pro-active, forward looking process that tries to identify such impacts on how they can be avoided;
- Successful integration of information on potential or actual human rights impacts, and successful response, relies on the incorporation of such issues into company management systems;
- A company should use its leverage to influence the entity causing adverse human rights impact to prevent or mitigate that impact, acting alone or in cooperation with other actors. The appropriate action depends on factors including its leverage over the entity. However, a company should track the effectiveness of its response, without it there is no way an enterprise could systematically know whether actions have been taken, whether they are effective and whether they may be missing issues. It usually involves the use of qualitative and quantitative indicators, and may incorporate the views of internal and external stakeholders;
- Due diligence also entails communicating how impacts are identified and addressed.



II. Human Rights Due Diligence and Financial Institutions

Proper CSR management and transparency from the very beginning is a better strategy than repairing damage after accusations. And because FIs are built over reputation and credibility, they could suffer from a CSR scandal committed by their clients even more than the clients themselves.

Several initiatives at the international level, point out the necessity to address and comprehend the particularities of financial companies when it comes to CSR-implementation, including respect of human rights. A relevant example is the United Nations Environment Programme-Finance Initiative (UNEP-FI), an institution which has addressed CSR management specifically for financial-institutions since 1992. It was launched due to financial industry's role in Environmental, Social and Governance (ESG) challenges and the great impact they can play in a more sustainable world.

Other examples of international initiatives specific to financial-institutions are: the International Finance Corporation (IFC), its sustainability framework includes several guidelines to be taken into consideration for investment;¹⁹ the Equator Principles for investment Services²⁰ as well as the Natural Capital Declaration, based on a formal commitment from banks, insurance firms and investors to consider sustainability in its business.²¹

An interesting argument that clearly illustrates one of the basic differences between financial and non-financial institutions regarding corporate policy and regulations, is the one presented by Dorenbos and Paces (2013): 'banks are distinguished from other firms due to their liquidity-generation function, which is essential for financing the economy [...] bank's leverage is significantly higher than the leverage of generic firms [...] this is obvious



19. The official website provides more detailed information, there a total of eight Performance Standards: "The Framework consists of: Policy on Environmental and Social Sustainability; Performance Standards which defines clients' responsibilities for managing environmental and social risks (which has a dedicated Performance Standard no.7 on 'Indigenous People' Available at: http://www.ifc.org/wps/wcm/connect/1ee7038049a79139b845faa8c6a8312a/PS7_English_2012.pdf?MOD=AJPERES) and Access to Information Policy, which articulates IFC's commitment to transparency". Available at: http://www.ifc.org/wps/wcm/connect/Topics_Ext_Content/IFC_External_Corporate_Site/IFC+Sustainability/Sustainability+Framework/. Accessed on 19.09.2013.

20. For information, see: <http://www.equator-principles.com/index.php/about-ep/about-ep>. The 2013 updated version of the Guidelines are available at: <http://www.equator-principles.com/index.php/the-eps>. Accessed on 19.09.2013.

21. The Declaration defines what is intended by the term 'Natural Capital' as "For purpose of this Declaration, [...] is referred to as the stock of ecosystems that yields a renewable flow of goods and services.". Available at: <http://www.naturalcapitaldeclaration.org/wp-content/uploads/2012/04/NaturalCapitalDeclaration.pdf>. Accessed on 23.09.2013, see footnote 1.

because money is the key factor of production in banking'. And that is why civil society is increasingly demanding from banks a stronger position and leverage exercise over clients.

The current status is that FIs are still struggling with what human rights due diligence embedded in both UNGP and OECD Guidelines really mean for them.

This view is expressed also in relevant reports, such as the OECD report on 'Environmental and Social Risk due diligence in the Financial Sector' of June 2013 and the report by the Thun Group of Banks, an initiative formed by several banks that issued the report 'UN Guiding Principles on Business and Human Rights- Discussion Paper for Banks on Implications of Principles 16-21'.²² So far, this was the greatest manifest of the sector regarding the United Nations Guiding Principles. The Thun Group stated that 'this is a complex issue for banks as most of their human rights impacts arise via the actions of their clients and are addressed through influence, leverage and dialogue rather than through direct action from the banks themselves' (The Thun Group of Banks, 2013, p.20)



The OECD concluded after a large amount of feedbacks from FIs worldwide, that the general view amongst businesses is that 'the Guidelines (the 2011 OECD Guidelines) are more easily understood and applicable for clients or investee companies than they are for FIs' (OECD, 2013, p.40). The concept of human rights due diligence is still burgeoning and the challenges and obstacles are only just crystallising now. There is still a massive work in order to translate the concept into actions. In case this doesn't happen, there is a great risk that the concept will be reluctantly implemented and become another bureaucratic and ineffective system within the corporate structure.

The biggest danger of the reversing this management risk concept (due diligence) to a concept that shall bear human beings, is that to become a tick the box exercise and not actually consider humans, their rights and the impacts they might suffer.²³

22. The Thun Group of banks is an informal initiative between banks representatives, that discuss the meaning of the UN Guiding Principles. The discussion was supported by University of Zurich Competence for Human Rights. The participating banks are Barclays, BBVA, Credit Suisse, ING, RBS, UBS and Unicredit. Available at: http://www.business-humanrights.org/media/documents/thun_group_statement_final_2_oct_2013.pdf. Accessed on 23.10.2013.

23. Interview with Prof. Menno Kamminga international lawyer at Maastricht University and Director of Centre of Human Rights at Maastricht University.

The leverage debate

As the Thun Group stated, exercise leverage is usually what is left for banks to do when the harm is caused by its business relationships, meaning their clients. Nevertheless, leverage is a very strong instrument especially for banks, and they shall make use of it. The Thun Group of banks made an effort to map different actions and leverage exercises according to the different types of financial service:



Figure 2 Integrating human rights due diligence into existing practice - a snapshot. The Thun Group, 2013, p.11

Leverage can vary considerably amongst FIs' clients. Another attempt to address this, is the following diagram that shows the various factors influencing the degree of leverage which can be exercised over clients, for example in corporate lending:

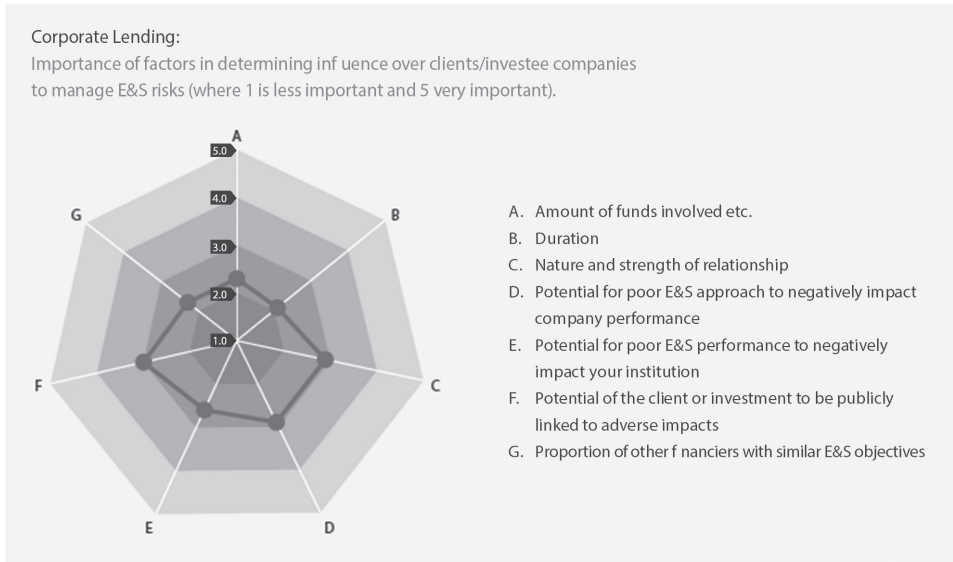


Figure 3: OECD Report Environmental and Social Risk due diligence in the Financial Sector, 2013, p.40

This approach could be used to better analyse engagement possibilities with a specific client in a specific corporate lending situation.



There are no doubts that leverage can vary immensely according to the service provided or the nature of the relationship. However, international frameworks do tackle some of these challenges. As mentioned previously, both the OECD Guidelines and the UNGP recognise that companies might be directly linked but do not cause or contribute to an adverse impact on human rights.²⁴ This is the predominant case with banks and their clients. Therefore, companies have to use their leverage to influence the entity that is directly causing the adverse impact on human rights to prevent or mitigate that impact, acting alone or in cooperation with other actors. Moreover, it would be unreasonable to demand a shift of the responsibility from the entity causing an adverse human rights impact to the enterprise with which it has a business relationship, but, when a company has leverage capacity, it should exercise it.²⁵

The level of leverage will depend on several factors and this is why enter-

24. Contribution is defined by the OECD as 'contributing to an adverse impact should be interpreted as a substantial contribution, meaning an activity that causes, facilitates or incentivises another entity to cause an adverse impact and does not include minor or trivial contributions.' General Policies, Commentary 14, p.22.

25. See OECD Guidelines Ch.IV Human Rights, Commentary 43,p.33 and UN Guiding Principle 12 Commentary, 14.

prises should use ‘the full range of options for exercising leverage at their disposal, rather than simply assuming they can take no action’ (Norwegian National Contact Point, 2013, p.35).

Without any doubts FIs can and should use their influence and power as money provider to drive clients to act responsibly on human rights. However, it is not possible to expect that FIs act *on behalf* of their clients. It is not the bank which is conducting the human rights abuses and it is the client’s primary responsibility to perform responsibly. The client should put in place the proper processes in order to comply with human rights by its own operations or through its business partners acting in the field.²⁶ However, according to international guidelines, FIs have the responsibility to exercise its leverage to the extent possible to change the situation in favour of the affected communities.

Another manner to exercise its leverage over a client is to include contractual clauses regarding human rights compliance. It is not a guarantee that the clause would per se be effective, since it might have limited legal effect in some countries. However, it is an additional effort and might serve at least in some jurisdictions as a legal protection for the bank and provide the possibility to end a relation with a client without breaching the business contract. Regardless of the legal effect, similar clauses have strong moral obligations.

Another option that could avoid subjective interpretations, is to standardise the clause for all clients active in specific sensitive sectors and or areas.

III. Conclusion

The wording of these frameworks is not always clear, neither in their scope or application, which can cause quite some confusion amongst businesses as to their proper implementation. Furthermore, it is understood that their broadness is because they are supposed to be applicable for all business. However, each business may have their own particularity and the frameworks alone are not enough to clarify these doubts.

26. Kristel Verhoef and Joeri de Wilde(2013),Praktijkonderzoek: Delfstofwinnende bedrijven en mensenrechten: Methodologie voor een aanstaand onderzoeksrapport voor de Eerlijke Bankwijzer en de Eerlijke Verzekeringswijzer (Amnesty International, Dierenbescherming, FNV, IKV Pax Christi, Milieudefensie en Oxfam Novib), Profundo, see p.17.



These doubts will come as they are being implemented. This is why it is so important that regular studies and updates are conducted in order to establish harmonized implementation and interpretation of these instruments, but also for a faster development of the frameworks themselves.

Financial institutions specifically, currently struggle on *how* to perform human rights due diligence and also on the question of to what extent they are accountable for negative impacts committed by their clients even where there is no actual proof –or possibility to determine- that the harm is directly linked with the services and products provided.

It is possible to understand that Ngos and civil society demands stronger position from FIs since they have a strong position in relation to their clients. There are no doubts that financial institutions can and should use their influence – and power as a money provider – to act responsibly on human rights. However, it is not possible – or fair to expect – that financial institutions act *on behalf* of their client since it is the client who is primarily responsible for performing responsibly and to put in place the processes in order to comply with human rights. Therefore, FIs can play a key role in influencing such virtuous behavior.

It is clear that in order to be effective many hurdles have to be met for a more effective human rights respect by corporations and hereby I mention a few:

- These frameworks are voluntary and not binding, so their breach leads to limited consequences;
- The UNGP and the OECD Guidelines expect companies to act only when they cause, contribute or when its services, products or operations are *directly linked* to a harm by a business relationship. However, there are not enough clarifications on how to behave when the products and services are not “traceable”, such as trade flows and general corporate loans;
- UNGP and OECD expects companies to exercise their leverage *only* when the direct link to a harm is established, which can be unproductive in cases where a company has great leverage over a business relationship regardless the fact is not connected to a harm and cases where the direct link is not identified by external stakeholders but the parties



involved are aware but prefer to stay silent.

Finally, it is my conclusion that these international legal frameworks to some extent fill in the gap of the lack of legal duties over corporations on international level, since they serve at least as a basis for human rights conduct by business which is increasingly being required by civil society. However, the most effective manner to avoid to the maximum extent human rights abuses by corporations is them to be held legally liable in their home countries, including for their operations overseas, being the applicable law the international commitments their local governments have on international human rights law.

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