

**AN INVESTIGATION OF THE EXTENT AND NATURE OF  
THE WORLD BANK'S LEGAL OBLIGATION TO RESPECT  
HUMAN RIGHTS IN DEVELOPING COUNTRIES**

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By

EDEN MWENDWA GATUIKU

101262

Prepared under the supervision of

MR. CHACHA ODERA

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
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## DECLARATION

I EDEN MWENDWA GATUIKU do hereby declare that this research is my original work and that to the best of my knowledge and belief, it has not been previously, in its entirety or in part, been submitted to any other university for a degree or diploma. Other works cited or referred to are accordingly acknowledged.

Signed: .....  
Date: 6/01/2021.....

This dissertation has been submitted for examination with my approval as University Supervisor.

Signed: .....  
MR. CHACHIA ODERA

## **ABSTRACT**

*This dissertation analyses how development injustices can be confronted by investigating the nature and extent of human rights obligations on the World Bank. In the wake of human rights violations occasioned by the Bank in developing countries, the silence of distinct human rights obligations is loud. The current frameworks that speak to the issue of these obligations at the World Bank offer weak answers to complex questions. Despite the intensification of human rights violations by the World Bank, these frameworks have remained static and maintained a disconnection from, and avoidance of accountability of the Bank. This dissertation discerns that the World Bank-through legal doctrines, institutional frameworks and relevant international law- has successfully legitimized and rationalized accountability avoidance. To this effect, this framework is ill-adapted in tackling development injustices caused by the Bank. The existing framework is therefore incapable of assuring that people in developing countries are shielded from harms that result from interventions by the World Bank. This dissertation investigates these legal instruments and navigates the body of international law to find ways in which this problematic debate on obligation can be resolved. Further, it offers recommendations on how the existing framework can be streamlined to ensure development justice for the Global South. To this effect, this dissertation contributes to the international law discourse through which developing countries can challenge development injustices.*

## LIST OF LEGAL INSTRUMENTS

Articles of Agreement of the International Development Association, Jan. 26, 1960, 11 U.S.T. 2284, 439 U.N.T.S. 249.

*Barcelona Traction, Light and Power Co Ltd (Belgium v Spain) (Second Phase)*, ICJ Reports 1970, 33-4.

International Bank for Reconstruction and Development, Articles of Agreement, July 22, 1944, 60 Stat. 1440, 2 UNTS 134.

Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt, Advisory Opinion, I.C.J. Reports 1980, Rep 174, 179.

*Reparations for Injuries Suffered in the Service of the United Nations (Advisory Opinion) [1949] ICJ.*

UNGA, *Question of Territories under Portuguese administration*, 12 December 1966, A/RES/2184 and UNGA, *The policies of apartheid of the Government of the Republic of South Africa*, 15 December 1965, A/RES/2054.

UNGA, Universal Declaration of Human Rights, UN A/Res/217 A 10 December 1948.  
*Vienna Convention on the Law of Treaties*, 23 May 1969, 1155 UNTS 331

*Western Sahara* Advisory Opinion, ICJ Reports, 1975, 53.

## LIST OF ABBREVIATIONS

DARIO- Draft Articles on the Responsibility of International Organizations

IBRD- International Bank for Reconstruction and Development

IDA- International Development Association

IFI- International Financial Institutions

TWAIL- Third World Approaches to International Law

UN-United Nations

WB- World Bank

# 1. CHAPTER ONE: INTRODUCTION

## 1.1. BACKGROUND

*“Our dream is a world free of poverty”<sup>1</sup>*

The words above accurately capture what is and has always been the central goal of the World Bank. The overwhelming majority of its operations are directed to this honorable aim whose attainment would supposedly make the world a “*better place*”.<sup>2</sup> It can be said that its greatest impact, if this admirable aim is to be achieved, is found in its intervention in multiple sectors of developing countries where there is greatest necessity.<sup>3</sup> However, developing countries were an afterthought for this institution, as its formation was primarily focused on the severe economic effects of World War II.<sup>4</sup> How then did developing countries become the “target audience” of the World Bank?

Founded in 1944 at the Bretton Woods Conference, the World Bank (herein referred to as the *Bank*) was originally the International Bank for Reconstruction and Development (IBRD).<sup>5</sup> It was tasked with the economic recovery of European nations after the Second World War. Countries like France and Britain benefitted from this institution as they largely depended on the Bank for their post-war reconstruction efforts.<sup>6</sup> However, the approval of the 1948 Marshall Plan where the United States of America donated huge sums of money to affected European nations, gave room for the Bank to diversify its objectives.<sup>7</sup>

The Bank embarked on a new mission to improve underdeveloped countries which led to the establishment of the International Development Association in 1960, which lent money to these

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<sup>1</sup> Granzow S, *Our Dream: A World Free of Poverty*, Oxford University Press, Oxford, 2012.

<sup>2</sup> Granzow S, *Our Dream: A World Free of Poverty*, Oxford University Press, Oxford, 2012.

<sup>3</sup> Clemens M and Kremer M, ‘The New Role of the World Bank’ 30 *The Journal of Economic Perspectives* 1, 2016, 53.

<sup>4</sup> Clemens M and Kremer M, ‘The New Role of the World Bank’ 30 *The Journal of Economic Perspectives* 1, 2016, 55.

<sup>5</sup> Gaurtham V, ‘The World Bank: An Overview of History, Structure and Priorities’, Grin, 2014 <<https://www.grin.com/document/289318>>- as of 28 June 2020.

<sup>6</sup> Toussant E, Anne, E, Briault V, Declercq B, Dhar S, Harris J and Valayden D, *The World Bank: A Critical Primer*, Pluto Press, London, 2008, 19.

<sup>7</sup> Toussant E, Anne, E, Briault V, Declercq B, Dhar S, Harris J and Valayden D, *The World Bank: A Critical Primer*, Pluto Press, London, 2008, 19.

countries.<sup>8</sup> The two institutions are now referred to as the World Bank and form part of the five institute World Bank Group. Collectively the World Bank Group also includes the Multi-Lateral Investment Guarantee Agency (MIGA), the International Finance Corporation (IFC) and the International Centre for Settlement of Investment Disputes (ICSID). The focus of this dissertation is the International Bank of Reconstruction and Development and the International Development Association. These two are commonly referred to as the World Bank, distinct from the World Bank Group which refers to all five institutions. This is because their objectives are directly tied to the subject of development of developing countries. To date, the World Bank is the leading multi-developmental bank in the world with more than 180 member countries.<sup>9</sup> The objectives of the IBRD and IDA can be found in their Articles of Agreement. For the IBRD, other than reconstruction efforts, Article 2 of its Articles of Agreement states that its purpose particularly for less developed countries is the encouragement of the development of productive facilities and resources.<sup>10</sup> Similarly, the objectives of the International Development Association are to promote economic development, increase productivity, and thus raise standards of living in the less-developed member states.<sup>11</sup>

After the cold war, there was a general acceptance of the capitalist system.<sup>12</sup> This presented a new paradox whereby there was increased competition and innovation to provide quality goods and services, but all came at a high cost.<sup>13</sup> Access to these amenities was restricted to only those who had sufficient resources and power. Therefore, necessities of water, medical services, housing and sanitary facilities were increasingly unavailable to the poor.<sup>14</sup> This led the World Bank to focus its approach and start looking into ways to make such necessities available to this disadvantaged group, from an economic perspective.<sup>15</sup> The needs identified above hold an

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<sup>8</sup> Gaurtham V, 'The World Bank: An Overview of History, Structure and Priorities', Grin,2014 <<https://www.grin.com/document/289318> >- as at 28 June 2020.

<sup>9</sup> 'Who are We', *World Bank*, <<https://www.worldbank.org/en/who-we-are> >- as at 15 August 2020.

<sup>10</sup> Article II, International Bank for Reconstruction and Development, Articles of Agreement, July 22, 1944, 60 Stat. 1440, 2 UNTS 134.

<sup>11</sup> Article II, Articles of Agreement of the International Development Association, Jan. 26, 1960, 11 U.S.T. 2284, 439 U.N.T.S. 249.

<sup>12</sup> Feder E, 'Plundering the Poor: The Role of The World Bank in the Third World' 13 *International Journal of Health Services* 4, 1983,649.

<sup>13</sup> Feder E, 'Plundering the Poor: The Role of The World Bank in the Third World' 13 *International Journal of Health Services* 4, 1983,649.

<sup>14</sup> Feder E, 'Plundering the Poor: The Role of The World Bank in the Third World' 13 *International Journal of Health Services* 4, 1983,649.

<sup>15</sup> Feder E, 'Plundering the Poor: The Role of The World Bank in the Third World' 13 *International Journal of Health Services* 4, 1983,650.

important characteristic often neglected in conversations regarding World Bank operations: the Bank interacts with fundamental human rights. Even though the Bank has never identified itself from a human rights lens, its intervention in sectors of sanitation, health, food et cetera means that it has a direct impact on these rights and freedoms whether positively or negatively in its operations.<sup>16</sup>

The Bank's impact on human rights can be seen in two cases involving World Bank funded projects in Kenya and Ethiopia. In Ethiopia, the Anuak indigenous community was displaced from Gambella region in a World Bank project, which resulted in violation of their socioeconomic rights. The stated objective of the program was to expand access to and improvement of basic services in sectors such as education, health, water, sanitation, and agriculture.<sup>17</sup>The reality that existed in these relocations was far from the expected. The new sites where the communities were forcibly moved were marred by infertile lands, lack of clinics and other health amenities, lack of schools et cetera.<sup>18</sup> Furthermore, the evictions were accompanied by arbitrary arrests, cases of rape and assault, and threats towards whoever opposed the relocation. The Human Rights Watch was among the civil society organizations that pressured the government to suspend the program till the necessary infrastructure was put in place, but this was not met with any correspondence from either the Ethiopian government or the World Bank.<sup>19</sup>

Similarly in Kenya, the IDA and IBRD funded the Natural Resource Management Project whose aim was to preserve the Embobut forest, an intergal water catchment area in Kenya.<sup>20</sup> This forest had been the ancestral home of the Sengwer- an indigenous community for many years. The World Bank project resulted in destruction of the community's property and forceful

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<sup>16</sup> Toussant E, 'The World Bank and Respect for Human Rights' in Toussant E (ed), *The World Bank*, Pluto Press, 2008,222.

<sup>17</sup> Ziai A, 'Ethiopia: Protection of Basic Services Program Phase II Additional Financing and Promoting Basic Services Phase III Project', *The World Bank and the Inspection Panel*, 2018.

<sup>18</sup> Ziai A, 'Ethiopia: Protection of Basic Services Program Phase II Additional Financing and Promoting Basic Services Phase III Project', *The World Bank and the Inspection Panel*, 2018.

<sup>19</sup> 'World Bank: Address Ethiopia Findings', *Human Rights Watch*,- <https://www.hrw.org/news/2015/02/23/world-bank-address-ethiopia-findings> >- as of 7 November 2020.

<sup>20</sup> The World Bank, 'Kenya: Natural Resources Management Project' <- <https://projects.worldbank.org/en/projects-operations/project-detail/P095050> >- as of 28 November 2020. <sup>24</sup> Inspection Panel, Report No. 77959 -KE : KENYA: Natural Resource Management Project (P095050), 2013.

relocation which rendered many of them homeless, due to a lack of concrete resettlement or compensation structures. Furthermore, the eviction had a substantial impact on the cultural and spiritual beliefs and values of the Sengwer which were inextricably tied to their land in the forest.<sup>24</sup>

The above cases are only a fraction of the reality which is that the Bank's operations and projects significantly affect fundamental human rights of project affected people in developing countries. This dissertation refers to these violations using the term development injustices. Development injustices are therefore institutional policies, practices and outcomes that constitute or result in violations of human rights that are linked to intervention of the World Bank in developing countries.<sup>21</sup>

The uncommon nature of development injustices occasioned by the Bank, has necessitated a debate on whether the Bank as an International Financial Institution should be bound by legal obligations to respect human rights in its operations. This is especially in light of the Bank's maintained position that human rights obligations fall outside the ambit of its operations. This dissertation advances that development injustices are an outcome of the Bank's institutional arrangements as well as international laws that have led to rationalised avoidance of human rights obligations by the Bank. In light of this, this dissertation aims to investigate the extent and nature of legal obligation on the Bank to respect human rights.

## **1.2. STATEMENT OF PROBLEM**

The reluctance of the World Bank to adopt a human rights agenda is problematic considering the numerous development injustices occurring in developing countries. It goes without saying that developing countries bear the brunt of this marginalization as this is where the effect is mostly felt. For instance, a coal mining World Bank project in the Philippines uprooted 200,000 people without compensation.<sup>22</sup> Further, reports by civil society groups in India indicate that whilst there was investment in tea farming by the Bank, it led to deplorable living conditions that continue to remain oppressive and unsafe for tea workers.<sup>23</sup> It is clear that the goal of

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<sup>21</sup> Owuor M.M, 'Towards Development Justice: Re-visiting The Accountability of the World Bank and the IMF of the World Bank and the IMF From a Right to Development Perspective', Unpublished PHD Thesis, Osgoode Hall Law School in York University, Toronto, 2020,8.

<sup>22</sup> Tibbets J, 'Breaking the World Bank' 103 *Environmental Health Perspectives* 5, 1995,447.

<sup>23</sup> Bhalla N, World Bank defends Treatment of India Tea Pickers Amid Fears of Exploitation, *Reuters* 13 April 2013 -< <https://www.reuters.com/article/us-india-tea-tata/world-bank-defends-treatment-of-india-tea-pickersamid-fears-of-exploitation-idUSKCN1BC50N> >- as at 21 March 2020.

“eradication of poverty” while advancing noble objectives, faults in its construction of obligation to adopt human rights.

For this reason, the author finds that the nature and extent of legal obligation of the Bank to respect human rights in its developmental functions is worth investigating. This dissertation aims to carry out an analysis of the extent and the nature of the World Bank’s legal obligation in to respect human rights in developing countries.

### **1.3. JUSTIFICATION AND SIGNIFICANCE OF THE STUDY**

This study is relevant both academically and in terms of policy making. From an academic lens, it contributes to the field of international law as well as international human rights law by questioning the legal obligation (or lack thereof) of the World Bank to respect human rights in light of the development injustices present in developing countries. As mentioned, the World Bank is rarely a subject of conversation in the field of human rights and perhaps this has led to the situation analysed in this text. This study will also contribute to the ongoing discussion in human rights, more specifically the Third World Approach in International Law which engages an audience of international law- developing countries- which has been ignored throughout the years. This means that individuals in these developing countries and more specifically the marginalized, would benefit from this discourse.

The results of this study are also important in terms of policy as it will potentially heighten the awareness of the need for the adoption of a human rights agenda as well as better accountability mechanisms for the World Bank.

### **1.4. STATEMENT OF AIMS AND OBJECTIVES**

The objectives of this literature are as follows:

- I. To build from Third World Approaches to Inter.4.national Law (TWAAIL) a conceptual framework within which to understand the need to attach human rights obligations to the World Bank.
- II. To investigate the nature and extent of legal obligations of the World Bank to respect human rights in its operations in developing countries.
- III. To investigate ways through which international law can be used creatively to challenge the nature and extent of human rights obligations on the World Bank.

- IV. To provide possible recommendations that ensure a more just world for people in developing countries affected by the World Bank's projects.

### **1.5. RESEARCH QUESTIONS**

- 1) How does TWAIL provide a lens through which human rights obligations on the World Bank ought to be analysed?
- 2) What is the nature and extent of legal obligations on the World Bank to respect human rights in its projects in developing countries?
- 3) How can international law be used creatively to challenge the nature and extent of human rights obligations on the World Bank?
- 4) What recommendations can ensure a more just world for people in developing countries affected by the World Bank's projects?

### **1.6. HYPOTHESES**

This research is based on the following hypotheses:

- a) TWAIL provides a suitable lens and framework through which the need to investigate legal obligations to respect human rights by the World Bank can be analysed.
- b) The nature and extent of legal obligations to respect of international human rights norms has affected to human rights of people in developing countries.
- c) International law can be employed creatively to challenge the legal instruments that circumvent attaching human rights obligations on the World Bank.

### **1.7. RESEARCH METHODOLOGY**

The study will adopt a library-based research methodology. This will involve the study and review of relevant primary and secondary sources through a qualitative analysis. It will also employ the use of case studies in the fifth chapter to illustrate how developmental projects of the World Bank violate human rights in developing countries.

### **1.8. LITERATURE REVIEW**

The impact of the World Bank on developing countries has been an area of research by many. It is safe to say that studies on the bank's impact are at constant loggerheads with its defenders arguing that the Bank has continued to deliver much of its initial promise, that in country after

country it endures to make a meaningful difference. On the other side of this divide are critics who posit that none of these strides constitute a justifiable trade-off as long as there are human right violations involved.<sup>24</sup> They state that the Bank constantly fails to pay enough attention to the environmental, social and economic consequences of its intervention in these developing countries. The two opposing ideas are engaged in this paper. Further, this paper engages a much-needed addition to the conversation on international aid: The Third World Approach to International Law which has also been explored by many legal scholars but rarely in the context of international aid.

Galit's<sup>25</sup> analysis is crucial in understanding the reluctance of the World Bank to be obligated to respect human rights norms as he raises the question of why human rights have become a marginal issue at the Bank. Further he argues that this status quo should come as a surprise not only due to the characterization of the Bank as a subject of international law but also due to the fact that other institutions similar to the Bank -that have developmental objectives- such as the United Nations Development Programme, the United Nations Children's Fund, and the United Kingdom's Department for International Development, have adopted human rights policies or a rights-based approach to development.<sup>26</sup> Further, the Bank has been pressed by civil society organizations and internal advocates to intergate human rights considerations into its projects and programs without success. It therefore remains a debate as to why human rights obligations have not been legalized for International Financial Institutions such as the Bank and the effect of this reluctance.

Bradlow's<sup>27</sup> analysis on the dual character of international institutions such as the World Bank and the International Monetary Fund is also important in this discussion. In his chapter he discusses a dual character existing in international financial institution that has always been incongruous. On one hand they engage in financial transactions which in many ways are guided by principles similar to the private sector's financial contracts. However, these institutions are

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<sup>24</sup> Tibbets J, 'Breaking the World Bank' 103 *Environmental Health Perspectives* 5, 1995,447.

<sup>25</sup> Galit A, 'Why Culture Matters in International Institutions: The Marginality of Human Rights at the World Bank', 103 *Cambridge University Press* 4,657.

<sup>26</sup> Galit A, 'Why Culture Matters in International Institutions: The Marginality of Human Rights at the World Bank', 103 *Cambridge University Press* 4,648.

<sup>27</sup> Bradlow D, 'International Law and the Operations of the International Financial Institutions' in Bradlow D and Hunter D (eds), *International Financial Institutions and International Law*, Kluwer Law International, Netherlands, 2010.

primarily intergovernmental organizations created for a public purpose and as subjects of international law they ought to have obligations arising from international law principles. The conflict of this dual character manifests in the absence of an accompanying clear international law that encompasses both the commercial nature of their operations and their public purpose that is geared towards development. Bradlow also asserts that there is ambiguity in the sources of international law that ought to be applicable to international financial institutions such as the Bank.<sup>28</sup> This paper will engage how this ambiguity has interacted with fundamental human rights in developing countries.

In a similar regard, McInerney-Lankford writes that human rights law is only efficient if the bearer of a human rights obligation is clearly pointed out.<sup>29</sup> This identification of a bearer of obligation is rarely done in developmental institutions such as the World Bank. Primarily, only states can be signatories to international law treaties which would exempt institutions such as the Bank from a clear obligation. However, this then begs the question as to whether they should then be left to operate in a sort of anarchy as they go about their operations.

As mentioned above, this paper will engage the concept of “third world” as a foundation of understanding the nature of international law dynamics. This field is championed by legal scholars who often call themselves TWAILERS, due to their extensive study on Third World Approach to International Law. This concept is analysed by Gathii who discusses the role played by international law and institutions in constituting order and disorder and the fact that there is great need to mend the mismatch that exists between international legal rules and the formal inequalities existent in developing countries and this reality is often ignored.<sup>30</sup> Further, Aswini states that the existence of a hegemonic relationship that ultimately dictates international relations is often neglected when looking at the concept of international aid especially with a reference to human rights in developing countries.<sup>31</sup> For while international

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<sup>28</sup> Bradlow D, ‘International Law and the Operations of the International Financial Institutions’ in Bradlow D and Hunter D (eds), *International Financial Institutions and International Law*, Kluwer Law International, Netherlands, 2010,18.

<sup>29</sup> McInerney-Lankford S, ‘International Financial Institutions and Human Rights: Select Perspectives on Legal Obligations’ in Bradlow D and Hunter D (eds), *International Financial Institutions and International Law*, Kluwer Law International, Netherlands, 2010.

<sup>30</sup> Gathii J, *The Agenda of Third World Approaches to International Law*, Cambridge University Press, 2019,13.

<sup>31</sup> Ray A, ‘Reinventing the Third World’ 47 *Economic and Political Weekly* 11, 2012,36.

aid through institutions such as the World Bank aim at globalisation, it has historically been on the terms and conditions of the dominant power-the West.

On the issue of TWAIL, Chimni analyses that both international law and international institutions have existed as tools of exerting dominance on developing countries to maintain the existing hierarchical global structure.<sup>32</sup> International institutions such as the World Bank and even the IMF have policies that gravely impact human rights in these countries but evade any discussions on reforming accountability systems that accommodate their concerns.<sup>33</sup> A comprehensive discourse on the accountability and legal responsibility of powerful institutions that affect the lives of the ordinary man in developing countries is urgent. Given the Eurocentric nature of international law would mean that this discourse would make a radical impact on the interaction of institutions such as the Bank on human rights in developing countries.<sup>34</sup>

Payer<sup>35</sup> does an extensive assessment on the World Bank as a "development assistance agency" that has done much to bring misery directly to the urban and rural proletariat of the developing countries. Payer notes that the large quantity of publications issued by the Bank deal predominantly with subjects that throw no light on its main activity, namely its lending. This has resulted in the institution successfully averting criticisms of its human rights violation for many years.<sup>36</sup> Her analysis is therefore crucial in studying the impact of the World Bank on socio-economic rights.

On the issue of accountability, Toussant does an analysis whose conclusion is that the very identification of the Bank has placed a hindrance on the ability to hold it accountable for its actions where human rights are concerned. The question of human rights has never been a priority concern for the World Bank. He states that in an ideal situation, as a multilateral institution the World Bank is bound by the application of international treaties and the rights that are declared therein. The Structural adjustment programmes issued by the Bank have such negative consequences for economic, social, and cultural rights (particularly among the most vulnerable), as well as for the environment, that it should be obliged to account for its actions.

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<sup>32</sup> Chimni B, 'Third World Approaches to International Law: A Manifesto' *International Community Law Review*, 2006,17.

<sup>33</sup> Chimni B, 'Third World Approaches to International Law: A Manifesto' *International Community Law Review*, 2006, 23.

<sup>34</sup> Gathii J, *The Agenda of Third World Approaches to International Law*, Cambridge University Press, 2019,13.

<sup>35</sup> Toussant E, 'The World Bank and Respect for Human Rights' in Toussant E(ed), *The World Bank*, Pluto Press, 2008,222-236.

<sup>36</sup> Payer C, *The World Bank: A Critical Analysis*, The Monthly Review Press, New York,1982, 7-41.

However, in spite of the international texts that provide the legal framework for the protection of human rights, the World Bank continues to operate according to the logic of a private financial enterprise, with little consideration for the social and political consequences of its actions.

As detailed above, two areas have been researched before. First, the relationship between international law subjects such as the Bank and their interaction with international human rights norms and secondly the third world approach to International Law in this context given the impact that powerful institutions such as the Bank have on human rights of people in these countries. Further, the question of obligation will be an important concept in analysing accountability (or lack thereof) owing to the fact that an institution cannot account for that which it is not obligated to do.

### **1.9. LIMITATION OF THE STUDY**

A potential limitation of this study is the inaccessibility of an array of primary sources of violation of human rights by the World Bank coupled with the fact that it enjoys immunity that shields it from being sued. Nonetheless, this study will aim to accommodate and mitigate this limitation by looking at other sources of accountability from which a substantive analysis can be engaged.

### **1.10. CHAPTER BREAKDOWN**

#### **Chapter 1: Introduction and Background of the Study.**

This Chapter provides an introduction and background of the study. It introduces the World Bank, its objectives and the problem of analysis in this study.

#### **Chapter 2: A Conceptual Framework:**

This chapter provide a context on the concept of development, human rights, and the World Bank. The context is further provided by employing the Third World Approach to International Law

#### **Chapter 3: Analysing the Question of Obligation**

This chapter investigates the legal instruments in international law as well as in its structural framework of the World Bank that circumvent human rights obligations. The Chapter analyses

how these structures hinder the creation of distinct human rights obligations on an organization that continues to violate human rights in developing countries.

#### **Chapter 4: Challenging the Nature and Extent of Legal Obligation of the World Bank to Uphold Human Rights.**

This chapter aims to investigate how international law can be used creatively to challenge the status quo where human rights obligations are concerned.

#### **Chapter 5: Reflections and Recommendations**

## **2. CHAPTER TWO: CONCEPTUAL FRAMEWORK**

Having laid a foundation in chapter one with regard to the World Bank as an international financial institution, one can now look at questions regarding its legal obligations towards human rights. However, such an analysis would not be appreciated without a proper conceptual understanding as to why human rights obligations in development are a necessity for developing countries.

With this in mind, this chapter aims to discuss Third World Approaches to International Law (TWAIL) to provide a suitable conceptual framework for this study. This framework will provide a lens through which human rights obligations, or lack thereof, will be analysed in subsequent chapters. However, before this is achieved, this chapter will start by discussing the concept of development and its relationship with human rights obligations.

### **2.1. PART ONE: DEVELOPMENT AND HUMAN RIGHTS**

The subject of human rights and development has been one of staggering antithesis over the years. One school of thought argues that human rights are a central part in development while others, though acknowledging some form of interdependence, firmly hold that they exist, and ought to continue to exist, as two separate concepts that operate in parallel fashion.<sup>37</sup>

#### **a) Competing Perception of Development**

The term “*development*” has been defined in many different ways over the years. The lack of a unanimous definition has resulted in competing views as to how it is approached.<sup>38</sup> This is because development is not one static concept neither does it describe one set of conditions whose fulfilment will satisfy a universally agreed threshold.<sup>39</sup> The main question in this debate has been whether development is predominantly an economic process or whether it is a holistic process of change that also encompasses social, political, and cultural issues of society. From this a classification of development into traditional and modern views emerged.

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<sup>37</sup> Posner E, ‘Should Human Rights Play a Role in Development?’ 30 *The World Bank Economic Review* 1, 2016.

<sup>38</sup> Bradlow D, ‘Development Decision-Making and The Content of International Law’, 24 *Boston College International and Comparative Law Review* 2, 2004, 196.

<sup>39</sup> Welch R, ‘The Meaning of Development: Traditional View and More Recent Ideas’, 76 *New Zealand Journal of Geography* 3, 1984, 2.

In the traditional view, development is viewed as a process of economic advancements characterised by the growth in gross domestic product.<sup>40</sup> Proponents of this view posit that the primary aim of development is economic growth and at least analytically, it ought to be treated as an isolated concept from social, cultural, and political issues of society.<sup>41</sup> On the other hand, modern perceptions view development in a more multi-dimensional lens. The modern view of development encompasses the political, social, and cultural aspects of human life.<sup>65</sup> It holds that development is a holistic interrelated process and therefore social, political, environmental, and cultural aspects of life are not distinct from economic pursuits.<sup>42</sup>

From the competing views of development, this dissertation challenges the Bank's inclination to the traditional view as it relates to human rights obligations, which is discussed below.

### **b) Competing Views of Development and Human Rights Obligations**

The competing views of development are integral in this research because out of this another debate on the role and responsibility of the State and other international actors affecting development has emerged.<sup>43</sup> The shortcoming of the traditional view of development lies in the fact that decision-makers in institutions such as the World Bank treat social, cultural, and environmental questions that arise in development projects as externalities.<sup>44</sup> Nowhere is this concept more alive than in the World Bank's Articles of Agreement- Section 10 of Article 4 in International Bank for Reconstruction and Development and Section 6 of Article 5 in the International Development Association which state that the Bank and its officers will only be guided by economic considerations in their decisions.<sup>45</sup> These will be discussed in the next chapter.

The modern view of development, however, holds that the fact that human beings are affected by their cultural, social and environmental needs, developmental projects should be cognizant

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<sup>40</sup> O' Manique J, 'Human Rights and Development', 14 *The Johns Hopkins University Press* 1, 1992, 78.

<sup>41</sup> O' Manique J, 'Human Rights and Development', 14 *The Johns Hopkins University Press* 1, 1992, 79. <sup>65</sup>

Slim H, 'What is Development?', 5 *Development in Practice* 2, 2005, 143.

<sup>42</sup> Bradlow D, 'Development Decision-Making and The Content of International Law', 24 *Boston College International and Comparative Law Review* 2, 2004, 208.

<sup>43</sup> Bradlow D, 'Development Decision-Making and The Content of International Law', 24 *Boston College International and Comparative Law Review* 2, 2004, 199.

<sup>44</sup> Bradlow D, 'Development Decision-Making and The Content of International Law', 24 *Boston College International and Comparative Law Review* 2, 2004, 201.

<sup>45</sup> Section 10, Article IV, International Bank for Reconstruction and Development, Articles of Agreement, July 22, 1944, 60 Stat. 1440, 2 UNTS 134 and Section 6, Article IV, Articles of Agreement of the International Development Association, Jan. 26, 1960, 11 U.S.T. 2284, 439 U.N.T.S. 249

of these needs.<sup>46</sup> In light of this, development projects and policies should not be treated as separate economic events but should contextualize the social, cultural and environmental facets of human life with an aim of whole transformation of a human being.<sup>47</sup> Therefore, in any project assessment, the desirability of a particular project proposal and its implementation should account for all the ways it impacts the social, political, and cultural needs of the individuals affected.<sup>48</sup>

From the above discussion, this dissertation supports the modern view of development as the best lens through which the World Bank ought to approach development projects in developing countries. A view that is aware of other non-economic aspects of human life is better placed to engage discourse on the necessity of intergating human rights obligations on institutions such as the Bank, and cultivate a culture of accountability to this effect. Though the Bank has made steps in realizing that development is a multidimensional agenda, the next chapter builds a case on how these steps are yet to morph into the attachment of any tangible responsibility for affecting the rights of people in developing countries.<sup>49</sup>

## **2.2. PART TWO: DEVELOPMENT, HUMAN RIGHTS AND THE THIRD WORLD APPROACHES TO INTERNATIONAL LAW**

Having discussed the nuances that underpin development in its competing views, there is left a necessity of finding a conceptual tool through which the main questions of research shall be studied, analysed and understood. In pursuit of analysing the nature and extent of legal obligation of the World Bank to respect human rights, the conceptual tool employed in this dissertation is Third World Approaches to International Law.

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<sup>46</sup> Bradlow D, ‘ Development Decision-Making and The Content of International Law’, 24 *Boston College International and Comparative Law Review* 2, 2004,201.

<sup>47</sup> Bradlow D, ‘ Development Decision-Making and The Content of International Law’, 24 *Boston College International and Comparative Law Review* 2, 2004,207.

<sup>48</sup> Bradlow D, ‘ Development Decision-Making and The Content of International Law’, 24 *Boston College International and Comparative Law Review* 2, 2004,208.

<sup>49</sup> Ciorciari J, ‘The Lawful Scope of Human Rights Criteria in World Bank Credit Decisions: An Interpretive Analysis of the IBRD and IDA Articles of Agreement’ 33 *Cornell International Law Journal* 2, 2000.

### 2.2.1. Third World Approaches to International Law (TWAIL)

TWAIL scholarship is a critical approach to International Law that seeks to retell and reconfigure international law from a third world perspective.<sup>50</sup> It does this by criticizing and challenging some of its central tenets such as its Westphalian origins<sup>51</sup>. TWAIL can be described as a historically aware methodology that challenges international law and its institutions, which are primarily choreographed by a dominating first world.<sup>52</sup> It argues that older forms of domination- such as colonialism- have morphed into modern forms of domination such as international law, its operative logics and its institutions.<sup>119</sup> TWAIL scholarship provides critique both of the scholarship and politics of international law. It further explores the extent to which international law has legitimised the marginalization of people in the third world.

TWAIL scholars have conceptualised it as a method and approach to International Law that augments other methods of studying International Law.<sup>53</sup> It therefore provides a lens of scholarship into international law. It is important to note here that the scope of scholarship is not limited to the operation of international law but extends to international politics, doctrines, operational logics as well as institutions with substantial influence in the global order.<sup>54</sup> It is often argued that these institutions, such as the United Nations, International Monetary Fund and the World Bank have amassed such power and influence, to the point that we cannot say that states remain the only primary actors in the global scene.<sup>55</sup> The distinctiveness of TWAIL as a method of study is found in its critical approach in exposing the potential illegitimacies in the body of international law. It does this in the following ways:

Firstly, Professor Okafor who is a TWAIL scholar posits that TWAIL pays more attention to the Third World's actual experiences as areas where international law, norms, institutions and

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<sup>50</sup> Gathii J, *The Agenda of Third World Approaches to International Law*, Cambridge University Press, 2019,2.

<sup>51</sup> Chimni B, 'Customary International Law: A Third World Perspective' 112 *The American Journal of International Law* 1, 2018.

<sup>52</sup> Gathii J, 'TWAIL: A Brief History of Its Origins, Its Decentralized Network, and a Tentative Bibliography' 3 *Trade, Law and Development Journal* 1,2011,34. <sup>119</sup> Gathii J, 'TWAIL: A Brief History of Its Origins, Its Decentralized Network, and a Tentative Bibliography' 3 *Trade, Law and Development Journal* 1,2011,26.

<sup>53</sup> Owuor M.M, 'Towards Development Justice: Re-visiting The Accountability of the World Bank and the IMF From a Right to Development Perspective', Unpublished PHD Thesis, Osgoode Hall Law School in York University, Toronto, 2020,41.

<sup>54</sup> Gathii J, *The Agenda of Third World Approaches to International Law*, Cambridge University Press, 2019.

<sup>55</sup> Owuor M.M, 'Towards Development Justice: Re-visiting The Accountability of the World Bank and the IMF From a Right to Development Perspective', Unpublished PHD Thesis, Osgoode Hall Law School in York University, Toronto, 2020.

doctrines operate.<sup>56</sup> To this effect, it rejects the notion that the current body of international law, doctrines and institutions is a suitable ‘*one size fits all*’ approach to achieving global order. This is because TWAIL scholarship is aware of not only the history but the marginalization brought about by colonialism as well as present day hegemonic laws and institutions that ensure the domination of the West on the third world.<sup>57</sup> It is important here to note that the concept of “third world” refers not to specific geographies or States *per se* but collectively to a people who are defined by shared experiences of subjugation and marginalization in the international order.<sup>58</sup> The terms ‘Global South’ and ‘developing countries’ are employed in this dissertation to refer to this group.

Another characteristic of TWAIL is the rejection of the universalism that masks Western motives which exert domination over the Global South.<sup>126</sup> TWAIL rejects globalised agendas as gospel truth. Furthermore, TWAIL scholars argue that the regime of international law and its institutions is illegitimate in so far as it sustains the subordination of developing countries by the West.<sup>59</sup> With this lens, it offers criticism to the ideas such as globalization posed by the West and argues that such ideas act as potential mechanisms of present day colonialism.<sup>60</sup>

Perhaps one of the most important tools in TWAIL, which is heavily utilised in this dissertation is the analysis and critiquing of international law, doctrines and by extension its institutions. This is fuelled by sceptical stances to, and distrust of international law, its institutions and doctrines.<sup>61</sup> The motivation behind this distrust is the understanding that international law and its institutions legitimize and perpetuate a system that sustains the subordination of developing countries by the West.<sup>62</sup> Professor Gathii who is also a TWAIL scholar states that one of the aims of TWAIL is to analyse the role played by international law in constituting global

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<sup>56</sup> Okafor O, ‘Newness, Imperialism, International Legal Reform in Our Time: A TWAIL Perspective’, 43 *Osgoode Hall Law Journal* 1, 2005,47.

<sup>57</sup> Gathii J, *The Agenda of Third World Approaches to International Law*, Cambridge University Press, 2019.

<sup>58</sup> Gathii J, *The Agenda of Third World Approaches to International Law*, Cambridge University Press, 2019. <sup>126</sup> Chimni B, ‘Customary International Law: A Third World Perspective’ 112 *The American Journal of International Law* 1, 2018

<sup>59</sup> Chimni B, ‘Third World Approaches to International Law: A Manifesto’ *International Community Law Review*, 2006,3.

<sup>60</sup> Owuor M.M, ‘Towards Development Justice: Re-visiting The Accountability of the World Bank and the IMF From a Right to Development Perspective’, Unpublished PHD Thesis, Osgoode Hall Law School in York University, Toronto, 2020,40.

<sup>61</sup> Owuor M.M, ‘Towards Development Justice: Re-visiting The Accountability of the World Bank and the IMF From a Right to Development Perspective’, Unpublished PHD Thesis, Osgoode Hall Law School in York University, Toronto, 2020,40.

<sup>62</sup> Gathii J, *The Agenda of Third World Approaches to International Law*, Cambridge University Press, 2019.

disorder.<sup>63</sup> TWAIL critiques international law and its institutions from this perspective. In the context of this research, this technique is employed in the investigation of the legal and structural instruments that speak to human rights obligations on the Bank. The uncertainty or sheer absence of such obligations in international law and within the Bank's Articles and structures, leaves room for the Bank to operate as it deems appropriate; quite characteristic of a hegemonic order.

B.S Chimni, a radical TWAIL scholar rightly posited that the dominant forces in society maintain their domination not because they employ the use of force but by having their perceptions and ideologies viewed as objective by those over whom they exercise this domination.<sup>64</sup> This is the reality that exists when looking at the language and narratives advanced by the West with reference to topics such as modernization, environmentalism and undoubtedly the concept of development. These concepts that have been preached as 'gospel truth' and portrayed as universal over the years. It is for this reasons that TWAIL scholarship also employs another technique of critical discourse analysis.<sup>65</sup> Critical research analysis is a research tool that views language as mechanisms of shaping social relations.<sup>66</sup> In the context of TWAIL, TWAIL scholars investigate how the language used in international law, institutions and doctrines is fundamentally interested in maintaining relationships of dominance, power and control.<sup>167685</sup> Critical discourse methodology is of interest when analysing the question of human rights obligations which will be seen in the third chapter.

Other than the critiquing aims of international law and its institutions, TWAIL is also committed to the reforming of international law in consideration of developing states.<sup>69</sup> This can be done by way of proposing recommendations that streamline the weaknesses cited in international law and institutions.<sup>70</sup> Further, TWAIL provides perspective through which

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<sup>63</sup> Gathii J, *The Agenda of Third World Approaches to International Law*, Cambridge University Press, 2019.

<sup>64</sup> Chimni B, 'Third World Approaches to International Law: A Manifesto' *International Community Law Review*, 2006,15.

<sup>65</sup> Owuor M.M, 'Towards Development Justice: Re-visiting The Accountability of the World Bank and the IMF From a Right to Development Perspective', Unpublished PHD Thesis, Osgoode Hall Law School in York University, Toronto, 2020,45.

<sup>66</sup> Norman F, *Critical Discourse Analysis: The Critical Study of Language*, 2<sup>nd</sup> ed, Routledge, New York, 2010, 67.

<sup>68</sup> Owuor M.M, 'Towards Development Justice: Re-visiting The Accountability of the World Bank and the IMF From a Right to Development Perspective', Unpublished PHD Thesis, Osgoode Hall Law School in York University, Toronto, 2020,45.

<sup>69</sup> Gathii J, *The Agenda of Third World Approaches to International Law*, Cambridge University Press, 2019.

<sup>70</sup> Gathii J, *The Agenda of Third World Approaches to International Law*, Cambridge University Press, 2019.

international law can be creatively employed in a manner that mitigates its problematic and often subjugating characteristics. One author calls this approach a means through which, at the very least a *modest harvest* can be derived from international law, for the benefit of developing countries.<sup>71</sup> This approach explores how best developing countries can derive value from international law, despite its underlying hegemonic tendencies. Both these tools will be applied in subsequent chapters.

TWAIL scholarship and its techniques provide a suitable lens and conceptual framework to proceed with an informed analysis in this dissertation. As a point of departure, TWAIL as a conceptual framework will be used in this dissertation to tackle the research questions in four major ways:

- a) First, to ground this research on the premise that the lack and avoidance of an explicit obligation to respect human rights in development projects is a manifestation of domination by the World Bank over developing countries.
- b) To critique the Bank's Articles of Agreement, DARIO and the internal and external accountability mechanisms of the Bank. This will be done by challenging the gaps and accountability deficits in the international system that legitimize the evasion of human rights obligations on the Bank.
- c) To investigate the hegemonic characteristic of international law and the Bank, by adopting a critical discourse analysis. This will be done by challenging the deployment of certain doctrines grounded in law that facilitate the avoidance of direct human rights obligations by the World Bank. These include doctrines such as political prohibition, economic rationalism and international responsibility.
- d) Lastly, to find creative ways through which international law can be used to answer the question of the nature and extent of human rights obligations on the Bank and provide recommendations from the challenges discussed.

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<sup>71</sup> Owuor M.M, 'Towards Development Justice: Re-visiting The Accountability of the World Bank and the IMF From a Right to Development Perspective', Unpublished PHD Thesis, Osgoode Hall Law School in York University, Toronto, 2020,43.

### 3. CHAPTER 3: INVESTIGATING THE WORLD BANK'S LEGAL OBLIGATIONS TO RESPECT HUMAN RIGHTS

#### Introduction

*“Generally the best way for us to proceed has been a sort of step-by-step way, doing it quietly, trying to assert the delivery of rights, but not necessarily couching it in terms of human rights.”<sup>72</sup>*

*-James Wolfensohn, President of the World Bank, 1995-2005*

The ‘do-it-quietly’ approach accurately represents the World Bank’s maintained position regarding its reluctance to apply or adopt a human rights agenda. The Bank has over the years taken a lukewarm and non-committal stance on the issue of human rights. From the words of the World Bank President, it would seem that the problem of human rights is one of discourse. From his report, human rights concerns in the Bank would be resolved through subtle references to the value of human rights in development without necessarily advancing a human rights agenda at the Bank.<sup>73</sup> This is premised on the fact that the Bank is primarily an international financial institution with no direct ties or responsibilities to the question of human rights. This chapter begins by emphatically rejecting this notion on two grounds: the first which places gravity on the subject of human rights in general and the second which forms the subject of analysis in this dissertation.

Firstly, much scholarship has gone into establishing the intricate connection between human rights and human dignity.<sup>74</sup> The concept of human dignity is quite ubiquitous in contemporary human rights discourse. By definition, human rights are entitlements that human beings possess just by virtue of their inherent dignity.<sup>75</sup> Therefore, the importance of human rights, and by extension the necessity to respect them is heavily tied to the immeasurable value of human dignity. The connection of human rights and dignity finds legitimacy in law. For instance, it occupies a prominent place in the United Nations Charter as well as the United Declaration of

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<sup>72</sup> Wolfensohn J, ‘Remarks on Human Rights and Sustainable Development: What Role for the Bank?’ (Speech delivered at the plenary of *Human Rights and Development: What Role for the Bank*, Washington DC, 2 May 2002).

<sup>73</sup> Ball R, ‘Doing It Quietly: The World Bank’s Engagement with Human Rights’ 34 (2) *Monash University Law Review*, 2008,330.

<sup>74</sup> Beitz C ‘Human Dignity in the Theory of Human Rights: Nothing But a Phrase?’ 41 (3) *Philosophy and Public Affairs*, 2013,259.

<sup>75</sup> Valentini L, ‘Dignity and Human Rights: A Reconceptualisation’ 37 (4) *Oxford Journal of Legal Studies*, 2017, Pages 862.

1948. Both state, in an identical manner, that human rights are derived from the inherent dignity of the human person.<sup>76</sup> From this, most human rights instruments at national and international level have constructed provisions that emulate this connection.

With the above context in mind, one must look at the question of an obligation to respect human right with this lens. The narrative advanced by the Bank does not appreciate, and in fact devalues the importance of human rights obligations and their intricate connection with human dignity. It attempts to shelve human rights obligations under the pretext of a '*doing it quietly*' narrative which constitutes an unsatisfactory approach to dealing with human rights.

The second, and perhaps more complex ground for this rejection, requires a *TWAILIAN* pair of eyes; so to speak. This is because the *doing it quietly* approach represents only a fraction of the underlying challenges surrounding the question of human rights obligations on the Bank. Human rights concerns cannot be resolved through discourse and subtle references as suggested by the Bank's former president. This is because obscurities surrounding human rights obligations are deeply entrenched within the structure, language and doctrines present in the legal instruments specifically the Bank's Articles of Agreement, international legal instruments as well as accountability mechanisms. These instruments have substantially legitimised and rationalised the Bank's disconnection from and avoidance of legal obligations to respect human rights.<sup>77</sup>

As mentioned in the second chapter, the genesis of any *TWAILIAN* discussion is found in the distrust of the body of international law. In light of this, this chapter analyses the Bank's Articles of Agreement on political prohibition, Draft Articles on the Responsibility of International Organisations and the Inspection Panel as legal instruments that are ill-adapted in ensuring the Bank's accountability for human rights violations. This analysis will use *TWAIL* techniques to analyse the nature and extent of the Bank's legal obligation to respect human rights.

### **3.1. HUMAN RIGHTS OBLIGATION AND THE WORLD BANK'S ARTICLES OF AGREEMENT**

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<sup>76</sup> Beitz C 'Human Dignity in the Theory of Human Rights: Nothing But a Phrase?' 41 (3) *Philosophy and Public Affairs*, 2013,259.

<sup>77</sup> Owuor M.M, 'Towards Development Justice: Re-visiting The Accountability of the World Bank and the IMF From a Right to Development Perspective', Unpublished PHD Thesis, Osgoode Hall Law School in York University, Toronto, 2020,43.

The Articles of Agreement of all institutions of the Bank represent their constitutive agreements and are binding upon the Bank. Its obligations and duties are posited here and they are therefore the first step when analysing the obligation to respect human rights. The Bank's position regarding human rights is premised on its interpretation of the IDA and IBRD Articles of Agreement.<sup>78</sup> Section 10 of the IBRD and Section 5 of the IDA's Articles of Agreement limit the Bank only to economic considerations and explicitly prohibit "*political*" activity.<sup>79</sup> These provisions, titled "*Political Activity Prohibited*", have formed the basis for the Bank's rebuttal when confronted with human rights questions.<sup>80</sup> Section 10 of Article 4 in IBRD Articles of Agreement states that:

*"The Bank and its officers shall not interfere in the political affairs of any member; nor shall they be influenced in their decisions by the political character of the member or members concerned. Only economic considerations shall be relevant to their decisions, and these considerations shall be weighed impartially in order to achieve the purposes stated in Article I."*<sup>81</sup>

These provisions on the prohibition of political activity are narrowed down even further when read together with Article 3, Section 5 (b) of the IBRD Articles which sets out an even narrower prohibition on the use of loans guaranteed, participated in, or made by the Bank.<sup>82</sup> An identical provision is present in the IDA's Articles of Agreement under Article 5, Section 1 (b).<sup>83</sup> They both state that:

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<sup>78</sup> Ball R, 'Doing It Quietly: The World Bank's Engagement with Human Rights' 34 (2) *Monash University Law Review*, 2008,335.

<sup>79</sup> Section 10, Article IV, International Bank for Reconstruction and Development, Articles of Agreement, July 22, 1944, 60 Stat. 1440, 2 UNTS 134 and Section 6, Article V, Articles of Agreement of the International Development Association, Jan. 26, 1960, 11 U.S.T. 2284, 439 U.N.T.S. 249.

<sup>80</sup> Ciorciari J, 'The Lawful Scope of Human Rights Criteria in World Bank Credit Decisions: An Interpretive Analysis of the IBRD and IDA Articles of Agreement' 33 (2) *Cornell International Law Journal*, 2000,336.

<sup>81</sup> Similarly, Section 6 of Article 5 of the IDA Articles of Agreement states that :

*"The Association and its officers shall not interfere in the political affairs of any member; nor shall they be influenced in their decisions by the political character of the member or members concerned. Only economic considerations shall be relevant to their decisions, and these considerations shall be weighed impartially in order to achieve the purposes stated in this Agreement."*<sup>159</sup>

<sup>82</sup> Section 5, Article V, International Bank for Reconstruction and Development, Articles of Agreement, July 22, 1944, 60 Stat. 1440, 2 UNTS 134.

<sup>83</sup> Section 1, Article 5, Articles of Agreement of the International Development Association, Jan. 26, 1960, 11 U.S.T. 2284, 439 U.N.T.S. 249.

*“The Bank shall make arrangements to ensure that the proceeds of any loan are used only for the purposes for which the loan was granted, with due attention to considerations of economy and efficiency and without regard to political or other non-economic influences or considerations.”*

Analogous to the provisions on political prohibitions, this provision limits the Bank only to economic considerations and further explicitly bars political and other non-economic influences from consideration. The status quo regarding the Bank’s position is hinged on the terms “*economic*” and “*political*” in the provisions cited above. The interpretation of these terms is the responsibility of its General Counsel who advises the Executive Directors and the Board of Governors of the World Bank on a variety of legal issues.<sup>84</sup> Among the responsibilities is the vital role of interpreting its constitutive agreements. Under the Counsel’s interpretation in the past, human rights questions do not have a “*direct and obvious economic effect*” as envisioned by the Articles of Agreement.<sup>85</sup> They are therefore predominantly “*political*” in nature which is prohibited. This interpretation was largely championed by former General Counsel, Dr. Ibrahim Shihata (1983 – 1998).<sup>86</sup> From an internal viewpoint, the World Bank’s position regarding human rights obligations is decisive because its Articles give the Bank- through its General Counsel- exclusive authority to interpret its Articles of Agreement. This grant of interpretive power makes a successful legal challenge an uphill task.

Nevertheless, this dissertation argues that the Bank’s position ought to be premised on a lawful interpretative methodology. This means that the maintained stance should be in consonance with a methodology of applicable international law.<sup>87</sup> For this reason, this section challenges the political prohibition doctrine by employing the Vienna Convention on the Law of Treaties as a suitable interpretative methodology. As mentioned in the previous Chapter, one of the aims of TWAIL is to find creative methods to critique international law. It is hoped that through this analysis, a new perspective on the political prohibition doctrine shall be formed. This will be

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<sup>84</sup> Shihata I, ‘Role of the World Bank’s General Counsel: Proceedings of the Annual Meeting in the American Society of International Law’, 91 (1) *Cambridge University Press*, 1997, 214.

<sup>85</sup> Ciorciari J, ‘The Lawful Scope of Human Rights Criteria in World Bank Credit Decisions: An Interpretive Analysis of the IBRD and IDA Articles of Agreement’ 33 (2) *Cornell International Law Journal*, 2000, 336.

<sup>86</sup> Shihata I, ‘Prohibition of Political Activities in the Bank’s Work’, *Legal Opinion by the Senior Vice President and General Counsel*, 12 July 1995.

<sup>87</sup> Ciorciari J, ‘The Lawful Scope of Human Rights Criteria in World Bank Credit Decisions: An Interpretive Analysis of the IBRD and IDA Articles of Agreement’ 33 (2) *Cornell International Law Journal*, 2000, 336.

done by analysing it not only as a provision that guides the Bank, but as a problematic obstruction from human rights obligations.

### **3.1.1. An Interpretive Methodology Using the Vienna Convention on the Law of Treaties**

The Vienna Convention on the Law of Treaties is the international codification for the making, practice, and interpretation of treaties. The Articles of Agreement fall within the scope of the Vienna Convention through Article 5 which states that the Convention applies to any treaty which is the constituent instrument of an international organization and to any treaty adopted within an international organization without prejudice to any relevant rules of the organization.<sup>166</sup> Article 31 particularly deals with rules of interpretation of treaties.<sup>167</sup>

It is important to note that the Articles of Agreement of the Bank predate the Vienna Convention. However, much research has gone into proving that the Vienna Convention largely represents a codification of pre-existing norms of customary international law which was the previous tool of interpretation.<sup>168</sup> This is proven further by the fact that Article 31 of the Vienna Convention in particular, was adopted without a dissenting vote and is therefore considered to have been declaratory of pre-existing customary international law.<sup>169</sup> The Convention can therefore be employed in the interpretation of the Bank's Articles of Agreement.

Article 31 sets a clear process when it comes to treaty interpretation.<sup>170</sup> Firstly, Article 31 requires the interpretation of a treaty to begin with an interpretation in good faith and in

<sup>166</sup> Article 5, *Vienna Convention on the Law of Treaties*, 23 May 1969, 1155 UNTS 331.

<sup>167</sup> Article 31 and 32, *Vienna Convention on the Law of Treaties*, 23 May 1969, 1155 UNTS 331.

<sup>168</sup> Ciorciari J, 'The Lawful Scope of Human Rights Criteria in World Bank Credit Decisions: An Interpretive Analysis of the IBRD and IDA Articles of Agreement' 33 (2) *Cornell International Law Journal*, 2000,340 and Henkin L, Crawford R, Schachter O and Smit H, *International Law: Cases and Materials: American Casebook*, 3<sup>ed</sup>, Cengage Learning Incorporated,1993, 416-417.

<sup>169</sup> Henkin L, Crawford R, Schachter O and Smit H, *International Law: Cases and Materials: American Casebook*, 3<sup>ed</sup>, Cengage Learning Incorporated,1993, 105.

<sup>170</sup> Article 31:

1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.
2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:
  - (a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty.
  - (b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.
3. There shall be taken into account, together with the context:

- (a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions.
- (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation.
- (c) any relevant rules of international law applicable in the relations between the parties.

4. A special meaning shall be given to a term if it is established that the parties so intended. accordance with the ordinary meaning of the terms in their context and in light of the Treaty's object and purpose.<sup>88</sup> Secondly, the context for the purpose of interpretation includes any documents relating to the said treaty and any relevant rules of international law that are applicable in the parties' relations.<sup>89</sup> The last provision of Article 31 permits a special meaning if it is established that the parties intended to do so.<sup>90</sup>

This section will engage the two main interpretive methodologies- ordinary meaning analysis and a purposive approach- to analyse the nature and extent of human rights obligations on the Bank.

### **A) Ordinary Meaning Analysis: Article 31 (1)**

Article 31 (1) sets forth the first rule of interpretation by stating that the treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of that particular treaty, and in light of its object and purpose.<sup>91</sup> The ordinary meaning usually forms the base or starting point during legal interpretation. It can be defined as an interpretation that aligns with that which a competent, knowledgeable, purposeful, and informed use of ordinary language would give to the ordinary words of the statute in issue.<sup>92</sup> Under Article 31 (1), the ordinary meaning of the provisions is a primary interpretative methodology and therefore an analysis of the IBRD and IDA Articles of Agreement must begin with a plain reading of the critical terms and provisions.<sup>93</sup> This will be the basis of analysis in this section.

#### ***i) Are Human Rights Political?***

As mentioned, the Former World Bank General Counsel Dr. Ibrahim Shihata, played a key role in attempting to broaden the interpretation of the Articles. In doing this he too, started by

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<sup>88</sup> Article 31 (1), *Vienna Convention on the Law of Treaties*, 23 May 1969, 1155 UNTS 331.

<sup>89</sup> Article 31 (2), *Vienna Convention on the Law of Treaties*, 23 May 1969, 1155 UNTS 331.

<sup>90</sup> Article 31 (3), *Vienna Convention on the Law of Treaties*, 23 May 1969, 1155 UNTS 331.

<sup>91</sup> Article 31, *Vienna Convention on the Law of Treaties*, 23 May 1969, 1155 UNTS 331.

<sup>92</sup> Summers R and Marshall G, 'The Argument from Ordinary Meaning in Statutory Interpretation', 43 (3) *Northern Ireland Legal Quarterly*, 1992, 213.

<sup>93</sup> Ciorciari J, 'The Lawful Scope of Human Rights Criteria in World Bank Credit Decisions: An Interpretive Analysis of the IBRD and IDA Articles of Agreement' 33 (2) *Cornell International Law Journal*, 2000,341. <sup>177</sup> Shihata I, 'Prohibition of Political Activities in the Bank's Work', *Legal Opinion by the Senior Vice President and General Counsel*, 12 July 1995.

looking at the dictionary definitions of the words. He concluded that political factors must involve belonging to or favouring a particular political party or partisan faction or following the political principles, convictions, or opinions of a particular party or individual.<sup>177</sup> Another dictionary definition of the term political is that which is relating to a government or the conduct of a government.<sup>94</sup> From this interpretation, one can see that the Bank should not interfere with affairs such as party politics or be seen to be supportive of certain political ideologies of member states, among other factors. This is in line with the fact that the Bank aims to remain a neutral international institution. Furthermore, this is premised on the international law principle of sovereignty of states which estops international institutions such as the Bank from interfering with the decisions of governments of member states.<sup>95</sup>

The definition of the term *political* does not clarify whether human rights should be classified as political in nature. If truly, the term political refers to domestic matters as per the ordinary meaning, the question then becomes whether human rights fall under this definition. Firstly, the United Nations Declaration speaks to the universality of human rights by stating that each person is entitled to the rights contained in it.<sup>96</sup> From a general standpoint, they are therefore international in nature and transcend the ambit of domestic issues. This is strengthened further by the International Court of Justice in *Barcelona Traction, Light and Power Co Ltd* -where the court in its decision stated that states have an obligation to the international community to protect certain basic human rights.<sup>97</sup> Although the Court has been criticized for not specifying which rights are considered '*basic*' or '*fundamental*', the Court spoke to a certain universality of human rights and the fact that they, for the most part, transcend domestic jurisdiction.<sup>182</sup> The above analysis is suggestive of human rights not being "*political*" due to their universal nature and as such weakens the Bank's rebuttal as to its obligations towards human rights.

Secondly, even if one were to concede and apply the ordinary definition given by the General Counsel, it would still not exclude human rights. The understanding of political affairs as party politics and favouring certain political factions means that human rights then fall outside this

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<sup>94</sup> Merriam Webster Dictionary, 4<sup>th</sup> ed.

<sup>95</sup> Ball R, 'Doing It Quietly: The World Bank's Engagement with Human Rights' 34 (2) *Monash University Law Review*, 2008,338.

<sup>96</sup> UNGA, *Universal Declaration of Human Rights*, 217 A (III), 10 December 1948.

<sup>97</sup> *Barcelona Traction, Light and Power Co Ltd (Belgium v Spain) (Second Phase)*, ICJ Reports 1970,33-4. <sup>182</sup> Ball R, 'Doing It Quietly: The World Bank's Engagement with Human Rights' 34 (2) *Monash University Law Review*, 2008,342.

definition. Human rights are severally defined as entitlements that are inherently owed to individuals by virtue of them being human. It becomes difficult to buy into the Bank's rebuttal that considering the human rights effects of a certain project would be interfering with the domestic affairs of a member state. Further, these entitlements do not tie directly to matters such as party politics or operations that would interfere with the unbiased nature envisioned by the Bank.

From the above analysis, it therefore seems unlikely that the prohibition of political activity under the ordinary meaning should equate a prohibition of human rights considerations. This challenges its use as a premise for denying the Bank's interaction with human rights more so a duty to respect these rights by the Bank. It would seem that the umbrella of 'political activity prohibited' may be a scapegoat used to shirk human rights obligations by the Bank.

*ii) Human Rights as Economic and Efficient Considerations*

The definition of the term *economic* given by Shihata is that which includes the management of a nation's money, finances and resources.<sup>98</sup> Economic considerations can also be defined as factors that are concerned with the inherent mechanisms that speak to resource allocation.<sup>99</sup> This definition supports the early view taken by the Bank that economic factors should be construed to exclude human rights as they were not directly linked to economic benefit.<sup>100</sup> However, that definition loses its credibility because the lack of respect for human rights can seriously affect the economic return of a project. For example, the displacement of a group of people without compensation greatly affects their ability to provide the needed labour in that project. Similarly, substandard health conditions for workers or hazardous environmental effects in World Bank initiatives can greatly affect how efficient the project is, in terms of both labour and sustainability.<sup>186</sup> As mentioned prior, Section 5 (b), Article 3 of the IBRD Articles of Agreement gives a narrower stance with regards to the use of loans. It states the only considerations of economy and efficiency are allowed and any other '*non-economic*' influences

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<sup>98</sup> Ciorciari J, 'The Lawful Scope of Human Rights Criteria in World Bank Credit Decisions: An Interpretive Analysis of the IBRD and IDA Articles of Agreement' 33 (2) *Cornell International Law Journal*, 2000,337.

<sup>99</sup> Merriam Webster, 4<sup>th</sup> ed.

<sup>100</sup> Ciorciari J, 'The Lawful Scope of Human Rights Criteria in World Bank Credit Decisions: An Interpretive Analysis of the IBRD and IDA Articles of Agreement' 33 (2) *Cornell International Law Journal*, 2000,336. <sup>186</sup> Bhalla N, 'World Bank defends treatment of India tea pickers amid fears of exploitation', Reuters,2017.

are prohibited.<sup>101</sup> It would seem that human rights would be regarded as ‘*non-economic*’ under this provision.<sup>102</sup> However, using the examples above, human rights are not necessarily economic in so far as their violation affects the return or profitability of a certain project.

In closing, a plain reading of the Articles is evidentiary of the fact that Section 5 (b) does not exactly prevent the Bank from lawfully considering human rights violations as long as those violations amount to an economic consideration. However, it is difficult to pinpoint how much an economic impact a human rights violation must have in order to constitute a valid economic consideration.<sup>103</sup> This is problematic as it leaves the Bank with all the power to manipulate this threshold as it deems fit.

From the above analysis, it can be deduced that human rights violations have a stake in the economic viability of a certain project and therefore do not only fail to constitute non-economic influences but could also affect economic efficiency.

### **B) Purpose of the Bank’s Articles of Agreement**

The Vienna Convention rules of interpretation require that the terms of a treaty or any law for that matter be interpreted not only in their grammatical context but also in light of their purpose.<sup>190</sup> This is the case with the second half of Article 31 (1) of the Vienna Convention which states that treaties should be interpreted with the purpose of the treaty in mind.<sup>104</sup> This can easily be deduced from the Articles’ objectives. For the IBRD, other than reconstruction efforts, Article 2 of its Articles of Agreement states that its purpose particularly for less developed countries is the encouragement of the development of productive facilities and resources.<sup>105</sup> This is in line with economic development. Similarly, the objectives of the IDA are to promote economic development, increase productivity, and thus raise standards of living standards in the less-developed member states.<sup>106</sup> For years, the Bank has relied in its purpose

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<sup>101</sup> Section 5, Article V, International Bank for Reconstruction and Development, Articles of Agreement, July 22, 1944, 60 Stat. 1440, 2 UNTS 134.

<sup>102</sup> Ball R, ‘Doing It Quietly: The World Bank’s Engagement with Human Rights’ 34 (2) *Monash University Law Review*, 2008,338.

<sup>103</sup> Ciorciari J, ‘The Lawful Scope of Human Rights Criteria in World Bank Credit Decisions: An Interpretive Analysis of the IBRD and IDA Articles of Agreement’ 33 (2) *Cornell International Law Journal*, 2000,337. <sup>190</sup> Summers R and Marshall G, ‘The Argument from Ordinary Meaning in Statutory Interpretation’, 43 (3) *Northern Ireland Legal Quarterly*, 1992, 215.

<sup>104</sup> Article 31, *Vienna Convention on the Law of Treaties*, 23 May 1969, 1155 UNTS 331.

<sup>105</sup> Article II, International Bank for Reconstruction and Development, Articles of Agreement, July 22, 1944, 60 Stat. 1440, 2 UNTS 134.

<sup>106</sup> Article II, Articles of Agreement of the International Development Association, Jan. 26, 1960, 11 U.S.T. 2284, 439 U.N.T.S. 249.

to maintain its distance from human rights obligation. Its characterization as an international financial institution has formed the premise of its distancing.

From the discussion on the traditional model of development in chapter two, the initial understanding of development was economic advancement.<sup>107</sup> This remains true in the context of the Bank because before anything else, it is an international financial institution. However, with the coming of a new understanding of development, it is argued that the Bank must be able to respond to changing realities.<sup>108</sup> The international community's understanding has evolved to cover a range of cultural, social, and political issues.<sup>109</sup> Economic advancements can no longer be construed as the Bank's purpose in isolation because it is evident that there are other countervailing human values in development that are now grounded and legitimised in social, environmental and cultural rights.<sup>110</sup> To this effect, it is possible to question the position by which the World Bank disavows human rights obligations due to their supposed deviation from its purpose. This position continues to threaten the security of human rights as it shirks the legal obligation of the Bank to respect human rights.

A broadened interpretation of development as part and parcel of the Bank's purpose ought to be accommodated in interpretation of its Articles. The modern view of development gives way for the respect of human rights to be considered necessary to attain developmental goals. If development truly ties into all facets of human life, then certainly the denial or infringement of social, cultural, and even political rights for economic pursuits by the Bank should be regarded as being in conflict with the Bank's purpose.

In closing, the adoption of the Vienna Law of Treaties in this section has challenged the obscurities that lie in the political prohibition doctrine. Through this analysis it can be seen that though the doctrine has successfully rationalised a disconnection and avoidance from human rights obligation, there is still room to challenge this rationalisation and further question the credibility of the General Counsel's interpretation. This analysis is founded on a TWAIL mindset that calls for dissatisfaction when presented with doctrines such as political prohibition that continue to validate the obstruction of human rights obligations at the expense of individuals affected by developmental projects in the Global South.

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<sup>107</sup> O' Manique J, 'Human Rights and Development', 14 *The Johns Hopkins University Press* 1, 1992, 78.

<sup>108</sup> Ball R, 'Doing It Quietly: The World Bank's Engagement with Human Rights' 34 (2) *Monash University Law Review*, 2008,340.

<sup>109</sup> Slim H, 'What is Development?', 5 *Development in Practice* 2, 2005, 143.

<sup>110</sup> Owuor M.M, 'Towards Development Justice: Re-visiting The Accountability of the World Bank and the IMF From a Right to Development Perspective', Unpublished PHD Thesis, Osgoode Hall Law School in York University, Toronto, 2020, 11.

### **3.2. PART TWO: DRAFT ARTICLES ON THE RESPONSIBILITY OF INTERNATIONAL ORGANIZATIONS**

The main international codification surrounding the topic of obligations on international organizations are the Draft Articles for on the Responsibility of International Organizations (DARIO) .This is the key international instrument concerned with the responsibility of international organizations when they perform internationally wrongful acts.

It sets out the elements that determine the wrongfulness of an act, imposes responsibility on these institutions, and sets out legal consequences for these wrongful acts.<sup>111</sup> It is modelled in a similar manner as the Articles on the Responsibility of States for Internationally Wrongful Acts. In 2002, the United Nations International Law Commission initiated discourse on the subject of responsibility of international organizations. By 2011, the Commission adopted a total of sixty-six draft articles. This section discusses DARIO -with reference to Articles 3 to 5 and their General Commentaries. This section argues that while DARIO is a step in the right direction where creation of obligation is concerned, the ambiguity and sheer opacity of these Articles makes it an unsatisfactory approach to establishing human rights obligations for the World Bank and in fact legitimize the Bank's avoidance of human rights obligations.

#### **An Analysis of DARIO**

DARIO begins by defining its scope of application in Article 1. It states that the Draft Articles apply to the international responsibility of an international organization for an internationally wrongfully act.<sup>256</sup>The scope created by this provision raises two issues of analysis that tie into the research undertaken in this dissertation:

- a) Does the World Bank qualify as an international organization capable of international responsibility under DARIO?
- b) What is an internationally wrongful act and does the violation of human rights constitute a breach of these acts?

On the first point of analysis, Article 2 defines an international organization as an organization established by a treaty or other instrument governed by international law and that possesses its

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<sup>111</sup> *Draft Articles on the Responsibility of International Organizations*, ILC 2<sup>nd</sup> Report, 2011, UN Doc A/66/10.

<sup>256</sup> *Draft Articles on the Responsibility of International Organizations*, ILC 2<sup>nd</sup> Report, 2011, UN Doc A/66/10.

<sup>257</sup> Article 2, *Draft Articles on the Responsibility of International Organizations*, ILC 2<sup>nd</sup> Report, 2011, UN Doc A/66/10.

own international legal personality.<sup>257</sup> It is easy to reconcile this issue by concluding that the World Bank is an international organization. The Articles of Agreement establish the Bank and its objects and are recognized in international law as constitutive documents responsible for forming international institutions. Undoubtedly, the World Bank falls within the scope of international organizations envisioned by DARIO. This therefore leaves the second point of analysis.

On the second issue, DARIO does little to establish what constitutes an internationally wrongful act that is attributable to an international organization. Article 4 states that there is an internationally wrongful act when the conduct consisting of an action or omission:

- a) Is attributable to that organization under international law and,
- b) Constitutes a breach of an international obligation<sup>112</sup>

This provision leaves more questions unanswered because one has to interrogate further what constitutes an international obligation whose breach would establish an internationally wrongful act. Article 2 of the Draft Articles provides no guidance as to the answer to this question in its definition of terms. Article 5 attempts to resolve this issue with little success by stating that the characterization of an international organization as internationally wrongful is governed by international law.<sup>113</sup> This means that one needs to refer to international law in order to characterize an act as internationally wrongful. This ambiguity is problematic considering questions regarding what may be considered internationally wrong and as such creating international obligation are directed to a robust and fragmented international legal order that is often characterised by conflict of doctrines, principles and norms.<sup>114</sup> The answers are therefore not clear-cut. For example, the sources of international law stated by the Statute of the ICJ include conventions, customary law and general principles recognized by civilised nations. Does it mean therefore that from all these sources, an internationally wrongful act can be established? If this is the case, then there is room to conclude that the violation of all human rights by international organizations such as the Bank, constitutes internationally wrongful acts under this provision. However, considering the many conventions establishing different rights and freedoms there is surely a lack of specificity here. The obscure nature of this provision,

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<sup>112</sup> Article 4, *Draft Articles on the Responsibility of International Organizations*, ILC 2<sup>nd</sup> Report, 2011, UN Doc A/66/10.

<sup>113</sup> Article 5, *Draft Articles on the Responsibility of International Organizations*, ILC 2<sup>nd</sup> Report, 2011, UN Doc A/66/10.

<sup>114</sup> Owuor M.M, 'Towards Development Justice: Re-visiting The Accountability of the World Bank and the IMF of the World Bank and the IMF From a Right to Development Perspective', Unpublished PHD Thesis, Osgoode Hall Law School in York University, Toronto, 2020,201.

however, means that it is not to be assumed that the breach of any duty created by international law constitutes a breach of an international obligation.

Lastly, Article 10 complicates the matter further by stating that there is breach of an international obligation by an international organization when an act of that organization is not in conformity with what is required of it by that obligation.<sup>115</sup> Once again, one cannot deduce what constitutes an international obligation and as such having a provision on the breach is not informative of what establishes an international obligation.

From a TWAIL perspective, the primary argument from this analysis is that the legal construction of DARIO legitimises accountability avoidance by the Bank. It achieves this through the shallow level of specificity in both establishing obligations as well as assigning responsibility for harmful outcomes by institutions such as the Bank. DARIO as a legal instrument for establishing responsibility gravely falls short and the effect of this is detrimental to developing countries than it is for the developed ones. This is because as long as a duty holder cannot be expressly pointed out in law, then that law has deliberated and legitimised accountability avoidance.<sup>116</sup> To this effect, DARIO is incompetent to deal with the development injustices in developing countries occasioned by institutions such as the Bank in its operations. This in itself is a form of oppression on developing countries. In closing, the abstract nature of DARIO as a legal instrument for establishing international responsibility poses a serious challenge when analysing whether a violation of human rights attracts specific liability on the Bank. What follows, therefore, is the Bank is able to legitimately and justifiably circumvent responsibilities such as human rights violations through an imprecise legal regime.<sup>117</sup>

### **3.3. PART THREE: OBLIGATION AND THE QUESTION OF ACCOUNTABILITY**

*“There is the old idea, that a body of men holding themselves accountable to nobody, ought not to be trusted by anybody.”*

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<sup>115</sup> Article 10, *Draft Articles on the Responsibility of International Organizations*, ILC 2<sup>nd</sup> Report, 2011, UN Doc A/66/10.

<sup>116</sup> McInerney-Lankford S, ‘International Financial Institutions and Human Rights: Select Perspectives on Legal Obligations’ in Bradlow D and Hunter D (eds), *International Financial Institutions and International Law*, Kluwer Law International, Netherlands, 2010.

<sup>117</sup> Owuor M.M, ‘Towards Development Justice: Re-visiting The Accountability of the World Bank and the IMF of the World Bank and the IMF From a Right to Development Perspective’, Unpublished PHD Thesis, Osgoode Hall Law School in York University, Toronto, 2020.

This last part of this chapter aims to extend this debate further by analysing the question of obligation through a lens of accountability. It is presumed in this dissertation that obscurities in human rights obligations come alive even more in the context of holding the Bank accountable for the violations of human rights of individuals in the developing countries.

This part aims to briefly analyse the question of accountability and bring out the challenges therein by answering four questions:

- a) Firstly, why is accountability a necessary principle for the Bank?
- b) Who is to be held accountable?
- c) To whom is the Bank accountable?
- d) For what is the Bank accountable?

This chapter will analyse these questions in an attempt to bring out the inherent challenge existing in defining accountability measures for the Bank.

#### **A. WHY IS ACCOUNTABILITY NECESSARY?**

This dissertation began by quoting the noble yet complex mission of the World Bank which was to realize a “*world free of poverty*”. By spearheading this dignified aim, the World Bank is currently the world’s largest development institution and therefore has significant influence as a non-state actor. The ability of the World Bank to lend huge sums of money to developing countries has resulted in its capacity to not only influence state policy but also direct the use of the resources in the projects it funds.<sup>118</sup> This means that it has the ability to impact the lives and livelihoods of peoples in the countries that it lends money. These factors undoubtedly create power dynamics between the Bank and developing countries. It is from this that the necessity of accountability is conceptualised.<sup>119</sup>

It is important to recall here the objectives of TWAIL scholarship as a critical approach to international law. TWAIL scholarship scrutinizes the role played by international law and its institutions in maintaining a hierarchical global order that sustains the subordination of the Global South by the North. Given the influence and power held by the World Bank on developing countries, it is evident that these countries are to suffer the most in the absence of

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<sup>118</sup> Naude A, *The World Bank Inspection Panel and Quasi-Judicial Oversight*, Utrecht, 2009, 165.

<sup>119</sup> Newell P & Bellour S, ‘Mapping Accountability: Origins, Contexts and Implications for Development’ Institute of Development Studies, IDS Working Paper 168, 2002, 1, <<https://opendocs.ids.ac.uk/opendocs/bitstream/handle/20.500.12413/3930/Wp168.pdf?sequence=1&isAllowed=y>>- on 16 December 2020.

distinct and direct accountability measures that hold the Bank responsible.<sup>120</sup> It therefore becomes a matter of urgency to look into the efficiency of the Inspection Panel as the Bank's internal accountability mechanism in this conversation on legal obligation. This analysis is imperative in this research because from an external accountability view point, the Bank enjoys wide immunity under the Convention on the Privileges and Immunities of the Specialised Agencies of the United Nations.<sup>269</sup> This means that it is rather difficult to have discourse surrounding its accountability in member states. For this reason, this chapter concludes by interrogating the efficacy of its internal accountability mechanism- the Inspection Panel.

### **B. WHO IS HELD ACCOUNTABLE?**

The answer to this first question is quite simple: The Bank. The Inspection Panel receives a Request from members of a community who have been aggrieved by the Bank's project.<sup>121</sup> Two issues arise when tackling this question:

Firstly, there is the issue of blurred lines in the division of responsibilities between the Bank and its Borrowers.<sup>122</sup> The Bank does not work in isolation but often joins efforts with the Borrowers' government in the implementation of these projects. What follows is that while the Bank and its Borrowers have shared responsibilities, they are often blurred in practice.<sup>123</sup> The question *who* exactly is responsible becomes less straightforward as previous practice shows a culture of the Bank and borrowing states sidestepping responsibilities in a tedious blame games as to who exactly ought to be accountable.<sup>273</sup> This is often at the expense of not only expedition of the cases but clarity of compensation of the aggrieved members.

The second challenge in this question is borrowed from a TWAIL discussion on the westernised concept of sovereignty. The practice of international law reflects a static understanding of the State as the chief duty bearer and any contrast with this, conflicts the idea of sovereignty.<sup>124</sup> It

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<sup>120</sup> Owuor M.M, 'Towards Development Justice: Re-visiting The Accountability of the World Bank and the IMF of the World Bank and the IMF From a Right to Development Perspective', Unpublished PHD Thesis, Osgoode Hall Law School in York University, Toronto, 2020

<sup>121</sup> Owuor M.M, 'Towards Development Justice: Re-visiting The Accountability of the World Bank and the IMF of the World Bank and the IMF From a Right to Development Perspective', Unpublished PHD Thesis, Osgoode Hall Law School in York University, Toronto, 2020

<sup>122</sup> Naude A, *The World Bank Inspection Panel and Quasi-Judicial Oversight*, Utrecht, 2009, 163.

<sup>123</sup> Naude A, *The World Bank Inspection Panel and Quasi-Judicial Oversight*, Utrecht, 2009, 165. <sup>273</sup> Inspection Panel Resolution,

<sup>124</sup> Owuor M.M, 'Towards Development Justice: Re-visiting The Accountability of the World Bank and the IMF of the World Bank and the IMF From a Right to Development Perspective', Unpublished PHD Thesis, Osgoode Hall Law School in York University, Toronto, 2020.

is generally held that the State ought to be the guarantor of rights and therefore any violation is also the responsibility of that state. This was also in use of the “political prohibition” provision in its Articles to disavow of human rights considerations. The justification given is that such considerations interfere with the political affairs of a State which is in conflict with the concept of sovereignty. The acceptance of this mind-set as truth has assured international organizations and mostly international financial institutions such as the Bank, are guaranteed a large degree of safety from accountability. We ought to be critical of a Westernised concept of sovereignty that neglects the power and influence international organizations such as the Bank hold over developing countries.<sup>125</sup> The lack of this critical approach poses a challenge in answering the question of *who* is accountable for human rights violations.

### C. TO WHOM IS THE BANK ACCOUNTABLE?

As earlier mentioned, the IBRD and IDA chief internal accountability mechanism is the Inspection Panel. The mandate of the Panel is to look into complaints that the rights or interests of a group of people have been or are likely to be directly affected by an action or omission of the Bank as a result of a failure of the Bank to follow its operational policies.<sup>126</sup> This is with respect to design, appraisal and/or implementation of a project financed by the Bank. Admittedly, the establishment of the Inspection Panel was a good occurrence in the international global order because for the first time the Bank gave project affected individuals access to a recourse mechanism. However, there are still major challenges of the Inspection Panel as an accountability mechanism, three of which are discussed below:

#### i) **Far from Independent**

The independence of the Inspection Panel has been a point of contention for many years.<sup>127</sup> This is because, though the Panel identifies itself as an independent arm of the Bank, its functioning is substantially if not wholesomely affected by the Bank’s Board of Executive Directors(the Board) as well as the Bank’s Management. The lack of *de facto* independence is evident in different ways:

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<sup>125</sup> Owuor M.M, 'Towards Development Justice: Re-visiting The Accountability of the World Bank and the IMF of the World Bank and the IMF From a Right to Development Perspective', Unpublished PHD Thesis, Osgoode Hall Law School in York University, Toronto, 2020.

<sup>126</sup> Naude A, *The World Bank Inspection Panel and Quasi-Judicial Oversight*, Utrecht, 2009, 167.

<sup>127</sup> Naude A, *The World Bank Inspection Panel and Quasi-Judicial Oversight*, Utrecht, 2009, 167.

Firstly, the Panel receives a Request for Inspection from Requesters-who are the aggrieved. The Panel then decides on the admissibility of the Request by assessing whether the Request has merit or it is frivolous. Even if the Panel decides that a request is admissible, the Panel has to seek approval for investigation from the Board and inform the Management of the Bank. It is only when these two are satisfied that investigations can commence. Secondly, the Panel submits an investigation report to the Board as well as the Management outlining the facts and a determination on whether the Bank has complied with all of its procedures and policies. After this, the Management responds to the findings of the report and makes recommendations to the Board by means of an action plan. The Board then deliberates on the fact-finding report and the recommendations of the Management. The reliance on approval and direction throughout the investigative process is evidentiary of a lack of independence of the Inspection Panel from the Bank.<sup>128</sup>

The challenges of independence- or lack thereof- of the Inspection Panel manifest themselves numerous times when Requests are made. In one case, there was a thermal power construction projects that had resulted in environmental degradation and forced evictions. After complaints were raised, the Board denied the Panel a right to conduct field visits. Similarly, in the *India Ecodevelopment Project of 1998* the Panel's scope of investigation was limited once more by the Board.<sup>279</sup> Though the Panel found the violation of rights of indigenous people, the Board concluded that no investigation was necessary. The challenges of independence demonstrate the limited capacity the Panel has as a recourse and accountability mechanism with regard to its independence.

ii) **Recommendations: Weak Solutions to Complex Problems**

It has been stated severally in this dissertation that it is ignorant to identify the Bank merely as an international financial institution. The Bank- specifically the IDA and IBRD- exercises a degree of influence on developing countries and impact the human rights of individuals therein. It is therefore unfortunate that the violation of human rights which is a complex and pressing issue is met by a weak solution of offering recommendations by the Panel. The problem of recommendations as a weak solution is an extension of the overarching challenge of accountability.

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<sup>128</sup> Naude A, *The World Bank Inspection Panel and Quasi-Judicial Oversight*, Utrecht, 2009, 168. <sup>279</sup> Naude A, *The World Bank Inspection Panel and Quasi-Judicial Oversight*, Utrecht, 2009, 180.

From the process outlined in the previous section, the final Board is responsible for the deliberation of findings in the investigation report submitted to the Panel, containing recommendations. The problem here is firstly, the Panel has no power to render a final decision with regard to its findings. Secondly, the lack of any binding force of the Panel means that there are no systems put in place to guarantee the follow-up of its recommendations or monitor compliance of the same. The Board's overarching authority renders the Panel's deliberations and recommendations weak solutions to the complex problem of human rights violations by the Bank. iii) **Necessity for External Accountability**

As mentioned prior, the Inspection Panel only exists as a mechanism of internal accountability for the Bank. Internal accountability means two things in this context: firstly, the Inspection Panel is an accountability mechanism functioning within structures set in place by the Bank. Secondly, it is also internal in the sense that its mandate is to monitor the compliance of the Bank with its own operational procedures.<sup>129</sup>The mandate does not extend to keeping the bank accountable for external regimes such as international human rights law, unless they directly emanate from the Bank's operational policies. The latter description of 'internal accountability' will be tackled in the next question.

#### **D. FOR WHAT IS THE BANK ACCOUNTABLE?**

In chapter one of this dissertation, it was rightly stated that you cannot account for that which you are not obligated to do. For this reason, it is essential in this analysis because even if all other challenges cited above were ideal, one would still need to interrogate '*against what*' should the World Bank's action be measured? The overarching problem of explicit human rights obligations-or lack thereof- analysed in chapter already poses a challenge to establishing distinct accountability of the Bank. This problem is exacerbated further by the limited mandate of the Inspection Panel with reference to human rights questions.

As earlier mentioned, the Inspection Panel monitors the compliance of the Bank with its own operational policies and procedures. The Operational Policies and Procedures (OPPs) function as safeguards against environmental, social, and economic risks. These safeguards function as ways to mitigate the adversarial effects of the Bank's projects. The concept of accountability in this regard is limited to finding out whether the relevant operational policies have been complied with. This paper finds two problems from this conception of accountability: firstly,

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<sup>129</sup> Naude A, *The World Bank Inspection Panel and Quasi-Judicial Oversight*, Utrecht, 2009, 167.

there is yet another problem of independence because most operational policies and procedures are issued under the authority of the President of the Bank and are discussed by the Board before they are adopted.<sup>130</sup> This runs the risk of ‘cherry-picking’ of operational policies as they are not grounded on international instruments. This therefore challenges the objectivity in answering the question; for *what* is the Bank accountable for? Furthermore, the legitimacy of this policies is questioned severally because they lack a concrete legal backing that would bind the Bank.<sup>131</sup> Therefore, even if the policies were streamlined to include human rights obligations, they are still an ineffective yardstick to keep the Bank accountable.

The second problem is that due to the limited scope of reference on the Inspection Panel, the unfortunate reality is it does not monitor or seek compliance with human rights. The Inspection Panel has no human rights mandate and therefore is not a human rights compliant body. The denial of this jurisdiction- through delimitations present in Operations Policies and Procedures- renders the Panel a weak mechanism for tackling the intergation of human rights in development.<sup>283</sup> The Inspection Panel only investigates the Bank’s compliance with the OPPs with the view that they provide the necessary safeguards against any cultural, environmental and social risks. By having this as the threshold of accountability, the Panel seldom references any compliance with human rights. Such a threshold is therefore completely detached from a model of accountability that is fashioned by human rights. From a TWAIL perspective, the delimitation of the Panel represents accountability evasion that is rooted in the structure and framework of the Bank. The conception of accountability that is hinged on reference to only internal policy frameworks ultimately hinders project affected parties in developing countries from building claims that are founded on human rights law. This is an unfortunate reality especially because Requests brought before the Panel often involve indigenous peoples’ rights, rights to property, displacement and environmental claims all which as core socio-economic rights protected by different international treaties.

Although the Bank has admitted the relevance of human rights in development, it has yet to fully grasp and internalise them as yardsticks through which compliance in monitored by the Panel. As mentioned, the establishment of the Inspection Panel was celebrated by virtue of its

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<sup>130</sup> Bradlow D & Naude F, ‘The Operational Policies of the World Bank and the International Finance Corporation Creating Law-Making and Law-Governed Institutions?’ 1(3) *International Organizations Law Review*, 2013, 4.

<sup>131</sup> Bradlow D & Naude F, ‘The Operational Policies of the World Bank and the International Finance Corporation Creating Law-Making and Law-Governed Institutions?’ 1(3) *International Organizations Law Review*, 2013, 4.

novelty and ability to hold the World Bank responsible. However, from the above analysis it is evident though it emerged out of necessity, it still constitutes a deficient tool to combat the gravity of development injustices occasioned by the Bank.

## **CONCLUSION**

This Chapter aimed to analyse and highlight how different legal instruments both in international law and within the structure of the World Bank are problematic in so far as they maintain a lack of clear human rights obligations on the World Bank. It is argued in this chapter that the maintenance of this status quo has contributed to the Bank's culture of violating human rights in developing countries and going unchecked. The body of international law and its organizations continues to exercise domination over the Global South through rationalisation of doctrines, laws and institutions that are inherently hegemonic in so far as they distance the Bank from human rights obligations. This chapter has analysed how such domination is seen in the obscurities that surround the attachment of human rights obligation to the World Bank. In light of this the next chapter attempts to propose, from a *TWAILIAN* lens, how International law can be used creatively to challenge these obscurities.

## **4. CHAPTER FOUR: CHALLENGING THE OBSCURITIES SURROUNDING HUMAN RIGHTS OBLIGATIONS ON THE WORLD BANK**

From the previous chapter, the question of human rights obligations was analysed from different perspectives. Firstly, the political prohibition doctrine was discussed and its connection to obscuring human rights obligations. Secondly, the author analysed the DARIO and concluded that it constituted an insufficient mechanism to attach human rights obligations on the Bank. The final part looked at human rights from an accountability lens from which further shortcomings of the Inspection Panel were unearthed.

With the concerns analysed in the previous chapter, this chapter aims to look into creative ways through which the debate on obligation can be resolved. This is premised on the previous TWAILIAN discussion that it is extremely problematic for the World Bank to operate in an ‘anarchy’ where human rights obligations are concerned. For this reason, this Chapter attempts an analysis of human rights obligations as being incumbent on the Bank by virtue of its status in international law.

### **4.1. HUMAN RIGHTS OBLIGATIONS AND THE WORLD BANK AS A SUBJECT OF INTERNATIONAL LAW**

The International Court of Justice in the case of the *Reparations for Injuries Suffered in the Service of the United Nations*, put to rest any doubt as to the status of international organizations in international law.<sup>132</sup> When addressing the United Nations, the honourable Court firstly held that international organizations have legal personality capable of instituting claims in their own right. More notably the dispute between the World Health Organization and the Arab Republic of Egypt solidified that other than having separate legal personality, international organizations are subjects of international law that are bound by- other than their constitutive agreements- the international agreements to which they are parties and lastly, general rules of international law.<sup>133</sup> The rational follow-up to this question is whether human rights obligations fall within the ambit of general rules of international law to which international organizations can be held liable and accountable.

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<sup>132</sup> *Reparations for Injuries Suffered in the Service of the United Nations (Advisory Opinion)* [1949] ICJ Rep 174, 179.

<sup>133</sup> Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt, Advisory Opinion, I.C. J. Reports 1980, 73 at 89-90.

This chapter intends to briefly discuss this question and concludes that though there is semblance of hope within this framework, its uncertainty still necessitates explicit intergation of human rights obligations on the Bank. Nonetheless, its analyses the nature and extent of legal obligation on the Bank as a subject of international law.

#### **4.1.1. Can Human Rights Obligations on the World Bank be found in its Status in International Law?**

The above question poses an unsettling debate with regard to the obligations envisioned by the ICJ on international organizations such as the World Bank as. This contention is aggravated further in scenarios like that of the World Bank, whereby it relies on its Articles of Agreement to circumvent human rights obligations, as discussed in the previous chapter.

As a starting point, the ICJ has recognised as seen above, that international organisations possess international legal personality by virtue of this they are bound by any ‘obligations incumbent upon them under general rules of international law.’<sup>134</sup> One author justifies the ICJ’s holding further by stating that since international organizations are a creature of international law no case can be pleaded on their superiority over international law.<sup>135</sup> Moreover, the Bank as an international institution is a creation of its member states which are bound by international law and in this case international human rights instruments. As such these member states should not be able to evade these laws by the fact that they are acting collectively.<sup>324</sup> This dissertation extends this justification further from a TWAIL angle by stating that member states with influential positions within the Bank are undoubtedly the developed and more powerful countries such as the United States and European countries. If these countries are individually bound by international law but still exercise high degrees of influence in the global community, it should not be justified for them to evade international obligations when they act collectively through institutions such as the World Bank.

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<sup>134</sup> Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt, Advisory Opinion, I.C. J. Reports 1980, 73 at 89-90.

<sup>135</sup> Ball R, ‘Doing It Quietly: The World Bank’s Engagement with Human Rights’ 34 (2) *Monash University Law Review*, 2008,347. <sup>324</sup> Ball R, ‘Doing It Quietly: The World Bank’s Engagement with Human Rights’ 34 (2) *Monash University Law Review*, 2008,347.

From the above context, this chapter attempts to answer the above question by looking into international law and analyse the extent to which human rights obligations can apply to the Bank.

## 4.2. INTERNATIONAL CONVENTIONS

International Conventions are treaties that act as ‘contracts’ between actors in the global community and therefore bind the parties to the treaty.<sup>136</sup> The difficulties associated with international conventions and international organisations is that the central subject of these conventions has always been the state. In practice, this can be seen in the fact that Bank has neither signed nor ratified any human rights treaties.<sup>137</sup> This is perhaps fuelled by its emphatic characterisation solely as an international financial institution and as such human rights treaty are not within its scope of operation. However, this dissertation has argued numerously that this is not the case in light of the development injustices and human rights violations it occasions in developing countries. Therefore, it cannot be stated that human rights treaties are wholly extraneous to the Bank’s practice.

One treaty that is appropriate in this discussion is the United Nations Charter. The World Bank is a specialized agency of the United Nations by virtue of Article 57 which states that the various specialised agencies have wide international responsibilities and are brought into relationship with the United Nations in accordance with the provisions of Article 63.<sup>138</sup> The relationship between the Bank – both the IDA and IBRD- and the United Nations is governed by their respective Relationship Agreements by virtue of Article 63 of the Charter.<sup>139</sup><sup>140</sup><sup>141</sup> The

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<sup>136</sup> Ciorciari J, ‘The Lawful Scope of Human Rights Criteria in World Bank Credit Decisions: An Interpretive Analysis of the IBRD and IDA Articles of Agreement’ 33 (2) *Cornell International Law Journal*, 2000,355.

<sup>137</sup> Ball R, ‘Doing It Quietly: The World Bank’s Engagement with Human Rights’ 34 (2) *Monash University Law Review*, 2008,347.

<sup>138</sup> Article 57 and 63, United Nations, *Charter of the United Nations*, 24 October 1945, 1 UNTS XVI.

<sup>139</sup> Article 63:

<sup>140</sup> . “*The Economic and Social Council may enter into agreements with any of the agencies referred to in Article 57, defining the terms on which the agency concerned shall be brought into relationship with the United Nations. Such agreements shall be subject to approval by the General Assembly.*”

<sup>141</sup> . *It may co-ordinate the activities of the specialized agencies through consultation with and recommendations to such agencies and through recommendations to the General Assembly and to the Members of the United Nations”*

Relationship Agreements, which are quite identical, define the affiliation between the Bank and the Charter.<sup>142</sup>

Firstly, the Agreement confers on the Bank a high degree of independence. It states that

*“The United Nations recognizes that the action to be taken by the Bank of any loan is a matter to be determined by the independent exercise of the Bank's own judgment in accordance with the Bank's Articles of Agreement. The United Nations recognizes, therefore, that it would be sound policy to refrain from making recommendations to the Bank with respect to particular loans or with respect to terms or conditions of financing by the Bank.”*<sup>143</sup>

This provision shows that the UN acknowledges that decisions regarding its loans are arrived to out of independent exercise of the Bank's judgement and as such refrains from interfering in this capacity. Some scholars have relied on this article to conclude that this provision therefore frees the Bank from abiding by legal obligation to abide by the UN Charter principles.<sup>331</sup> The opposition to this argument is that the above provisions merely constitute a functional independence of the Bank rather than explicit removal of legal duties that bind the World Bank to the UN Charter and its principles.<sup>144</sup> This argument finds is backed by the reading of Article 2 of the Agreement which states that the Bank possesses wide responsibilities as defined in its Articles in economic and related fields that operate within meaning of Article 57 of the Charter of the United Nations. Article 2 suggests that though the Bank operates independently, it must do so within the bounds of the Charter.

The UN Charter further speaks to the responsibility of the World Bank through a reading of Article 59 and 55 of the Charter. Article 59 grants power to the UN to establish specialised

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<sup>142</sup> Agreement between the United Nations and the International Bank for Reconstruction and Development, GA Res 124(II), UN GAOR, UN Doc A1349 (15 November 1947) ('Relationship Agreement') and : Agreement on Relationship between the United Nations and the International Development Association, 582 UNTS(II) 394 (entered into force 27 March 1961).

<sup>143</sup> Art. 4, Agreement between the United Nations and the International Bank for Reconstruction and Development, GA Res 124(II), UN GAOR, UN Doc A1349. <sup>331</sup> Ciorciari J, 'The Lawful Scope of Human Rights Criteria in World Bank Credit Decisions: An Interpretive Analysis of the IBRD and IDA Articles of Agreement' 33 (2) *Cornell International Law Journal*, 2000,359.

<sup>144</sup> Ball R, 'Doing It Quietly: The World Bank's Engagement with Human Rights' 34 (2) *Monash University Law Review*, 2008,348.

agencies in order to achieve the goals set out in Article 55 of the Charter. Article 55 of the Charter expresses the responsibility of the UN to promote:

*“A. higher standards of living, full employment, and conditions of economic and social progress and development;*

*B. solutions of international economic, social, health, and related problems; and international cultural and educational cooperation; and*

*C. universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion.”*<sup>145</sup>

Article 55 enunciates and affirms the importance of human rights and their respect to the centrality of the UN system. To this effect it ought to be acknowledged, at the very least, that the observance of human rights is given a very high importance in the UN and there is room to expand this importance to its specialised agencies. The World Bank was created by UN members who are bound by the Charter, more specifically Article 55 provisions on the universal respect for and observance of human rights and fundamental freedom. It is unlikely that this provision remains inconsequential to the Bank.<sup>146</sup> With this in mind, there is at the very least room to allude to the fact that the Bank ought to act in accordance with the UN Charter objectives and purposes, including the respect and observance of human rights.

### **4.3. ERGA OMNES OBLIGATIONS**

Erga Omnes Obligations are a common subject of discourse in international law. They emanated from the *Barcelona Traction, Light and Power Co Ltd* case which involved a dispute between Belgium and Spain. In this case the International Court of Justice stated that there are obligations that transcend domestic obligations and apply *erga omnes* which is interpreted to mean ‘*applying to all*’.<sup>147</sup> It stated that such obligations emanate from contemporary international law that outlaw acts of aggression and genocide and from principles concerning the basic rights of the human person, giving the examples of slavery and racial discrimination. The debate emanates from this point. From the Court’s statement, it is undisputed that international organizations ought to comply with *erga omnes* obligations as they are part of the

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<sup>145</sup> Article 55, United Nations, *Charter of the United Nations*, 24 October 1945, 1 UNTS XVI.

<sup>146</sup> Ball R, ‘Doing It Quietly: The World Bank’s Engagement with Human Rights’ 34 (2) *Monash University Law Review*, 2008,348.

<sup>147</sup> *Barcelona Traction, Light and Power Co Ltd (Belgium v Spain) (Second Phase)*, ICJ Reports 1970,33-4.

international community. However, there is contention as to what constitutes an *erga omnes* obligation.

On one hand there are those who support the idea that the Courts' orbiter must be taken to mean human rights generally and not the cited acts of aggression, genocide, and racial discrimination exclusively.<sup>148</sup> They argue that Court's inclusion of '*basic rights of the human person*' intended to cover the whole spectrum of human rights conclusively. Further, principles that concern the basic rights of the human person can be derived from the robust network of human rights treaties that have been widely ratified in regional and universal capacities.<sup>149</sup> It can be argued, therefore, that projects undertaken by the Bank that compromise the basic rights of the human person constitute a default of *erga omnes* obligations of the Bank as a subject of international law, created by the *Barcelona Traction* case.<sup>150</sup>

On the other hand, there are those that argue that the Court's dictum did not constitute a conclusive test on how to identify an *erga omnes* obligation.<sup>151</sup> When stating that *erga omnes* obligations can be found in '*principles of basic rights of the human person*', the Court alluded to the fact that there are those rights that entered the body of general international law, while others were specifically conferred by international treaties.<sup>152</sup> The lack of specificity here makes it hard for one to conclude that all human rights fall within scope of *erga omnes* obligations. The openness has left room for different interpretations on a subjective level.

From the above discussion, it was not intended that as subjects of international law, international institutions ought to operate in a '*lawless*'. From the Court's orbiter dictum, *erga omnes* obligations were owed by the international community as a whole and intended to protect and promote the basic values and common interests of all. However, the openness of the *erga omnes* doctrine renders it a problematic stance for establishing human rights obligations on international institutions. With specific reference to the Bank, the first part of the chapter already cites challenges present in the Bank's interpretation of its Articles. The

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<sup>148</sup> Ball R, 'Doing It Quietly: The World Bank's Engagement with Human Rights' 34 (2) *Monash University Law Review*, 2008, 344.

<sup>149</sup> Rodley N, 'Is There General International Human Rights Law?' EjiTalk, 16 October 2014 - < <https://www.ejiltalk.org/is-there-general-international-human-rights-law/> > on 15 December 2020.

<sup>150</sup> Ball R, 'Doing It Quietly: The World Bank's Engagement with Human Rights' 34 (2) *Monash University Law Review*, 2008, 344.

<sup>151</sup> Tams C, *Enforcing Obligations Erga Omnes in International Law*, Cambridge University Press, Cambridge, 2005, 118.

<sup>152</sup> Tams C, *Enforcing Obligations Erga Omnes in International Law*, Cambridge University Press, Cambridge, 2005, 119.

reliance on “*secondary sources*” such as the unsettled debate of the *erga omnes* principle, does little to contribute to the security of human rights for people impacted by World Bank operations especially in relation to the respect of these rights.

#### **4.4. GENERAL PRINCIPLES OF INTERNATIONAL LAW**

The last argument made in this Chapter is by looking at the Bank’s duty to respect human rights as a general principle of international law. General Principles of international law are a legitimate source of law under the *Statute of the ICJ* and therefore the remaining question would be whether international human rights fall within general principles of international law. This debate has been interrogated by the European Court of Justice which held that though the international organization in question was not directly bound by the European Convention of Human Rights, it was bound to respect basic human rights as they formed part of the general principles of international law.<sup>153</sup> In a subsequent case, the Court also held that fundamental rights form an integral part of general principles of law.<sup>342</sup> Though the scope of the European Court of Human Rights is largely defined by its continental jurisdiction, these two cases speak to the possibility that human rights can fall within the ambit of general principles of international law to which international organizations such as the World Bank ought to comply with.

Author Ernst-Ulrich Peterman argues that given the high number of states which have signed treaties and obligations that deal directly with human rights, coupled with the intergation of human rights in many domestic constitutions, he analyses that human rights have ‘become part of the general principles of law which are recognized by civilised nations.’<sup>154</sup> To this effect, the Bank by virtue of its international legal personality has an obligation to respect human rights. This is a similar reasoning to supporters of the *erga omnes* inclusion of human rights as earlier mentioned.

#### **CLOSING REMARKS**

This chapter set out to analyse the extent to which the international law can shed light on the obscurities surrounding human rights obligations and the World Bank. Though an uphill task,

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<sup>153</sup> *Advisory opinion of 28 March 1996 of the European Court of Justice on Accession by the Community to the European Convention for the Protection of Human Rights and Fundamental Freedoms.* <sup>342</sup> *Wachauf v Germany, European Court of Human Rights, (1989).*

<sup>154</sup> Petersmann E, ‘Time for a United Nations Global Compact for intergating Human Rights into the Law of Worldwide Organizations: Lessons from European Intergation,’ 13 (1) *European Journal of International Law*, 2002, 621.

this chapter has analysed that there are aspects of international law that can be navigated to establish human rights obligations on the World Bank. Furthermore, it would seem that international law, legal commentary and case law has placed focus not on whether there exists an obligation to respect human rights under international law but the extent to which his obligation applies. This Chapter concludes, from a TWAIL perspective, by stating that even the smallest nuances of establishing human rights obligations must be considered as valuable and worth expanding for developing countries to enable them to derive any redress for the development injustices occasioned by the Bank in their territories.

## **5. CHAPTER FIVE: FINDINGS, RECOMMENDATIONS, AND CLOSING REFLECTIONS**

### **5.1. FINDINGS FROM THE DISSERTATION**

This dissertation was motivated by the recognition that there exist legal, structural, and operational gaps in the World Bank that have made human rights obligations an evasive concept by the Bank. The overarching finding of this dissertation is that the current existing obligation requirements as well as accountability regimes are not well adapted to ensure the respect of human rights.

Chapter One of this research gave an expansive background of this research by painting the picture of development injustice. As an institution tasked with developmental functions, it gave instances where the Bank, in carrying out its functions evidently affects the enjoyment of human rights in developing countries. For this reason, it set out to investigate whether the current institutional structure as well as international law regime is well-adapted to place human rights obligations that would hold the Bank accountable for these development injustices.

Chapter Two advanced TWAIL as the conceptual framework for this research. TWAIL was a suitable tool of reference as it provided a lens through which the subject of human rights obligations was analysed. It premised this research on the fact that obscurities of the Bank's legal obligations are consequential of the general hegemonic character of international law and its institutions. By employing it as a framework this dissertation was able to conclude that the current opacity of human rights obligations on the Bank are a form or legitimising the avoidance of, disconnection from and ultimately obstruction of accountability of the Bank.

Chapter Three delved into investigating the nature and extent of the Bank's legal obligation to respect human rights in its operations. This was done by analysing the political prohibition doctrine, DARIO and the Inspection Panel as legal instruments that speak to the Bank's obligations and duties. Through employing the Vienna Convention on the Law of Treaties, this the author challenged the maintained position by the Bank's General Counsel that the human rights are extraneous to the Bank due to their political nature and non-economic character. Secondly, this chapter delved into analysing DARIO as a legal instrument responsible for

establishing international legal obligation. This investigation revealed that its non-specificity and need for secondary reference makes it deficient in establishing human rights obligations that can address development injustices occasioned by the Bank. Lastly, this chapter investigated the Inspection Panel as the internal accountability mechanism of the Bank. From this three main conclusions were drawn. Firstly, that the Panel's lack of independence renders it affects its ability to effectively address development injustices. Secondly, its reliance on Operational Policies and Procedures that do not make direct reference to human rights challenges the extent to which it can create human rights accountability on the Bank. The last finding was that its method of redress which are recommendations, neither Bind the Bank nor offer sufficient amends to project affected parties. The above findings led the author to conclude that the nature and extent of human rights obligations on the bank is obscure, narrow and insufficient to combat the development injustices in the Global South. Through this obscure nature, they have successfully legitimised and rationalised an avoidance of responsibility by the Bank.

Chapter Four set out to find ways in which, despite the shortcomings of Chapter Three, human rights obligations can be placed on the Bank. This Chapter engaged sources of international law such as case law, international conventions, norms such as erga omnes obligations and general principles of international law. Through this investigation, the author concluded that there is room to interpret that the Bank indeed has human rights obligations that it owes its member countries.

## **5.2. RECOMMENDATIONS**

From the challenges brought out in previous chapters, these are the recommendations proposed by this dissertation

### **a) Integration of Human Rights Obligations into the IDA and IBRD Articles of Agreement**

The author starts by admitting that the IBRD and IDA Articles of Agreement have stood the test of time since the formation of these institutions. However, it ought to be recognized that the world has not remained static and as such the Articles should not either. The IBRD no longer occupies a position a "saviour" from the aftermath of war. It has instead evolved into an economic "saviour" of sovereign states still healing from the aftermath of colonization and

marginalization by the very countries that were salvaged from war. Through this, these institutions occupy an influential position -in the global order that gives them the ability to impact the realization of fundamental rights and freedoms.

In light of this, this dissertation recommends that human rights are explicitly intergated as considerations in the Articles of Agreement. It has been seen in previous chapters that the Articles are the first source of rebuttal when confronted with human rights questions. This dissertation holds, that if anything is to change in the way the Bank interacts with human rights, there has to be an explicit commitment by the Bank to respect human rights. The defence of this recommendation is threefold:

First, even if the international regime for responsibility is streamlined, the respect of human rights is so pertinent to the human person that it ought to be included in the main constitutive agreement on any institution that has the ability to affect these rights.

Secondly, this intergation of human rights consideration -particularly the respect thereof, is realistic in so far as it does not transform the objectives of the Bank. Recalling the tripartite language of human rights, the duty to respect constitutes a negative obligation and as such will not interfere with the Bank's ability to carry out its main objective of lending. The final defence is that the recommendation is realistic and achievable in so far as it will still interact with the Operational Policies and Procedures put in place. The goal is not to say that there will not be risks of violations as assessed by these policies for example displacement. The goal is to ensure that once the risks are assessed, the respect of human rights is an overarching theme and consideration as to how or whether to advance that particular project.

Lastly, it is important to note that though the legal rules of interpretation were employed in analysis in this dissertation, the prerogative of interpretation with regard to the World Bank rests on the General Counsel- an institution within the Bank. It is therefore important that this intergation is explicitly done by restructuring either the '*political prohibition*' clause to exclude respect for human rights considerations grounded in international human rights law treaties or the clause on '*non-economic considerations*' to exclude the same.

### **b) Developing a more suitable and Specific International Regime for Responsibility of International Institutions.**

One of the ways of tackling the question of obligations is by developing a more suitable regime for tackling the responsibility of international organizations for internationally wrongful acts. From the challenges posed by the obscurity of DARIO, the following recommendations are made:

Firstly, the Draft Articles should begin by defining an ‘internationally wrongful act’ with a contextual understanding of the roles played by international organizations in their different capacities. This will better achieved by giving specific definitions in Article 4. Recalling Article 4 of DARIO which states that there is an internationally wrongful act when the conduct consisting of an action or omission is attributable to that organization under international law and constitutes a breach of an international obligation.

The Articles ought to define what constitutes an international obligation and include international human rights as obligations established by different international human rights treaties. Furthermore, over and above the conduct or omissions as constituting a breach of international obligations, the Draft Articles ought to include wrongfulness occasioned by policies and rules imposed by the Bank. This is to ensure that even when the implementation of a project falls within the responsibility of a state, one can establish indirect accountability of the Bank where the project’s rules and policies were already in violation of human rights.

### **c) Reforming the challenges of internal accountability within the World Bank**

When it comes to the reformation of internal accountability within the World Bank, the author proposes the following:

Firstly, it is a matter of necessity that internal accountability is not restricted to mean the monitoring of compliance with internal operational policies only. Compliance ought to be measured against external yardsticks, and more specifically universal human rights standards and conventions that explicitly protect the fundamental rights and freedom of the human person.

Secondly, it is imperative to secure the independence of the Inspection Panel to make it an effective recourse mechanism for Requesters seeking redress for harms by the Bank. This will be done firstly, by diminishing the role played by the Board in the investigative process. The Board of the Bank is an administrative organ with the interests of the Bank at heart. Its role in accountability should therefore be diminished, if not done away with, if there is to be any independence in the process of investigation. Secondly, the role of the Board should also be done diminished in relation to the recommendations put forth by the Panel. This would make the Panel recommendations binding, making it a better and more effective internal accountability mechanism.

The final recommendation is that the Inspection Panel ought to extend its jurisdiction to preliminary stages of a project. This recommendation means that the Bank should be obliged to report the lines of responsibility established between itself and the borrowing state in a project, to ensure clarity in determining who is responsible for what. This prevents the ongoing back and forth present when establishing liability.

### **5.3. CONCLUSION**

The debate on obligation does not end here. It is- and ought to be- an ongoing dialogue led by scholars in developing countries. Through this, universalised goals such as development are analysed critically; with an aim of placing obligations on those like the World Bank who claim to secure it. For years, concepts such as development have been unfavourably skewed by the West in the name of globalisation. By so doing, developing countries continue to maintain their position in the hierarchical global order that has persisted for years. The onus therefore falls on developing countries to ask the important questions that hold powerful institutions such as the World Bank accountable. This is to achieve an even greater goal of resisting this new age of recolonization that manifests itself in international law and its institutions. It must start with the denial of Westernized concepts such as development as being gospel truths. Through questioning accountability and obligation requirements for powerful institutions such as the World Bank, a step is advanced in ensuring the security of the human person, his rights and freedoms in the Global South. It is for this reason that such discourse - where the right questions are asked- must be spearheaded in developing countries out of the recognition that, whoever frames the question, wins the debate.

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