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## THE WORLD BANK GROUP OPERATIONS IN CONFLICT AFFECTED STATES AND THE RUGGIE PRINCIPLES: AN OPPORTUNITY FOR ACCOUNTABILITY<sup>1</sup>

OPERAÇÕES DO BANCO MUNDIAL EM ESTADOS AFETADOS  
POR CONFLITOS E OS PRINCÍPIOS RUGGIE: UMA  
OPORTUNIDADE PARA A PRESTAÇÃO DE CONTAS

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### Abstract

In spite of the efforts that both States and International Institutions have carried out to prevent Human Rights abuses related to development activities, the results obtained have not completely fulfilled the expectations. In fact, in some cases, they have contributed to weaken the delicate balance in conflict-affected areas, increasing poverty and marginalization. Indeed, the WBG activities in Fragile and Conflict States face several challenges regarding the implementation of the UNGPs and their analysis is crucial in the improvement of social risks linked with Banks operations in conflict-affected areas. To this regard, the present paper analyses the system created by the WB to avoid Human Rights violations and how it can be influenced by the UNGPs. The author has divided the WBG system in two structural elements: Operational Policies and the Bank Risk Assessment analyzing. At the same time the paper face the issue of the immunity regarding human rights violations.

### Keywords

World Bank Operational Policies. Human Rights and Business. Grievance Mechanisms. Access to Remedy. Compliance Bodies. Judicial and Non-Judicial remedy.

### Resumo

Apesar dos esforços que tanto os Estados como as Instituições Internacionais têm realizado para prevenir os abusos dos Direitos Humanos relacionados com as atividades de desenvolvimento, os resultados obtidos não têm correspondido completamente às expectativas. De fato, em alguns casos, eles contribuíram para enfraquecer o delicado equilíbrio nas áreas afetadas pelo conflito, aumentando a pobreza e a marginalização. De fato, as atividades do Banco Mundial em Estados frágeis e em situação de conflito enfrentam diversos desafios em relação à implementação das UNGP e sua análise é crucial para a melhoria dos riscos sociais ligados às operações dos Bancos em áreas afetadas por conflitos. Neste sentido, o presente documento analisa o sistema criado pelo BM para evitar violações dos Direitos Humanos e como pode ser influenciado pelos UNGPs. O autor dividiu o sistema do BMG em dois elementos estruturais: Políticas operacionais e a análise da Avaliação de Risco do Banco. Ao mesmo tempo, o documento enfrenta a questão da imunidade em relação às violações dos direitos humanos.

### Palavras-chave

Políticas Operacionais do Banco Mundial. Direitos Humanos e Empresas. Mecanismos de denúncia. Acesso a Remédios. Órgãos de Compliance. Remédios Judiciais e Não Judiciais.

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## 1. INTRODUCTION

Given the expansion of the globalization phenomenon, the largest enterprises of the industrialized countries started to invest significant quantities of resources in overseas territories. These extraterritorial investments, usually sponsored by the International Financial Institutions (among them the World Bank), produced several conflicts related to all kinds of productive activities, often affecting the fundamental rights of the actors involved. According with Non-Governmental Organizations (NGOs), ethnics groups, Civil Society and academia, the increased number of complaints against the World Bank Group is due to adverse environmental and social impacts caused by investment projects. This situation is particularly delicate in conflict-affected areas, where the risk of Human Rights abuses is higher.

As it is well known, the World Bank Group (hereinafter WBG) has supported a process aimed at fighting against extreme poverty, enhancing good global governance, promoting gender policy, economic prosperity and sustainable development. In particular, for the WBG, Fragile and Conflict States (hereinafter FCSs) are a key priority. Its poverty-fighting mission faces several challenges, including weak Governments, corruption, political instability, and often ongoing violence or the legacy of past violence. According to the WBG, indeed, addressing poverty and development in conflict-affected situations is fundamental to reach the objective of ending extreme poverty by 2030. This is demonstrated also by the 'World Development Report 2011: Conflict, Security and Development', that called for a paradigm shift in the development community's approach to fragile and conflict-affected situations, based on the premise that violence and other constraints cannot be resolved by short-term or partial solutions in the absence of institutions that provide security, justice, and employment.

According to the WBG data,<sup>2</sup> it is estimated that 32 percent of the world's poor will be living in fragile and conflict-affected situations by 2015, which account for: (i) a third of deaths from HIV/AIDS; (ii) a third of people who lack access to clean water; (iii) a third of children who do not complete primary school; and, (iv) half of all child deaths. Since 2000, the International Development Association (IDA) - the World Bank's Fund for the poorest - has provided over US\$22 billion in post-conflict reconstruction assistance to FCSs. IDA supports FCSs by providing interest-free financing and the requested know-how to rebuild institutions and economies. Since 2000, IDA has provided more than US\$22 billion for supporting fragile and conflict-affected States, among other initiatives, helping immunize 10 million children and providing prenatal care to 1.5 million women, also providing US\$4 billion in debt relief. To date, the Bank has created several specialized institutions, such as its specialized conflict unit, namely the 'Center on Conflict, Security and Development' (CCSD). Nonetheless, Human Rights abuses are still ongoing.

Despite of the international efforts, in recent years NGOs, ethnics groups, and Civil Society have started to denounce the negative impacts and the related Human Rights violations produced by WBG's investment projects. The activist movements retain that, in spite of the efforts that both States and International Institutions have invested to prevent Human Rights abuses related to development activities, the results obtained have not completely fulfilled the expectations. In fact,

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<sup>2</sup> See World Bank Group, *FCS Countries Are a Key Priority for the World Bank*. Available at [web.worldbank.org](http://web.worldbank.org); see also, World Bank Group, *Country results supported by the Bank*, The World Bank Results 2013, last visit May 2014.

in some cases, they have contributed to weaken the delicate balance in conflict-affected areas, increasing poverty and marginalization. Usually, on one side, Low-Income States (LIS) and FCSs suffer the damage produced by the Bank's activities, and, on the other side, they are obliged by international agreements to guarantee the continuity of the project, causing a direct impact on citizens and communities.

For example, a recent Human Rights Watch Report demonstrates how the World Bank infrastructure projects in the Ethiopian Western region of Gambella have provoked serious Human Rights violations. In particular, the Ethiopian Government has started the so-called *urbanization program*, which consists in forced relocation of some 1.5 million indigenous and other marginalized people in new villages<sup>3</sup>. Furthermore, one of the most relevant cases regarding Human Rights violations linked to the World Bank's operations is the Chad Cameroon Pipeline Project, (GARYL & REISCH, 2005, p.4) in which both FCSs - Chad and Cameroon - agreed to a bilateral treaty that provided for the construction and operation of the pipeline and other oil transportation facilities. The projects produce several environmental and social damages. Furthermore, WBG projects have provoked several problems (complaints for gross HR violations), especially related to the extractive sector, affecting labor rights of employees in the Central African Republic and South Sudan. In 2013 the International Finance Corporation (IFC)<sup>4</sup> and the South Sudan's Government (Africa's newest country) are partnering to generate investment opportunities in the country, and are encouraging public-private dialogue around health, energy, water, and sanitation projects. As a consequence, the Government is developing an infrastructure investment plan that will devote \$500 billion over the next five years to promote infrastructure development in order to fill the huge infrastructure gap.<sup>5</sup> IFC is also investing for strengthening the legal framework and the national institutions that support country's private sector, including the Chamber of Commerce and Business Forum. However, Human rights violations in South Sudan, linked with oil companies and human rights abuses, continue. In particular, NGOs have denounced that South Sudan's Government has used the roads, bridges and airfields built by the oil companies as a means for launching attacks on civilians. Some reports of company executives are not clear in regard to reported government attacks on civilian targets, including aerial bombing of hospitals, churches, relief operations and schools. Undoubtedly, concerns about the investment conducted by multinational enterprises -and managed by the IFC- in human rights abuses in Sudan and South Sudan remain.<sup>6</sup>

## 2. NEW BUSINESS AND HUMAN RIGHTS FRAMEWORK

Given the appointment in 2005 of the UN Secretary-General's Special Representative for Business and Human Rights, Prof. John Ruggie, and the following adoption by the UN Human Rights Council of the UN Framework 'Protect, Respect and Remedy' (2008), the endorsement of the UN

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<sup>3</sup> Human Right Watch, *Abuse-free development: How the World Bank Should Safeguard Against Human Rights Violations*, 2013. Available at: <http://www.hrw.org>

<sup>4</sup> IFC, a member of the World Bank Group, is the largest global development institution focused exclusively on the private sector.

<sup>5</sup> U.S. Chamber of Commerce. *Investment Climate Update: South Sudan* (Vol. 2 No 3. September 2011) Available at [www.uswwwchamber.com](http://www.uswwwchamber.com) last visited (16 May 2014).

<sup>6</sup> Human Rights Watch, Sudan, Oil, and Human Rights. Available at [www.hrw.org](http://www.hrw.org) last visited (16 May 2014).

Guiding Principles on Business and Human Rights (hereinafter UNGPs)<sup>7</sup> in March 2011 could be considered as the first and most effective international initiative in this field. Among the most relevant innovations introduced by this instrument, it is worth mentioning the important principles to be followed by States and enterprises, contained in the three UNGPs pillars: (a) the State duty to protect against Human Rights abuses by third parties, including business; (b) the corporate responsibility to respect Human Rights; and (c) a greater access by victims to effective remedy, both judicial and non-judicial. Additionally, the framework suggests four fundamental principles regarding conflict-affected areas that can be summarized as follows: (a) engaging at the earliest stage possible with business enterprises to help them identify, prevent and mitigate the Human Rights-related risks of their activities and business relationships; (b) providing adequate assistance to business enterprises to assess and address the heightened risks of abuses, paying special attention to both gender-based and sexual violence; (c) denying access to public support and services for a business enterprise that is involved in gross Human Rights abuses and refuses to cooperate in addressing the situation; and, (d) ensuring that their current policies, legislation, regulations and enforcement measures are effective in addressing the risk of business involvement in gross human rights abuses. Furthermore, these prescriptions suggest methods and procedures for multinational enterprises and States, and have been welcomed by the International Community as an expression of a wider international consensus for Sustainable Development and Human Rights-Based Model.<sup>8</sup>

Against the circumstances explained above, the WBG activities in FCSs face several challenges regarding the implementation of the UNGPs, and their analysis is crucial in order to improve social risks linked with Banks operations in conflict affected areas. On this achievement the study of the system created by the WB to avoid Human Rights violations in conflict-affected areas and how it can be influenced by the UNGPs is essential.

Mainly, the system can be divided in two structural elements: the first one is a legal framework known as the Operational Policies (hereinafter OPs) typically established as parameters of conduct for operations, the Operational Policies of the World Bank Group operates as internal rules seeking the accountability of the Banks activity. Despite their internal character, the OPs are now widely disseminated and disclosed outside the Bank's system, strengthening their role as benchmark to assess the social and political risks linked with the Bank's lending activities and addressing not only the internal behavior of the institution, but also the borrower State performance at public and private level. These policy instruments could be considered as a binding norm applicable to the entire supply chain of the operation and influence all the stakeholders involved in lending activities. Furthermore, they have been adopted as benchmark for accountability by other International Institutions and States. (DE FEYTER, 2002, p.12), (SHIHATA, 1992), (PALACIO, 2006). The second structural element making part of the Bank Risk Assessment System is arranged in two institutional/procedural bodies able to investigate allegations of non-compliance with the Operational Policies. The most representative bodies on this respect are: the Inspection Panel and the CAO Ombudsman.

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<sup>7</sup> United Nations, Human Rights Office of the High Commissioner, Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework, (A/HRC/17/31, 21 March 2011).

<sup>8</sup> See the OECD Guidelines for Multinational Enterprises; the International Labor Organization (hereinafter ILO) Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy; the UN Global Compact; the EU Strategy on Corporate Social Responsibility.

Taking into account the considerations expressed previously, the present paper will explore On one hand, the issue of the Bank immunity and the role of the compliance bodies *versus* the Third Pillar content (access to remedy), namely the problem of granting access to justice for victims. On the other hand, the paper will conduct a comparative analysis between the corporate responsibility to respect Human Rights provided by the UNGPs Second Pillar and the *WBG Operational Policies*.

## 2.1 THE WB AND THE HUMAN RIGHTS DEBATE AS CONTEXT

During the 1960s, the International Community condemned several States and International Organizations for their involvement in Human Rights violations. The South African Government, for example, was deeply criticized for its apartheid policies, whilst Portugal was censored for its refusal to implement the '*Declaration on the Granting of Independence to Colonial Countries and Peoples*' and for its repressive policies in Angola and Mozambique. In this context the WBG was required to fulfill several recommendations from the UN regarding loans to States involved in Human Rights violations. Explicitly, the UN recognized that it would "*refrain from making recommendations (...) with respect to particular loans or terms and conditions of financing by the WBG*".<sup>9</sup> The Bank asserted its independence from the UN General Assembly by ignoring several UN resolutions calling on international financial institutions to refrain from granting assistance to certain countries on human rights grounds. The World Bank disregarded the General Assembly recommendations for a short period, but eventually stopped lending to rogue Countries basing on economic considerations. It was during this period that the Bank began to include some Human Rights policies and activities in its policy, such as the introduction in 1970 of poverty alleviation programs and several initiatives related to women rights. Since the early 1980s, the Bank elaborated some guidelines for ensuring that displaced populations and indigenous peoples could benefit from Bank projects and for mitigating the potentially adverse effects of development plans (HERNANDEZ, 2001, p.205).

Since its very beginning, the institution has traditionally considered Human Rights as a concept not explicitly included in its development mandate, arguing that Human Rights imply political concerns. Indeed, according to law, the lending process includes rules prohibiting the Bank's involvement in political situations.<sup>10</sup> In the 1990s, the debate about the political considerations of a Human Rights approach ended, since the Bank realized that the success of its projects was tied to stable governmental institutions in borrowing Countries. With the aim of overcoming the apparent legal constraints imposed by the Articles of Agreement, the Bank justified its incursion into the political sphere as a mean to create more market-friendly institutions. This realization prompted the Bank to adopt the notion of good governance to support intervention in political affairs avoiding Human Rights issues. Indeed, the Bank defined the problem of development in terms of 'crisis of governance' including (implicitly) political matters. According to the Bank's own definition, governance encompasses: (i) the form of political regime; (ii) the process by which authority is exercised in the management of a country's economic and social resources for development; and, (iii) the capacity of governments to design, formulate and implement policies and discharge functions.

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<sup>9</sup> Agreement between the United Nations and the International Bank for Reconstruction and Development, Nov. 15, 1947, art I(2) 16 U.N.T.S. 346. See also Agreement between the United Nations and the International Development Association, Mar. 27, 1961, 394 U.N.T.S. 222; Agreement between the United Nations and the International Bank for Reconstruction and Development (Acting for and on Behalf of the International Finance Corporation) Feb. 20, 1957, 256 U.N.T.S. 314.

<sup>10</sup> International Bank for Reconstruction and Development Article of Agreement. Art. IV, Sec. 10.



This situation deeply changed in 1998 when the WBG published the '*Development on Human Rights: the Role of the World of the World Bank*', recognizing that Human Rights are a fundamental part of development. In 1999, the WBG adopted the '*Comprehensive Development Framework*' to provide poverty reduction strategies in each borrowing Country. With the adoption of the '*Millennium Development Goals*' in 2000 many development organizations, particularly UN agencies (among them the WBG) shifted to a Human Rights-based approach to development. Nevertheless the adoption of an explicit Human Rights framework from the WBG Board of Directors, it has not been endorsed yet, the WBG legal mandate has not changed and, based on its own interpretative powers, the Bank retains that the provision does not ban itself from financing Human Rights-related projects, nor does it suggest that the Bank should enjoy impunity when involved in Human Rights violations. Furthermore, the *exegesis* would allow the Bank to do not refuse assistance to borrower Countries involved in Human Rights violations (HERNANDEZ, 2002: p. 177-178) (HEAD, 2007, p.17) (BRADLOW & HUNTER, 2002).

In the attempt to define its mandate, the Bank's Board of Directors argues that any activity that has a direct, preponderant and clear effect on the Country's economic development prospect could be treated as falling within its economic mandate - as articulated in Article 1 of the Articles of Agreement - although such activities have clear political dimensions. The Bank, indeed, satisfies the legal requirement and fulfills new economic matters as a scope of its responsibility. Conversely, the interpretation language used by the Board is ambiguous and its *exegesis* has facilitated misunderstandings and lack of coherence.

In this respect, scholars retain that the Bank has clear international duties regarding Human Rights and as a consequence, it has to respect, protect and promote them, considering these prescriptions as part of the Bank's mandate.

Moreover, they stressed that, due to the Bank's subsequent practice, its OPs contain a variety of binding provisions on environmental and social assessments, protection of cultural property and development cooperation and conflict. Finally, they affirm that Human Rights issues pertain to the economic sphere in terms of sustainable development (BRODNIG, 2002). From another point of view, the Rights-Based Model for Development and the Right to Development are not yet enshrined in any international convention, neither in the Bank's Articles of Agreement. However, as it has widely accepted by the current international practice of development, the concept of sustainable development based on the respect of Human Rights and their integration in economic, environmental and social concerns have created new legal parameters.

It is thus clear that the Bank's has faced human rights as an instrument to be used depending on its decision-making process. As a consequence, the Human Rights framework is used more as a tool to prevent eventual social or environmental risks (which results economically disadvantageous) in the development strategy, than as a legal parameter to be respected. In the following words, Ana Palacio, Senior Vice President and General Counsel of the Bank, allow us to understand this approach:

The challenge we now face is to clarify how these legal concepts (human rights obligations in areas that fall within its mandate) should be specifically incorporated into the work of the Bank in order to further its mission of sustainable and equitable development, taking into account the following general considerations: First, many areas of Bank activity have a human rights dimension.(...) Second, there is a need for recognition of the role of human rights as legal principles (...) Third, there should be a clear understanding that in certain

cases and under certain circumstances, human rights generate actionable legal obligations (...). From an internal perspective, the Bank's analytical work can benefit from a systematic inclusion of human rights considerations and the broadened range of legal analysis these require. Areas such as governance or the legal empowerment of the poor are particularly relevant in this respect. (...)(PALACIO, 2014).

Regardless of the Bank approach through Human Rights and its link with the concept of development, in substantive ways they occupy many of the same sectors or spheres of operation, and in certain types of procedures development bear distinct similarities to human rights. For these reasons, and looking for a better way to improve its mandate, the Bank has taken several measures to address social issues in its operations; nevertheless, if we carefully compare the entire landscape of the Banks' measures in avoiding social risks with the outcomes obtained to date, the resulting conclusions are not encouraging.

## 2.2 THE ISSUE OF THE IMMUNITY AND THE UNGPS' THIRD PILLAR

As it has widely accepted by international doctrine and jurisprudence, an accountable system of protection of human rights needs to guarantee the access to justice for victims that have suffered harms through both judicial and non-judicial mechanisms, able to guarantee an effective remedy (reparation, restitution, truth telling and guaranties of non-repetition). Indeed, the international system of protection entrusts this important task, firstly through the national judicial systems, guaranteeing the best remedy opportunity to individuals. As a subsidiary tool, the system foresees international judicial and non-judicial mechanisms in the attempt of addressing national misunderstandings. The most representative examples in this field have been endorsed by the UN: this institution has contributed to provide more accessible judicial remedies worldwide, through quasi-judicial treaty monitoring bodies which are mandated to deal with individual complaints as well. Furthermore, the United Nations Human Rights Committee (UNHRC) sets out an authoritative interpretation regarding Article 2 of the International Covenant on Civil and Political Rights ICCPR, namely: "*the state party has undertaken, to ensure to all individuals within its territory and subject to its jurisdiction, the rights recognized in the Covenant, and to provide an effective and enforceable remedy in case a violation has been established*". Following the same theoretical perspective, the concept has been explicitly recalled within the foundational principle endorsed by the UNGPs in the Third Pillar (Access to Remedy):

As part of their duty to protect against business-related human rights abuse, States must take appropriate steps to ensure, through judicial, administrative, legislative or other appropriate means, that when such abuses occur within their territory and/or jurisdiction those affected have access to effective remedy. (UN, 2011)<sup>11</sup>

Furthermore, regarding the conflict affected areas, the UNGPs are clear. This international legal instrument suggests that States ensure that business enterprises operating in those contexts were not involved with such abuses, including by: (a) engaging at the earliest stage possible with business enterprises to help them identify, prevent and mitigate the human rights-related risks of their activities and business relationships; (b) providing adequate assistance to business enterprises

<sup>11</sup> United Nations, Human Rights Office of the High Commissioner, Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework. Op cit. Art. 25.

to assess and address the heightened risks of abuses, paying special attention to both gender-based and sexual violence; (c) denying access to public support and services for a business enterprise that is involved in gross human rights abuses and refuses to cooperate in addressing the situation; (d) ensuring that their current policies, legislation, regulations and enforcement measures are effective in addressing the risk of business involvement in gross human rights abuses. Depending on circumstances, business enterprises may need to consider additional standards. For instance, in armed-conflict situations, enterprises should respect the standards of international humanitarian law.

Despite the UN effort, the term “access to justice” as a right is not commonly used in legal international terminology, and is not expressly used in international legal instruments. Its identification differs from one scholar or judge to another. However, both international doctrine and jurisprudence have pointed out several issues regarding its crucial role referring to victims of mass atrocities. On the basis of legal provisions, “access to justice” has generally been understood as a source of several interrelated rights, such as the right to effective access to a dispute resolution body, the right to fair proceedings, the right to a timely resolution of disputes, the right to adequate redress and the principles of efficiency and effectiveness. Over time, the concept has undergone several alterations, and depending on the legal culture of the State and the region where both courts or international rules operate, and on the power of the regional compliance bodies, its theoretical structure changes from one international court or treaty to another. Despite the access to justice is universally considered so far as a fundamental individual right, the activities and operations of the World Bank Group enjoy jurisdictional immunity before national and, consequently, international courts.

According to the majority of the doctrine, the main reason for protecting international organizations from unwarranted pressure by their member States – and in particular the WBG – is enabling the Bank to fulfill its functions independently (BROHMER, 2012), (BENEYTO, 2013, p.9). Considering the Bank’s immunity, regarding in particular the IDA activities, it poses an important gap within the commitment for the UNGPs’ implementation. The international duty to remedy human rights abuses collides with the WBG immunity, while States do not have any legal possibility to guarantee access to justice for victims of the Bank’s operations.

It has been properly established by international jurisprudence that both States and International Organizations, as subjects of International Law, have the duty to respect human rights norms. However, scholars stress that when immunity of international organizations is granted - although only for the effective fulfillment of their functions (*functional immunity*) - or is subject to other restrictions, it has to be interpreted widely, granting *de facto* an absolute immunity. (BROHMER, 2012) Undoubtedly, applying justice to international organizations, even in case of such serious violations, could be particularly problematic since the alternative accountability mechanisms available to States (including suit in national courts and internal political accountability) are not available for international Organizations. Indeed, strong arguments exist in favor of removing international organizations’ immunity in the event of gross human rights violations (BROHMER, 2012) (BENEYTO, 2013, p.9).

In particular, the World Bank immunity allows the Bank and its staff to avoid domestic and internal legal suits. When a borrower-country joins the Bank Articles of Agreement it recognizes in its



internal law privileges and immunities for Bank staff. In addition, Bank's staff may also receive additional protection through a host-country agreement or through the UN Convention on the Privileges and Immunities of the Specialized Agencies. According with Article IX, Section 31 of the UN Convention the Bank's organizations, by virtue of their status as specialized agencies of the United Nations, are not subject to the judgment of domestic courts. Internal judicial bodies, indeed, have no jurisdiction in the settlement of disputes between private parties and these international financial institutions, unless the immunity has expressly been waived in respect to the claim or qualified by a special rule contained in the charters of the organization concerned or another relevant international instrument, such as a headquarters agreement. This obligation applies to the International Bank for Reconstruction and Development (IBRD), the International Development Association (IDA), and the International Finance Corporation (IFC) (RUTSEL, 2012, p.113).

The Bank constituent instruments (Articles of Agreement) contain provisions with regard to judicial process, immunity of assets from seizure, immunity of archives, freedom of assets from restrictions, privilege for communications, immunities and privileges of officers and employees, immunities from taxation. The Articles of Agreements provide also that each Member State must take such action in order to make effective - in terms of domestic law - the principles set forth in the Article on privileges and immunities.<sup>12</sup> These privileges and immunities protect the Bank as an entity from most claims of liability. Similarly, Bank staff receives privileges and immunities that protect the officials from liability for any duties carried out by them. The Bank enjoys immunity from every form of legal process. In fact, it is not allowed to bring any action against the Bank by any agency, entity or individual. To do it, the Bank has its own special procedures for the settlement of controversies between the Bank and any other national subject. Property and assets of the Bank shall, whosoever located and by whomsoever held, be immune from all forms of seizure, attachment or execution, before the delivery of final judgment against the Bank.<sup>13</sup>

### 2.3 THE STATE ATTEMPTS FOR ACCOUNTABILITY

Recently, despite of the apparent absolute immunity of the Bank, the 2nd Senior Assistant Judge's Court of Dhaka in Bangladesh addressed the issue of the World Bank legal immunity in Bangladesh, arose with a court case issued by Ismet Zerin Khan, a Bangladeshi national former employee of the World Bank.<sup>14</sup> She challenged the Bank's decision not to confirm her probationary appointment on the grounds of abuse of discretion and failure to apply the staff rules. She exhausted all the internal administrative grievance recourses of the World Bank, including the appeals committee and the administrative tribunal. The suit's matter mainly refers to the internal administrative practices of the World Bank towards its own employees. In April 2002, the World Bank filed an objection under Order 7 Rule 11 Civil Procedure Code (Bangladesh) for rejecting the complaint, claiming for the immunity. However, in May 2003, the 2nd Senior Assistant Judge's Court of Dhaka rejected the World Bank's claim for legal immunity and decided to proceed with the hearing of the case. The World Bank then filed a revision petition to the High Court Division of the Supreme

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<sup>12</sup> World Bank Group, Privileges and Immunities. Available at: [www.worldbank.org](http://www.worldbank.org). Last visit (March 13, 2014).

<sup>13</sup> Ibid.

<sup>14</sup> Bangladesh Working Group on International Financial Institutions and Trade Organizations, The World Bank And The Question Of Immunity. (Vol.1 No.1 September 4, 2004) available at: [www.unnayan.org](http://www.unnayan.org). Last visit (March 15 2014).

Court of Bangladesh and was successful in obtaining a stay order for a period of six months.<sup>15</sup> This case did not end with the proceedings in Dhaka. However, on the critical issue of immunity, the court observed that: “No Establishment Agreement existed between the World Bank and Bangladesh”. The court also determined that the provision of immunity is in opposition to the Constitution of Bangladesh and that immunity in this setting is fundamentally contrary to the spirit of the Constitution. As to the merits, the court ruled that the plaintiff was entitled to be reinstated and received arrear salaries and benefits. In this way, the Bangladeshi State ignores a final decision (*res judicata*) of the World Bank Administrative Tribunal. This ruling is unprecedented, and it illustrates why domestic courts begin to erode the principle of immunity of the Bank. However, to date there are not internal legal suits against the Bank regarding serious human rights violations.

Usually States, when acceding to treaties, often accept corresponding dispute settlement mechanisms of judicial or quasi-judicial nature. One of the areas where it occurred is the protection of human rights. As it has been noted above, international organizations, in particular the World Bank Group, are usually not signatories of human rights treaties, hence also not subjected to the corresponding dispute settlement mechanisms. This has been illustrated in Behrami and Saramati case before the European Court of Human Rights. The case concerned a group of children encountering undetonated NATO bombs that killed a boy and caused serious injuries. In this case, the Court declined its jurisdiction *ratione personae* and attributed the conduct to the involved member States, which failed in protecting human rights, since the alleged violation of human rights was attributed to an international organization not subject to international accountability mechanisms. The Bank has not been involved in any suit in international Courts so far (BENEYTO, 2012).

Despite the efforts, the access to justice for victims linked with Banks’ operations in both national and international courts is far from effective. The *de facto* total immunity of the Bank is undoubtedly an enormous obstacle to the commitment to the UNGPs Third Pillar. Furthermore, the question about the harmonization and enhancements of the National Action Plans<sup>16</sup> referring to projects and activities financed by the Bank remains.. Finally, the pressing of the international community and CSOs in searching for a change has forced the Bank to address its own conduct through the creation of internal grievance mechanisms that - as it will be fully explained - even if it embodies a step forward for Bank accountability it has not completely fulfilled the expected standards established by the Ruggie principles.

### 3. THE COMPLIANCE BODIES OF THE WBG ARE NOT ENOUGH TO GUARANTEE THE THIRD PILLAR PRINCIPLES

According to the UNGPs, the term ‘grievance mechanism’ is used to indicate any routinized, State-based or non-State-based, judicial or non-judicial process through which grievances, concerning business-related human rights abuse, can be raised, and remedy can be sought.<sup>17</sup> Furthermore, Art. 26 of the quoted document endorsed the Non-State Based Grievance Mechanisms, suggesting the

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<sup>15</sup> Ibid.

<sup>16</sup> The UN Working Group strongly encourages all States to develop, enact and update a national action plan on business and human rights as part of the State responsibility to disseminate and implement the Guiding Principles on Business and Human Rights.

<sup>17</sup> United Nations, Human Rights Office of the High Commissioner, *Guiding Principles on Business and Human Rights: Implementing the United Nations ‘Protect, Respect and Remedy’ Framework*, Commentary of the Third Pillar, pp. 27, op cit.

creation of tools for facilitating the access to effective non-State-based grievance mechanisms dealing with business-related human rights harms.

On the attempt to investigate allegations of fraud, corruption, and ensure compliance with its OPs, the World Bank has set up several mechanisms able to investigate allegations of staff misconduct and non-compliance with the Operational Policies. The most representative bodies are: the Inspection Panel, the CAO Ombudsman, the Department of Institutional Integrity (INT) and the Operations Evaluation Department (OED).

As far as conflict-affected States concerns, the IDA<sup>18</sup> is specifically supported by the Inspection Panel created in 1993 to ensure to individuals the access to a quasi-independent body able to heard complaints and seek recourse.

### 3.1 THE INSPECTION PANEL: A GRIEVANCE MECHANISMS?

The Inspection Panel is a quasi-independent compliance mechanism for individuals and communities who have been, or are likely to be, adversely affected by a IBRD/IDA-funded project. The Panel is composed of three members from different countries, selected for their experience in development and their independence and integrity. Each member serves a non-renewable five-year term.

Despite the effort in granting independency and impartiality, the Inspection Panel is not a compliance mechanism working outside of the Bank sphere; indeed, it reports to the Bank's Executive Board, although it is independent by the World Bank management.<sup>19</sup>

The process begins when more than one Stated/borrower citizen (Requesters) retains to be affected by one or more activities linked with a bank's operation. The Requesters may submit a complaint to the Panel (Request for Inspection). Through a process, the Panel assesses whether the Bank has complied with its policies and procedures and whether any non-compliance action has contributed - or may contribute in the future - to the harm described in the Request. Once the Panel has received and registered a Request, the Bank Management has the opportunity to provide an initial response, which generally focuses on the compliance with the relevant Bank policies in the specific project. The Panel then examines the eligibility of the Request for a full investigation. If the Panel decides that the Request is eligible, it sends a recommendation for a full investigation to the Board of Executive Directors, which traditionally agreed with the Panel's recommendations without interference in the Panel's work.

Once the investigation is completed, the Panel sends its final report with findings to the Board and to the Bank Management. The Management, in consultation with the borrower and – more often - also with the Requesters and the affected populations, responds to the Panel's final report providing some recommendations and an action plan. The latter usually lays out the process by which the project should be brought into compliance and the needed operational corrections. The Board takes a decision on the next steps basing on both the Panel Report and the Management's Response.

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<sup>18</sup> The International Development Association (IDA) supports fragile and conflict-affected states by providing interest-free financing and the knowledge needed to rebuild institutions and economies, and by putting in place the building blocks people need to resume peaceful and productive lives. Since 2000, IDA has provided more than \$28.5 billion in support for fragile and conflict-affected states addressing and resolving.

<sup>19</sup> World Bank Inspection Panel, How to file a request for inspection to the World Bank inspection panel general guidelines. Available at: [ewebapps.worldbank.org](http://ewebapps.worldbank.org). Last visit (Mar 28, 2014).

The Panel's methodology for an investigation includes field work, fact finding, verification, public meetings, interviews with affected people and Bank operations staff, and review of relevant project documents and policies. The Panel process also provides opportunities for constructive interaction between the Requesters and the World Bank, with the aim of problems to the benefit of all parties involved. All the reports released, including the initial complaint, are public, but the identities of the Requesters remain confidential if they request so.

### 3.2 CHALLENGES OF THE INSPECTION PANEL

Despite the effort of guaranteeing the accountability of Bank activities, several concerns regarding its capabilities remain. In an important Panel's report,<sup>20</sup> the analysts have identified the issue of human rights gross violations in relationship to Bank policies and to Requesters. In the words of the Inspection Panel, the "*requesters (who are often poor and marginalized and lack a voice in the political process) are often at risk of retaliation, intimidation, or even imprisonment.*"<sup>21</sup> Indeed, recent researches have demonstrated that Requesters have suffered not just retaliation, intimidation, or even imprisonment, but often torture, degrading and inhuman treatments and extrajudicial killing.<sup>22</sup>

The Panel has been concerned that this risk may threaten the integrity of the its process and has sought alternative ways to alleviate the risks, such as developing strict provisions for maintaining the confidentiality of Requesters when needed. However, the Panel does not mention the problem that Requesters have on regards of the Bank's agents: some denounce made by several NGOs, indeed, remarks the lack of transparency and the ineffectiveness of the Bank regarding its own agents. This problem is probably due to the fact that the Panel and CAO's mandates could not be extended to issues relating to procurement of goods or services, fraud and corruption. All the issues related to suspected fraud or corruption, to misprocurement in a World Bank-supported project, or to Bank staff misconduct in relation to allegations of fraud and corruption should be reported to the Bank's Fraud and Corruption Body.

The quoted report identified two key challenges on the achievement of Bank's accountability. The first one refers to a more accessible Panel process for affected people. On this particular issue, indeed, the UNGPs endorsed the idea that the access to effective remedy has both procedural and substantive aspects and, as a consequence, non-judicial mechanisms should consider as tools for addressing any imbalances between the parties of business-related human rights claims and, any additional barrier faced by individuals, groups or populations at heightened risk of vulnerability or marginalization. The gaps identified by the Inspection Panels' Report include the role of stakeholders and could be resuming as follows: 1) the Bank Management has not yet sufficiently lived up to its mandate of increasing awareness about the Panel work. 2) The Panel has to investigate the dynamics of a project and the problems faced by the complaining citizens, such as: is the situation going to improve or will it stays the same or get even worse? In some cases, the Panel has broken ground by promoting problem solving between the Management and the Requesters, to help mediate less

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<sup>20</sup> World Bank Inspection Panel, "*Accountability at the World Bank, the inspection panel at 15 years.* Available at: [ewebapps.worldbank.org](http://ewebapps.worldbank.org). Last visit (Mar 28, 2014. pp.47-55).

<sup>21</sup> Ibid (pp. XI).

<sup>22</sup> Human Right Watch, *Abuse-free development: How the World Bank Should Safeguard Against Human Rights Violations 2013.* Available at: [www.hrw.org](http://www.hrw.org).

contentious cases and lead to an earlier resolution of community concerns or policy compliance problems. 3) The Requesters do not always have access to information during the Panel process because of certain disclosure restrictions.<sup>23</sup>

### 3.3 THE COMPLIANCE ADVISOR/OMBUDSMAN (CAO) IMPROVEMENT

As it is well known, the CAO is a quasi-independent grievance mechanism of the International Finance Corporation (IFC) and the Multilateral Investment and Guarantee Agency (MIGA), the private sector lending arms of the World Bank Group. CAO's mission is to address complaints filed by people affected by IFC/MIGA projects and to enhance the social and environmental accountability of both institutions. Established in 2000 CAO carries also out an ombudsman role by attempting to mediate disputes between companies, governments, and civil society organizations. As private lending arm, the CAO eventually faces complaints against enterprises operating in Conflict-Affected Areas as Cambodia, Colombia and Ukraine.

A remarkable difference between the Inspection Panel and CAO is the additional missions of Ombudsman and Dispute Resolution body entrusted to the CAO. While the Inspection Panel carries out, mainly, compliance functions, the CAO performs mediation and conciliation. Regarding its dispute resolution function or Ombudsman role, the CAO addresses the complaints through a previous dispute resolution process, by providing a mechanism through which the project affected communities can engage directly with the IFC/MIGA client (private project operator), in order to address concerns related to the environmental and social impacts of an IFC/MIGA project. If parties choose dispute resolution, CAO helps them to design and implement flexible and collaborative processes, aimed at seeking mutually agreeable solutions to the issues raised in the complaint. This may involve, among others, mediation, assisted dialogue, or joint fact finding. CAO also monitors the implementation of any actions and agreements reached. If parties are unable to resolve their concerns through dispute resolution, the case is transferred to CAO Compliance.<sup>24</sup> Finally, its Advisory Function is directed to the IFC/MIGA Senior Management and the President of the Bank; the advisory reports are typically disclosed publicly. The CAO Advisor provides advice in relation to broader environmental and social policies, guidelines, procedures, strategic issues, trends, and systemic issues.<sup>25</sup>

However, this particular delegation's power makes CAO closer to the UNGPs' definition of grievance mechanism, although the CAO activity faces several problems. After several analyses conducted by internal and external experts, the most common problems of CAO's operations can be synthesized as information/transparency issues, non-decisional participation and reason-giving practices. Normally, the information/transparency gap deals with communities affected by IFC/MIGA projects, that are often unaware of the IFC/MIGA's involvement and of the existence of CAO as a resource for conflict resolution. The second transparency problem is the lack of disclosure of both CAO and IFC/MIGA to the public. The CAO only publishes the results of Compliance audits once the president of the World Bank Group has cleared them. CAO transparency would be enhanced and this

<sup>23</sup> World Bank Inspection Panel, "Accountability at the World Bank, the inspection panel at 15 years, pp.47-55.cit.

<sup>24</sup> See Compliance Advisor Ombudsman, *Operational Guidelines 2006*. Available at: [www.cao-ombudsman.org](http://www.cao-ombudsman.org). Last visit (April 11, 2014).

<sup>25</sup> For further information regarding the CAO process and functions see: Ibid.



type of problem would be reduced if CAO publicly released preliminary drafts of audit reports, when completed. The IFC also suffers from a lack of timeliness in information disclosure. According to its disclosure policy, project information is to be publically released before a project receives final approval of funding from the IFC Board of Directors, but after the IFC has determined that the client can be expected to conduct the project consistent with the Performance Standards. This implies that the information disclosure is made only after significant preliminary planning work in which has occurred lack of awareness of IFC/MIGA involvement, along with delayed or non-existent disclosure of documents that hinders the CAO's ability to employ its transparency policies to promote greater responsiveness. Further, the non-decisional participation and reason-giving requirements that CAO has implemented cannot fully impact the situation of disregard, unless the "disregarded" is aware of and has access to CAO (SAPER, 2012, p.1321).

As far as Human Rights concern, several NGOs and CSOs, having the same critical approach to the Inspection Panel, agree on the fact that the CAO staff has not adequately assessed and responded to the risk of violence and forced evictions in the investment, in violation of the internal rules. Indeed, several times CAO has affirmed that, eventually, the IFC and MIGA staff had underestimated the risks related to security and land conflicts, and had not undertaken an adequate due diligence, even though the situation around the project and the risks had been raised publicly. Nor did IFC project staff inform other IFC specialists about such environmental and social risks and the possible problems occurring. Generally, enterprises involved in grave Human Rights violations have conducted, facilitated, or supported forced evictions of farmers and violence (including multiple killings), that occurred because of inappropriate use of private and public security forces under enterprises control or influence.<sup>26</sup>

One of the most recalling criticisms made to the Banks operations is the lack of coherence in the identification of the rules to be observed. Systematically, CAO and the Inspection Panel consider that the Bank staff failed to comply with its own rules (Operational Policies) due to a wide degree of discretion in interpreting the rules. In fact, the lax application of rules within the Banks Operations raises serious questions about how the institution ensures their enforcement, particularly regarding environmental and social issues and in high risk contexts. Nevertheless the results obtained to date show that the institutional rules on the matter are both optional and inappropriate; the Bank relies on its Operational Policies to protect human rights and the environment.

#### **4. THE OPERATIONAL POLICES ON THE LIGHT OF THE UNGPS: WHY THE OPERATIONAL POLICIES ARE RULES TO BE CONSIDERED AS HUMAN RIGHTS ADDITIONAL STANDARDS IN THE UNGP FRAMEWORK**

The problem of 'tailored' Human Rights rules to enterprises activities represents a challenge in the current debate; the Ruggie Principles, indeed, considered human rights as governed by sources, or legal systems, completely different one from the other: from the Universal Declaration of Human

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<sup>26</sup> See. Human Rights Watch, *World Bank Group: Inadequate Response to Killings, Land Grabs, Ombudsman Finds Honduras Palm Oil Investment Violates Key Policies*, Jan 10, 2014; See also. *World Bank Group: Project Critics Threatened, Harassed, Jailed Prevent, Respond to Reprisals*, June 22, 2015; *World Bank: Address Ethiopia Findings Response to Inquiry Dismissive of Abuses*, Feb, 23 2015; *World Bank: No Probe of Link to Abuses in Uzbekistan, Decision on Forced Labor 'Shocking,' Rights Advocates Say*, Feb, 2, 2015 Available at [www.hrw.org](http://www.hrw.org), last visited, Jan 13 2015.

Rights to numerous international conventions directly or indirectly related to human rights, from regional Conventions - such as the European one - to national systems, the issue of the rules applicable remains always an interpretative task.<sup>27</sup> The pragmatic intent of the UNGPs to clearly identify and limit the sources - or rather the texts containing the rules applicable to business - does not completely solve the problem. In fact, throughout history, principles and rules relating to human rights have diversified and multiplied. To date, the situation is very complex and therefore difficult to understand and manage. Undoubtedly, the situation turns out harder when the analysis regards the identification of rules currently ruling enterprise activities and policies applied to avoid social or environmental risks rather than Human Rights standards. The rise of new approaches aiming at mediating between risks assessment systems and human rights is, indeed, one of the most important aims of the entire Human Rights and business movement. On that regards, the UNGPs clearly endorse the State Duty to protect, by affirming: *"States must protect against human rights abuse within their territory and/or jurisdiction by third parties, including business enterprises. This requires taking appropriate steps to prevent, investigate, punish and redress such abuse through effective policies, legislation, regulations and adjudication."*<sup>28</sup> Furthermore, the UN soft law instrument explains:

States may breach their international human rights law obligations where such abuse can be attributed to them, or where they fail to take appropriate steps to prevent, investigate, punish and redress private actors' abuse. While States generally have discretion in deciding upon these steps, they should consider the full range of permissible preventative and remedial measures, including policies, legislation, regulations and adjudication (UN, 2011).<sup>29</sup>

In this context, the Operational Policies of the World Bank Group could represent the core scope of the analysis aimed at better defining Bank's accountability under the UNGPs provisions, such as: *"States also have the duty to protect and promote the rule of law"*.<sup>30</sup>

The legal instrument also pointed out a deontological parameter on the evaluation of the standards when it suggests that the rule of law can be guaranteed *"by taking measures to ensure equality before the law, fairness in its application, and by providing for adequate accountability, legal certainty, and procedural and legal transparency"*.<sup>31</sup>

In conclusion, the need of inquiry about the fairness, equality before the law, legal certainty and procedural transparency of the World Bank Operational Policies still remain.

#### 4.1 WBG OPERATIONAL POLICIES

Originally drafted as an internal policy to guide the Bank staff on the management of risks linked with operations, the OPs are now widely spread within the institution. and their performance helps the mitigation of negative social and environmental impacts from the adverse effects of Bank-financed operations, by providing guidelines for the Bank and borrower staffs in the identification,

<sup>27</sup> Ruggie tries to solve the problem by making explicit reference to: the Universal Declaration of Human Rights; the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights; the most relevant Conventions aiming at the protection of labour, promoted by ILO – International Labour Organization (Declaration on Fundamental Principles and Rights at Work) and the ILO Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy

<sup>28</sup> United Nations, Human Rights Office of the High Commissioner, Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework, Article 1, Cit.

<sup>29</sup> Ibid, Commentary to the Article 1, pp. 3.

<sup>30</sup> Ibid.

<sup>31</sup> Ibid.

preparation, and implementation of programs and projects. The OPs require that the Bank acts in case of development policy lending will cause “*significant poverty and social consequences*” or “*significant effects on the country’s environment, forests, and other natural resources*”. By the Banks perspective “*the effectiveness and development impact of projects and programs supported by the Bank has substantially increased as a result of attention to these policies*”. In addition, the policies have often provided a platform for the participation of stakeholders in project design, and have been an important instrument for building ownership among local populations” (WORLD BANK GROUP, 2014).<sup>32</sup>

The OPs operate as laws adopted by the Bank’s Management, creates a structured process wherein the Executive Directors determine the broad outlines and the organization is responsible for the details. The Policies follow the Bank’s Articles of Agreement, the general conditions and the policies approved by the Board. In many cases they also describe the circumstances under which exceptions to policy are admissible and spell out who authorizes the exceptions.<sup>33</sup>

Both groups of rules underscore the importance of managing environmental and social performance throughout of the development of a determinate project. Moreover, they have an own methodology of implementation by which the institutions apply an Environmental and Social Management System (ESMS) by engaging the client, workers, local communities directly affected by the project and other stakeholders. These rules are usually internal; however, they are now widely disseminated and disclosed outside the Bank, which strengthens their role as benchmark to assess the Bank lending activities.

Nowadays, the Bank is reviewing the original safeguards to update and improve them. Consultations with stakeholders are integral to the review process. However, many CSOs asked for a broader consideration by the Bank during the first two worldwide consultation rounds (2013 and 2014). Following each consultation phase, the Bank released new ESMS drafts, respectively in July 2014 and in July 2015.

Bank policies are not international legal rules; nevertheless they may enter into the international legal order through the loan agreements (international treaty signed by the Bank and the borrower State) related to the Bank finance projects. These policy instruments influence other international institutions and States which have introduced some of their features into their own legal order (ABDELWAHAB, 1999, p.292) (SHIHATA,1994).

The OPs are codified in the Operational Manual of the Bank, which includes also several directives. The determination ‘OP’ can be applicable also to the Bank Procedures (BPs), the Good Practices (GPs), the Operational Directives (ODs) and the Operational Memorandum (Op. Memos). More precisely, the OPs related to environmental and social impacts are known as Safeguards Policies<sup>34</sup> (hereinafter Safeguards): they consist of ten key environmental and social guidelines that

<sup>32</sup> World Bank Group. *Safeguard Policies*. Available at: [www.worldbank.org](http://www.worldbank.org). Last visit (Jan 20, 2014).

<sup>33</sup> World Bank Group, *Definitions in* [www.worldbank.org](http://www.worldbank.org). Last visit (March 4 2015).

<sup>34</sup> The safeguards could be resuming as follows: OP 2.30 Development Cooperation and Conflict, OP 4.01 Environmental Assessment, OP 4.04 Natural Habitats, OP 4.07 Water Resources Management, OP 4.09 Pest Management, OP 4.10 Indigenous Peoples, OP 4.12 Involuntary Resettlement, OP 4.20 Gender and Development, OP 4.36 Forestry, OP 7.30 Dealings with De Facto Governments, OP 7.50 Projects on International Waterways, OP 7.60 Projects in Disputed Areas and OP 10.20 Global Environment Facility Operations. In addition, two separate policies cover social and environmental reviews of policy loans (development policy lending and other reforms programs) that may have significant social and environmental impacts. Finally the Bank has improved the special Safeguard Policies for World Bank Reconstruction Projects whose objective is to prevent

set standards and procedures that both the borrower and the Bank must follow. While the Safeguards apply to IBRD and IDA, the IFC created eight separate Performance Standards<sup>35</sup> (hereinafter PSs) which govern directly the enterprises behavior and the client's role and responsibilities. These PSs are characterized by several guidelines ruling particular issues: whilst the OPs are generic, the PSs ruled particular hypothetical situations.

Scholars discuss the effect of the PSs considering that IFC' PSs are weaker than the Bank's safeguard policies.<sup>36</sup> In spite of criticisms, the Bank Group is evaluating the possibility to adopt the IFC Performance Standards for IBRD *"to facilitate Bank support for private sector led projects by applying environmental and social policy standards that are better suited to the private sector, while enhancing greater policy coherence and cooperation across the World Bank Group"*<sup>37</sup> Finally, the Bank Group has started the Access to Information Policy whose objective is to increase the information available to the public. The strategy aims to disclose information about projects under preparation and implementation, analytic and advisory activities, and Board proceedings (BAGLIONI, 2015, p.74).

#### 4.2 CHALLENGES AND GAPS ON THE HARMONIZATION PROCESS OF THE OPs TO THE UNGPs

Based on the analysis contained on several documents (KINLEY,2007 p.353-383) (HERBERTSON, THOMPSON E GOODLAND,2010),(HERNANDEZ, 2001, p. 201) the World Bank Operational Polices present several critical gaps that can be summarized as follows:

- (i) The Operational Policies do not ensure the full respect of human rights in all the Banks activities. Some cases on the ground demonstrated, indeed, that they contribute to or exacerbate human rights violations. The lending activities founded in the Ops, do not consider an appropriate access to remedy in case of eventual harm within the recipient domestic judicial systems.

The rules of the World Bank, despite theoretically tailored on UN standards, do not directly recall national or international law, including regional treaties and Human Rights agreements which complicate the rules' interpretation and harmonization. For this reason, undertaking human rights impact assessments for identifying the adverse effects of Bank's activities and avoiding or mitigating these consequences is not enough. Furthermore, the entire OPs system do not ensure that all members of affected communities have the opportunity to meaningfully participate in shaping development agendas and policies, during all stages of projects or programs. To this regard, the updating of the indigenous peoples and involuntary resettlement policies – aimed to meet the standards set out in relevant human rights treaties, declarations, and UN documents - is necessary, in order to ensure the non- discrimination against people on any grounds, as provided by International Law.

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and mitigate excessive damage to people and their environment in the development process. These policies provide guidelines for Bank and borrower staffs in reconstruction and post- conflict situations.

<sup>35</sup> Mainly the Performance PS 1: assessment and management of environmental and Social risks and Impacts, PS 2: labor and Working Conditions, PS 3: resource efficiency and Pollution Prevention, PS 4: Community Health, Safety, and Security, PS 5: land acquisition and Involuntary resettlement, PS 6: biodiversity Conservation and Sustainable management of living natural resources, PS 7: Indigenous Peoples, PS 8: Cultural Heritage.

<sup>36</sup> Bretton Woods Project, Safeguard policies and performance standards. Available: [www.brettonwoodsproject.org](http://www.brettonwoodsproject.org). Last visit (26 January 2014).

<sup>37</sup> World Bank Group, Proposed Adoption and Application of World Bank Performance Standards for Private Sector Projects supported By IBRD/IDA. Internal Memorandum, (No 69559 Jun 4, 2012) Available at: [www-wds.worldbank.org](http://www-wds.worldbank.org). Last visit (Jan25, 2014).

As far as the environmental damage concerns, the OPs require systematic assessment of the environment for discrimination and marginalization when analyzing the risks related to and the impacts of proposed projects or programs, including obstacles to substantive equality. This legal system also demands for the respect of the rights of persons with disabilities and for ensuring that all activities are disability-inclusive.

Finally, nor the Inspection Panel neither the CAO are adequate grievance mechanisms under the UNGPs. For this reason, the OPs do not ensure an effective implementation of the Safeguard Policies, as amended for including human rights due diligence. In addition, those compliance mechanisms do not properly enable people to raise concerns about alleged violations of human rights in the context of World Bank activities, not ensuring the monitoring activity of these mechanisms in terms of compliance with International Human Rights Law.

The entire system does not offer enough support to member States in creating and upholding strong remedies for human rights violations, including the ones to which Bank activities have contributed or exacerbated due to its *de facto* total immunity.

## 5. CONCLUSIONS

The harmonization process between the Operational Policies and the UNGPs is emerging as a compelling topic. This situation can be mainly attributed to the following considerations:

- It remains clear that for the Bank Human Rights have been taken into account as eventual risks related to operations, rather than structural standards ruling financial institutions' behavior. The Bank's approach awards to Human Rights an 'accessorial nature' and set aside a real rights- based approach development model suggested by the UNGPs. This gap can be attributed to the restrictive interpretation of the Bank Articles of Agreements with regard to Human Rights issues: the historical resistance of the Bank referring to Human Rights limits its application to particular activities and operations. The UNGPs can be a useful tool for articulating a comprehensive approach to lending activities.

- Undoubtedly, the OPs - and in general the World Bank Group - are currently under an increasing internal (States) and external (civil society and other International Institutions) pressure, aimed at developing a coherent legal structure regarding Human Rights. The UNGPs can thus play an important role in achieving this objective. Nevertheless, scholars sought to demonstrate that OPs and Standards, despite of their accessorial nature, have increased Bank's accountability. In fact, the material application of OPs over certain circumstances would guarantee the protection of citizens against Human Rights violations. However, it remains clear that the OPs, eventually, are applied as a formality rather than as a comprehensive framework of Human Rights protection. Indeed, the lack of harmonization between the international Human Rights legal framework and the Ops system within both fields of application (domestic and international) leads to a misunderstanding between legal systems.

- The implementation of UNGPs within the Bank's activities can be reached through two different approaches:

1. A top-down approach is a challenge



According to the Ruggie Framework, the World Bank Group would need to improve coherence in its lending activities, in spite of the relevant challenge of immunity. The access to remedy contained by the Third Pillar clearly provides that States cannot endorse a comprehensive National Action Plan on Human Rights protection if a greater access to judicial remedies is not ensured within the development projects financed by the World Bank.

## 2. A Bottom-up approach is possible with the UNGP spread out

The adoption and implementation of the UNGPs by Conflict Affected States may have a positive impact on the national legislations and jurisprudence trends. For example, National Action Plans and the training initiatives about Business and Human Rights issues will contribute to improve accountability in the Banks Operations, through the adoption of internal laws and private voluntary standards able to reinforce the lending activities and the OPs.

- The WBG compliance mechanisms have improved the Bank's behavior by addressing its activities. However, they are not able to replace neither judicial impartial institutions, nor independent ombudsman bodies. The reasons of their ineffectiveness could be associated with the accessorial nature of the Human Rights legal framework (OPs), the dependency by a party involved in the conflict (Bank) and their multi-tasking function (compliance, advisory and ombudsman), particularly for the CAO. However, nowadays their advisory role and their conflict resolution approach are extremely valued, especially, regarding the Bank's legal immunity by national court's jurisdiction.

- The Bank's immunity against Human Rights violations limits States obligations (protect, respect and remedy) and deny access to remedy. Furthermore, the immunity under domestic legal regimes reduces States powers to pursue human rights violations. The reason of the existence of such provisions could be linked with the Bank lack of coherence regarding Human Rights. This absolute Bank's immunity, along with the internal problems of corruption in the Bank, constitutes a serious threat to the Human Rights Bank's accountability.

- One of the most important characteristics of the UN Guiding Principles instrument is the coherence between international Human Rights legal framework and Action Plans. In spite of this instrument has not been drafted to directly address bank's behavior, the coherent model presented by the UN Framework could be an example of how to perform a Human Rights legal instrument within the World Bank Group. By increasing the interdependence between economic welfare and human rights, indeed, this instrument could help to radically change the Bank's developmental objectives.

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