



**CONCEPT NOTE DATED 18 APRIL 2013**

**THE PROMOTION OF BANK'S**  
**COMPLIANCE TO HUMAN RIGHTS**

The Research Group aims to create a platform for ongoing dialogue and exchange of ideas and seeks to explore key themes, new developments and different ways of thinking with other interested stakeholders at the UN Forum on Business and Human Rights 2013 in Geneva.

It intends to achieve this by discussing the results of its research project, organizing *ad hoc* seminars and encouraging a continuous flow of information and exchange of ideas among various stakeholders such as: academic researchers, human rights practitioners, CSOs, NGOs, international organizations and the private sector.

**THIS RESEARCH PROJECT WAS SUPPORTED BY UNICREDIT.**



## BACKGROUND

The issue of accountability of banks, both as direct actors and as indirect financing agents in respect of human rights violations has come under the spotlight and deserves renewed attention as the risk of involvement of banks and other financial institutions' is notably increasing.

This is especially pronounced following the adoption by the UN Human Rights Council of the report of Prof. J. Ruggie, establishing the "*Protect, Respect and Remedy*" framework. Consequently, several private banks are developing and adopting human rights standards and codes of conduct within their policies.

Under the current regime, banks can be directly held liable for human right violations of employees, ; but in some cases, they can also be held indirectly liable for human rights violations resulting from the business activities of their clients through the concept of complicity and the communities within which they operate.

Thus, because a bank often performs a facilitative role to the business activities of its clients, its conduct will also be evaluated on a broader basis to assess whether it contributes, facilitates or supports human rights violations committed by other actors.

This research project seeks to explore such new trends whereby banks' impugned conduct is perceived to fall beyond direct human rights violations, to also include indirect conduct by way of complicity, if violations are committed by enterprises financed by those banks. The conclusions of the research are especially interesting regarding:

- The extent of Banks' responsibility through the concept of complicity;
- Judicial versus non-judicial remedies;
- Extraterritorial competence of national courts; and
- The increasing supervisory role of CSOs and NGOs as human rights watchdogs.



## KEY FINDINGS AND POTENTIAL BENEFITS

The research underlines and provides an overview of:

- **the consistent, concurrent and unequivocal action of international and national public bodies towards a stronger compliance to human rights principles and norms by businesses, including banks and financial institutions** (the Global Compact, the new IFC Performance Standards and the revised version of OECD Guidelines for Multinational Enterprises, as well as the ECAs incoming OECD's Council Recommendation on Common Approaches Officially Supported Export Credits and Environmental and Social Sustainability (the 'Common Approaches') and the human rights compliance requirements by the Sustainability Rating Agencies, by Sustainability Indexes such as FTSE4GOOD and Dow Jones).
- **the expansion of the jurisdiction of national courts and positivist attitudes to adjudicating international human rights standards and norms at the domestic level:** many scholars already speak of strategic or **innovative litigation** and there is an increase in positivist judgements from national courts in the face of rising pressures of public opinion to hold businesses accountable for human rights violations. In addition to courts, there are other adjudicatory mechanisms such as national and international human rights defenders, prosecutors and ombudsmen that have an investigative and sometimes adjudicative function, as is the case with the IFCs Ombudsman or the OECD Contact Points.
- the tendency of some national courts such as the US courts that are more willing to review the day-to-day functioning of banks and would sometimes examine the **corporate culture of a bank to determine a bank's corporate liability (usually through complicity)** for human rights violations.
- **an increasing supervisory role performed by CSOs and NGOs** often beyond - and in addition to - Government and national courts. CSOs are considered to be more efficient 'watchdogs' and now more frequently bring to attention human rights violations, using innovative techniques such as requests of explanations. Another actor that also performs a supervisory role is NGOs (both international and national).
- **the commonalities and key trends that would be useful to make banks and other financial institutions aware of the potential nature of the risk deriving from human rights violations.** In this regard, potential risk may be caused directly as a result of its own conduct or indirectly, as a result of the conduct of its borrowers/customers. An inadequate, irresponsible or unsuccessful management of human rights allegations could be costly for banks and financial institutions, especially CEOs and Board members given their duties to both the company, stakeholders and shareholders.
- **the consistent finding in the analysis that all types of bank operation can potentially be the subject of an alleged human right violation with different levels of risk:** from project finance, to general lending to enterprises, acquisition of stocks and subscription bonds, etc. Client evaluation thus becomes more complex. Banks are increasingly requested to review the activities of its corporate clients to look beyond simple financial analysis to judge credit worthiness of clients to a deeper understanding of the nature of its clients activities.



More precisely, the research deals with the following aspects:

- ✓ Banks are increasingly alleged to be involved in human rights abuses through the principle of complicity
- ✓ Growing international momentum in the business and human rights field: banks and business compliance under scrutiny
- ✓ The attitude of the most relevant international Institutions
- ✓ The attitude of the National Overseas Investment and Credit Guarantee Agencies as well as the National Banking Associations
- ✓ The attitude of an increasing number of the largest world private banks
- ✓ Human rights are increasingly a parameter for the evaluation of banks and businesses by the sustainability rating agencies
- ✓ The increasing number and importance of watchdogs and reinforced activism of some investors which use ESG screening criteria
- ✓ The increasingly stringent requirements of national corporate laws
- ✓ The expansion of the jurisdiction of competent national courts to adjudicate human rights abuses committed abroad
- ✓ The increasing tendency of national courts and public administration bodies to consider corporate culture as a parameter for evaluating the level of corporate responsibility in respect to the one of individual managers or employees
- ✓ Increasing number of cases involving banks
- ✓ The enlargement and diversification of the type of bank operations in respect to potential human rights abuses
- ✓ The dimension of the damages suffered by the banks, both economic and reputational, due to involvement in human rights abuses
- ✓ The increased availability of information on invested companies and bank clients
- ✓ The structure of the contracts for the most relevant transactions, especially for large works and investments in developing countries increasingly contain clauses referring to the respect of human rights
- ✓ Human rights compliance can boost motivation and performance of staff, workers and management

- **The research aims to promote and facilitate greater compliance to international human rights norms and standards by banks and other financial institutions.** This can be achieved in a number of ways, including development and revision of existing policies, encouraging change in corporate culture and increased training of management and staff. In particular, embedding human rights compliance within the corporate culture of banks maybe a challenging medium term goal, but it would yield long-term benefits.
- **Research indicates that stronger human rights compliance is conducive to building an effective relationship with civil society and communities, far beyond judicial assessments.**
- The research also provides recommendations developed using the case law analysis and current literature to date. It discusses innovative ways in which banks may respect, protect and remedy human rights within their individual corporate structures and **analyzes the effectiveness of risk management measures such as internal policy statements, due diligence processes and other mitigation measures.**
- *In conclusion and more importantly, the research showed that the underestimation of the risks connected with human rights violations can cause long-term damage (both reputational and economic) to banks, financial institutions and any overarching holding companies.*

## **PROJECT DESCRIPTION AND METHODOLOGY**

The research study has been structured on two different grounds: theoretical and empirical. The first approach has been conducted through the study and review of existing literature, international law and relevant national legislation with the aim to respond to the underlying premise of the project: "Why should banks comply with human rights?"

The empirical component of the research study was conducted by reviewing 170 cases of alleged violations of human rights that have had an impact on or have involved banks in the last 10 years. This provided the research project with a deeper level of understanding to gauge how risk was perceived and how responsibility was allocated within specific fact matrices. As a result of this analysis, certain general remarks can be made with respect to how banks maybe liable in the future for potential human rights violations. The research team has also developed a casebook matrix used for its analysis that illustrates alleged violations of human rights violations that have had an impact on or such to involve banks and other businesses.

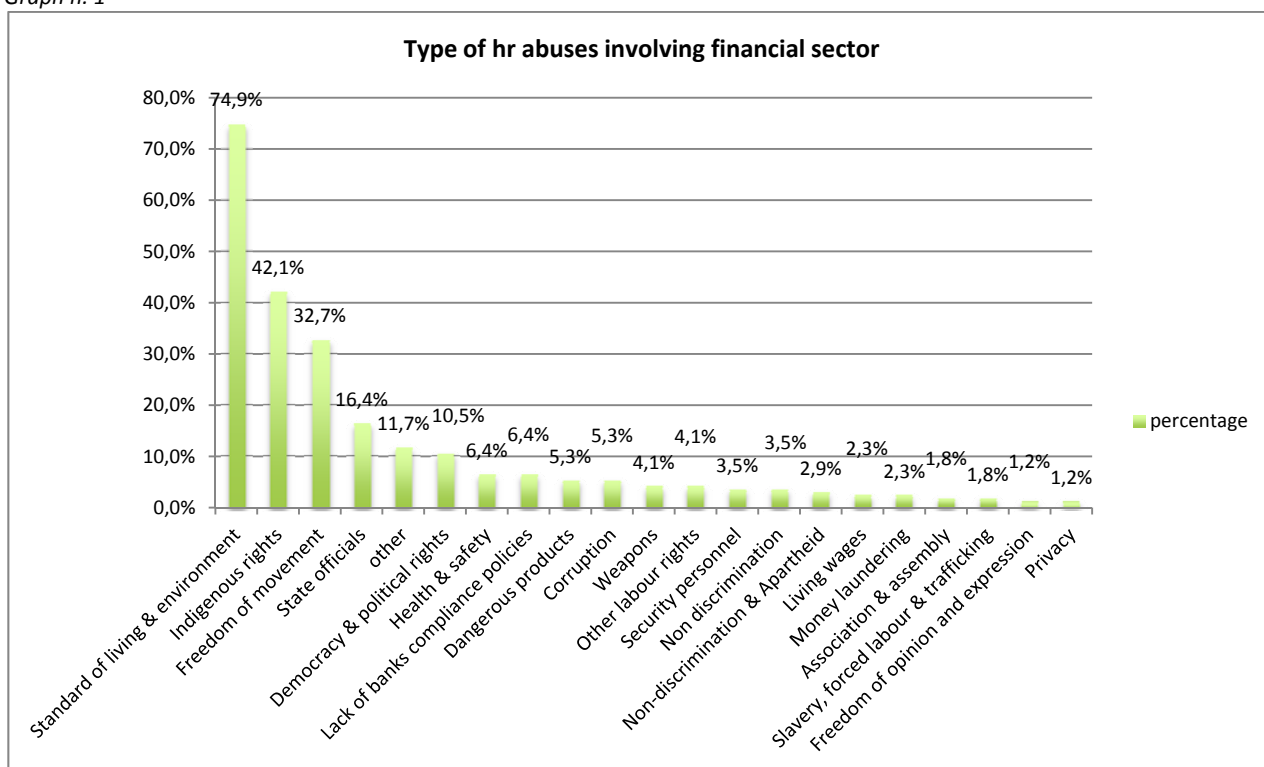
The cases are categorized using the following parameters:

- geographic localization of the alleged violation
- the nature of the human rights norm under question
- human rights violations by industry sector
- length of the dispute resolution process
- type of human rights violation involving banks or other entities in the financial sector
- groups of human rights more frequently violated (right to life, labour rights, etc.)
- type of banking or financial operation allegedly involving human rights violations
- relevance of cases reported
- quantification of damages

The thorough review of key cases has allowed unorthodox aspects of the litigation process to emerge, such as the role of CSOs, the level of judicial and non-judicial enforceability of human rights norms, the role of social mobilization including media campaigns that bring banks conduct to public attention, an attempt to quantify of reputational and other damages suffered by banks and financial institutions.

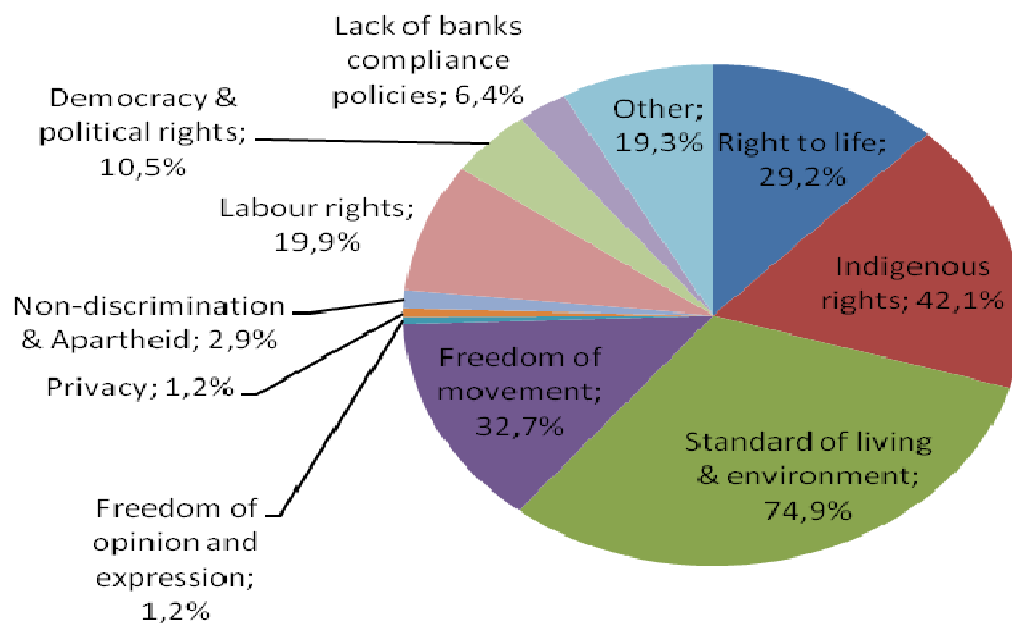
Among the graphs summarizing the cases surveyed, the ones below show that the financial sector has been the subject of alleged violations across the full spectrum of human rights considered within the present study.

Graph n. 1



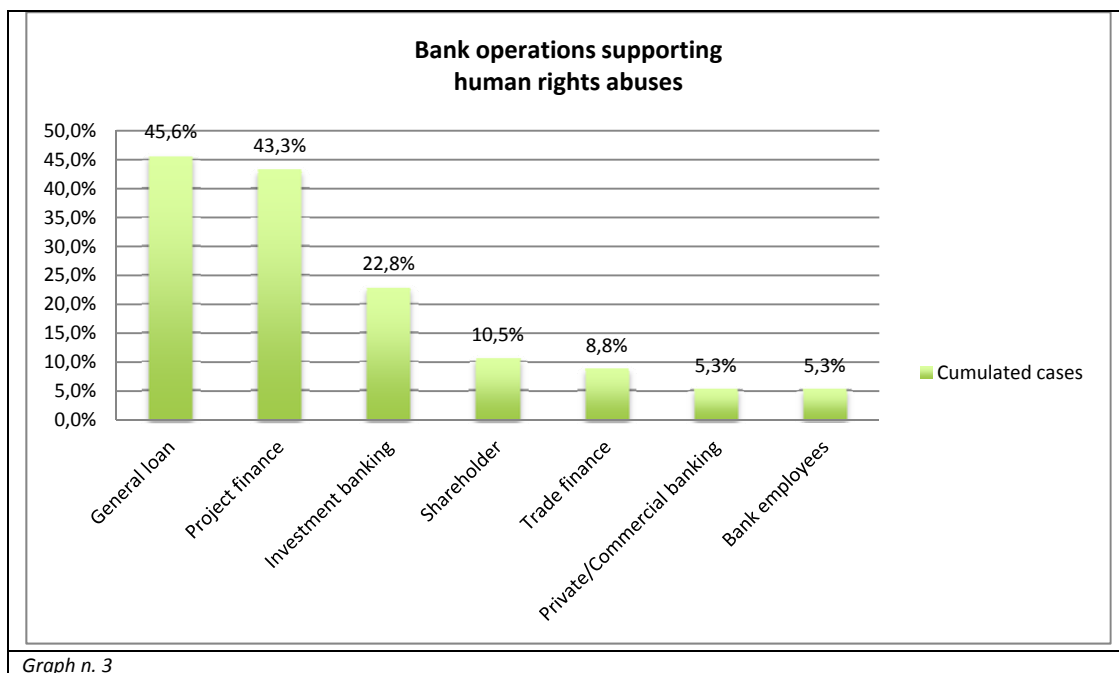
Graph n. 2

## HR groups more frequently abused



The analysis also focused on the specific banking or financial activities that were subject of the alleged violation. Alleged violations fell into two categories and were either directly the subject of a human rights violation or indirectly through the provision of funds to partners or customers.

Graph 3 below illustrates the frequency of type of lending connected with Human Rights violations.



## THE RESEARCH GROUP

The group is composed by independent researchers from the University of Rome Tor Vergata led and coordinated by Professor Alessandro Costa.

**Alessandro Costa**, Research Group Coordinator; Professor of International Environmental Law at the University Parthenope of Naples, Italy. Topic: complicity in legal and ethical terms.

**Andrea Shemberg**, Research Group External Advisor

**Antonella Sarro**, Lawyer; Deputy Research Group Coordinator. Topic: Human Rights hard and soft law sources.

**Angelica Bonfanti**, Research Fellow in International Law – University of Milan, Law School (Italy). Topic: Human Rights and Environmental Law.

**Marta Bordignon**, PhD candidate in International Law - Rome Tor Vergata University (Italy). Topic: Human Rights and banks: case law and the role of Rating Agencies.



**MariaCristina Caracciolo**, Ph.D. in Comparative Law - Faculty of Political Studies and for European and Mediterranean High Education "Jean Monnet" of Second University of Naples (SUN), Italy. Topic: the boundaries of national Courts extraterritorial jurisdiction.

**Damiano De Felice**, PhD candidate in International Relations at the London School of Economics and Political Science (LSE), UK. Topic: the Human Rights watchdogs and the attitude of the primary private banks.

**Silvia Fratini**, MA in Science in Economic and Social Science – Bocconi University, Milan (Italy). Officer at Transfer Pricing Team at KStudio Associato – KPMG in Rome. Topic: the appreciation of banks' material and reputational damages for Human Rights abuses.

**Giada Lepore**, LL.M. magna cum laude in Intercultural Human Rights at St. Thomas University School of Law (Miami, US), PhD candidate in Business and Human Rights at the same university. Topic: Human Rights incorporation and enforcement within national legal system.

**Janelle Shoemake**, LL.M. in Intercultural Human Rights Law at St. Thomas University School of Law (Miami, US); she is currently pursuing a Master's in International Development Practice from the University of Minnesota Humphrey School of Public Affairs (US). Topic: the role of social license and corporate culture in determining banks responsibility for Human Rights abuses.

**Silvia Solidoro**, PhD in Economic and Market Law from the Institute of Advanced Interdisciplinary Studies (ISUFI) in Lecce, Italy. Officer at the Investment Climate Department of the International Finance Corporation (IFC) of the World Bank Group. Topic: the attitude of the International Financial Institutions towards Human Rights enforcement.