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Banks and human rights: The Thun Group and the UN Guiding Principles on Business and Human Rights

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Abstract – The publication of the Thun Group’s discussion paper *The Guiding Principles on Business and Human Rights: An Interpretation for Banks* represented a critical step on the way to delineate the relationship between the financial sector and human rights: the document lays the foundations for the adoption of the first ever comprehensive guide on how universal banks should operationalise their responsibility to respect human rights. As the arguments offered by the Thun Group are likely to influence the way in which numerous financial institutions integrate human rights into their operations, this article offers a critical assessment of the discussion paper. Notwithstanding several positive features, the Thun Group relies on a faulty subsidiary approach, avoids fundamental issues like access to effective remedy and downplays the importance of effective engagement with affected stakeholders.

Keywords – banks, finance, Thun Group, Guiding Principles, business and human rights

1. Introduction

In June 2011 the United Nations (UN) Human Rights Council unanimously ‘endorsed’ the *Guiding Principles on Business and Human Rights (GPs)*, the final document of Professor John Ruggie’s mandate as Special Representative of the Secretary-General (SRSG) on the issue of human rights and transnational corporations and other business enterprises.¹ The GPs offer the first authoritative guidance on how companies should meet their responsibility to respect human rights.² In short, business enterprises are expected to have in place policies and processes appropriate to their size

¹ John G. Ruggie, *Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework* (Human Rights Council, March 21, 2011). For a comprehensive account of Ruggie’s mandate as SRSG, see John G. Ruggie, *Just Business: Multinational Corporations and Human Rights* (New York: W. W. Norton & Company, 2013).

² The governance framework proposed by Ruggie rests on three pillars: (1) the state duty to protect against human rights abuses by third parties, including business; (2) the corporate responsibility to respect human rights; and (3) greater access by victims to effective remedy, both judicial and non-judicial. See also John G. Ruggie, *Protect, Respect and Remedy: A Framework for Business and Human Rights* (Human Rights Council, April 7, 2008).

and circumstances, including a policy commitment to meet their responsibility to respect human rights, a human rights due-diligence process to identify, prevent, mitigate and account for how they address their impacts on human rights, and processes to enable the remediation of any adverse human rights impacts they cause or to which they contribute.

International organizations, standard-setting bodies and national governments rapidly embraced the key elements of the corporate responsibility to respect for human rights. To mention a few examples, the Organization for Economic Co-operation and Development (OECD) updated its Guidelines for Multinational Enterprises and added a chapter on human rights explicitly drawing on the GPs;³ ISO26000, a new social responsibility standard adopted by 93% of the membership of the International Organization for Standardization, includes a human rights clause that is closely aligned with Ruggie’s conclusions;⁴ the British government published a National Action Plan on business and human rights in which it expressly requests that ‘the GPs guide the approach UK companies should take to respect human rights wherever they operate’.⁵

The diffusion of the expectation that corporations should act with due diligence to avoid infringing on the rights of others and to address adverse impacts with which they are involved is a positive development. However, as acknowledged by Ruggie himself, the definition of the basic features of the corporate responsibility to respect human rights only represents ‘the end of the beginning’.⁶ This is particularly true because the GPs

are not intended as a tool kit, simply to be taken off the shelf and plugged in. While the Principles themselves are universally applicable, the means by which they are realized will reflect the fact that we live in a world of ... 80,000 transnational enterprises, 10 times as many subsidiaries and countless millions of national firms, most of which are small and medium-sized enterprises. When it comes to means for implementation, therefore, one size does not fit all.⁷

In other words, since the GPs apply to all business enterprises, both transnational and others, regardless of their size, sector, location, ownership and structure, they cannot but offer generic guidance. Specific details are left unspecified.

How to address the challenge of ‘fine-tuning’ the UN document? So far, the prevalent strategy has been to adopt a sectoral approach. Even though each company is different from another, those belonging to the same industry share similar problems and potential solutions. Thus, the European Commission released human rights guidance for three business sectors: employment and recruitment, information and communication technology (ICT), and oil and gas.⁸ The Global Network Initiative, a multi-stakeholder group of ICT companies, investors and NGOs, adopted Principles and Implementation Guidelines on issues related to privacy and freedom of expression.⁹

³ OECD, *Guidelines for Multinational Enterprises*, 2011, Chapter 4.

⁴ International Organization for Standardization, *ISO 26000: Guidance on Social Responsibility*, 2010, Clause 6.3.

⁵ Government of the United Kingdom, *Good Business: Implementing the UN Guiding Principles on Business and Human Rights*, September 4, 2013, Chapter 3.

⁶ Ruggie, *Guiding Principles*, Para. 13.

⁷ *Ibid.*, Para. 15. See also OHCHR, *The Corporate Responsibility to Respect Human Rights: An Interpretive Guide* (Geneva: United Nations, 2012), 3.

⁸ See, for instance, Shift and Institute for Human Rights and Business, *Oil and Gas Sector Guide on Implementing the UN Guiding Principles on Business and Human Rights* (European Commission, 2012).

⁹ Global Network Initiative, “Principles on Freedom of Expression and Privacy,” 2008, <http://www.globalnetworkinitiative.org/principles/index.php>.

IPIECA, the global oil and gas industry association for environmental and social issues, prepared a practical guide to assist companies in implementing human rights due diligence.¹⁰

Universal banks – that is, those financial institutions that combine the aspects of both commercial banking and investment banking – find themselves in a similar situation to other businesses. Rae Lindsay and Anthony Crockett argued that the GPs ‘offer only high-level guidance’ and ‘the precise steps that financial institutions will need to take to adapt their policies, procedures and other governance arrangements remain unclear’.¹¹ According to Mary Dowell-Jones, the core challenge for the business and human rights agenda in the financial sector is to ‘focus on defining principles and methodologies that are practically applicable to the complex array of products, processes and services that make up modern finance, using the UN Guiding Principles as the normative framework’.¹² Motoko Aizawa emphasised that the OECD Guidelines ‘are intended to apply to the financial sector, but how they are to be implemented by the sector is not evident’.¹³

The production of human rights guidance specifically tailored for the financial sector is important not only because banks, as any other company, can abuse the human rights of their employees, customers and other stakeholders. Financial institutions are rather special businesses: they can be ‘invisible players to affected communities or victims on the ground ... “but for” their financial role, many human rights abuses would not happen’.¹⁴ In addition, ‘whether as a percentage of GDP, as a percentage of corporate profits, in terms of financial depth or compared with the growth of trade, the financial sector has become proportionately more important in the overall economy in the last three decades’.¹⁵ Financial activities can have repercussions far beyond the borders of the country where they take place and the sphere of influence of the company that manage them.¹⁶

Financial institutions are aware of their challenges in implementing the GPs, and have moved the first steps to clarify their responsibilities. The International Finance Corporation (IFC), the private

¹⁰ IPIECA, *Human Rights Due Diligence Process: A Practical Guide to Implementation for Oil and Gas Companies*, 2012.

¹¹ Rae Lindsay and Antony Crockett, “Does Money Mind If We Say It’s Evil?,” *International Financial Law Review* 30, no. 6 (2011): 111–13. A new brief published by Clifford Chance in May 2014 confirms that the GPs “have acted as a catalyst for financial institutions to introduce or to expand policies and procedures around human rights due diligence although the sector is at an early stage of examining the full implications”: Roger Leese, Rae Lindsay, and Steve Nickelsburg, *Business and Human Rights: Emerging Issues for Financial Institutions*, May 2014, 1.

¹² Mary Dowell-Jones, “Financial Institutions and Human Rights,” *Human Rights Law Review* 13, no. 3 (2013): 428.

¹³ Motoko Aizawa, “Cash, Crisis, Conscience: How Can the Financial Sector Ensure It Respects Human Rights?,” *Institute for Human Rights and Business*, July 18, 2011, http://www.ihrb.org/commentary/guest/cash_crisis_conscience.html. Ruggie himself “indicated that more granular work would be required in order for governments, businesses and other stakeholders to turn the GPs into rules and tools for specific industry sectors and operating contexts, different scales of operations, various forms of financial intermediaries, and so on”: John G. Ruggie, “Progress in Corporate Accountability,” *IHRB Commentary*, February 4, 2013, <http://www.ihrb.org/commentary/board/progress-in-corporate-accountability.html>.

¹⁴ BankTrack, *Human Rights Responsibilities of Private Sector Banks*, 2010, 2. See also Danish Institute for Human Rights, *Values Added: The Challenge of Integrating Human Rights into the Financial Sector*, 2010, 6. Gaia Ghirardi, head of Group Sustainability at UniCredit, recognises that the position of the financial sector relative to potential human rights abuses “deserves special attention”: Gaia Ghirardi, “Understanding and Managing the Financial Sector’s Responsibilities in Terms of Human Rights: The UniCredit Experience,” *Notizie Di Politeia* 106 (2012): 67.

¹⁵ Center of Concern, *Submission to the Working Group on Business and Human Rights in the Occasion of Working Group’s Visit to United States*, April 29, 2013, 1. The “shadow banking system”, which is comprised of financial institutions that are outside the traditional banking regulatory structure but which engage in banking functions like granting credit, should also be taken into consideration: see The Economist, “An Ignominious History: Shadow Banking,” May 8, 2014, <http://www.economist.com/blogs/schumpeter/2014/05/special-report-shadow-banking>.

¹⁶ For a more general discussion, see David Kinley, *An Awkward Intimacy: Why Finance and Human Rights Must Learn to Love Each Other* (forthcoming, 2014).

sector lending arm of the World Bank Group, included an explicit reference to the corporate responsibility to respect human rights in its Performance Standards – that is, the environmental and social requirements that clients must apply in the case of IFC direct investments.¹⁷ The latest version of the Equator Principles, a risk management framework adopted by more than 70 financial institutions for determining, assessing and managing environmental and social risk in the projects they finance or advise on, is based on the updated IFC Performance Standards and explicitly requests that clients, if appropriate, complement their assessment documentation with specific human rights due diligence, as referenced in the GPs.¹⁸

The problem with these initiatives (as well as with other industry projects like the OECD Common Approach on Export Credit)¹⁹ is that their focus is limited to a specific type of activity: project finance (and, only more recently, a few related services too).²⁰ The narrow scope is regrettable. The provisions of the Equator Principles can easily be circumvented by offering other products (such as general corporate loans or bond underwriting).²¹ Financial institutions should therefore produce (and receive) guidance on how to conduct human rights due diligence in all their activities.²² This explains the significance of the creation of the Thun Group of Banks.

The Thun Group was launched by four European banks (Barclays, Credit Suisse, UBS and UniCredit) in 2011.²³ The four banks recognised that the GPs ‘do not – nor do they intend to – provide specific guidance for each industrial sector’ and that ‘further interpretation work is required to understand how the Guiding Principles should be implemented within specific industries, including the banking sector’. The objective of the collaboration is to produce ‘a practical application guide setting out the challenges and best practice examples of operationalising the Guiding Principles in universal banks’.²⁴

In October 2013, the Group (enlarged by the participation of three additional members: BBVA, ING Bank N.V. and RBS Group) released its first public document, a discussion paper entitled *The Guiding Principles on Business and Human Rights: An interpretation for banks*. Several commentators emphasised that the publication of the paper represents a critical juncture on the way to

¹⁷ IFC, *Sustainability Framework*, 2012.

¹⁸ See Paul Q. Watchman, Angela Delfino, and Juliette Addison, “EP 2: The Revised Equator Principles: Why Hard-Nosed Bankers Are Embracing Soft Law Principles,” *Law & Fin. Mkt. Rev.* 1 (2007): 85; John M. Conley and Cynthia A. Williams, “Global Banks as Global Sustainability Regulators?: The Equator Principles,” *Law & Policy* 33, no. 4 (2011): 542–75; Donald H. Schepers, “The Equator Principles: A Promise in Progress?,” *Corporate Governance* 11, no. 1 (2011): 90–106; Christopher Wright, “Global Banks, the Environment, and Human Rights: The Impact of the Equator Principles on Lending Policies and Practices,” *Global Environmental Politics* 12, no. 1 (2012): 56–77.

¹⁹ OECD Council, *Recommendation of the Council on Common Approaches for Officially Supported Export Credits and Environmental and Social Due Diligence*, June 28, 2012.

²⁰ For a comprehensive introduction to the topic, see Sheldon Leader and David Ong, *Global Project Finance, Human Rights and Sustainable Development* (Cambridge University Press, 2011).

²¹ Mary Dowell-Jones showed how, despite all the very visible, lengthy human rights controversies attached to Vedanta, this company was able to raise significant amounts of financing and easily circumvent the strictures of the human rights/finance initiatives described above: Dowell-Jones, “Financial Institutions and Human Rights,” 460.

²² The UN Principles for Responsible Investment (PRI) is another initiative that aims to integrate environmental and social issues into financial activities. The PRI has just started specific work on human rights, through a collaborative engagement in the extractives with a focus on joint ventures (on file with the author).

²³ The name of the Group comes from the Swiss town where bank representatives met for the two initial workshops.

²⁴ Thun Group, *Statement on the “Guiding Principles for the Implementation of the United Nations ‘protect, Respect and Remedy’ Framework” on Human Rights*, October 19, 2011.

delineate the human rights responsibilities of the financial sector.²⁵ According to Swisspeace, the document shows, for the first time, ‘a common understanding amongst the companies involved that respect for human rights is an integral part of the business, that taking voluntary and proactive action is better than waiting for legal requirements to be enforced, and that adopting a joint approach with competitors facilitates the internal persuasion process’.²⁶ At the 2013 UN Annual Forum on Business and Human Rights, the document was hailed as a ‘paradigm shift’ for thinking on human rights in the banking sector, in spite of its shortcomings.²⁷ Sudeep Chakravarti argues that the paper is ‘a must-read for financiers, their clients, corporate governance and human rights specialists, and teachers and students of business schools ... the weight of the names involved in Thun Group alone demands it. To have guidelines enunciated by such a group is priceless. Besides, even public relations exercises are sometimes known to evolve into public policy’.²⁸

The foundational aspect of the Thun Group’s discussion paper makes it particularly important that banks ‘get it right’ from the very beginning and avoid any misinterpretation of their responsibilities. A false start can have long-lasting repercussions (in terms of both poor risk management and adverse human rights impacts). This article therefore responds to the objective of the document – that is, ‘to generate constructive dialogue among banks and other stakeholders’²⁹ – and offers a critical assessment of its main arguments. The article is structured as follows. The second section concentrates on the adoption of human rights policies. The third section focuses on human rights due diligence processes. The fourth section emphasises four general shortcomings: the Thun Group relies on a faulty subsidiary approach, ignores the responsibility to provide access to effective remedy, avoids the foundational principles and the principles on ‘issues of context’, and downplays the importance of effective engagement with potential victims. The conclusion emphasises that, given the numerous unresolved dilemmas around banks’ human rights responsibilities, meaningful consultation with affected stakeholders is fundamental to ensure the future success of the initiative.

2. The Thun Group and the statement of policy

GP 16 requires that all business enterprises have in place a policy commitment to meet their responsibility to respect human rights. In addition, it illustrates how this statement of policy should be adopted. For instance, it should be informed by relevant internal and/or external expertise, and be publicly available.

The Thun Group’s discussion paper not only visibly acknowledges that ‘a statement of policy should be developed which aims to express the bank’s public commitment to respect human rights’ (6),³⁰ but also heavily draws on the GPs to describe how this commitment should be expressed. Among the numerous positive elements, the seven banks recognise that it ‘is not sufficient to ring-

²⁵ The relevance of the document derives not only from the important role played by global banks in the world economy. Banks are general businesses that include asset management units, insurance divisions, etc. As such, guidance for banks automatically provides guidance for institutional investors as well.

²⁶ KOFF, *Newsletter* (Bern: Swiss Peace Foundation, March 2014), 10.

²⁷ Human Rights Council, *Summary of Discussions of the Forum on Business and Human Rights*, April 15, 2014, para. 95.

²⁸ Sudeep Chakravarti, “A Human Rights Code for Banks,” October 3, 2013, <http://www.livemint.com/Opinion/nGCMPDRc4WLG2C9UUkAt2J/A-human-rights-code-for-banks.html>.

²⁹ Thun Group, *Statement: “The Guiding Principles: An Interpretation for Banks,”* October 2, 2013.

³⁰ For the sake of readability, references to specific pages of the Thun Group’s discussion paper are along the text, between brackets.

fence a policy in one part of the organisation’. As such, the statement should ‘apply to all parts of the business’ (6). The banks also concede that staff ‘may lack confidence in interpreting the policy and guidance and need to know they are supported in considering the issues’. It is therefore ‘critical to seek senior management buy-in at the outset’ (7). Furthermore, the Thun Group clarifies the expectation that the statement of policy should be reflected in operational policies and procedures necessary to embed it throughout the business enterprise by emphasising that this document should ‘generate awareness and understanding throughout the organisation of the importance and relevance of human rights issues to business decisions’, ‘signpost tools and guidance to assist personnel in dealing with issues in their part of the bank’, and ‘establish clear accountabilities and allocation of responsibility’ (6).

Notwithstanding these (and other) encouraging features, the discussion paper has two important shortcomings. First, the banks do not mention the need to align their policy commitment with internal incentives.³¹ The GPs are clear that business enterprises ‘need to strive for coherence between their responsibility to respect human rights and policies and procedures that govern their wider business activities and relationships. This should include, for example, policies and procedures that set financial and other performance incentives for personnel’.³² The inclusion of human rights indicators in the performance assessments of staff across all relevant functions has proven fundamental in changing the behaviour of other businesses, like pharmaceutical companies. Managers within GlaxoSmithKline’s Developing Countries and Market Access Unit enjoy incentive schemes that reward volume growth rather than profit. This means that it is now in managers’ interests to increase access to medicines.³³

Second, the Thun Group is silent on the Human Rights Council’s recommendation that the statement of policy should stipulate the enterprise’s human rights expectations not only of personnel, but also of ‘business partners and other parties directly linked to its operations, products or services’.³⁴ According to the OHCHR, this is particularly important because it ‘provides a starting point from which the enterprise can better leverage respect for human rights in these relationships, should this be necessary. ... Conversely, if it is not clear that these expectations with regard to human rights are a firm policy of the enterprise, they can easily become “negotiable” and be sidelined in particular relationships or circumstances’.³⁵

3. The Thun Group and the due diligence process

The section of the discussion paper that concentrates on human rights due diligence offers a similar picture to the one that focuses on the statement of policy: positive features sit alongside with serious deficiencies. Starting from the bright side, the GPs are clear that human rights risks are to be understood not as risks to the company, but as risks to vulnerable individuals: human rights due diligence ‘can be included within broader enterprise risk-management systems, provided that it goes

³¹ The importance of aligning remuneration structures with responsible decision-making was highlighted also by Rathbone Greenbank Investments and Ecumenical Council for Corporate Responsibility, *The Banks and Society: Trust Rebuilt?*, March 2014, 11.

³² Ruggie, *Guiding Principles*, Commentary to GP 16.

³³ Francis West, “Five Ways to Restore Public Trust in Big Business,” *Politics.co.uk*, April 9, 2014, <http://www.politics.co.uk/comment-analysis/2014/04/09/comment-five-ways-to-restore-the-public-s-trust-in-big-busin>.

³⁴ Ruggie, *Guiding Principles*, GP 16.

³⁵ OHCHR, *The Corporate Responsibility to Respect Human Rights: An Interpretive Guide*, 27.

beyond simply identifying and managing material risks to the company itself, to include risks to rights-holders'.³⁶ The Thun Group welcomes this interpretation and highlights that 'the due diligence outlined by the Guiding Principles requires that businesses, including banks, take a broader view of their potential impacts rather than focusing solely on their own commercial and reputational risks' (9). The suggestion is to develop 'a risk management model that goes beyond traditional parameters, to address (identify, manage and mitigate) human rights risks to external stakeholders, i.e., which identifies and assesses potential adverse impacts on rights holders as well as risks to the bank itself' (5).

The seven banks also acknowledge that 'all human rights are relevant' (9), that 'due diligence is an ongoing process, not something to be completed once and not revisited' (16) and that 'heightened attention needs to be paid to groups who are particularly vulnerable to human rights violations in a specific context, even though the bank's connection to these violations may be remote' (10). The last statement almost copy-pastes the GPs, according to which 'business enterprises should pay special attention to any particular human rights impacts on individuals from groups or populations that may be at heightened risk of vulnerability or marginalization'.³⁷

Lastly, the discussion paper puts forward the sensible recommendation to adapt the due diligence process to the different financial services offered. Banks do business with many types of clients: from individuals via retail and private banking, to commercial businesses via corporate and investment banking, to investors via asset management activities. The Thun Group rightly argues that a one-size-fits-all approach 'will not be feasible across the many relationships, transactions and activities of a multi-national bank' (9). As such, 'each type of client and product range has its own risk profile and requires tailored risk management approaches' (10). This recommendation is in line with the analysis of the Danish Institute for Human Rights: 'the wide spectrum of financial actors and instruments will require different methodologies in a tool to measure human rights compliance ... emphasis must be placed on developing methodologies that are specific to particular asset classes'.³⁸

Moving to the most problematic aspects, it is regrettable that the Thun Group completely ignores a fundamental element of human rights due diligence: tracking. The discussion paper never mentions this activity. Yet, the GP are clear that business enterprises should monitor the effectiveness of their response in order to verify whether adverse human rights impacts are being addressed.³⁹ The OHCHR specifies that tracking is necessary 'in order for a business enterprise to know if its human rights policies are being implemented optimally, whether it has responded effectively to the identified human rights impacts, and to drive continuous improvement'.⁴⁰

³⁶ Ruggie, *Guiding Principles*, Commentary to GP 17.

³⁷ *Ibid.*, Commentary to GP 18.

³⁸ Danish Institute for Human Rights, *Values Added: The Challenge of Integrating Human Rights into the Financial Sector*, 5. The Institute for Human Rights and Business also argues that different types of assets "will have different human rights impacts and opportunities associated with them. Developing tools to better understand the human rights impacts of types of assets, whether these are property, commodities or other resources, will help investors to be more precise in their analysis and engagement": Institute for Human Rights and Business, *Investing the Rights Way: A Guide for Investors on Business and Human Rights*, 2013, 57, <http://www.ihrb.org/publications/reports/investing-the-rights-way.html>.

³⁹ Ruggie, *Guiding Principles*, GP 20.

⁴⁰ *Ibid.*, Commentary to GP 20.

If tracking is forgotten, the Thun Group covers human rights reporting. However, the seven banks seem to suggest that this activity is purely voluntary. The discussion paper states that

banks may wish to report on the following factors in their sustainability reporting or other communications:

- voluntary human rights standards that the bank is signatory to;
- policies and procedures to identify and mitigate human rights risks;
- approach to human rights issues specific for sectors in which bank's clients operate;
- governance process for dealing with human rights;
- staff training on human rights (17).

Ruggie would disagree with this interpretation of banks' responsibilities. According to the GPs, businesses 'should', not 'may wish to', be prepared to communicate how they address their human rights impacts, 'particularly when concerns are raised by or on behalf of affected stakeholders'.⁴¹ Higher transparency is considered a key development in the financial sector. Back in 2003, more than a hundred NGOs signed the Collevocchio Declaration and argued that financial institutions 'must be transparent to stakeholders, not only through robust, regular and standardized disclosure, but also by being responsive to stakeholder needs for specialized information on their policies, procedures and transactions'.⁴² The Swedish and Norwegian OECD National Contact Points supported these demands. In its conclusion regarding a special instance against Nordea as partial financier of the Finnish company Botnia's construction of a pulp mill in Uruguay, the two NCPs encouraged 'actors in the financial sector to practice as much transparency and freedom of information as possible. In order to foster greater understanding among the general public for their activities, it is essential that companies be sensitive to the public's increasing demands for information'.⁴³ The argument offered by Andreas Missbach is forceful: if banks 'want the public to believe that they are serious about their respect for human rights they will not only have to develop a comprehensive human rights policy and adequate sectoral due diligence standards, but they will actually have to allow the public to see them'.⁴⁴

As far as human rights assessment and integration are concerned, the way in which the Thun Group recommends to prioritise action represents a serious misunderstanding of the GPs.⁴⁵ According to the discussion paper, banks should 'prioritize the assessment of their potential adverse impacts on human rights and related risks by using two criteria: first, the impact on the rights holders themselves (severity and number of affected people), and second, the bank's connection to these

⁴¹ Ruggie, *Guiding Principles*, GP 21.

⁴² *Collevocchio Declaration: The Role and Responsibility of Financial Institutions*, 2003, <http://www.evb.ch/es/p25001979.html>.

⁴³ Swedish National Contact Point, *Statement by the Swedish National Contact Point (NCP) for the OECD Guidelines for Multinational Enterprises - with the Full Support of Norway's NCP - in Connection with a Complaint from the Argentine Environmental Organisation CEDHA against Nordea*, January 1, 2008, 2, http://oecdwatch.org/cases/Case_123.

⁴⁴ Andreas Missbach, "Without Map or Compass. Credit Suisse, UBS and Human Rights" (Berne Declaration, 2010), 16.

⁴⁵ Further research confirms that financial institutions have a poor understanding of the core concepts of the GPs and the OECD Guidelines. The findings from a recent report by Sustainable Finance Advisory "indicate that some of the concerns expressed by FIs appear to, in part, reflect a misunderstanding of some of the main concepts from the OECD Guidelines and their implications (i.e. linkage and leverage). Thus, several panellists indicated that it will be very important to effectively communicate the expectations and definitions of these main concepts": OECD, *Summary Report* (OECD Global Forum on Responsible Business Conduct, June 27, 2013), 15.

adverse impacts’ (10). In other words, ‘it will not be possible to evaluate every impact of every business decision regardless of proximity’ (9).

The idea that proximity, or the level of connection between the bank and the human rights abuse, should be used as a criteria to prioritise action is new to the business and human rights community. The GPs are clear: severity, nothing else, should inform prioritization.⁴⁶ The OHCHR clarifies that

it may not always be possible for an enterprise to address all adverse human rights impact immediately. ... If these impacts cannot reasonably be addressed all at once, the focus must be on those that would cause the greatest harm to people. That means prioritizing those impacts that are, or would be, most severe in their scope or scale or where a delayed response would render them irremediable.⁴⁷

Thus, if a bank’s asset management unit is both a majority shareholder in a company which is involved in a numerous cases of workplace discrimination and a minority shareholder in a company which is accused of complicity in the killings of labour leaders by a repressive regime, the bank should prioritise action in the latter case. The proximity of the first abuse does not offset the severity of the second one.

Importantly, the fact that severity of human rights abuses is the only factor that should inform prioritization of action does not mean that the GPs completely disregard proximity between the bank and its human rights impacts. If one equates proximity with leverage (assuming that closeness is positively correlated with the ability to effect change in the wrongful practices of another party), this element serves to define what actions a bank is required to undertake (once human rights have already been prioritised on the basis of severity). When a bank identifies a risk of adverse human rights impact linked to its operations, products or services and caused by a party with which it has a business relationship (such as a loan for general corporate purposes), the GPs suggest the following approach:

- the bank should always exercise its leverage to mitigate any impact to the greatest extent possible;
- if the bank lacks leverage, there may be ways to increase it. Leverage may be augmented, for example, by ‘offering capacity-building or other incentives to the related entity, or collaborating with other actors’;⁴⁸
- when there is no leverage (and no way to increase it), the bank should consider ending the relationship.⁴⁹

⁴⁶ Ruggie, *Guiding Principles*, GP 24.

⁴⁷ OHCHR, *The Corporate Responsibility to Respect Human Rights: An Interpretive Guide*, 82.

⁴⁸ Ruggie, *Guiding Principles*, Commentary to GP 19.

⁴⁹ There are numerous examples of banks terminating their business relationships with abusive clients. RBS (and a few other European banks) stopped underwriting bonds of the Belarus government: “RBS Agrees to Cease Belarus Work,” *BBC News*, August 29, 2011, <http://www.bbc.co.uk/news/business-14706646>. Santander suspended its funding for Brazil’s hugely controversial Santo Antonio dam, citing environmental and social concerns: Survival International, “Santander Bank Reports Suspension of Funding for Controversial Brazilian Dam,” May 5, 2011, <http://www.survivalinternational.org/news/7255>. The only exception to the schema outlined in the article is when the business relationship is deemed “crucial” to the company. However, the GPs define a crucial business relationship as one that “provides a product or service that is essential to the enterprise’s business, and for which no reasonable alternative source exists”: Ruggie, *Guiding Principles*, Commentary to GP19. It is difficult to imagine any financial activity which meets this requirement. The exception is therefore not relevant for the banking sector.

A last comment is dedicated to the following question: should the fact of knowing the use of proceeds of a financial product or service – that is, whether the funds are intended for general corporate purposes or whether they will be used for a specific investment or project – affect the type of human rights due diligence required to a financial institution? According to the Thun Group, the two situations should be treated differently. On the one hand, if the clients need the funds for general corporate purposes (such as strengthening the working capital), ‘the bank should look for management systems and structures on the client’s side that demonstrate the company’s ability to identify, manage and respond adequately to general human rights issues across all assets and operations in the various countries the client may be active’ (15). On the other hand, if the funds are intended for a defined purpose, such as to develop a new coal mine or a hydropower dam, ‘the potential impact of these specific investments on the human rights of affected rights-holders should be assessed in addition to the company’s general management of human rights’ (15). The Berne Declaration is right to criticise that a ‘procedural’ scan is not sufficient when funding for general corporate purposes is provided. The NGO argues that banks ‘often finance projects in areas where human rights violations are commonplace, such as mines, oil fields or chemical plants. Even when funding is for non-determined purposes, the activities of the company at stake often reveal more about its human rights record than the procedures written on paper’.⁵⁰ BankTrack points to an additional problem. Victims of corporate human rights abuses and NGOs that support them ‘usually raise their voices against specific investments rather than commenting on the processes of the company involved’. The result of the proposal by the Thun Group would be that ‘their voices remain unheard in the due diligence process’.⁵¹

4. General shortcomings

The Thun Group’s discussion paper suffers from four general shortcomings. First, it does not recognise the full range of human rights abuses which banks can be involved in. Second, it ignores an issue as fundamental as access to effective remedy. Third, it circumvents the ‘Foundational Principles’ and the Principles on ‘issues of context’. Lastly, it shows a poor understanding of the role to be played by effective engagement with affected stakeholders.

4.1. *The subsidiary approach*

A Chief Executive Officer (CEO) briefing on human rights prepared by the UN Environment Programme Finance Initiative (UNEP FI) in 2008 listed the following three core areas of interaction between financial services and human rights:

- where a customer’s business causes or contributes to human rights violations or its products/services are used for such purposes (for example, military equipment);
- where project finance lending for large projects causes or contributes to human rights violations; and
- where financial services facilitate capital flight and money laundering.⁵²

⁵⁰ Berne Declaration, “‘Groupe de Thoune’: Les Banques Reconnaissent Enfin L’importance Du Respect Des Droits Humains Dans Leurs Activités,” October 2, 2013, <http://www.evb.ch/fi/p25021647.html>.

⁵¹ BankTrack, *BankTrack on the Thun Group Paper on Banks and Human Rights*, December 2013, 5.

⁵² UNEP Finance Initiative, “CEO Briefing,” June 2008, 4.

The approach of the CEO briefing perfectly represents what Mary Dowell-Jones considers one of the biggest problems in the current thinking on the relationship between banks and human rights: the ‘subsidiary approach’, i.e., the perspective that ‘financial institutions and human rights only come into contact with each other through the funding of companies in other sectors (for example mining) who may be directly violating rights’.⁵³

The Thun Group falls victim of this erroneous belief too. The largest sections of the paper are dedicated to investment banking (e.g. loans to other companies) and asset management (e.g. ownership of other companies). Even the third main section – dedicated to retail banking – is mostly focused on the risks deriving from ‘association with politically sensitive clients associated with human rights controversy’ and ‘association with clients who are the owners of companies involved in human rights controversies, or who hold influential directorships in such companies’ (12). The conclusions of the document are revealing: business and human rights 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’ (20).⁵⁴

This perspective is problematic because the ways in which banks can have adverse human rights impacts are numerous. First of all, it is important for enterprises ‘to look beyond the most obvious groups and not assume, for instance, that the challenges lie in addressing impact on external stakeholders while forgetting direct employees’.⁵⁵ Even though health and safety problems are rare in the financial sector, they are not impossible. In November 2012, a 21-year-old intern at Merrill-Lynch (part of Bank of America) died suddenly after reportedly working 72 hours straight, prompting the company to ‘review working conditions’.⁵⁶ Cases of discrimination are more

⁵³ Dowell-Jones, “Financial Institutions and Human Rights,” 423. A rare exception can be found in an interview to Mark Harding, former General Counsel of Barclays, who affirmed: “We focused on three areas of impact: our role as an employer, as a purchaser of goods and services, and as a provider of financial services to clients. We found that many of our policies and practices already took account of human rights issues without explicitly referencing human rights. We had sound policies and requirements covering aspects such as discrimination, diversity, bullying and harassment, health and safety, and a range of other human rights-relevant issues”: Mark Harding, “Banking on Human Rights,” *The Business and Human Rights Review* 1 (2012): 4. A recent report by KPMG is also laudable as it highlights three areas that hold the highest risk with regard to human rights: consumers’ activities, employee management and supply chain management: KPMG, *Human Rights in the Banking Sector*, 2013, 14.

⁵⁴ See also the way in which the document is introduced on the website of Credit Suisse: “[a]s the discussion paper explains, the majority of human rights impacts of banks result from the activities of their clients”. Credit Suisse, “Banks Helping to Respect Human Rights: Commitment,” October 2, 2013, <https://www.credit-suisse.com/ch/en/about-us/corporate-responsibility/news/commitment.article.html/article/pwp/news-and-expertise/2013/09/en/bank-helping-to-respect-human-rights.html>. This view is surprising because in other contexts banks have recognised their direct impacts on employees and customers. Credit Suisse itself, in the same webpage of the previous statement, argues: “Credit Suisse”s most direct link to human rights issues is in its working relationship with its employees and where we can exercise the greatest influence over such issues’. Gaia Ghirardi, head of Group Sustainability at UniCredit, recognises that “[o]f course banks are in a position to directly abuse the human rights of their employees and customers”: Ghirardi, “Understanding and Managing the Financial Sector’s Responsibilities in Terms of Human Rights: The UniCredit Experience,” 67.

⁵⁵ OHCHR, *The Corporate Responsibility to Respect Human Rights: An Interpretive Guide*, 37.

⁵⁶ Tom Sykes, “Did Bank of America Merrill Lynch Intern Moritz Erhardt Die of Stress?,” *The Daily Beast*, November 22, 2013, <http://www.thedailybeast.com/articles/2013/11/22/did-bank-of-american-merrill-lynch-intern-moritz-erhardt-die-of-stress.html>; Shiv Malik, “Moritz Erhardt Intern Death Spurs Bank of America Merrill Lynch Review,” *The Guardian*, August 23, 2013, sec. Business, <http://www.theguardian.com/business/2013/aug/23/intern-death-bank-of-america-merrill-lynch>.

frequent. Banks are well-known for a ‘macho’ culture which ‘holds women back’.⁵⁷ For example, in June 2011 the U.S. District Court for the District of Columbia approved a \$32 million settlement of a national gender discrimination case against Wachovia Securities, now known as Wells Fargo Advisors.⁵⁸ According to the complaint, the discrimination deprived 3,000 women financial advisors of opportunities to develop business by, among other things, denying them a fair share of account distributions, fair treatment in investment partnerships and opportunities to purchase books of business from other financial advisors, and fair consideration in other mentoring and marketing opportunities.⁵⁹

Banks can also discriminate against their customers. The Thun Group cursorily acknowledges this issue by highlighting that ‘most multinational banks will have ... anti-discrimination policies (diversity and inclusion policies relating to clients, suppliers and employees) (12). However, the magnitude of the problem would require a much more detailed examination. A report by Noreena Hertz published in November 2011 shows that banks in the United Kingdom are discriminating against female customers, in particular pregnant women and women on maternity leave seeking mortgages, and against female entrepreneurs seeking loans.⁶⁰ On the same day, the Deputy Prime Minister Nick Clegg announced an immediate investigation into banks’ lending practices.⁶¹ On similar lines, in July 2012 Wells Fargo agreed to pay \$175 million to settle charges that it discriminated against thousands of blacks, Latinos, and other minority borrowers between 2004 and 2009. The U.S. Justice Department had accused the bank, the country’s largest mortgage lender, of charging minority borrowers higher interest rates and fees on home loans than it charged white borrowers with similar credit ratings.⁶²

The document by the Thun Group also deliberately ‘focuses on the human rights implications arising from banks’ business relationships with clients, and not on the broader impacts of the banking industry on society’ (3). The consequence of this choice is that the document never mentions the far-reaching human rights implications of the recent financialisation of the world economy – that is, the process whereby financial markets, financial institutions, and financial elites gain greater influence over economic policy and economic outcomes.⁶³ Adverse human rights impacts have principally been linked to banks’ activities in derivatives markets. On the one hand, bad risk management by global banks can exacerbate financial crises and thus provoke significant ‘collateral damage’ in the enjoyment of economic and social rights by the most vulnerable segments

⁵⁷ Julia Kollewe, “Banks’ Macho Culture ‘Holds Women Back,’” *The Guardian*, March 12, 2012, <http://www.guardian.co.uk/business/2012/mar/12/women-management-ftse-100-firms>. See also Elizabeth Rigby and George Parker, “City ‘needs Women’ to Fight Macho Culture,” *Financial Times*, September 5, 2011.

⁵⁸ Carter et al v. Wells Fargo Advisors LLC et al, U.S. District Court, District of Columbia, No. 09-01752.

⁵⁹ Some banks have recognised the importance of non-discrimination in their individual approaches. For instance, UniCredit’s “Integrity Charter” bans discrimination on the grounds of sex, age, race, political opinion or trade-union activity. Most recently, additional principles and rights regarding diversity and inclusion have been set forth in the “Joint Declaration on Equal Opportunities and Non Discrimination” signed by the UniCredit European Works Council and the bank’s management. Ghirardi, “Understanding and Managing the Financial Sector’s Responsibilities in Terms of Human Rights: The UniCredit Experience,” 69.

⁶⁰ Noreena Hertz, *Women and Banks: Are Female Customers Facing Discrimination?* (Institute for Public Policy Research, November 10, 2011).

⁶¹ Elizabeth Rigby, “Clegg Orders Review into How Banks Treat Women,” *Financial Times*, November 9, 2011.

⁶² Charlie Savage, “Wells Fargo to Settle Mortgage Bias Charges,” *The New York Times*, July 12, 2012, <http://www.nytimes.com/2012/07/13/business/wells-fargo-to-settle-mortgage-discrimination-charges.html>.

⁶³ Gerald A. Epstein, *Financialization and the World Economy* (Edward Elgar Publishing, 2005); Thomas I. Palley, *Financialization: What It Is and Why It Matters* (The Levy Economics Institute, 2007).

of the world population.⁶⁴ Estimates by the International Labour Organisation and the World Bank suggest that the 2007 financial crisis forced 27 million workers to lose their job and 64 million people to fall under the poverty line.⁶⁵ On the other hand, speculation in commodity derivatives can drive up food prices around the world, with devastating consequences for the right to an adequate standard of living of millions of low-income families in food-importing countries.⁶⁶ Researchers and NGOs have offered strong evidence that recent peaks in food prices were the consequence not only of increased demand from rapidly growing emerging economies, biofuels production, and weather events, but also of structural changes in the trading of commodity derivatives.⁶⁷ According to Olivier de Schutter, a significant role in the price spikes of the last few years ‘was played by the entry into markets for derivatives based on food commodities of large, powerful institutional investors such as hedge funds, pension funds and investment banks, all of which are generally unconcerned with agricultural market fundamentals’.⁶⁸

Silence on these issues is disappointing because there is a desperate need to discuss banks’ responsibilities in the context of financial crises and commodity speculation.⁶⁹ As highlighted by Mary Dowell-Jones and David Kinley, human rights due diligence cannot easily be applied to these situations. Daunting questions include:

does it require that financial entities disinvest from certain markets that may be overheating because the attendant systemic risks may well prove extremely detrimental to human rights should they materialise, even in the face of huge uncertainty as to the likelihood of this? How does this interact with a bank’s responsibilities to its shareholders? Would doing so only destabilise the markets sooner rather than later?⁷⁰

⁶⁴ Mary Dowell-Jones and David Kinley, “Minding the Gap: Global Finance and Human Rights,” *Ethics & International Affairs* 25, no. 02 (2011): 183–210; Mary Dowell-Jones, “International Finance and Human Rights: Scope for a Mutually Beneficial Relationship,” *Global Policy* 3, no. 4 (2012): 467–70.

⁶⁵ ILO, *Global Employment Trends 2011: The Challenge of a Jobs Recovery* (Geneva, 2011), ix; World Bank, *Global Monitoring Report 2010: The MDGs after the Crisis* (Washington, 2010), 6.

⁶⁶ John Richardson, Professor at the American University, founded the Initiative for Human Rights in Business to inform investors of the human rights risks associated with commodities speculation, to identify the investors and institutions involved in this speculative trading, and to address the failure of states to prevent these trading abuses and the resulting harm to populations in need: John Richardson, “Initiative for Human Rights in Business,” 2013, <http://ihrib.org/site/jupgrade/blog/>.

⁶⁷ See World Development Movement, *The Great Hunger Lottery - How Banking Speculation Causes Food Crises*, July 2010, <http://www.wdm.org.uk/food-speculation/great-hunger-lottery/>; Friends of the Earth Europe, “Farming Money: How European Banks and Private Finance Profit from Food Speculation and Land Grabs,” January 2012, <http://www.foeeurope.org/farming-money-Jan2012>. Markus Henn collected more than 100 articles and reports demonstrating the adverse consequences of commodity speculation: Markus Henn, *Evidence on the Negative Impact of Commodity Speculation by Academics, Analysts and Public Institutions* (WEED, June 14, 2012). In January 2014 the European Parliament and the EU Presidency agreed on new regulations that would cap trading of some commodity derivatives (linked to wheat, corn, soybean and sugar), ban unregulated trading and establish tighter rules for high-frequency trading: Mark Tran, “EU Curb on Food Speculation Gets Qualified Welcome from Activists,” *The Guardian*, January 15, 2014, <http://www.theguardian.com/global-development/2014/jan/15/eu-curb-food-speculation-activists>.

⁶⁸ Olivier De Schutter, *Food Commodities Speculation and Food Price Crises. Regulation to Reduce the Risks of Price Volatility*, Briefing note by the Special Rapporteur on the right to food, September 2010, 1.

⁶⁹ The absence of the topic of food speculation is also surprising given that in February 2013 Barclays stopped speculative trading of agriculture commodities as part of an effort to scale back businesses that risk its reputation: Maria Kolesnikova and Isis Almeida, “Barclays Stops Speculative Agricultural Commodity Trading,” *Bloomberg*, February 12, 2013, <http://www.bloomberg.com/news/2013-02-12/barclays-stops-speculative-agricultural-commodity-trading-2-.html>.

⁷⁰ Mary Dowell-Jones and David Kinley, “The Monster Under the Bed: Financial Services and the Ruggie Framework,” in *The Un Guiding Principles on Business and Human Rights: Foundations and Implementation*, ed. Radu Mares (Martinus Nijhoff Publishers, 2011), 206.

The problem lies not only in the opacity and complexity of many financial instruments. Addressing the questions above would also ‘require a foray into systemic dynamics and the issue of collective action/collective responsibility. There are many cases in finance where what would be harmless activity when conducted by a few market participants in small numbers turns into a powder keg of risk for everyone, including the global poor, when it attracts large numbers of players.’⁷¹

In sum, ‘existing initiatives like the Equator Principles cannot simply be scaled up to deal with the system as a whole’.⁷² As highlighted by the Institute for Human Rights and Business, ‘at the same time as the UN Guiding Principles have been developed with a strong emphasis on accountability to individuals whose human rights have been abused, the financialisation of many sectors has been moving the world in the opposite direction where accountability of a particular company for the impact of operations becomes harder and harder to pin down. How to reconcile these approaches will require innovative thinking’.⁷³

The discussion paper is also silent with respect to lobbying, notwithstanding the facts that (1) research by academics and NGOs has demonstrated that banks frequently ‘capture’ regulators and heavily influence regulation (both in the US and in Europe),⁷⁴ and (2) the issue is explicitly covered by the Human Rights Council. According to the GPs, ‘business enterprises need to strive for coherence between their responsibility to respect human rights and policies and procedures that govern their wider business activities and relationships. This should include, for example, ... lobbying activities where human rights are at stake.’⁷⁵ The Thun Group should take inspiration from the activities of a group of responsible investors who energetically engage with law-makers, regulators and other business on several human rights issues (including supply chain problems in Bangladesh, conflict minerals reporting in the US and civil litigation under the Alien Tort Claims Act) and publicly report on their lobbying practices.⁷⁶

This list of potential human rights abuses is not even complete: space constraints preclude from addressing issues as important as financial exclusion,⁷⁷ consumer protection⁷⁸, the effect of fees and

⁷¹ Ibid., 207. Problems of collective action can also arise in other circumstances. According to Roger Leese, Rae Lindsay and Steve Nickelsburg, implementation of the GPs “is likely to be particularly challenging and complex where multiple parties are involved, such as in syndications”: Leese, Lindsay, and Nickelsburg, *Business and Human Rights: Emerging Issues for Financial Institutions*, 2.

⁷² Mary Dowell-Jones and David Kinley, *The UN Framework on Business and Human Rights: The Importance of Financial Institutions* (Submission to the new UN Working Group on Human Rights and Transnational Corporations and Other Business Enterprises, 2011), 3.

⁷³ Institute for Human Rights and Business, *Investing the Rights Way: A Guide for Investors on Business and Human Rights*, 58. Rae Lindsay agrees that there is “greater familiarity with these concepts around project finance ... But trying to apply this across sectors, businesses, products and geographies is not necessarily straightforward and requires a lot more thought”: Leese, Lindsay, and Nickelsburg, *Business and Human Rights: Emerging Issues for Financial Institutions*, 2.

⁷⁴ Barry Herman, *Regulating Financial Sectors for Development and Social Justice* (New York: Social Justice in Global Development and the New School, April 24, 2013), 4; SOMO, *Taking Lobbying Public: The Transparency of Dutch Banks’ Lobbying Activities*, December 2013.

⁷⁵ Ruggie, *Guiding Principles*, GP 16.

⁷⁶ Interfaith Center on Corporate Responsibility, “A Year After Rana Plaza, Investors Call for Transparency,” April 24, 2014, <http://www.iccr.org/year-after-rana-plaza-investors-call-transparency>; Ben DiPietro, “Report Sets Expectations for Conflict Minerals Reporting,” *Wall Street Journal*, September 5, 2013, <http://blogs.wsj.com/riskandcompliance/2013/09/05/report-sets-expectations-for-conflict-minerals-reporting/>; Boston Common Asset Management, *Investor Statement for Human Rights and in Support of the U.S. Alien Tort Statute*, October 2, 2012, www.bostoncommonasset.com/news/Investor-Statement-ATS-FINAL.pdf.

⁷⁷ Rathbone Greenbank Investments and Ecumenical Council for Corporate Responsibility, *The Banks and Society: Trust Rebuilt?*, 32.

charges on personal savings,⁷⁹ land grabbing,⁸⁰ tax avoidance,⁸¹ and corruption.⁸² Yet, it shows the inadequacy of the approach chosen by the Thun Group. According to Christian Leitz, head of corporate responsibility at UBS, the Group ‘took a conscious decision to focus on those elements that are most relevant for the business of a bank ... Deliberately, we did not venture into business areas that are not core business activities of the banks involved in the Thun Group. And, also deliberately, we did not address issues that are non-specific for the banking industry, such as supply chain screening or employment practices.’⁸³ The question is the following: are not retail banking and derivatives trading a core business activity of the seven banks? As seen above, the GPs require that companies priorities their action on the basis of the severity of their impacts, including their scope, that is, the number of individuals that are affected. These numbers are in the range of thousands for cases of discrimination, and in the range of millions for financial crises and food prices volatility.

4.2. Access by victims to effective remedy

The document by the Thun Group focuses exclusively on GPs 16-21 and therefore intentionally avoids the ‘need for greater access by victims to effective remedy’ – the last pillar of the three-pronged governance framework proposed by Ruggie. This is disappointing because the UN document is clear that the corporate responsibility to respect human rights includes expectations regarding remedial action. GP 22 states that ‘[w]here business enterprises identify that they have caused or contributed to adverse impacts, they should provide for or cooperate in their remediation through legitimate processes’.⁸⁴ GP 29 adds that ‘business enterprises should establish or participate in effective operational-level grievance mechanisms for individuals and communities who may be adversely impacted’.⁸⁵

Representatives from the seven banks advanced three different arguments to defend their decision to circumvent remediation. First, the discussion paper claims to focus on those GPs that are ‘most relevant to banks’ potential adverse impacts on human rights’ (3). This justification is fallacious because the UN document is clear that the GPs are ‘an inter-related and dynamic system of preventative and remedial measures’, and all three pillars should be implemented simultaneously.⁸⁶ As a matter of fact, even the best policies and practices may not prevent from accidentally causing or contributing to adverse human rights impacts. This is why Ruggie affirmed that business enterprises conducting human rights due diligence ‘should not assume that, by itself, this will automatically and fully absolve them from liability for causing or contributing to human rights abuses’.⁸⁷ In sum, if prioritisation is possible to tackle the most severe human rights impacts, the option is not available for allegedly ‘most relevant’ GPs.

⁷⁸ Herman, *Regulating Financial Sectors for Development and Social Justice*.

⁷⁹ Dowell-Jones, “Financial Institutions and Human Rights,” 452.

⁸⁰ Global Witness, *Rubber Barons: How Vietnamese Companies and International Financiers Are Driving a Land Grabbing Crisis in Cambodia and Laos*, 2013.

⁸¹ Actionaid, *Time to Clean up: How Barclays Promotes the Use of Tax Havens in Africa*, November 2013.

⁸² Global Witness, *International Thief Thief: How British Banks Are Complicity in Nigerian Corruption*, 2010.

⁸³ Christian Leitz, “Human Rights and the Financial Sector,” *The Business and Human Rights Review* 3 (2013): 6.

⁸⁴ Ruggie, *Guiding Principles*, GP 22.

⁸⁵ *Ibid.*, GP 29.

⁸⁶ *Ibid.*, Para. 6.

⁸⁷ *Ibid.*, Commentary to GP 17.

Second, the seven banks declared to concentrate on the GPs which ‘tend to be most challenging to implement’ (5). This argument is invalid because recent experience with the Compliance Advisor/Ombudsman (CAO) – the independent recourse mechanism for the IFC and the Multilateral Investment Guarantee Agency – has shown that assuring effectiveness of accountability mechanisms actually represents one of the trickiest aspects of the implementation strategy of the corporate responsibility to respect human rights by financial institutions.⁸⁸ In addition, the GPs are clear that ‘[i]ndustry, multi-stakeholder and other collaborative initiatives that are based on respect for human rights-related standards should ensure that effective grievance mechanisms are available’.⁸⁹ The Equator Principles, the most important industry-led initiative on sustainable banking, still have no accountability and compliance mechanism where affected stakeholders could file complaints against non-compliant banks.⁹⁰

Third, Mercedes Sotoca, head of environmental and social risk at ING, noted that in most cases where a bank is potentially linked to a human rights impact, ‘the impact will have been caused not by the bank itself, but by its client. Therefore, the client is in a better position to provide access to remedy, and depending on the type of its relationship with or its service to the client, the bank may be able to exert influence on the client’s approach to access to remedy’.⁹¹ This statement can be challenged on two grounds. On the one hand, the previous section has amply demonstrated that it is not true that in most cases where a bank is potentially linked to a human rights abuse, the adverse impact will have been caused not by the bank itself but by its client. Suffice it here to remember the numerous cases of gender discrimination against employees and customers. On the other hand, increasing recourse to the CAO shows that bank’s clients that abuse human rights are not always willing to provide effective remedy to victims. It is therefore important that banks establish their own mechanism in order to provide rights-holders affected by bank-supported projects and activities a last resort remedy.

As a final point on the issue of access to remedy, it is important to recall that accountability and grievance mechanisms are not only part of the remediation pillar of the GPs. They also feature as critical elements to assess and track human rights impacts within due diligence processes. In Ruggie’s words, they provide ‘a channel for those directly impacted by the enterprise’s operations to raise concerns when they believe they are being or will be adversely impacted. By analysing trends and patterns in complaints, business enterprises can also identify systemic problems and

⁸⁸ See, for example, the controversy over the CAO report that strongly criticised the IFC for its \$30 million loan to a Honduran palm oil project managed by Corporación Dinant: Human Rights Watch, “World Bank Group: Inadequate Response to Killings, Land Grabs,” January 10, 2014, <http://www.hrw.org/news/2014/01/10/world-bank-group-inadequate-response-killings-land-grabs>; Bretton Woods Project, “IFC Fails to Act on Human Rights Abuses in Honduras,” January 23, 2014, <http://www.brettonwoodsproject.org/2014/01/ifc-fails-act-human-rights-abuses-honduras/>; Joe Athialy, “The Weakest Link in Development Lending,” *Business Standard India*, April 17, 2014. More in general, on accountability mechanisms of development banks, see Benjamin M. Saper, “International Finance Corporation’s Compliance Advisor/Ombudsman (CAO): An Examination of Accountability and Effectiveness from a Global Administrative Law Perspective, The,” *New York University Journal of International Law and Politics* 44 (2012 2011): 1279; Suresh Nanwani, “Directions in Reshaping Accountability Mechanisms in Multilateral Development Banks and Other Organizations,” *Global Policy*, Dicembre 2013, n/a–n/a.

⁸⁹ Ruggie, *Guiding Principles*, GP 30.

⁹⁰ BankTrack, “New Equator Principles to Have Deeply Underwhelming Impact on People and Planet,” June 4, 2013, http://www.banktrack.org/show/news/new_equator_principles_to_have_deeply_underwhelming_impact_on_people_and_planet.

⁹¹ Ariel Meyerstein, “Are Big Banks Short-Selling Their Leverage over Human Rights?,” *The Guardian*, October 31, 2013, <http://www.theguardian.com/sustainable-business/banks-short-selling-leverage-human-rights>. See also the argument by Leitz, “Human Rights and the Financial Sector,” 7.

adapt their practices accordingly'.⁹² This means that, even in the absence of a specific section on remediation, the due diligence focus of the Thun Group's discussion paper should have required an analysis of grievance mechanisms anyway. Unfortunately, this is not the case.

4.3. Foundational principles and issues of context

The Thun Group's document not only circumvents the issue of access to remedy but also ignores the five 'foundational principles' (GPs 11-15) and the two principles that deal with 'issues of context' (GPs 23-24). The reason behind this 'amnesia' is likely to be related to the presence of strong statements in favour of remediation responsibilities. According to GP 15, in order to meet their responsibility to respect human rights, 'business enterprises should have in place policies and processes appropriate to their size and circumstances, including ... processes to enable the remediation of any adverse human rights impacts they cause or to which they contribute'.⁹³ The Commentary to GP 11 emphasises that addressing adverse human rights impacts requires 'taking adequate measures for their prevention, mitigation and, where appropriate, remediation'.⁹⁴ The problem is that, acting this way, the Thun Group overlooks other important aspects of the corporate responsibility to respect.

First of all, the discussion paper misses the opportunity to reiterate that banks 'may undertake other commitments or activities to support and promote human rights, which may contribute to the enjoyment of rights. But this does not offset a failure to respect human rights throughout their operations'.⁹⁵ This is particularly important because the sustainability reports of the great majority of banks still focus on philanthropic activities.⁹⁶ In the context of human rights 'there is no equivalent of a carbon off-set for harm caused to human rights: a failure to respect human rights in one area cannot be cancelled out by a benefit provided in another'.⁹⁷

Second, the suggestion on how to solve potential conflicts between international human rights law and local regulations is only partially in line with the GPs. According to Thun Group, a bank 'may apply international human rights standards wherever possible but if doing so means that its employees in a particular jurisdiction are acting in breach of local law and may be subject to legal retribution, then it may decide to comply with local law and seek alternative means of compliance with accepted standards' (5). This statement can be criticised for two reasons. On the one hand, BankTrack is right to argue that 'bank employees are not forced by governments to maintain a specific activity or client relationship'. As such, 'legal retribution in the event that they terminate a business relationship because of human rights concerns is unlikely. To prioritise local law over universal standards and disguise this as protection of employees is an unnecessary weakening of,

⁹² Ruggie, *Guiding Principles*, Commentary to GP 29.

⁹³ *Ibid.*, GP 15.

⁹⁴ *Ibid.*, Commentary to GP 11.

⁹⁵ *Ibid.*

⁹⁶ See, for instance, Adam Quinton, *Corporate Social Responsibility in Latin America: The Financial Services Perspective* (New York: Columbia University School of International and Public Affairs, 2012). To take one example among the banks participating in the Thun Group, Barclays concentrates on tackling youth unemployment: David Wheldon, "Why Are Young People Everyone's Business?," *The Guardian*, December 14, 2012, sec. Guardian Sustainable Business, <http://www.theguardian.com/sustainable-business/barclays-unicef-youth-unemployment>.

⁹⁷ OHCHR, *The Corporate Responsibility to Respect Human Rights: An Interpretive Guide*, 15.

and diversion from, the Guiding Principles'.⁹⁸ On the other hand, the GPs explicitly request business enterprise not only 'to respect the principles of internationally recognized human rights to the greatest extent possible in the circumstances', but also 'to be able to demonstrate their efforts in this regard'.⁹⁹ The communication aspect is forgotten in the Thun Group's document.

Lastly, the Thun Group describes the GPs as 'law in the making'. The seven banks argue that 'although the Guiding Principles are not binding in law, they are more than simple voluntary guidelines. They are a good example of "hardening" soft law in the sense that they act as a catalyst to spark new policy requirements or binding regulation and are being multiplied by other international organisations and national legislators' (4). Credit Suisse confirms this view by arguing that 'recent developments demonstrate that international and national standard setting bodies are increasingly *advocating* new policy requirements and regulations on businesses with regards to human rights' (emphasis added).¹⁰⁰ Three recent developments are considered to be particularly relevant for banks: the update of the OECD Guidelines, the European Union (EU) Strategy on Corporate Social Responsibility 2011-2014 and the seven shared principles on investment by the EU and the US.¹⁰¹

Even though this characterization of the GPs is, generally speaking, accurate, it leaves the reader with the impression that today banks cannot be held legally accountable for complicity in human rights abuses, and that everything that is 'legal' in the relationship between financial activities and human rights is prompted by the GPs. The message between the lines is that soft law is the present, hard law is just for the future.

Legal precedents do not support this view. The landscape is, at best, mixed.¹⁰² During the apartheid era, Barclays and UBS provided loans to the South African government. In April 2009 Judge Scheindlin dismissed a lawsuit brought against the two banks by a group of South Africans on the basis of the following argument: money is not the means by which human rights abuses were committed (as guns would have been).¹⁰³ Sabine Michalowski heavily criticised this line of reasoning. First of all, the Nuremberg cases that are used as authoritative case-law, together with recent developments in international law, do not justify such a far-reaching conclusion.¹⁰⁴ Second, the approach used by Judge Scheindlin

exempts whole industries, such as finance, from responsibility without requiring a case-by-case analysis. Indeed, even if the defendant provided loans with the specific intent to further gross

⁹⁸ BankTrack, *BankTrack on the Thun Group Paper on Banks and Human Rights*, 3.

⁹⁹ Ruggie, *Guiding Principles*, Commentary to GP 23.

¹⁰⁰ Credit Suisse, "Banks Helping to Respect Human Rights: Commitment". Emilio Martín-More suggests that the objective of the creation of the Thun Group is to "anticipate the regulator": Emilio Martín-More, "En BBVA Promovemos Las Buenas Prácticas Con Otros Bancos," *OndaCRO*, December 2013, <http://www.ondacro.com/index.php/bbva/578-emilio-martin-more-en-bbva-promovemos-las-buenas-practicas-con-otros-bancos>.

¹⁰¹ Another interesting development is highlighted by Roger Leese. There is "potentially increased scope for investors to seek to hold asset managers liable where investee companies have abused human rights on the basis that breaches of the investment mandate, of the contractual duty of care, and of fiduciary duty, have occurred": Leese, Lindsay, and Nickelsburg, *Business and Human Rights: Emerging Issues for Financial Institutions*, 3.

¹⁰² Anita Ramasastry, "Secrets and Lies? Swiss Banks and International Human Rights," *Vanderbilt Journal of Transnational Law* 31 (1998): 325; Shaw W. Scott, "Taking Riggs Seriously: The ATCA Case against a Corporate Abettor of Pinochet Atrocities," *Minnesota Law Review* 89 (2004): 1497.

¹⁰³ *In re South African Apartheid Litigation*, 617 F. Supp. 2d 228 (S.D.N.Y. 2009).

¹⁰⁴ Sabine Michalowski, "No Complicity Liability for Funding Gross Human Rights Violations," *Berkeley Journal of International Law* 30 (2012): 454.

human rights violations, no liability would be incurred under Judge Scheindlin’s approach because the money provided was not the direct means to the violation.¹⁰⁵

Juan Pablo Bohoslavsky (together with other researchers) supports a case-by-case approach and adopted an innovative methodology to demonstrate the legal responsibilities of foreign financial institutions in supporting the macro-economic policies and military expenditures of repressive regimes in Latin America in the 1970s.¹⁰⁶ Recent cases in Argentina and at the Special Court for Sierra Leone seem to move away from the absolute position suggested by Judge Scheindlin and align with the arguments by Michalowski and Bohoslavsky.¹⁰⁷

In sum, it is true that the GPs do not create new legal obligations. Yet, this does not mean that these obligations were necessarily non-existent before the adoption of the UN document. Actually, GP 23 clearly states that ‘business enterprises should ... [t]reat the risk of causing or contributing to gross human rights abuses as a legal compliance issue’.¹⁰⁸ Sector-based initiatives like the Thun Group’s discussion paper should do more to raise awareness among banks of the expanding web of potential corporate legal liability arising from extraterritorial civil claims, and from the incorporation of the provisions of the Rome Statute of the International Criminal Court in jurisdictions that provide for corporate criminal responsibility.

4.4. Effective engagement with affected stakeholders: drafting process and recommendations

Michael Addo argues that consultation with all key stakeholders laid at the base of the consensus that Ruggie so expertly secured on the GPs. The practical effect of this element was a ‘sense of inclusiveness and ownership of the GPs by all interested parties’.¹⁰⁹ The Thun Group agrees with this narrative: ‘the particular strength of the Guiding Principles lies in the fact that they are the result of six years of robust multi-stakeholder consultations’ (4). Unfortunately, this lesson was not internalised by the seven banks.

The discussion paper reports that its drafting process benefitted from support of the Competence Center for Human Rights at the University of Zurich as well as from critical feedback from a small group of individuals who had already been involved in drawing up the GPs.¹¹⁰ However, no

¹⁰⁵ Ibid., 464.

¹⁰⁶ Juan Pablo Bohoslavsky and Veerle Opgenhaffen, “Past and Present of Corporate Complicity: Financing the Argentinean Dictatorship, The,” *Harvard Human Rights Journal* 23 (2009): 157–211; Juan Pablo Bohoslavsky and Mariana Rulli, “Corporate Complicity and Finance as a ‘Killing Agent’: The Relevance of the Chilean Case,” *Journal of International Criminal Justice* 8, no. 3 (July 1, 2010): 829–50. The methodology was pioneered by Antonio Cassese in a study on the relationship between financial markets and the Pinochet dictatorship: Antonio Cassese, “Study of the Impact of Foreign Economic Aid and Assistance on Respect for Human Rights in Chile” (Commission on Human Rights, E/CN.4/Sub.2/412, 1978); Antonio Cassese, “Foreign Economic Assistance and Respect for Civil and Political Rights: Chile--A Case Study,” *Texas International Law Journal* 14 (1979): 251.

¹⁰⁷ *Ibañez Manuel Leandro y otros casos/Diligencia Preliminar Contra Instituciones Financieras No Determinadas*, No. 95.019/2009, Buenos Aires; *Prosecutor v. Taylor*, Case No.SCSL-03-01-A, Judgment (Spec. Ct. for Sierra Leone Sept. 26, 2013), para. 392.

¹⁰⁸ Ruggie, *Guiding Principles*, GP 23.

¹⁰⁹ Michael K. Addo, “The Reality of the United Nations Guiding Principles on Business and Human Rights,” *Human Rights Law Review* 14, no. 1 (March 1, 2014): 136. See also Susan Ariel Aaronson and Ian Higham, “‘Re-Righting Business’: John Ruggie and the Struggle to Develop International Human Rights Standards for Transnational Firms,” *Human Rights Quarterly* 35, no. 2 (2013): 333–264.

¹¹⁰ Professor Christine Kaufmann supported the group with expert input from the University of Zurich Competence Centre for Human Rights throughout the process. According to Bruno Bischoff, Sustainability Affairs at Credit Suisse,

meaningful consultation took place with affected stakeholders and human rights NGOs. According to the Berne Declaration, ‘it is surprising and regrettable that the banks have not sought to include in their discussions human rights NGOs’.¹¹¹ BankTrack confirms that no-one within ‘its network of 40 civil society organisations working on banks was consulted, despite assurances from UBS and Credit Suisse that this would take place’.¹¹²

The lack of effective engagement with affected stakeholders and/or their representatives is not only a shortcoming of the drafting process. One of the chief weaknesses of the discussion paper is the absence of comprehensive recommendations in favour of regular consultation with potential victims and/or organisations that operate in their defence. The document contains only one reference to engagement, consultation or dialogue with stakeholder groups. Under the “Reporting” section, the banks suggest that

[i]n addition to its annual sustainability reporting, a bank should also make use of other communications channels to ensure a flow of relevant human rights-related information to its stakeholders. In contrast to reporting, which is usually “one-way” communication, conducting a dialogue with stakeholder groups on the topic of human rights will allow the bank to draw directly upon their feedback on relevant issues. Reporting to, and dialogue with, the bank’s own employees is also important to maintain awareness and commitment to applying consistent standards of human rights due diligence (19).

Notwithstanding the absence of any distinction between stakeholders and *affected* stakeholders – a distinction that the text of the GPs clearly supports – this passage is commendable. The problem is that the OHCHR explicitly affirms that consultation at the stage of reporting is not sufficient:

for any enterprise with a significant risk of human rights impact, this is just one of the ways in which it should engage with potentially affected stakeholders. Stakeholder engagement should also feature as a part of the enterprise’s efforts to assess its impact and to gain feedback on how effectively it has responded to impact. More generally, it is an important means of understanding the concerns and interests of affected stakeholders and of building effective relationships with these crucial groups on an ongoing basis.¹¹³

Indeed, the GPs recommend effective engagement with affected stakeholders at all stages of the human rights due diligence process. Thus, consultation with potential victims and human rights NGOs would ‘advise how the wording of the draft policy commitment is likely to be viewed by these important stakeholder groups’.¹¹⁴ Furthermore, the assessment of actual and potential impacts should ‘[i]nvolve meaningful consultation with potentially affected groups and other relevant stakeholders, as appropriate to the size of the business enterprise and the nature and context of the operation’.¹¹⁵ This is important because it is not always self-evident what types of impacts are ‘severe’ or ‘irremediable. When it is ‘less clear what human rights impact should be considered most severe or what factors might affect its remediability ... [w]here possible, enterprises are advised to engage with those whose rights are at risk in order to ensure they have understood what

“the role as independent expert took essentially three different shapes during the process: Input provider, sounding board and facilitator”: Credit Suisse, “Banks Helping to Respect Human Rights: Commitment.”

¹¹¹ Berne Declaration, “‘Groupe de Thoune’: Les Banques Reconnaissent Enfin L’importance Du Respect Des Droits Humains Dans Leurs Activités.”

¹¹² BankTrack, *BankTrack on the Thun Group Paper on Banks and Human Rights*, 2.

¹¹³ OHCHR, *The Corporate Responsibility to Respect Human Rights: An Interpretive Guide*, 62.

¹¹⁴ *Ibid.*, 29.

¹¹⁵ Ruggie, *Guiding Principles*, GP 18.

impact they may have’.¹¹⁶ In a similar fashion, tracking responses should ‘[d]raw on feedback from both internal and external sources, including affected stakeholders’.¹¹⁷ The OHCHR clarifies that ‘the purpose of engaging with relevant “internal and external sources, including affected stakeholders” in the tracking process is to draw as accurate a picture as possible of how well an enterprise is responding to human rights impact. It helps reduce the risk of bias that may arise when those being measured do the measuring.’¹¹⁸

5. Conclusion

The relationship between banks and human rights is on the spotlight. The topic is regularly included in the yearly Top Ten List of Business and Human Rights Issues published by the Institute for Human Rights and Business.¹¹⁹ Civil society organisations and academics have showed the financial links between banks and abusive companies, repressive regimes and controversial products.¹²⁰ Advocacy groups created ethical rankings of banks’ human rights policies and practices.¹²¹ Banks regularly feature among the winners and nominees of the Public Eye Awards.¹²²

Research on banks and human rights is also proliferating around the world.¹²³ There is always a panel on the financial sector at the Global Forum on Responsible Business Conduct.¹²⁴ UNEP FI created an Online Human Rights Guidance Tool for the Financial Sector which works as a ‘one stop shop’ resource, providing practical guidance to frontline business and client officers in the lending and investment community. The Working Group on the issue of human rights and transnational corporations and other business enterprises – the UN body with the mandate to promote the

¹¹⁶ OHCHR, *The Corporate Responsibility to Respect Human Rights: An Interpretive Guide*, 84.

¹¹⁷ Ruggie, *Guiding Principles*, GP 20.

¹¹⁸ OHCHR, *The Corporate Responsibility to Respect Human Rights: An Interpretive Guide*, 55.

¹¹⁹ Institute for Human Rights and Business, “Top Ten Business and Human Rights Issues 2014,” December 10, 2013, http://www.ihrb.org/top10/business_human_rights_issues/2014.html. An item of the 2014 list is “Developing tools and approaches for the financial sector to understand and address human rights risks”. In 2013, the list included “Advancing uptake of the UN Guiding Principles in key enabling sectors including finance, ICT and infrastructure”.

¹²⁰ See, for example, Global Witness, *Undue Diligence: How Banks Do Business with Corrupt Regimes*, 2009; Facing Finance, *Dirty Profits II*, December 2013; ICAN and IKV Pax Christi, *Don’t Bank on the Bomb*, 2013; Oxfam Australia, *Banking on Shaky Ground: Australia’s Big Four Banks and Land Grabs*, 2014; Horacio Verbitsky and Juan Pablo Bohoslavsky, *Cuentas Pendientes: Los Cómplices Económicos de La Dictadura* (Siglo Veintiuno Editores, 2013). Some organisations, like Profundo, have specialised in providing in-depth research on which banks are involved with the financing of companies who cause harm to humans and/or the environment and what they do to avoid involvement.

¹²¹ BankTrack, *Close the Gap: Benchmarking Credit Policies of International Banks*, 2010; “Fair Bank Guide,” 2013, <http://www.eerlijkebankwijzer.nl/english/>.

¹²² Berne Declaration and Greenpeace, “Public Eye Awards,” accessed May 7, 2014, <http://publiceye.ch/>. For instance, Goldman Sachs won the Jury Award in 2013. Barclays won it in 2012.

¹²³ Alessandro Costa, ed., *Banks and Human Rights: Pathways to Compliance* (Lulu.com, 2013); Rolf H. Weber, “Human Rights Due Diligence as New Policy in Banks” (Hong Kong University, Asian Institute of International Financial Law, December 14, 2013), <http://www.law.hku.hk/aiifl/events/documents/RolfWeberppt.pdf>; Juan Pablo Bohoslavsky and Jernej Letnar Cernic, eds., *Making Sovereign Financing and Human Rights Work* (Hart Publishing, 2014).

¹²⁴ OECD, “Global Forum on Responsible Business Conduct,” 2014, <http://mneguidelines.oecd.org/globalforumonresponsiblebusinessconduct/>.

effective and comprehensive dissemination and implementation of the GPs – recently encouraged that ‘further study be made on applying the GPs in the financial sector’.¹²⁵

Notwithstanding these developments, a recent study conducted by Sustainable Advisory Services and commissioned by the Netherlands in support of the Proactive Agenda of the OECD Working Party on Responsible Business Conduct concluded that ‘awareness and implementation of the GPs by financial institutions is variable’, and that

of the FIs which participated in the study that are familiar with the UNGPs, in general, most are at the early stages of understanding the implications for their institutions and many find its interpretation for their business challenging. FIs that have reviewed the UNGPs express a lack of clarity on how the scope and terminology of the UNGPs applies to their institutions.¹²⁶

The limited integration of human rights into banks’ operations is confirmed by the absence of human rights language in the most advanced sustainability initiatives in the financial sector. In 2009 Standard Chartered commissioned two reports to gain an understanding of its social and economic impacts in Ghana and Indonesia respectively.¹²⁷ None of the reports ever mentions human rights. In 2011 the world’s leading sustainable banks created the Global Alliance for Banking on Values (GABV), a membership organisation with the mission to use the knowledge from these innovative banks and affiliates to provide alternatives for addressing the current crisis in our financial world impacting the overall sustainability of our society. GABV documents never make reference to the GPs.

This situation explains why the publication of the Thun Group’s discussion paper *The Guiding Principles on Business and Human Rights: An Interpretation for Banks* represented a critical moment for the definition of the relationship between human rights and the financial sector: the document lays the foundations for the adoption of the first ever comprehensive guide on how universal banks should operationalise their responsibility to respect human rights. Human rights consultancies have even started offering their services to implement the suggestions offered by the discussion paper.¹²⁸

As the arguments offered by the Thun Group are likely to become the basis of future initiatives on integrating human rights into financial activities, as well as influence the implementation of the GPs by numerous banks,¹²⁹ this article critically assessed the discussion paper and highlighted its major

¹²⁵ UN Working Group on business and human rights, “Statement at the End of Visit to the United States UN Working Group on Business and Human Rights,” May 1, 2013, <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=13284&LangID=E>.

¹²⁶ Sustainable Finance Advisory, *Environmental and Social Risk Due Diligence in the Financial Sector: Current Approaches and Practices* (Brussels: OECD Working Party on Responsible Business Conduct, May 2013), 76.

¹²⁷ Ethan B. Kapstein and René Kim, *The Social and Economic Impact of Standard Chartered in Ghana* (Standard Chartered, 2011); Ethan B. Kapstein and René Kim, *The Social and Economic Impact of Standard Chartered in Indonesia* (Standard Chartered, 2011).

¹²⁸ Enodo Rights, *Human Rights Due Diligence for Banks: Implementing the Thun Group Recommendations*, 2014.

¹²⁹ Leitz argued that the Thun Group of Banks’ discussion paper “should be viewed as a constructive and concrete step forward in the discussion about business and human rights - with, of course, a specific focus on banking. The paper points out practicable steps for banks on their journey to live up to their corporate responsibility to respect human rights”: Christian Leitz and Lizelle Marwick, “A Corporate Perspective on Business and Human Rights,” *Who’s Who Legal*, March 2014, <http://whoswholegal.com/news/humanrights/article/31229/a-corporate-perspective-business-human-rights>; According to Credit Suisse, by publishing the discussion paper, the Thun Group of Banks “hopes to provide guidance to interested banks in addressing these challenges and to support the integration of the Guiding Principles into the policies and practices of financial institutions in the future”: Credit Suisse, “Banks Helping to Respect Human Rights: Commitment.”

strengths and shortcomings. This exercise was deemed essential in order to prevent that future achievements are inhibited by a false start.

The article showed that the document contains numerous positive elements. Two of the most important ones have not been acknowledged yet. First, the seven banks recognise that the GPs represent ‘a new overarching single point of reference for business and human rights’ (4). The banks thus formally accept that the UN document is the starting point for any discussion on their responsibility to respect human rights. Second, the Thun Group acknowledges that human rights due diligence should be conducted not only because of the financial, reputational and legal advantages that it offers (the so-called ‘business case’ for human rights’). Rather, it is based on ethical grounds: respecting human rights is ‘the right thing to do’ (3).

Notwithstanding the presence of these (and other) encouraging aspects, the discussion paper also suffers from numerous drawbacks. Above all, the Thun Group does not recognise the importance of effective engagement with affected stakeholders and/or their representatives, including trade unions and human rights NGOs. This limitation is far-reaching because the definition of banks’ human rights responsibilities still present abundant unresolved dilemmas, and Ruggie’s mandate demonstrated that long-lasting solutions can only be achieved through a participatory and inclusive approach.

The thorny issues of ‘complicity’ and ‘leverage’ offer two interesting examples in this respect. First, the Thun Group takes no position on whether the different activities, operations, products and services of universal banks (such as lending, underwriting, managing assets or participating in derivatives markets) ‘cause’, ‘contribute’, or ‘are directly linked to’ potential adverse human rights impacts (or whether they should not be included in any of these categories). The question is not only terminological. According to the GPs, business enterprises should seek to prevent or mitigate only those adverse human rights impacts that are ‘directly linked to their operations, products or services by their business relationships, even if they have not contributed to those impacts’.¹³⁰ Does this category include beneficial complicity, that is, when a company benefits from human rights abuses even if it did not proactively aided or abetted their perpetration? If so, almost all banks’ activities and services would be covered: it is the business model of a bank to profit from lending money, owning shares, underwriting bonds, etc. In addition, the expectation of the GPs is that a company that *causes or contributes to* adverse human rights impacts act in a different way from a company whose operations, products or services are *directly linked to* human rights abuses through a business relationship. For instance, only the former should provide for, or cooperate in, remediation.¹³¹ How to qualify a revolving credit facility in favour of an extractive company which is displacing a local community without appropriate consultation or compensation as per international resettlement standards? Is this contributing to adverse human rights impacts or merely being linked to them?¹³²

¹³⁰ Ruggie, *Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework*, GP 13.

¹³¹ *Ibid.*, GP 22.

¹³² The Dutch National Contact Point, the UN Working Group on Business and Human Rights and the Office for the High Commissioner on Human Rights have already expressed their views on some of these “definitional” issues: Netherlands National Contact Point, *Final Statement on the Specific Instance Notified by Lok Shakti Abhiyan, KTNC Watch, Fair Green and Global Alliance and Forum for Environment and Development Concerning an Alleged Breach of the OECD Guidelines for Multinational Enterprises by the Dutch Pension Fund ABP and Its Pension Administrator APG*, September 18, 2013; OHCHR, *Request from the Chair of the OECD Working Party on Responsible Business*

Second, the discussion paper argues that there is ‘a common public perception that banks have strong leverage over their clients’ behaviour and can, and should, seek to influence client actions to promote good practice. In practice, the degree of leverage is often a great deal less than popularly believed’ (5). Aldo Caliari disagrees: financial companies, ‘more than other companies, have the potential, with their change of behaviour, to influence the behaviour of other actors. That means they also should be upheld to a greater level of responsibility when they fail to do so’.¹³³ BankTrack adds that banks ‘have the possibility to increase leverage, for example by the use of specific covenants outlining non-financial obligations of the client, as is standard practice with transactions that fall under the Equator Principles’.¹³⁴ Who is right?

None of these questions comes with simple, general answers. Rae Lindsay and Anthony Crockett acknowledge that identifying the point at which a bank ‘clearly has a responsibility to take steps to avoid or prevent an impact is not easy, and determining what steps should be taken is even harder’.¹³⁵ Similar complications arise also with respect to other issues. For instance, how should the financial sector demonstrate its due diligence? Banks often claim to be constrained by a legal obligation to keep client information confidential.¹³⁶ What level of transparency can reasonably be expected? The OHCHR offers no doubts on which path to follow in these complex circumstances: if an enterprise ‘cannot find immediate or obvious solutions, it will be well advised to engage with relevant expert stakeholders – including, where possible, any groups or individuals whose rights may be affected by the conflicting requirements’.¹³⁷

Notwithstanding the name (‘discussion paper’), there has been almost no publicity around the document prepared by the Thun Group. BankTrack emphasised that its release ‘was not accompanied by a launch event, press release or press conference, and accordingly, there has been minimal public discussion on its contents and implications’.¹³⁸ This article hopes to trigger renewed attention on the strengths and weaknesses of the arguments offered by the Barclays, BBVA, Credit Suisse, ING Bank N.V., RBS Group and UBS. The seven banks have much to gain from an informed debate on these issues. The drafting process of the GPs has showed that clarity of external expectations – which is the basis of effective risk management – can be achieved only through inclusion and participation.

Conduct, November 27, 2013; UN Working Group on business and human rights, *Request for Guidance on Specific Aspects the Guiding Principles and Their Meaning in the Context of Financial Transactions and Institutions*, December 3, 2013. UNEP FI and Foley Hoag are currently working on developing a report on “banking and human rights” with the aim of bringing more clarity around situations where banks, through their lending or investment activities, can be judged to cause, contribute to, or be linked through their products and services to negative human right impacts. The OECD Working Party on Responsible Business Conduct is also taking into consideration the opportunity to refer the issue to a multi-stakeholder Advisory Group.

¹³³ Center of Concern, *Submission to the Working Group on Business and Human Rights in the Occasion of Working Group’s Visit to United States*, 1.

¹³⁴ BankTrack, *BankTrack on the Thun Group Paper on Banks and Human Rights*, 2.

¹³⁵ Lindsay and Crockett, “Does Money Mind If We Say It’s Evil?”.

¹³⁶ Aizawa, “Cash, Crisis, Conscience: How Can the Financial Sector Ensure It Respects Human Rights?”.

¹³⁷ OHCHR, *The Corporate Responsibility to Respect Human Rights: An Interpretive Guide*, 79.

¹³⁸ BankTrack, *BankTrack on the Thun Group Paper on Banks and Human Rights*, 6.