

# FINANCING FORCED LABOR

The Legal and Policy Implications of World Bank Loans  
to the Government of Uzbekistan



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The International Labor Rights Forum is a human rights organization dedicated to achieving dignity and justice for workers worldwide.

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## EXECUTIVE SUMMARY

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Sixty years have passed since the adoption of ILO Convention No. 105 (Abolition of Forced Labor Convention, 1957), yet a number of States have persisted in using forced labor for economic development, the eradication of which was a driving force behind establishing the Convention. Nowhere in the world is this problem more entrenched and pervasive than Uzbekistan.

Each fall for the last 25 years, the Uzbek government has forced farmers to deliver annual production quotas and citizens to harvest cotton and perform other field work, all under menace of penalty. During the 2015 harvest, civil society monitors estimate over 1 million citizens were forced to pick cotton, including students, teachers, doctors, and nurses. Those who refused to pick cotton or did not meet their quota were threatened with job loss, expulsion, and other penalties conveyed by their employers, administrators, and local authorities at the order of high-level government officials.

The Government of Uzbekistan is primarily responsible for the perpetration of its forced labor system, but two other actors have contributed to its longevity: the World Bank Group and global brands. Since 1995, the Uzbek system has been sustained in part through loans to the Government from the International Bank for Reconstruction and Development and the International Development Association, and loans to private companies sourcing Uzbek cotton from the International Finance Corporation. Barring suspension or cancellation of loans, approximately USD 308 million will be disbursed to the Government of Uzbekistan in the next five years to support its agricultural industry.

While the UN and the ILO have annually found the Government of Uzbekistan to be in violation of international labor and human rights standards concerning forced labor, neither institution has extended or exercised its authority to consider whether the World Bank is violating international law by providing loans to the Government that are used for cotton production. No national or international court has heard or issued an opinion about this matter either. This report provides the first comprehensive analysis of the legal implications of the World Bank's decisions to continue lending to the Government of Uzbekistan when it is aware of a plausible link between its funds and the forced labor of Uzbek citizens. The analysis, based on the circumstances surrounding a 2013 complaint to the World Bank Inspection Panel by civil society organizations representing Uzbek victims, and the national and international laws applicable to the Bank, finds that the Bank is indeed violating international law and could be held liable in U.S. courts.

Over the last 10 years, the World Bank has constantly justified its approach to human rights by citing the Political Prohibition Provisions of its Articles of Agreement which it claims prevent it from considering non-economic factors such as human rights in its loan decisions. The Bank has never disputed, however, that it is obligated to adhere to peremptory norms of general international law, or *jus cogens*, in its operations. The international community has long recognized that *jus cogens* are non-derogable norms that sit atop the hierarchy of international law and treaties which conflict with these norms become void and terminated. This report presents a detailed assessment of the prohibition against State mobilization and use of forced labor for economic development, as defined in Article 1(b) of Convention No. 105, and



concludes that this norm, which the Uzbek government has violated for the last 25 years, has attained the status of *jus cogens*. Therefore, in accordance with international law, all Bank financing agreements that support cotton production in Uzbekistan should be declared void and terminated. The Bank's *jus cogens* obligations also require it to stop providing loans which are used in any way for Uzbek cotton production until the violation of Article 1(b) of Convention No. 105 ceases to exist. As there are currently no mitigation measures sufficient to prevent a violation of this *jus cogens* norm in Uzbekistan, the Bank must refrain from approving new agricultural loans while the Government's system of forced labor is still intact.

The World Bank has continually justified its refusal to suspend or cancel its agricultural loans by pointing to the Uzbek government's action plans and policy commitments and assuring concerned stakeholders that its developmental approach to eliminating forced labor, mechanization of cotton production, will be effective in the long term. The Bank should note, however, that its international legal obligation to adhere to *jus cogens* requirements supersedes any policy or business considerations that may guide its engagement with the Uzbek government. Even an indirect violation of Article 1(b) of Convention No. 105 by the Bank could result in civil liability in the U.S. The Bank's role as a lender, given the unique circumstances of its engagement with the Government of Uzbekistan, may not absolve it from legal liability under U.S. tort and contract law for contributing to the Government's forced labor system.

Besides questions of legality, the World Bank's decisions concerning its loans to the Government of Uzbekistan raise serious concerns about the prudence and effectiveness of the Bank's policies and strategies in countries where gross human rights abuses are perpetrated by the State. In Uzbekistan, the Bank should reconsider its developmental approach, as its unconditional engagement with the Government has undermined its mission to alleviate poverty and damaged its reputation. The example of Uzbekistan, one of the most egregious cases of IFI-supported human rights abuses in recent memory, should reinvigorate discussions within the Bank of an appropriate human rights policy which would prevent the reoccurrence of the Bank's misconduct in the country.

The purpose of this report is to inform all concerned stakeholders of the World Bank's serious violations of international law and the potential legal consequences that may come to bear if it continues to provide loans to the Uzbek government when the risk of systematic forced labor in the country is real. More importantly, it is hoped that this report will lead the World Bank, its member States, and its officers to seriously consider the comprehensive reforms needed to ensure the Bank no longer contributes to the perpetration of human rights abuses in countries where it operates. These necessarily include a more transparent and rights-centered loan-making process, reform of the structure and function of the Inspection Panel, and an amendment to the Political Prohibition Provisions of the Bank's Articles of Agreement.



# INTRODUCTION

In 2012, the International Labour Organization (ILO) conducted a global survey on the prevalence of forced labor and found that 10 percent, or 2.2 million, of the estimated 20.9 million people around the world forced to work are doing so in State-imposed systems. The two forms of State-imposed forced labor noted were prisons and work imposed by military or paramilitary forces. These findings led the ILO to conclude that “state-imposed forced labor is declining in importance when compared to the extent of forced labor in the private economy,” but “vigilance is needed to prevent state-imposed forced labor from resurging.”<sup>2</sup>

The ILO’s shift in focus to the private sector may be strategic prioritization, but it overlooks the 2.2 million people whom the ILO could estimate and millions more it has been unable to take into account due to lack of data but are nevertheless forced to work by their government.<sup>3</sup> 60 years have passed since the adoption of ILO Convention No. 105 (Abolition of Forced Labor Convention, 1957), yet a number of States have persisted in using forced labor for economic development, the eradication of which was a driving force behind establishing the Convention.<sup>4</sup> Nowhere in the world is this problem more entrenched and pervasive than Uzbekistan.

Each fall for the last 25 years, the Uzbek government has forced farmers to deliver annual production quotas and citizens to harvest cotton and perform other field work, all under menace of penalty.<sup>5</sup> The Uzbek system of forced labor is an adaptation and degenerated vestige of the industrial cotton production system established by the Soviet Union.<sup>6</sup> During the 2015 harvest, civil society monitors estimate over 1 million citizens were forced to pick cotton, including students, teachers, doctors, and nurses.<sup>7</sup> Those who refused to pick cotton or did not meet their quota were threatened with job loss, expulsion, and other penalties conveyed by their employers, administrators, and local authorities at the order of high-level government officials.<sup>8</sup>

While the Government of Uzbekistan is primarily responsible for the perpetuation of this forced labor system, two other actors have contributed to its longevity: the World Bank Group (WBG)<sup>9</sup> and global brands. Since 1995, the Uzbek system has been sustained in part through loans to the Government from the International Bank for Reconstruction and Development (IBRD) and the International Development Association (IDA), and loans to private companies sourcing Uzbek cotton from the International Finance Corporation (IFC).<sup>10</sup>

To date, much has been written about the forced labor system in Uzbekistan and numerous recommendations for reform have been proposed with respect to both the Uzbek system and the WBG’s policies and practices. But there has yet to be a comprehensive analysis of the legal implications of the World Bank’s decisions to continue lending to the Government of Uzbekistan when it is aware of a plausible link between its funds and the forced labor of Uzbek citizens.<sup>11</sup> This report fills that lacuna and will proceed in six parts: Part I reviews the circumstances surrounding a 2013 complaint to the World Bank’s Inspection Panel and the subsequent events leading up to this report; Part II explains the relevant national and international laws applicable to the WBG; Part III explores the potential legal liability of the World Bank; Part IV considers some policy implications arising from this case; Part V shares some conclusions; and finally, Part VI provides some recommendations to the World Bank.



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# I. BACKGROUND

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## A. THE UZBEK SYSTEM OF FORCED LABOR

The Government of Uzbekistan has maintained direct and total control over a forced labor system of cotton production since 1991 when the State gained its independence from the former Soviet Union. It regularly uses slogans such as “cotton is the people’s riches” and “cotton is the country’s white gold” to convey to its citizens the economic importance of the harvest and impart a sense of national duty. The system, described by the Government as “khashar,” or voluntary work for collective improvement, is organized from the top down and its implementation involves officials at every level.<sup>12</sup>

In the first quarter of the year, the president, prime minister, ministers of Agriculture and Water Resources, the Economy, Finance, Foreign Economic Relations, and Investment and Trade ministries, and representatives from the state-controlled cotton association set the national production target. The prime minister issues quotas to the regional hokims, who, with the cotton association, impose production quotas on farmers through their land lease agreements and procurement contracts. Officials threaten and exact penalties against farmers who do not fulfill their annual production quotas. Penalties include loss of land, confiscation of property, criminal charges, civil fines, and verbal and physical abuse.<sup>13</sup>

Additionally, the government uses financial tools of coercion. Farmers, who do not own their land but lease it from the government, are required by the Government to use inputs and agricultural services sold by government-controlled monopolies and are obligated to sell their cotton to one of the state-controlled gins at the state price. The Finance Ministry sets the procurement price for cotton – the price paid to farmers – below the government’s own estimate of production costs.<sup>14</sup> This practice puts farmers in chronic debt and as result, they could not afford to hire voluntary labor for field work or invest in equipment or improved production practices even if they were to have autonomy over their farms.<sup>15</sup> Law enforcement and local authorities are also tools the government uses to coerce farmers. Police regularly patrol cotton fields, inspect farms, and monitor both workers and the progress of the harvest. Farmers who fail to meet their quota are subjected to severe humiliation, and threatening and degrading treatment by hokims and local officials.<sup>16</sup>

In addition to setting production quotas, the Government also establishes field work quotas and enforces them with threats of penalties through a chain of command. Reporting to the Prime Minister, regional governors assign quotas for weeding the cotton fields in the springtime and harvesting cotton in the autumn to the public and private organizations in their region. In turn, district-level officials work with administrators of schools, hospitals, other public-sector institutions and businesses to organize people to fulfill the field work quotas. Those ordered to pick cotton are organized by their institutions so that the institutions can report to the officials that they fulfilled their mobilization requirements.<sup>17</sup>

Students who do not want to weed fields or pick cotton fear disciplinary measures, poor grades, and difficulty entering universities or getting jobs. This fear is reinforced by college teachers who threaten students with poor grades or expulsion if they refuse to participate in the spring cotton field preparation and the autumn

cotton harvest.<sup>18</sup> Employees in the health and education sectors fear losing their jobs and are compelled to pay significant bribes if they choose not to pick cotton.<sup>19</sup> The only option for employees and students who do not want to pay bribes is to pay replacement workers to pick cotton in their name. These replacement workers are held to the same quota as the person who paid them.<sup>20</sup>

The Government establishes a rate to pay people for weeding cotton fields and picking cotton. However, the rates are substantially lower than market wages, reducing the likelihood of voluntary labor.<sup>21</sup> Due to mandatory payments for transportation, accommodations, food and other expenses, as well as fines for insufficient cotton picked, many forced laborers pay more than they receive.<sup>22</sup> Furthermore, officials exploit the vulnerability of their constituents, caused by the forced mobilization, for personal gain. This is manifest in extortion schemes such as payments for exemptions from field work or fines levied on people who are assigned quotas they could not possibly achieve.<sup>23</sup> In addition to these schemes, which are perpetrated at the highest levels of government, cotton revenues disappear into a fund controlled by senior officials which is neither reported to the public nor the national assembly.<sup>24</sup>

## **B. THE WORLD BANK GROUP'S INVOLVEMENT IN THE UZBEK SYSTEM OF FORCED LABOR**

Since the Uzbek government became a member of the World Bank in 1992, the WBG has financed several projects in the Uzbek agriculture sector. In 1995, the IBRD<sup>25</sup> approved the Cotton Sub-Sector Improvement Project, the Bank's first agreement with the Government of Uzbekistan which resulted in a total of USD 66 million in loans issued to the Government over eight years.<sup>26</sup> In 2001, the IBRD and IDA approved the Rural Enterprise Support Project (Phase I), a partnership with the Government of Uzbekistan which resulted in a total of USD 36.1 million in loans issued to the Government over seven years.<sup>27</sup> RESP I was designed to improve the country's irrigation system which provides the water necessary for production of cotton, wheat, and other agricultural commodities.<sup>28</sup> Barring suspension or cancellation of loans, approximately USD 308 million will be disbursed to the Government of Uzbekistan in the next five years to support its agricultural industry.<sup>29</sup> Roughly USD 8 million of this will come from the Rural Enterprise Support Project, Phase II (RESP II), a project started in 2008 that is at the center of an ongoing dispute between civil society organizations representing Uzbek victims of forced labor and the World Bank.<sup>30</sup> The dispute, which prompted a complaint to the Inspection Panel in 2013 and remains unresolved for the victims, is the focus of this report.

On June 12, 2008, the WBG Board of Directors approved the RESP II for Uzbekistan. The project's stated objective is "to increase the productivity and financial and environmental sustainability of agriculture and the profitability of agribusiness in the project area." This was to be carried out through "the provision of financial, infrastructure and capacity building support to newly independent farmers." In the eight years since, approximately USD 101 million has been lent to agribusinesses "to finance agricultural machinery, processing equipment, packaging equipment and materials, investments in tree-crops, poultry, fishery and livestock production."<sup>31</sup>

A primary objective of the RESP II has been to diversify agricultural production, reducing the reliance on cotton as a cash crop and increasing the cultivation of fruits and vegetables as well as the raising of livestock. Other goals of the project include improving irrigation and drainage systems and providing training and advisory services to farmers to strengthen farm management capacity.<sup>32</sup> A second round of funding for the project was approved by the WBG Board of Directors in September 2012 despite calls from civil society to refrain from providing loans that would likely be used to perpetuate forced labor in the country.<sup>33</sup>

On September 4, 2013, the Association for Human Rights in Central Asia, Human Rights Society of Uzbekistan 'Ezgulik', and Uzbek-German Forum for Human Rights ("Requesters") submitted a Request



for Inspection to the World Bank Inspection Panel<sup>34</sup> alleging there were no adequate measures in place to prevent World Bank funds from contributing to forced and child labor in Uzbek cotton farms.<sup>35</sup> The Requesters' complaint was registered by the Inspection Panel on September 23, 2013 and in response, Bank management asserted that the RESP II was not linked to the alleged human rights abuses.<sup>36</sup>

On December 9, 2013, the Panel issued an eligibility report that noted "these harms ... can indeed be characterized as serious,"<sup>37</sup> "a plausible link does exist between the project and the alleged harms,"<sup>38</sup> and "the Bank's support through this project may be contributing to a perpetuation of this alleged harm."<sup>39</sup> Despite these findings, which met the criteria for a full investigation, the Panel decided to give Bank management one year to address the concerns of the Requesters and pursue its action plan.<sup>40</sup> During this period, the Requesters and their coalition partners continued to raise serious concerns with Bank management and the Board of Directors, noting that the proposed mitigation measures, while generally useful in other countries, would not be feasible in Uzbekistan given the unique features of the State-orchestrated forced labor system.<sup>41</sup> The three mitigation measures, or commitments, were (1) suspend loans if child or forced labor is found in World Bank-financed project sites; (2) establish third-party monitoring of labor practices; and (3) establish a grievance redress mechanism.

With respect to the first commitment, the loans were never suspended despite credible documentation that State-led, systematic, and widespread forced labor continued to exist at World Bank-finance project sites. The Bank also reneged on its second commitment by establishing a joint ILO-Uzbek government monitoring mission rather than arranging for monitors fully independent from the Government. Although the ILO monitoring was characterized by the Bank as "third-party," in reality each ILO monitor was accompanied by officials from Government ministries. With regard to the last commitment, the Bank did not establish a mechanism that would provide redress to victims of forced labor. Instead, the Bank established a "feedback mechanism" comprised of hotlines managed by the Uzbek Labor Ministry and the State-controlled Federation of Trade Unions of Uzbekistan.<sup>42</sup> The hotlines could only be used to inform authorities of crimes, not guarantee victims access to justice and effective remedies for violations of their rights, as was promised earlier.

One year after the Inspection Panel report, Bank management submitted a progress report to the Panel noting that all Bank project documents were revised to require compliance with national and international laws against forced labor and child labor. The Bank also noted that it had concluded an agreement with the ILO to monitor child and forced labor in Bank-financed projects from 2015-2016. The ILO's mandate would also include the development and implementation of the "feedback mechanism" which victims could use to report cases of forced or child labor to the ILO and Uzbek authorities. The Panel, applauding these changes and Bank management's commitment to report to the Board of Directors, recommended against a full investigation.<sup>43</sup> On January 23, 2015, the Board of Directors officially approved the Inspection Panel's recommendation not to conduct a full investigation.<sup>44</sup>

The 2015 cotton harvest was the first time the ILO conducted monitoring of child and forced labor in Uzbekistan. From September 14 to October 31, "third-party monitoring" took place in 10 of the 13 provinces of Uzbekistan, including World Bank project sites such as southern Karakalpakstan. According to the ILO, these provinces account for four-fifths of cotton production and are where relevant World Bank-supported projects are located. A monitoring team was based in each province, consisting of a foreign ILO monitor and five national monitors (Ministry of Labour, Trade Union Federation, Chamber of Commerce, Women's Committee, and an accredited NGO).<sup>45</sup>

In its assessment submitted to the World Bank, the ILO noted the following key findings:

- The commitment to conduct an awareness-raising campaign against child and forced labor resulted in posters and banners being displayed but did not change practices of officials responsible for meeting

cotton production quotas;<sup>46</sup>

- The organized recruitment of adults to pick cotton was widespread;
- There is a role for the Feedback Mechanism, but its effectiveness was limited by lack of public trust in it;
- Compulsory labor was practiced in the education and health-care sectors despite policy commitments not to recruit medical staff and teachers;
- Colleges and universities for those 18 years and older did not appear to be functioning normally as these students participated in the harvest; and
- Worrying reports were received from other sources [independent civil society organizations and forced labor monitors] which reported systematic forced labor on a wider scale than captured by the ILO-Uzbek government monitors and harassment and threats to people documenting these practices.<sup>47</sup>

The 2015 cotton harvest was also monitored by Uzbek human rights defenders who received training from an international labor expert and support from international civil society organizations. The results of this monitoring were released by the Uzbek-German Forum for Human Rights (UGF) in its March 2016 report, “The Cover-Up: Whitewashing Uzbekistan’s White Gold.” The key findings in this report include:

- To harvest cotton, Uzbek officials once again forced more than one million people, including students, teachers, doctors, nurses, and employees of government agencies and private businesses, to the cotton fields, against their will and under threat of penalty, especially losing their jobs;
- People picked cotton for shifts of 15-40 days, working long hours and enduring abysmal living conditions, including overcrowding and insufficient access to safe drinking water and hygiene facilities;
- Under the government’s “re-optimization” plan for agriculture, officials punished farmers in debt or who failed to meet production quotas by seizing land and property;
- Managers of public and private-owned businesses, themselves pressured by officials to support the national plan, ordered 40% or more of their employees to pick cotton, often in written directives;
- Cotton work is not viewed by the vast majority of people as an opportunity to supplement income;
- Employees who remained at work while their colleagues picked cotton had to work extra for no overtime pay to cover their colleagues’ absences, as officials pressed administrators of schools, hospitals, and other institutions to appear to be functioning normally;
- Many colleges (equivalent of high schools) and universities suspended classes entirely for students at the harvest, or in the case of some colleges, nominally held classes only for first- and second-year students while third-year students picked cotton;
- A climate of fear pervaded the harvest season as evidenced by the near unanimous indication from interviewees that they were directly threatened or understood implicit threats if they refused to pick cotton;
- The government significantly increased its harassment and persecution against independent monitors as demonstrated by repeated arrest, assault, and fabrication of charges against citizens documenting forced labor; and
- To make the forced labor appear voluntary, officials forced teachers, students, and medical workers to sign statements attesting that they picked cotton of their own will and agreeing to disciplinary measures, including being fired or expelled, if they failed to pick cotton. They also instructed people to tell ILO

monitors they picked cotton of their own volition.<sup>48</sup>

At present, the WBG continues to finance agricultural projects in Uzbekistan through loans from the IBRD, IDA, and IFC. The Bank has not suspended the RESP II loans and has indicated that it has no plans to do so. On December 17, 2015, the WBG Board of Directors approved a new loan of up to USD 40 million from the IFC to Indorama Kokand Textile (IKT) to expand the company's cotton processing operations in Uzbekistan.<sup>49</sup> Uzbek citizens subsequently requested the Compliance Advisory Ombudsman, the IFC's recourse mechanism, to investigate the IFC's compliance with its policies in regard to its loan to IKT.<sup>50</sup>



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## II. NATIONAL AND INTERNATIONAL LAWS APPLICABLE TO THE WORLD BANK GROUP

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While the UN and the ILO have annually found the Government of Uzbekistan to be in violation of international labor and human rights standards concerning forced labor, neither institution has extended or exercised its authority to consider whether the World Bank is violating international law by providing loans to the Government that are used for cotton production. This Part lays the legal foundation for that assessment by explaining the international laws applicable to the World Bank's financing of agricultural projects in Uzbekistan. It also considers how violations of international law by the Bank might be addressed in the U.S. legal system and potential obstacles to enforcement in this forum.

### A. INTERNATIONAL LAWS APPLICABLE TO THE WORLD BANK GROUP

International legal personality, or the capacity to have rights and obligations under international law, is a prerequisite to hold international organizations such as the IBRD, IDA, and IFC legally accountable for financial complicity in the forced labor system imposed by the Uzbek government. The attribution of international legal personality to international organizations has been firmly established since the *Reparation for Injuries* Advisory Opinion of the International Court of Justice in 1949.<sup>51</sup> As subjects of international law, the IBRD, IDA, and IFC, like all international organizations in the United Nations (UN) system, are “bound by any obligations upon them under general rules of international law.”<sup>52</sup>

Two primary sources of international law, treaties and customary international law, are especially relevant to the operations of international financial institutions (IFIs).<sup>53</sup> IFIs such as the IBRD, IDA, and IFC are bound by their founding instruments, treaties known as Articles of Agreement, which states their purpose and guides their decisions.<sup>54</sup> The 1969 Vienna Convention on the Law of Treaties (VCLT) is the predominant guide to interpreting these Articles of Agreement.<sup>55</sup>

Customary international law, the general and consistent practice of States that follows from a sense of legal obligation, is another binding source of international law that applies to IFIs.<sup>56</sup> Of particular importance is *jus cogens*, a peremptory norm of general international law, that is, a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.<sup>57</sup> *Jus cogens*, a concept recognized in international practice and jurisprudence, has cemented its place atop the international hierarchy of norms and its inviolability is such that other norms which conflict with it are rendered invalid or terminated.<sup>58</sup> Examples of *jus cogens* include, but may not be limited to, the prohibition of torture, the prohibition of genocide, crimes against humanity, the prohibition of slavery, the prohibition of piracy, the prohibition of racial discrimination and apartheid, the prohibition of aggressive use of force, and the right to self-determination.<sup>59</sup>

## 1. The IBRD Articles of Agreement

The IBRD's Articles of Agreement provide the framework by which its Executive Directors make decisions on approving, suspending, and terminating loans to its borrowing members. Three clauses in the Articles have been regularly cited by World Bank management and the Board of Directors when they are called upon to justify decisions that negatively affect the communities located at their project sites. These "Political Prohibition Provisions," on their face, appear to require the IBRD to refrain from interfering with the political affairs of its members.

First, Article IV, Section 10 states, "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 [of the Bank]."<sup>60</sup> Second, Article III, Section 5(b) states, "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."<sup>61</sup> Finally, Article V, Section 5(c) states, "The President, officers and staff of the Bank, in the discharge of their offices, owe their duty entirely to the Bank and to no other authority. Each member of the Bank shall respect the international character of this duty and shall refrain from all attempts to influence any of them in the discharge of their duties."<sup>62</sup>

According to Hassane Cissé, current Director of Governance and Inclusive Institutions, and the Bank's Deputy General Counsel until 2014, "these provisions allow the Bank to make decisions based only on economic considerations and impose a mutual obligation on the member States and the Bank's president, officers, and staff to respect the independence of each other."<sup>63</sup> Yet international law scholars and prior World Bank General Counsels have agreed that there are exceptional situations where the Bank's obligations under international law trump the restrictions mentioned above. These include agreements that conflict with *jus cogens* and UN Chapter VII Security Council Resolutions.<sup>64</sup>

In the 1990s, then World Bank General Counsel Ibrahim Shihata made a series of comments on human rights and Bank operations that shed light on the Bank's views on its international legal obligations vis-à-vis the Articles. Although interpretation of the Articles is officially decided by the Executive Directors, in practice, legal opinions of the Bank General Counsel have provided the basis for most such interpretations.<sup>65</sup> First, he acknowledged that international agreements to which the World Bank is a party "should not derogate from peremptory norms which mandate respect for basic human rights." He distinguished the Bank's obligation in this regard with its approval of loans to States where violations of human rights occur but are not necessarily linked to the Bank's funds. Shihata then noted that the Articles can be appropriately interpreted to allow the World Bank to use its lending power as an instrument for ensuring respect for political human rights where pervasive violations have significant economic effects.<sup>66</sup> He also recognized that the Bank's obligations under its Articles could be superseded by UN Security Council decisions requiring compliance with a specific course of action.<sup>67</sup>

A subsequent General Counsel of the World Bank, Roberto Dañino, took a more active role in promoting human rights within the Bank. On his last day in office in January 2006, he circulated an internal legal opinion that charted a new approach to human rights. First, the Bank could take any type of human rights into account, provided there was economic impact or relevance. Second, where violations or non-fulfillment of human rights obligations had an economic impact, the Bank should take them into account. And third, the Bank might assist member States to meet their legal obligations regarding human rights and should be broadly supportive of such commitments where they had an economic impact or relevance.<sup>68</sup> He concluded his note by saying, "The Articles of Agreement permit, and in some cases require, the Bank to recognize the human rights dimensions of its development policies and activities, since it is now evident that human



rights are an intrinsic part of the Bank's mission."<sup>69</sup> 10 years later, Dañino, in response to a restrictive opinion of the current General Counsel, Anne-Marie Leroy, reaffirmed his approach, stating, "While the Bank's Articles of Agreement establish economic criteria as the guiding principles for decision-making, this does not exclude the consideration of social and political factors, provided these have an economic impact." He also emphasized, contrary to the opinion of the current General Counsel, that Bank compliance with international human rights standards is mandatory, not optional.<sup>70</sup>

Although the World Bank's current interpretation of the IBRD Articles of Agreement is significantly more restrictive than 10 years ago, the debate on human rights has largely centered on the legality of establishing a Bank human rights policy rather than any disagreement with its *jus cogens* obligations.<sup>71</sup> With respect to the former, it has been argued by the UN Special Rapporteur on Extreme Poverty and Human Rights that the Bank's current interpretation of its mandate "clearly accommodates human rights."<sup>72</sup> Indeed, the Bank's rationale for its involvement in the criminal justice sector is based on its view that economic considerations demand a focus on criminal justice.<sup>73</sup> Following this reasoning, as the Special Rapporteur points out, leads to the conclusion that "innumerable human rights violations have major economic impacts [that disproportionately affect the poor]"<sup>74</sup> and thus, an institutional human rights policy is not only justified but needed in order for the Bank to fulfill its mission of alleviating poverty.

## **2. The *Jus Cogens* Prohibition of State Mobilization and Use of Forced Labor for Purposes of Economic Development**

The ILC has stated that "there is no simple criterion by which to identify a general rule of international law as having the character of *jus cogens*."<sup>75</sup> But it has noted consistently that it is not the universal acceptance that elevates a norm to the status of *jus cogens*, but its content.<sup>76</sup> Elaborating on this view, the Commission stated, "[i]t is not the form of a general rule of international law but the particular nature of the subject-matter with which it deals that may, in the opinion of the Commission, give it the character of *jus cogens*." It further added that obligations under peremptory norms of international law "arise from those substantive rules of conduct that prohibit what has come to be seen as intolerable because of the threat it presents to the survival of States and their peoples and the most basic human values."<sup>77</sup>

Some international law scholars have argued that the starting point for identifying criteria to determine *jus cogens* should be Article 53 of the VCLT, which states in pertinent part that peremptory norms are "accepted and recognized by the international community of States as a whole."<sup>78</sup> The ILC has astutely noted the paradox of basing the determination of *jus cogens* on what is agreed between States when the point of *jus cogens* is to limit what may be lawfully agreed on by States.<sup>79</sup> While the progressive development of international law still relies heavily on the Westphalian system of international relations, influential international law scholars and the jurisprudence of regional courts in Latin America and Europe have increased the value of individual, as opposed to State, considerations in the development and codification of international law.<sup>80</sup> It is important to note here that the historical background of *jus cogens* lies in an anti-voluntarist natural law and the presumption of the existence of "absolute" norms on human conduct.<sup>81</sup> State practice and the jurisprudence of international tribunals are still important indicators of whether a general rule of international law has risen to the level of *jus cogens*, but 50 years have passed since the ILC reinforced traditional Westphalian notions of rulemaking in the language of the VCLT.<sup>82</sup> The evolution of international law since then suggests that peremptory norms should no longer be solely determined by the practice and views of State institutions; the fundamental concerns of the most vulnerable human beings must be weighted heavily to give full effect to the original justification for placing *jus cogens* above all other rules governing human and State relations in the world.<sup>83</sup>

The question of whether the prohibition of forced labor in all its forms is *jus cogens* was considered by tripartite delegates in the negotiations leading up to the adoption of the ILO 2014 Protocol to the Forced

Labour Convention, 1930.<sup>84</sup> The Worker and Employer Vice-Chairpersons answered in the affirmative, noting that Convention No. 29 had been ratified by 177 countries and recalling that the Commission of Inquiry on Myanmar had concluded in 1998 that there “exists now in international law a peremptory norm prohibiting any recourse to forced labour.”<sup>85</sup> The Government delegates disagreed on this proposition, with the Government member of Brazil supporting it and noting that the Supreme Court in his country had accepted a ruling on this but several other Government members asserting that the lawful derogations built into Convention No. 29 conflicted with the definition of *jus cogens*.<sup>86</sup>

The ILO Legal Adviser reminded the Committee on Forced Labour that the Commission of Inquiry on Myanmar had stated that “a State which supports, instigates, accepts or tolerates forced labour on its territory commits a wrongful act and engages its responsibility for the violation of a peremptory norm of international law.” He also noted that this view was later endorsed by the ILO Committee of Experts which, in its 2007 General Survey on Convention No. 29, stated that the principles embodied in Convention No. 29 “had since been incorporated in various international instruments both universal and regional, and had therefore become a peremptory norm of international law.”<sup>87</sup> The Legal Adviser concluded that the prohibition of forced labor could be considered *jus cogens* but it would be up to the Committee to decide whether it wished to include language to this effect in the treaty.<sup>88</sup> Not wishing to prevent rapid and wide ratification of the Protocol, the Worker Vice-Chairperson and Employer Vice-Chairperson supported the final text proposed by the EU member States: “Recognizing that the prohibition of forced or compulsory labour forms part of the body of fundamental rights.”<sup>89</sup>

Notably, the ILO Committee on Forced Labour’s decision not to confirm the prohibition of forced labor in all its forms as a peremptory norm did not foreclose the possibility that some forms of forced labor that are absolutely prohibited could possess the character and force of *jus cogens*.<sup>90</sup> The prohibition of using forced labor for purposes of economic development, as defined in Article 1(b) of Convention No. 105 and interpreted by ILO bodies, is one such norm that has become so absolute in practice and opinion that it has attained the status of *jus cogens*.

ILO Convention No. 105, Art. 1(b), states: “Each Member of the International Labour Organisation which ratifies this Convention undertakes to suppress and not to make use of any form of forced or compulsory labour as a method of mobilizing and using labour for purposes of economic development.”<sup>91</sup> In assessing whether this norm has reached the level of *jus cogens*, it is most appropriate, in the absence of internationally-accepted requirements, for the international community and civil society to judge its merit under both natural and positive law. The five criteria considered here are: (1) nature of the norm;<sup>92</sup> (2) State practice and *opinio juris*;<sup>93</sup> (3) jurisprudence of international tribunals;<sup>94</sup> (4) statements and actions by international organizations;<sup>95</sup> and (5) opinions of distinguished international law scholars.<sup>96</sup>

### **1) Nature of the Norm**

The first report by the ILC Special Rapporteur on *jus cogens* presents three draft conclusions to the Committee for its consideration. Draft conclusion 3, concerning the general nature of *jus cogens* norms, has two parts, the first of which states, “Peremptory norms of international law (*jus cogens*) are those *norms of general international law* accepted and recognized by the international community of States as a whole as those from which *no modification, derogation or abrogation is permitted*.”<sup>97</sup> (emphasis added).

#### Universally Applicable and Non-Derogable

A norm of general international law, as opposed to particular international law, is one that is universally applicable and not limited to only a few States.<sup>98</sup> In this regard, Article 1(b) of Convention No. 105 qualifies as a norm of general international law by virtue of Convention No. 105’s status as an international convention open for ratification by all 187 member States of the ILO. Furthermore, the ILO Declaration on Fundamental Principles and Rights at Work unequivocally states that the norms enshrined in the eight

core conventions of the ILO, including Convention No. 105, are “universal and applicable to all people in all States, regardless of the level of economic development.”<sup>99</sup> Since 1998, ILO member States have committed to a follow-up procedure implemented by the organization that requires States that have not ratified one or more of the core Conventions to report each year on the status of the relevant rights and principles within their borders.<sup>100</sup>

With respect to non-derogation, an essential element of *jus cogens*, the ILO Governing Body has made it clear that the transitory provisions previously accepted for all forms of forced labor no longer apply and the “minor community service” and “normal civic obligations” exceptions found in Convention No. 29 do not, by definition, apply to Article 1(b) of Convention No. 105.<sup>101</sup> Further, the ILO Committee of Experts has clarified that this norm applies only to the mass mobilization and use of forced labor for economic ends, thereby negating the possibility “training-orientated” forced labor could be considered an exception to the rule.<sup>102</sup> The intention of the ILO was to secure the abolition of any form of forced or compulsory labor as a method of mobilizing and using labor for purposes of economic development.<sup>103</sup> To this end, both direct compulsion in the call-up of labor and systems of mobilization of labor through certain indirect forms of coercion were envisaged by the drafters of the Convention to fall within the scope of Article 1(b).<sup>104</sup> Unlike the exceptions to forced labor codified in Convention No. 29, there is simply no lawful derogation permitted for the specific form of forced or compulsory labor described in Article 1(b) of Convention No. 105.

Some skeptics of this norm’s qualification as *jus cogens* may question whether narrowing the norm goes against the very nature of a peremptory norm. For without the narrowing, one may say, the five exceptions to the prohibition of forced labor found in ILO Convention No. 29 disqualify the overarching norm because non-derogation is an essential element of *jus cogens*. However, to address this concern, one need only look to the prohibition of aggressive use of force, one of the most widely recognized norms of *jus cogens*, as an example of a narrowed norm that has established its place atop the hierarchy of international law.<sup>105</sup> Like the general prohibition of forced labor, the general prohibition of use of force contains a few exceptions.<sup>106</sup> The prohibition of aggressive use of force, however, has no exceptions and may only be modified by another norm of *jus cogens* in accordance with the definition of peremptory norm in Article 53 of the VCLT.<sup>107</sup>

Draft conclusion 3.2 of the first report by the ILC Special Rapporteur on *jus cogens* lays out an additional element of *jus cogens* not explicitly referred to in Article 53 of the VCLT. The Special Rapporteur, noting that the element is drawn from doctrine and practice, observes that “norms of *jus cogens* protect the fundamental values of the international community.”<sup>108</sup>

#### Protective of the fundamental values of the international community

The fundamental values which norms of *jus cogens* protect have been described by international tribunals as concerning basic considerations of humanity,<sup>109</sup> and by national courts as “[not derived] from the fortuitous or self-interested choices of nations.”<sup>110</sup> They are also “often [] described as international *ordre public* or public order.”<sup>111</sup>

Judge Moreno Quintana’s separate opinion in *Case Concerning the Application of the Convention of 1902 Governing the Guardianship of Infants* sheds light on the significance of *ordre public* in international peace and security. He explains, “*International ordre public* operates within the limits of the system of public international law when it lays down certain principles such as the general principles of the law of nations and the fundamental rights of States, *respect for which is indispensable to the legal co-existence of the political units which make up the international community.*”<sup>112</sup> (emphasis added).

In common law countries, *international ordre public* has been interpreted as public policy, or the rejection of foreign law when it offends the forum’s concept of fundamental norms. English courts adopted this practice in the 18th and 19th centuries when they refused to enforce claims to the ownership of slaves at the height of the British abolition movement.<sup>113</sup> In France, a civil law country, all labor law is considered *d’ordre*

*public* and have been held to be exceptions to treaty obligations.<sup>114</sup> In a case before the Tribunal civil de Grasse, the court held that the 1898 French Workmen's Compensation Law was *d'ordre public*, concerned the economic and social order of the country, and consequently could not be superseded by the Franco-Swiss Treaty of 1869 because that would lead to intolerable results.<sup>115</sup>

Taken together, it can be said that the fundamental values referred to by the Special Rapporteur on *jus cogens* (i) concern basic considerations of humanity; (ii) ensure the peaceful co-existence of the international community; (iii) may relate to economic and social order; and (iv) may be linked to principles of equality, dignity, and autonomy. The analysis below will show that the fundamental values protected by Article 1(b) of Convention No. 105 possess these qualities.

#### i) Basic considerations of humanity

The *travaux préparatoires*, or legislative history, of Article 1(b) of Convention No. 105 shows that the ILO realized in order to truly protect *freedom of labor*, a fundamental value it viewed as a principle of democratic development and a universally applicable human right, it must address coercion by the State for purposes of economic development.<sup>116</sup> Freedom of labor was not originally understood by the ILO in terms of individual rights, but after the Philadelphia Conference of 1944, the organization began promoting it as a fundamental right of all human beings.<sup>117</sup> With increasing global outrage about the gulags of Eastern Europe in the 1950s, human rights advocates in the UN and the ILO leveraged public sentiment to garner support for its characterization of State-orchestrated systems of forced labor motivated solely or primarily by economic development as a gross violation of human rights.<sup>118</sup>

The efforts of the UN-ILO ad hoc committee on forced labor to include Article 1(b) in the Convention, despite an original mandate to focus only on forced labor systems that were both politically *and* economically motivated, and the overwhelming acceptance of the norm by ILO member States when the Convention was adopted, demonstrates that the international community understood the norm to be indispensable because of the fundamental human values it protects.<sup>119</sup> 60 years after its adoption, Article 1(b) has proven to be one of the most universally accepted norms in international law.<sup>120</sup> Its subject matter is covered by all three generations of human rights and adherence to it has become the touchstone of sound sustainable development policies in the global south.<sup>121</sup> The decision by the ILO in 1998 to identify Convention No. 105 as one of its eight core conventions and to require all member States to adhere to it further demonstrates the fundamental nature of Article 1(b). The strategic prioritization of this norm above most others reflects the strong belief among members of civil society and the international community that the values it protects lie at the core of humanity and that their preservation is essential to the survival of the human race.

#### ii) Peaceful co-existence of the international community

The right of workers to be free from coercion by their State for economic purposes is a prerequisite of peaceful relations among States. While de-colonization uprooted many of the manifestations of State-orchestrated systems of forced labor for economic development in the global south, and in the process defused rising tensions between colonies and their oppressors, contemporary forms of this forced labor, often linked to now highly inter-connected global supply chains, have contributed to deepening inequality and threats to peace around the world.

The importation of forced labor produced goods into markets in which forced labor is effectively prohibited continues to undercut employment, wages, and efforts at achieving economic equality in nations around the world. As a result of lower production costs, manufacturers sell forced labor produced goods at sub-market prices to retailers who are then able to sell their products at prices far below what the cost would have been had workers in the supply chain worked voluntarily, recruited through the offer of decent wages and working conditions. This unfair competition created by the use of forced labor lowers the income of workers in nations enforcing forced labor prohibitions by decreasing demand from their potential employers for the

production of the same class of goods. Potential jobs in their sectors disappear or fail to materialize due to the unfair competition and artificially low labor costs in countries that use forced labor. Wages for existing jobs in an economic sector distorted by forced labor production are also likely to be suppressed by existing employers in that sector, who have to compete with employers in countries where forced labor laws are not enforced.

This confluence of effects has contributed to the widening of the socio-economic gap between the working class and upper class in the most developed countries around the world. Recent political events in the United Kingdom show that serious consequences of this inequality can stretch beyond the borders of the affected country. It is important to reflect here on the origin of the ILO as it serves to remind the international community that it established the organization on the belief that universal and lasting peace can be accomplished only if it is based on social justice, and social justice can only be achieved when workers everywhere have just and humane conditions of labor.<sup>122</sup> In this regard, it can be said that freedom of labor, and in particular, the right of workers to be free from coercion from their State for economic purposes, must be protected to ensure the peaceful co-existence of the international community.

### iii) Economic and social order

The most commonly recognized norms of *jus cogens*, such as the prohibition of genocide and the prohibition of torture, concern values related to civil and political order and often emerge in the context of international armed conflict. But as the French legal system shows, laws related to economic and social order can also concern *d'ordre public*, or fundamental values of society that must be protected above all others. It follows that the prohibition of State mobilization and use of forced labor for purposes of economic development, a norm that protects values related to economic and social order, can be considered a norm of *jus cogens* with the same legal character as peremptory norms that protect values related to civil and political order.

### iv) Equality, Dignity, and Autonomy

The refusal of English courts to enforce claims of ownership to slaves in the 18th and 19th centuries on the basis of public policy demonstrates the supremacy of the values that would eventually be safeguarded by the abolition of slavery. Those values – equality, dignity, and autonomy – are also protected by Article 1(b) of Convention No. 105.

The moral impetus for proscribing the conduct described in Article 1(b) of Convention No. 105 is the same as that for the prohibition of slavery, a long recognized norm of *jus cogens*. At the core of both slavery and forced labor is the denial of the natural dignity, equality, and liberty of all humans.<sup>123</sup> The abolitionist movements in France and England, while driven by different philosophies, shared the belief that all humans by nature are born equal with the right to freedom from oppression.<sup>124</sup>

In the mid-1920s, the International Labour Office strongly advocated for inclusion of language in the Slavery Convention of 1926 that would ban various forms of forced labor along with slavery and the slave trade. Their efforts were resisted by the colonial powers, but as a concession, the League of Nations gave the ILO the task of conducting a study into possible steps “to prevent compulsory labour or forced labour from developing into conditions analogous to slavery.”<sup>125</sup>

Although the normative solutions to forced labor developed by the ILO ultimately differed from the two slavery conventions, the international community, as evidenced by the ILO’s efforts in the 1920s, clearly was concerned about forced labor for the same reasons it was troubled by slavery. Both practices robbed humans of their inherent dignity, equality, and autonomy, values deemed by the leading thinkers and activists of the 18th and 19th centuries as so essential to humanity that there could be no right under law for a human to sell himself into servitude.<sup>126</sup>



## 2) State Practice and *Opinio Juris*

State practice has shown virtually every member of the international community supports this norm. Although universal acceptance is not necessary for a norm to attain *jus cogens* status, the 175 ratifications of Convention No. 105 by ILO member States is persuasive in the assessment of Article 1(b)'s normative strength.<sup>127</sup> It is the second-most ratified ILO convention, behind only the 1930 Forced Labor Convention, and it has garnered more ratifications than the Genocide Convention and the Convention against Torture, two UN conventions that define norms which are indisputably *jus cogens*.<sup>128</sup>

Since the end of the Soviet era, nearly all States that used to mobilize labor for economic purposes have reformed their policies and practices. In its 2005 report on forced labor, the ILO found that “the systematic state practice of compelling free citizens to work, for either economic or political purposes, is on the decline worldwide.”<sup>129</sup> It noted, however, that there remained a few remnants in Central Asian countries of such practices which were once widespread under the Soviet Union.<sup>130</sup> Two years later, the ILO observed in its global survey of forced labor that the State imposition of labor for public works has “practically disappeared in the great majority of countries.”<sup>131</sup> It further noted that the few rare exceptions concerned legislative provisions that remained in force rather than actual practice by States.<sup>132</sup> The governments in question indicated that these provisions had fallen into disuse and that measures were being taken to repeal them.<sup>133</sup> With respect to compliance with Article 1(b) of Convention No. 105, the ILO similarly found that mobilization of labor for economic purposes was largely a remnant of the past and the few governments that still had pieces of legislation providing for such behavior usually stated that such measures were no longer applied in practice.<sup>134</sup> Furthermore, these governments also usually stated their intention to change or repeal the laws in question with a view to bringing them into conformity with the ILO conventions on forced labor.<sup>135</sup> These observations by the ILO indicate that both State practice and *opinio juris* on Article 1(b) are virtually uniform across the international community and there remain but a few rare examples of States that persist in mobilizing and using the involuntary labor of their citizens for economic development.<sup>136</sup>

## 3) Jurisprudence of International Tribunals

International and regional tribunals have yet to be seized of this issue, but a number of decisions by prominent national courts suggest that the prohibition of forced labor for economic development would be considered a *jus cogens* norm if the question were presented to these courts. Most notably, the Brazil Supreme Federal Tribunal and two U.S. federal courts have held that the prohibition of forced labor has indeed attained the status of a *jus cogens* norm.<sup>137</sup>

## 4) Statements and Actions by International Organizations

### Statement and actions by the ILO secretariat and social partners

The ILO is the only UN agency with a specific mandate to promote labor rights and strengthen dialogue on work-related issues through its tripartite structure.<sup>138</sup> The positions of its secretariat and social partners on international labor standards are authoritative and should be given significant weight when considering whether one of its norms is *jus cogens*.<sup>139</sup> Further, the unique tripartite structure of the ILO – consisting of governments, workers, and employers – adds private sector and civil society dimensions to global governance and the creation of international law. This participation of non-State actors in setting and elaborating on standards related to work adds more legitimacy to the decision-making process of the ILO, especially when it concerns a norm such as *jus cogens* which is grounded on the protection of individual rights, than that of international organizations governed solely by States.<sup>140</sup>

In this regard, the ILO secretariat and social partners' statements and actions supporting the notion that the prohibition of all forms of forced labor is a peremptory norm of international law lends credence to the assertion that the norm defined in Article 1(b) of Convention No. 105 has attained *jus cogens* status.

The ILO's secretariat and tripartite members have undertaken several actions in support of this view, including nullifying the transitory provisions related to the elimination of forced labor and requiring all member States to respect and promote the principles and rights enshrined in Convention No. 29 and No. 105 regardless of their ratification of the instruments.<sup>141</sup> The 1998 Declaration on Fundamental Principles and Rights at Work confirms the ILO's modern stance on forced labor – that freedom of labor is both a universal human right with no exceptions for economic development and a basic prerequisite of sustainable and democratic economic and social development.<sup>142</sup>

Although the government members of the ILO Committee on Forced Labor declined to endorse the prohibition of all forms of forced labor as *jus cogens* in the 2014 Protocol, the ILO secretariat affirmed its position on this issue and advised the Committee that it had sound legal basis to declare the prohibition of forced labor a peremptory norm of international law.<sup>143</sup> The worker and employer members, who combined have the same number of votes as government members, supported the ILO secretariat's view but ultimately agreed to call the norm a fundamental right instead of *jus cogens* so the Protocol could be ratified more rapidly and widely.<sup>144</sup> The ILO secretariat's designation of the norm as *jus cogens* was therefore disputed on legal grounds only by the government members of the Committee. The normative strength of specific prohibitions of forced labor such as Article 1(b) has yet to be considered by the ILO's government members.

#### Statements by the UN

The position of the UN Office of the High Commissioner for Human Rights (OHCHR) on the normative status of Article 1(b) of Convention No. 105 is authoritative due to its unique mandate from the international community to promote and protect all human rights, including those secured by *jus cogens* norms.<sup>145</sup> As the principal human rights office of the UN, the OHCHR provides technical expertise and substantive support to the different UN human rights bodies that set international human rights standards and monitor their implementation on the ground.<sup>146</sup> Its expertise and impartiality allow it to “speak out objectively in the face of human rights violations worldwide.”<sup>147</sup> It is thus instructive that the OHCHR noted in its March 2016 comments on the World Bank's draft environmental and social framework that the prohibition against forced labor is an example of a *jus cogens* norm that applies to the Bank and its member States.<sup>148</sup> It observed, “[the *jus cogens* prohibition against forced labor] may not seem like [a] ‘development’ issue[] in a traditional sense, or [an] issue relevant to MDB-supported investment projects, but the [] Uzbekistan Rural Enterprise Services Project II project illustrates otherwise.”<sup>149</sup> This statement, citing the form of forced labor in Uzbekistan as an example, strongly supports the conclusion that Article 1(b) of Convention No. 105 is a *jus cogens* norm.

#### **5) Opinions of Distinguished International Law Scholars**

The opinions of distinguished international law scholars bolster the body of evidence that proves Article 1(b) of Convention No. 105 has attained *jus cogens* status. The value of independent legal opinions in debates on *jus cogens* has been questioned by some international law practitioners and promoted by others.<sup>150</sup> In the latter group, Judge Antônio Augusto Cançado Trindade of the International Court of Justice, stands out as one of the most prominent voices in international law espousing a shift from the traditional ILC view on the formation of *jus cogens*. In his words, “*jus cogens* ... is an open category, which expands itself to the extent that the universal juridical conscience (material source of all Law) awakens for the necessity to protect the rights inherent to each human being in every and any situation.”<sup>151</sup> Universal juridical conscience, or *opinio juris communis*, flows from all subjects of international law: States, international organizations, human beings, and humankind as a whole.<sup>152</sup> But of these, it is human conscience “that rescues international law from the pitfalls of State voluntarism and unilateralism, incompatible with the foundations of a true international legal order [based on human rights].”<sup>153</sup>

At the nexus of labor and international law, the ILO Committee of Experts on the Application of

Conventions and Recommendations (CEACR) produces valuable assessments of the normative standing of core labor standards in the hierarchy of international law. The CEACR, an independent body of legal experts entrusted by the tripartite members of the ILO with technical opinions on international labor standards, is authoritative in part because of its independent and impartial analysis of important legal issues affecting the world of work. Their comments inform the policies and practices of all subjects of international law and in this regard, their observations on Article 1(b) of Convention No. 105 are instructive when considering its normative status.

In 2007, the CEACR released its general survey on the application of Convention No. 29 and No. 105. Its findings delimit the boundaries and elaborate on the meaning of specific provisions in each convention, including Article 1(b) of Convention No. 105. Of particular relevance are its comments on manifestations of the conduct prohibited by Article 1(b). It noted that legislation permitting the mobilization of a civilian population in the event of serious economic crisis, the requisitioning of persons and goods to satisfy national needs and protect a nation's vital interests, and the mobilization of labor for the purpose of promoting a country's economic and social development all fell within the meaning of Article 1(b) and were thus strictly prohibited.<sup>154</sup> With respect to the scope of Convention No. 105 in relation to Convention No. 29, the CEACR noted that the former "does not, as a matter of law, incorporate any of the provision of the earlier one" and that "this is also true with regard to exceptions laid down in Article 2, paragraph 2, of Convention No. 29." It further noted that in this regard, "the prohibition laid down in Article 1(b) applies even where recourse to forced or compulsory labour as a method of mobilizing and using labour for purposes of economic development is of temporary or exceptional nature, since the Conference declined a proposal to limit the application of this provision to the use of forced labour as a "normal" method of mobilizing and using labour for such purposes."<sup>155</sup> These observations by the CEACR support the assertion made above that the content of Article 1(b) lies squarely within the parameters of *jus cogens* since no derogation is permitted from the norm.<sup>156</sup>

Based on the analysis above, it appears that the prohibition of use of forced labor for economic purposes as defined in Article 1(b) has indeed attained the status of *jus cogens*.

### 3. The Responsibility of International Organizations for Financial Complicity in International Crimes

As the IBRD, IDA, and IFC are not the principal perpetrators of forced labor in Uzbekistan, a prerequisite for holding them legally accountable is the existence of a secondary mode of participation for which they can be found liable. Complicity, broadly defined as "involvement in crimes," is a secondary mode of civil and criminal liability that is a general principle of international law found in the national laws of countries around the world.<sup>157</sup> When the crime concerned is a *jus cogens* norm, customary international law prohibits the conduct.<sup>158</sup> While there is currently no international convention that deals specifically with responsibility for financial complicity in international crimes, there are numerous international instruments generally prohibiting complicity.<sup>159</sup> Furthermore, international courts such as the Nuremburg Military Tribunals have exercised jurisdiction over financial complicity, and individual criminal responsibility for financing international crimes has been established in their jurisprudence.<sup>160</sup>

The one international instrument that specifically prohibits complicity of international organizations in international crimes is the Articles on the Responsibility of International Organizations ("ARIO"). Adopted and taken note of in 2011 by the UN International Law Commission (ILC) and the UN General Assembly,<sup>161</sup> respectively, the ARIO are to a large extent based on the Articles on Responsibility of States for Internationally Wrongful Acts, adopted by the ILC in 2001.<sup>162</sup> Although some international law experts contend that most of the ARIO constitute progressive development rather than codification of existing international law,

others such as the Council of Europe's Rapporteur on Accountability of International Organizations for Human Rights Violations posit that the high authority of the texts the ILC produces support the assertion that the ARIO have contributed to the formation of custom.<sup>163</sup> Landmark decisions of the European Court of Human Rights and national courts on the responsibility of international organizations and their member States for internationally wrongful acts lend support to the latter proposition.<sup>164</sup>

The ARIO are premised on the notion that “[e]very internationally wrongful act of an international organization entails the international responsibility of that organization.”<sup>165</sup> An internationally wrongful act consists of two elements: attribution of the conduct in question and breach of an international obligation.<sup>166</sup> The most basic rule regarding attribution is contained in Article 6, which states that conduct of organs or agents of international organizations is attributable to that organization. In addition to responsibility for its own conduct, the ARIO also cover the responsibility of international organizations in connection with the internationally wrongful act of a State.<sup>167</sup> Such “indirect” responsibility can be incurred by international organizations through (1) aid or assistance to a State that commits an internationally wrongful act; (2) knowledge of the circumstances of the internationally wrongful act; and (3) if the act violates international law binding on the organization at the time the organization contributed to the breach.<sup>168</sup>

With respect to aid and assistance, the drafting history of Article 14 shows that financial support from IFIs used by a State to commit an international crime falls within the scope of responsibility for internationally wrongful acts envisaged by the ILC.<sup>169</sup> The ILC's commentary on Article 14 notes the additional requirement in the Articles on Responsibility of States for Internationally Wrongful Acts that the aid or assistance should contribute “significantly” to the commission of the wrongful act.<sup>170</sup> It is unclear, based on the drafting history of and commentary on the Article, whether the requirement also applies to aid or assistance from international organizations.<sup>171</sup>

The ILC's commentary on Article 14 also notes the higher standard of intent in the Articles on Responsibility of States.<sup>172</sup> However, unlike the question of contribution, there is clear indication that the knowledge standard written into Article 14 should be accepted on its face. The sole example of aid and assistance provided in the commentary concerns the illegality of continuing to provide support to a host State's armed forces when an international organization has reason to believe the forces are still violating international law despite efforts by the organization to halt its misconduct.<sup>173</sup>

In the absence of an international instrument specifically prohibiting financial complicity of international organizations in international crimes, the relevant provisions in the ARIO on indirect responsibility are controlling. Current jurisprudence of international criminal tribunals that reflect the customary international law on responsibility for aiding and abetting an international crime, and standards propounded by eminent jurists on financial complicity in international crimes, are other sources of international law to consider when assessing the potential liability of the World Bank for financial complicity in the Uzbek government's system of forced labor.

The ARIO provisions on indirect responsibility are consistent with, albeit less defined than, current customary international law on responsibility for aiding and abetting an international crime. The International Criminal Tribunal for the former Yugoslavia (ICTY) Trial Chamber's opinion in *Prosecutor v. Furundžija*, which considered the elements of aiding and abetting liability under customary international law, and subsequent opinions define accomplice liability as “[providing] practical assistance, encouragement, or moral support which has a substantial effect on the perpetration of the crime,<sup>174</sup> [with knowledge] that these acts assist [or facilitate] the commission of the offense.”<sup>175</sup> This definition, while generally limited to criminal law,<sup>176</sup> is largely consistent with the elements of financial complicity laid out by the International Commission of Jurists (ICJ) in their seminal study on corporate complicity and legal accountability.<sup>177</sup>

The ICJ, after a survey of national and international laws and practices concerning corporate complicity

in human rights abuses, determined that the elements of financial complicity should be (1) causation and contribution; (2) knowledge or foreseeability of risk; and (3) proximity.<sup>178</sup> The first element is satisfied if the conduct in question enabled, exacerbated, or facilitated the crime. Enabling a crime means without the organization's conduct the abuses would not have occurred. Exacerbating a crime means the organization's conduct makes the abuses and the harm worse. Facilitating a crime means the organization's conduct changes the way the abuses are carried out. This only requires a finding that the organization's contribution made it easier to carry out the abuses. That the crime in question would still have occurred without the assistance of the organization is irrelevant.<sup>179</sup>

The second element requires knowledge or foreseeability of risk. An organization possesses the requisite state of mind for complicity if it knew or had reason to know that its conduct would likely contribute to the crime. In criminal law, legal responsibility can arise where the individual/s concerned subjectively knew that their course of conduct was likely to contribute to the crime and, even though they may not have wanted the crime to occur, undertook the course of conduct anyway. Subjective knowledge is a question of fact for the court to determine and it can be implied from the surrounding facts and circumstances.<sup>180</sup> The internal deliberations and knowledge of an organization's officials, as well as the surrounding objective circumstances, are both relevant in a court's determination of whether an organization knew or had reason to know that crimes would result from its action.<sup>181</sup> Under the law of civil remedies, liability can arise even where an organization had no knowledge as to the risk of the harm. Whether the risk was reasonably foreseeable is a question of fact for the court to decide.<sup>182</sup>

The third element asks if the organization was close or proximate to the principal perpetrator of the crime or to the victims. An organization that exercises control or influence over an actor that commits a crime will be scrutinized by the court more carefully to assess the impact of its conduct. The deeper the interaction between an organization and the principal perpetrator, the more implausible it will be for an organization to claim it did not know the consequences of the assistance it provided to the principal offender. Satisfaction of this element is therefore closely linked to satisfaction of the first and second elements. There are generally four types of evidence that fulfill the proximity requirement: (1) geographical; (2) economic and political relationships; (3) legal relationships which lead to shared decision-making and close coordination between the parties; and (4) intensity, duration, and texture of relationships (e.g. openness, closeness, frequency and duration of informal or personal contacts and discussion).<sup>183</sup>

Building on the framework established in the ARIO, with due consideration given to the jurisprudence of the ICTY and the standards proposed by the ICJ, the standard adopted for the analysis below is:

An international financial institution which aids or assists a State in the commission of an internationally wrongful act by the State is internationally responsible for doing so if:

- (a) the aid or assistance is practical and has a significant effect,<sup>184</sup> meaning it enabled, exacerbated, or facilitated the internationally wrongful act;<sup>185</sup>
- (b) the organization does so with knowledge of the circumstances of the internationally wrongful act; and
- (c) the organization was close or proximate to the principal perpetrator of the internationally wrongful act or to the victims.<sup>186</sup>

## **B. NATIONAL LAWS APPLICABLE TO THE WORLD BANK GROUP**

There are numerous national laws in jurisdictions around the world that could be applicable to the WBG in the context of financial complicity in systematic forced labor. These laws are beyond the scope of this



report but the potential application of the U.S. Alien Tort Statute (ATS) and the potential enforcement of third-party beneficiary rights under U.S. contract law will be explored here. The WBG's legal defense of immunity will also be considered.

## 1. The Alien Tort Statute

The ATS is a U.S. federal law adopted in 1789 that grants U.S. federal courts jurisdiction to hear claims brought by non-U.S. citizens for torts committed in violation of the law of nations.<sup>187</sup> The ATS has the following requirements: (1) the tort claim must be brought by a non-U.S. citizen; (2) the defendant must be directly or indirectly responsible for the violations and be personally served with the lawsuit while living in or visiting the U.S.; and (3) the underlying violations are limited to human rights abuses prohibited by customary international law.<sup>188</sup> The latter requirement is satisfied by violations of *jus cogens* norms and will be explained in more detail below.

When the ATS was drafted, international law dealt primarily with regulating diplomatic relations between States and prohibiting crimes such as piracy. However, in the 21st century, international law has expanded to include the protection of human rights, and since the 1980s the ATS has given survivors of egregious human rights abuses the right to sue the perpetrators in the U.S. Over the last 35 years the ATS has been used successfully in cases involving torture, state-sponsored sexual violence, extrajudicial killing, crimes against humanity, war crimes, and arbitrary detention.<sup>189</sup>

The landmark *Filartiga* case in 1980 paved the way for the modern application of the ATS to individual perpetrators of severe human rights violations.<sup>190</sup> This was a substantial breakthrough for victims and advocates, but other actors involved in human rights abuses continued to be shielded from legal accountability. In 1996, a new class of defendants emerged: multinational corporations accused of complicity in human rights abuses.<sup>191</sup> Although several corporate accountability cases brought under the ATS were dismissed, two cases – *Doe v. Unocal* and *Wiwa v. Shell* – resulted in settlements that provided reparations to the survivors of human rights abuses and their communities.<sup>192</sup>

In *Unocal*, the oil company was accused of knowingly using forced labor to construct its Yadana gas pipeline, which stretches through Burma into Thailand. Unocal contracted with the military junta in control of Burma to provide security for the project. The junta forced local people to clear the way for the pipeline and its accompanying infrastructure. The Burmese villagers forced to work claimed that the company was liable on the basis of its complicity in the junta's wrongdoing.<sup>193</sup>

Before the case was settled in 2002, Judge Pregerson of the U.S. Court of Appeals for the Ninth Circuit wrote an opinion for the panel holding that Unocal could be held liable on the basis of aiding and abetting under the ATS for “knowing practical assistance or encouragement which has a substantial effect on the perpetration of the crime.”<sup>194</sup> This decision overturned a lower court ruling that Unocal's liability rested upon its intention to commit these abuses, a higher standard that had proven difficult to establish in other ATS cases involving corporate complicity. Rather than risk liability and perhaps an unfavorable legal precedent, Unocal agreed to provide direct compensation and “substantial assistance” to the Burmese who were harmed via funds for programs to improve living conditions, health care, and education.<sup>195</sup>

While the *Unocal* case was a significant victory for human rights advocates struggling to hold corporations accountable for human rights abuses, it is unclear what effect it ultimately will have on the development of U.S. and international law on financial complicity of IFIs. The law on aiding and abetting liability under the ATS remains unsettled and to date, no contested corporate ATS case has resulted in a jury verdict in favor of the plaintiffs.<sup>196</sup> An ATS claim against the WBG for aiding and abetting forced labor would be a case of first impression.<sup>197</sup>

Since *Unocal*, use of the ATS has both expanded and contracted. In *Sosa v. Alvarez-Machain*, the U.S. Supreme Court, affirming the *Filartiga* line of cases, held that the ATS grants federal courts jurisdiction over claims based on specifically defined, universally accepted, and obligatory norms of international law.<sup>198</sup> The Court also suggested that the practical consequences of making a particular cause of action available to litigants should be considered.<sup>199</sup> In setting the standard, the Court declined to enumerate specific international norms which would give rise to causes of action, recognizing the evolving nature of international law and the possibility additional norms could become actionable under the ATS in the future.<sup>200</sup>

Three years ago, however, the U.S. Supreme Court significantly limited the use of the ATS. In *Kiobel v. Royal Dutch Petroleum Co.*, the Court held that claims will generally not be allowed if they concern conduct occurring in the territory of a foreign sovereign. It invoked the “presumption against extraterritoriality” and reasoned that “the principles underlying th[is] canon of interpretation similarly constrain courts considering causes of action that may be brought under the ATS.” The majority concluded its analysis by noting, “[E]ven where the claims touch and concern the territory of the United States, they must do so with sufficient force to displace the presumption against extraterritorial application. Corporations are often present in many countries, and it would reach too far to say that mere corporate presence suffices.”<sup>201</sup> The Court did not elaborate on what will be required in order for an ATS claim to rebut this presumption, but it appears that claims can still be brought for torts in violation of international law that occur partially in the U.S.<sup>202</sup> It also seems clear that there will be situations in which corporate or organizational conduct in the U.S. is sufficiently connected to foreign human rights violations that it will be actionable under ATS.<sup>203</sup> A company’s incorporation in the U.S. is one condition which the Fourth Circuit determined militates against barring an ATS claim.<sup>204</sup> An international organization’s establishment of its headquarters in the U.S. may be another.<sup>205</sup>

It is important to consider here the D.C. District Court and D.C. Circuit’s decisions on aiding and abetting liability under the ATS, as any claim brought by Uzbek victims against the World Bank would be heard in D.C. federal courts. In *Doe v. Exxon Mobil Corp.*, the D.C. Circuit looked to both federal common law and customary international law to determine the availability of aiding and abetting liability under the ATS, and to customary international law for the applicable standard.<sup>206</sup> With respect to the former, the Court found that both national and international authorities supported the conclusion that aiding and abetting liability is a violation of the law of nations, meets the requirements mandated in *Sosa*, and is thus available under the ATS.<sup>207</sup> With regard to the latter, the Court determined that the *mens rea* requirement is knowledge and the actus reus requirement is “acts [or omissions] that have a substantial effect in bringing about the violation.”<sup>208</sup> The Court, explaining the rationale for its decision, noted that the Rome Statute of the International Criminal Court “is properly viewed in the nature of a treaty and not as customary international law,” and as such, its purpose standard of *mens rea* is not the applicable standard for aiding and abetting liability under the ATS.<sup>209</sup>

It is also noteworthy that the D.C. Circuit rejected the Second Circuit’s finding in *Kiobel* that corporate liability is not available under the ATS.<sup>210</sup> It observed that the majority of the Second Circuit erred in looking to customary international law to determine the nature of the remedy requested when they should have referred to federal common law instead.<sup>211</sup> The Court concluded that under federal common law, corporations can be held liable for torts committed by their agents, and thus, corporate liability is available under the ATS.<sup>212</sup>

The D.C. District Court’s decisions in *Doe v. Exxon Mobil Corp.*,<sup>213</sup> decided last year on remand, are particularly important to note as they have clarified key issues related to aiding and abetting liability that were previously unsettled in this venue. With respect to the extraterritorial application of the ATS, the Court recalled that the *Kiobel* Court had cited *Morrison v. Nat’l Australia Bank Ltd.* in its discussion of its “touch and concern” test and therefore that case’s “focus” test should inform the District Court’s

interpretation of the touch and concern test.<sup>214</sup> Applying the focus test, which looks to the primary focus of congressional concern in passing a law, the Court found that Congress intended the ATS to provide jurisdiction for violations of customary international law.<sup>215</sup>

The Court then considered what level of conduct would be sufficient to displace the presumption and concluded that the conduct would be adequate if there are specific, substantial allegations of conduct occurring in the United States that supports an ATS cause of action.<sup>216</sup> After clarifying that the required domestic conduct need not amount to a completed tort under the ATS,<sup>217</sup> the Court found that the two other criteria it would consider are U.S. citizenship or corporate status and important national interests of the United States. With respect to the former, the Court decided that it is a relevant consideration, but not a fundamental criterion.<sup>218</sup> With regard to the latter, the Court noted that “such national interests might be triggered by the fact that the United States government is in some way culpable or, at least, integrally involved in the conduct giving rise to the claims at issue.”<sup>219</sup>

The District Court also determined the applicable standard for assessing aiding and abetting liability under the ATS. The D.C. Circuit, in 2013, remanded the case to the District Court with an order to apply both the *Kiobel* “touch and concern” test and the *Perisic* “specific direction” *actus reus* requirement that had just been adopted by the ICTY Appeals Chamber.<sup>220</sup> However, in January 2014, the ICTY Appeals Chamber decided in *Prosecutor v. Sainovic* to overrule the *Perisic* Appeals Court finding that “specific direction” is an element of the *actus reus* of aiding and abetting. The *Sainovic* Appeals Court held that the correct standard under customary international law is “practical assistance, encouragement, or moral support which has a substantial effect on the perpetration of the crime.”<sup>221</sup> In December 2015, the *Stanisic and Simatovic* Appeals Court upheld the *Sainovic* Appeals Court decision to overrule the *Perisic* Appeals Court.<sup>222</sup>

The District Court adopted the *Sainovic* standard, noting its conformity with the D.C. Circuit’s previously articulated standard,<sup>223</sup> and then elaborated on its understanding of the “substantial effect” element. It held, “for assistance to be substantial, it need not be proved that there was a ‘cause-effect relationship’ between the defendant’s conduct and the primary violation of international law.”<sup>224</sup> It also noted that “there must only be some sort of direct relationship” between the aider and abettor’s actions and the underlying crime.<sup>225</sup> Seeking to provide more clarity, the Court noted that “a defendant may render substantial assistance by providing the means by which a violation of the law is carried out” or “permitting the use of resources under his or her control to facilitate the perpetration of a crime.”<sup>226</sup> It concluded that “an aider and abetter need not provide the actual tools used in carrying out the violation of customary international law if they directly facilitate the ultimate commission of the underlying offense.”<sup>227</sup>

With regard to the *mens rea* element of aiding and abetting liability, the Court cited recent ICTY jurisprudence in elaborating on the knowledge standard adopted by the D.C. Circuit. It held that the defendant must “know the intent of the principal perpetrator,” but “[k]nowledge of the same or similar actions in the past by the principal perpetrator is sufficient [to satisfy this requirement].”<sup>228</sup> Applying this law to the allegations in the case, the Court determined that the knowledge standard was satisfied based on the assertion that the defendant received reports about human rights violations committed by its personnel on its overseas property and warnings allegedly provided to the defendant that supplying its personnel with more resources could lead to a greater likelihood of abuses perpetrated by them.<sup>229</sup>

The Court concluded that despite the absence of important national interests in this case, the plaintiff’s “allegations of U.S.-based decision making constitute substantial and specific allegations of domestic conduct relevant to the *actus reus* of aiding and abetting a violation of customary international law, [and these allegations], in combination with the fact of the defendant’s U.S.-based incorporation and principal place of business, demonstrate that plaintiffs’ claims against the defendant sufficiently touch and concern the United States to displace the presumption against extraterritorial application of the ATS.”<sup>230</sup>

## 2. Third-Party Beneficiary Rights under U.S. Contract Law

The third-party beneficiary rule in U.S. contract law provides a non-signatory to a contract the right to enforce promised performance if the parties to the contract so intended.<sup>231</sup> This right has become generally accepted across all jurisdictions in the U.S. since the landmark case, *Lawrence v. Fox*.<sup>232</sup> The essential requirement for third-party beneficiary status is establishing the intent to benefit the non-signatory so that the non-signatory can be classified in U.S. courts as an intended beneficiary of the contract.<sup>233</sup> In D.C. courts, a third-party beneficiary may bring a legal action against the contracting parties if the parties “intended to create and did create enforceable contract rights in the third party.”<sup>234</sup> Third-party beneficiary status also requires that the benefit conferred by the contracting parties is not merely coincidental to the performance of the contract.<sup>235</sup> To determine the intent of the parties, courts consider both the language of the contract and the circumstances of the agreement.<sup>236</sup>

The test for determining whether a non-signatory is an intended or incidental beneficiary is two-fold and requires both conditions to be satisfied unless otherwise agreed by the contracting parties.<sup>237</sup> First, recognition of the third party’s right to performance must be considered “appropriate to effectuate the intention of the contracting parties.”<sup>238</sup> Second, either performance of a promise releases the promisee from a debt or the circumstances indicate that “the promisee intends to give the beneficiary the benefit of the promised performance.”<sup>239</sup>

Three additional considerations with respect to intended beneficiaries are important to note. First, an intended beneficiary need not be mentioned by name so long as the beneficiary belongs to a distinct class of people, not just the general public.<sup>240</sup> Second, no contract or communication with the beneficiary is necessary to create third-party beneficiary status.<sup>241</sup> Finally, the promised performance may provide economic benefit to a person other than the third-party beneficiary so long as the beneficiary is designated to receive the underlying benefit intended by the contracting parties.<sup>242</sup>

## 3. The International Organization Immunity Act of 1945

International organizations in the UN system generally derive their immunity from two sources: the 1946 Convention on the Privileges and Immunities of the United Nations (CPIUN) and the 1947 Convention on the Privileges and Immunities of the Specialized Agencies (CPISA).<sup>243</sup> The former applies only to the UN while the latter applies to its specialized agencies such as the WBG. The U.S., host State to both the UN and the WBG, has ratified the CPIUN but not the CPISA. In lieu of ratifying the CPISA, the U.S. government has chosen to extend privileges and immunities to the WBG under the International Organization Immunity Act of 1945 (IOIA).

The IOIA provides that certain international organizations “shall enjoy the same immunity from suit and every form of judicial process as is enjoyed by foreign governments.”<sup>244</sup> When the IOIA was enacted, foreign states generally had “absolute immunity” in U.S. courts. However, since then, the U.S. has clarified that foreign sovereign immunity does not mean “absolute immunity” in all cases.<sup>245</sup> This practice of “restrictive immunity” was codified in the Foreign Sovereign Immunities Act of 1976 (FSIA), but U.S. courts have generally continued to grant absolute immunity to international organizations covered by the IOIA.<sup>246</sup> The Third Circuit, the lone U.S. appellate court thus far to restrict international organization immunity, noted in its decision that an alternate finding would allow foreign governments to operate with absolute immunity simply by acting through an international organization.<sup>247</sup>

The absolute immunity claimed by the UN and the WBG has generally been upheld by U.S. courts, but there are currently two cases pending that could have broad legal and policy implications for future cases involving unlawful acts allegedly committed by international organizations headquartered in the U.S. One

case, *Georges, et al. v. United Nations, et al.*, involves alleged negligence by the UN that resulted in the introduction of cholera to Haiti and over 10,000 deaths since 2010. Although the Second Circuit Court of Appeals recently affirmed the New York Southern District Court’s 2015 judgment dismissing the case for lack of subject matter jurisdiction, the plaintiffs still have the option of appealing to the U.S. Supreme Court. The plaintiffs’ lawyers have stated that they may do so if the new actions currently being considered by the UN do not provide remedies to the victims of the epidemic.<sup>248</sup>

The other case, *Jam, et al. v. International Finance Corporation*, involves alleged destruction of the livelihoods and property of fishing communities and farmers, as well as threats to their health, by the IFC-funded Tata Mundra coal-fired power plant in India.<sup>249</sup> The D.C. District Court, in upholding immunity for the IFC in the first instance, noted that it had no authority to overturn the current jurisprudence of the D.C. Circuit regarding immunity of international organizations under the IOIA and it would be up to the D.C. Circuit to decide whether recent U.S. Supreme Court jurisprudence concerning the FSIA demonstrates that immunity for the IFC should be restricted.<sup>250</sup> While *Georges* turns on the issue of immunity under the CPIUN and would not set legal precedent for claims against the WBG, *Jam* is a challenge by the plaintiffs against the immunity asserted by the IFC under the IOIA. The D.C. Circuit’s decision on the scope and application of immunity in that case could establish a new path to justice not only for the communities harmed by the Tata Mundra project, but also local populations around the world harmed by other WBG-financed projects.

If the D.C. Circuit does decide to restrict the IFC’s immunity, the onus would then be on the plaintiffs to convince the Court that the IFC either impliedly waived its immunity or engaged in a commercial activity within the meaning of Sections 1603 and 1605 of the FSIA.<sup>251</sup> The general rule for a finding of implied waiver is that the plaintiff must provide strong evidence of the foreign state’s intent to waive its immunity.<sup>252</sup> However, the D.C. Circuit has, as the D.C. District Court did in *Jam*, using the balancing test developed in *Mendaro*,<sup>253</sup> *Atkinson*,<sup>254</sup> and *Osseiran*<sup>255</sup> to weigh the benefits and burdens of a waiver of the IFC’s immunity. The District Court noted in its assessment that the relevant question was whether the benefits accruing to the organization over the long term, as a result of [a] waiver for the specific type of suit and plaintiff at bar, “would be substantially outweighed by the burdens caused by judicial scrutiny of the organization’s discretion to select and administer its programs.”<sup>256</sup> The Court then explained that it would find a waiver beneficial to the IFC in the long term if the particular type of suit brought by the plaintiffs would further the organization’s objectives. The Court ultimately concluded that the potential burdens to the organization associated with defending against lawsuits substantially outweighed the potential benefits of improving its compliance with its policies and the law, increasing local communities’ confidence in the organization, and ultimately furthering its development goals.

The commercial activity exception, on the other hand, requires a finding that (1) the defendant engaged in “either a regular course of commercial conduct or a particular commercial transaction or act;”<sup>257</sup> (2) the plaintiff’s specific claim is “based upon” the commercial activity or upon an act in connection with the activity;<sup>258</sup> and (3) the activity in question has a sufficient jurisdictional nexus to the U.S.<sup>259</sup> With respect to the first element, the FSIA provides that “[t]he commercial character of the activity shall be determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose.”<sup>260</sup> The Fifth Circuit, in interpreting this provision, found a contract for the provision of training and support services to a foreign state’s air force to be non-commercial but a related contract for parts and components for its aircraft to fall within the commercial activity exception.<sup>261</sup> The D.C. Circuit has interpreted the second element loosely, in one instance finding the purchase of a plane ticket in the U.S. to have sufficient nexus to a negligence claim arising from an injury abroad.<sup>262</sup> U.S. courts have found that the third element is satisfied by evidence of receipt of financing from a private or public lending institution located in the U.S.<sup>263</sup>

In *Jam*, the Court only addressed the first element of the commercial activity exception. It noted that unlike



prior cases where it had found an exception, the plaintiffs (fishermen and farmers) in the case at bar did not have a direct commercial relationship with the IFC. Rejecting the plaintiffs' arguments, the Court recalled that prior claims which were successful in invoking the exception had been based on principles of contract law, not tort.<sup>264</sup>

Although *Jam* has been temporarily sidetracked due to its dismissal by the District Court,<sup>265</sup> the plaintiffs' legal battle has illuminated potential paths forward for future cases that might be brought against the IFC or World Bank for complicity in human rights abuses. In particular, it can be inferred from the District Court's handling of the plaintiffs' arguments for abrogation of immunity that there are other strategies and claims that the Court might find more compelling and within the scope of exceptions to international organization immunity.



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## III. ASSESSMENT OF THE POTENTIAL LEGAL LIABILITY OF THE WORLD BANK

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The World Bank’s continued financing of agricultural projects in Uzbekistan when it knows of a plausible link between its funds and forced labor seemingly violates both its internal laws and the international law on responsibility of international organizations for financial complicity in international crimes. No national or international court, however, has heard or issued an opinion about this case, and there has never been a legal assessment conducted on its merits. The analysis below, based on the facts and law presented in Parts I and II above, attempts to shed some light on whether the Bank is indeed in the zone of legal risk with respect to its agricultural loans to the Government of Uzbekistan.

This Part begins by considering whether the Bank is continuing to violate international law by providing agricultural loans to the Uzbek government. It then assesses the potential legal liability of the Bank if a complaint is filed against it in a U.S. court. Finally, it addresses possible Bank arguments about its constitutive instrument and immunity from suit.

### **A. THE WORLD BANK IS CONTINUING TO VIOLATE INTERNATIONAL LAW BY FINANCING PROJECTS THAT PERPETUATE THE UZBEK SYSTEM OF FORCED LABOR**

#### **1. The Uzbek system of forced labor is a violation of the *jus cogens* prohibition against using forcing labor for economic development**

The prohibition against using forced labor for economic development has attained the status of *jus cogens*, and as such, no justifications may be made for the continued existence of the widespread and systematic forced labor orchestrated by the Government of Uzbekistan each autumn. The facts below, based on the findings of the ILO and UGF in 2015, show that the features of the Uzbek system of forced labor match each element of the conduct prohibited by Article 1(b) of Convention No. 105, namely (1) mobilization of people; (2) by the State; (3) for involuntary work; (4) under threat of penalty; and (5) for purposes of economic development.

First, the UGF report revealed that more than one million people were called up to pick cotton during the Fall 2015 cotton harvest and the institutions to which they belonged – schools, universities, hospitals, and mahallas – played an instrumental role in organizing them.<sup>266</sup> The findings of UGF’s independent civil society monitors are consistent with the observations of the ILO, which concluded in its monitoring report that the “organized recruitment of adults to pick cotton was widespread” and “colleges and universities for those 18 years and older did not appear to be functioning normally as these students participated in the harvest.”<sup>267</sup>

Second, the UGF report documented the Uzbek government’s central role in mobilizing its people for the cotton harvest. The report noted that the president, prime minister, heads-of-government, and state agents

set the national production target at the beginning of the year and required farmers to meet individual production quotas. Further, the institutions involved in organizing people did so because they were required to report to higher authorities on the fulfillment of their mobilization requirements.<sup>268</sup>

Third, UGF's monitors found that the more than one million people who were called up to pick cotton did so involuntarily for shifts of 15-40 days.<sup>269</sup> This finding is consistent with the ILO's conclusion that "organized recruitment of large numbers of people in such a short period of time carries certain risks linked to workers' rights ... and certain indicators of forced labour have been observed."<sup>270</sup> UGF's monitors also found that "cotton work is not viewed by the vast majority of people as an opportunity to supplement income" and "to make the forced labor appear voluntary, officials forced teachers, students, and medical workers to sign statements attesting that they picked cotton of their own will."<sup>271</sup>

Fourth, the UGF report found that the people who involuntarily grew or picked cotton did so under threat of penalty. Public and private sector employees were threatened with the loss of their jobs, and students were threatened with poor grades or expulsion. Under its "re-organization" plan, the Uzbek government punished farmers in debt and those who failed to meet their production quotas by taking back their land and seizing livestock and other property.<sup>272</sup>

Finally, the Uzbek government's own statements confirm that its citizens grow and pick cotton to further the country's economic development. Both high-level and local authorities have made it clear to citizens that they believe "cotton is the people's riches" and picking cotton is "khashar," or voluntary work for collective improvement.<sup>273</sup> The ILO CEACR has concluded that "khashar" does not fall within the "normal civic obligations" or "minor communal services" exceptions found in Article 2 of Convention No. 29; rather, it is clearly involuntary work for purposes of economic development as prohibited by Article 1(b) of Convention No. 105.<sup>274</sup>

## **2. Uzbek citizens at World Bank-financed project sites were forced to grow and pick cotton in 2015**

Although Uzbekistan's system of cotton production is a clear violation of Article 1(b) of Convention No. 105, and Article 1(b) by definition implies systematic and possibly widespread use of forced labor, the World Bank's project agreements with the Government of Uzbekistan only require it to suspend its loans when a specific instance of child or forced labor is found at project sites.<sup>275</sup> In 2015, UGF's monitors carried out research in six regions in Uzbekistan, including three districts in Karakalpakstan where a USD 260 million World Bank-financed irrigation and agriculture project is being implemented.<sup>276</sup> The Uzbek monitors' research revealed that the Government's forced labor system was implemented at Karakalpakstan and other World Bank-financed project sites.<sup>277</sup>

The Government's "re-optimization" and "cleaver" plans authorized local officials throughout Uzbekistan, including at World Bank-financed project sites, to punish farmers in debt or who failed to meet production quotas by taking back their land and seizing their possessions.<sup>278</sup> In a conference call with local authorities and farmers on October 12, 2015, Shavkat Mirziyayev, Uzbekistan's prime minister, ordered local officials to use court bailiffs and police to take property from indebted farmers. A farmer from Namangan who was on the call told Radio Ozodlik that the prime minister said, "Go to farmers' fields and tell them to fulfill the [production] plan. Go to the homes of farmers in debt, who can't repay their credit, take their cars, livestock, and if there are none, take the slate from their roofs!"<sup>279</sup>

At Buka, one of the regions where World Bank-financed projects are located, the director of the Angren branch of the joint stock company O'zbekko'mir ordered the company's workers to pick cotton from September 9 to the end of the harvest season. Point 3 of the directive signed by the Director explicitly

threatens workers with dismissal for refusal to pick cotton or failure to meet the quota.<sup>280</sup>

At Karakalpakstan, college teachers confirmed that they and mahalla committee members were required to visit the parents of students to “acquaint them with the recent orders and directives of the government regarding students’ education and their participation in the work and activities of the college.” Parents were required to send their children to the harvest and some provided statements indicating they were “not opposed to my child taking part in the work of the college.”<sup>281</sup> In the context of forced labor in Uzbekistan, the “work of the college” is evidently a common euphemism for going to the fields to pick cotton.

Other college teachers in Karakalpakstan confirmed that they were instructed to falsify class attendance sheets to make it appear as though students who picked cotton were actually in class. One teacher noted, “During the harvest the educational program is not cut. Officially, all students are in class and no one, not even for a day, was in the fields!”<sup>282</sup> A college student in Karakalpakstan who was in the fields noted that even those who were paid for their work often finished in debt due to the exorbitant cost of food. The student recalled, “[T]he price for one kilo [of cotton] from start to finish was 230 soum. But they didn’t pay students any money, telling them it was all spent on food. Those who didn’t pick much went into debt for the food.”<sup>283</sup>

While UGF monitors were able to obtain evidence of forced labor in some parts of Karakalpakstan, they were often met with resistance from security service officers who prevented them from collecting a more voluminous account of forced labor at World Bank-financed project sites in that region. In one documented account, security service officers denied Malohat Eshankulova and Elena Urlaeva, two independent civil society activists, access to teachers and medical workers who were sent to the cotton fields in Ellikkala and Beruni.<sup>284</sup>

The evidence presented above indicates the Uzbek system of forced labor was implemented at World Bank-financed project sites through punitive agricultural plans imposed on farmers at the start of the year and the mobilization of college students and employees of public-private enterprises during the autumn cotton harvest. Furthermore, it is well established that the circumstances in these areas were “so coercive as to negate any possibility of consent.”<sup>285</sup> The concept of “climate of fear,” which has been affirmed by the ICTY and several U.S. appellate courts, is an exception to the general requirement that forced labor be proved on a case by case basis.<sup>286</sup> The concept applies when the specific conditions creating a pervasive climate of fear are such that the victims’ “general situation negated any possibility of free consent.”<sup>287</sup> Under these circumstances, “it may neither be expected of a [forced laborer] that he voice an objection nor held that a person in authority need threaten him with punishment if he refuses to work in order [for the offense of] forced labour to be established.”<sup>288</sup>

In Uzbekistan, forced labor occurs in the context of entrenched repression and widespread human rights violations. Courts are neither independent nor trusted by the population as impartial, and serious due process and other rights violations are rife in the criminal justice system.<sup>289</sup> Police and prosecutors have even been observed supervising the mobilization of citizens for the cotton harvest.<sup>290</sup> This breakdown of the independent functions of the judiciary and law enforcement effectively silences citizens who would complain about forced labor and other human rights abuses perpetrated by the State.

The Government also regularly subjects journalists, civic activists, and human rights defenders, including independent forced labor monitors, to surveillance, harassment, and intimidation for doing their work, and in some cases imprisonment, ill-treatment, and torture.<sup>291</sup> The examples made of these individuals remind citizens of the dangers of complaining about forced labor. Local neighborhood councils, known as mahalla committees, also contribute to the climate of fear by closely cooperating with the police to monitor and report on residents.<sup>292</sup> Those who refuse to pick cotton face are reported to the authorities and also face repercussions from others in their community.<sup>293</sup> The mahalla committees, with authority over welfare

payments and utilities, have also withheld these basic necessities as punishment against residents who inform independent civil society monitors of forced labor in their neighborhoods.<sup>294</sup>

In addition to these specific conditions which create a climate of fear, the totalitarian regime in power has instilled a deep-rooted fear in citizens by brutally repressing those who seek democracy or are perceived as opponents to the Government.<sup>295</sup> The pervasive sense among Uzbek citizens, reinforced by the actions of state-controlled institutions responsible for mobilization,<sup>296</sup> is that those who refuse to pick cotton could be viewed as anti-state or opposed to the leadership of the country.<sup>297</sup> In the context described above, such denouncements would inevitably lead to retaliation, including imprisonment, torture, and other inhumane treatment.

Given the specific conditions that have established a pervasive climate of fear throughout Uzbekistan, it is reasonable to conclude that the general situation of those who were forced to work in the cotton fields negated any possibility of free consent. Therefore, all citizens who grew or picked cotton in 2015 are *de jure* victims of forced labor, and individual cases need not be proven in order for a finding that forced labor occurred at all the World Bank-financed project sites where cotton was grown.

### **3. The World Bank incurs international legal responsibility for financing projects that perpetuate the Uzbek system of forced labor**

The World Bank, a public international organization, possesses international legal personality and has corresponding rights and obligations under international law. One of its obligations is to refrain from committing an internationally wrongful act. As the ARIO note, international organizations such as the World Bank can be held “indirectly” responsible for committing an internationally wrongful act if it provides aid or assistance to a State that is the principal perpetrator.<sup>298</sup> To establish the World Bank’s secondary responsibility for the commission of an internationally wrongful act, or in other words, its complicity, it must be proven that the misconduct of the State violated an international law binding on the Bank at the time it contributed to the breach. It must also be proven that the contribution of the Bank to the commission of the act by the State satisfied these three elements: (1) the aid or assistance provided to the State was practical and had a substantial effect; (2) the Bank aided or assisted the State with knowledge of the circumstances of its internationally wrongful act; and (3) the Bank was close or proximate to the State or the victims.

The international legal obligations of the World Bank encompass the requirements imposed on all subjects of international law by *jus cogens* norms such as the prohibition against using forced labor for economic development. Thus, if it is established that the World Bank contributed to the mobilization and use of forced labor in Uzbekistan for purposes of economic development, the organization will incur international responsibility for its internationally wrongful acts.

With respect to the first element, the World Bank facilitated the Government of Uzbekistan’s violation of Article 1(b) of Convention No. 105 by approving loans in 2012 for an agricultural project connected to cotton production that made it easier for the Government to carry out its crimes. The Bank also facilitated the Government’s violation of Article 1(b) by deciding not to suspend its loans despite evidence of forced labor presented by civil society groups.<sup>299</sup>

With respect to the second element, the World Bank knew that its approval of loans, and decision not to suspend them, would likely contribute to the violation of Article 1(b) of Convention No. 105 as evidenced by the myriad civil society reports presented to the organization since 2010 which documented the Government’s mobilization and use of forced labor during the annual cotton harvest.<sup>300</sup> Further, the organization was aware as early as 2013 of a “plausible link” identified by the Inspection Panel between its funds and forced



labor but decided not to investigate the allegations made by the Requesters and approved the mitigation measures proposed by Bank management despite warnings from civil society that the measures would be unfeasible to implement and insufficient to prevent its financing from perpetuating forced labor in its project sites. These decisions effectively allowed the Bank to continue lending to the Government and its loans have not stopped ever since. The 2015 ILO and UGF reports provided the Bank with additional evidence of widespread and systematic forced labor orchestrated by the Government, yet the Bank continues to claim a different interpretation of the findings and its Board of Directors recently agreed to provide new loans through the IFC to support private sector involvement in cotton production in Uzbekistan.

Finally, with regard to the last element, the World Bank continues to exercise control and influence over the Government of Uzbekistan in its implementation of World Bank-financed projects that have contributed to the perpetration of forced labor in the country. The Government has been a member of the World Bank since 1992. The sheer amount of funds distributed through the projects has established a close economic relationship between the Bank and the Government of Uzbekistan. Furthermore, the Bank's agreement with the ILO to monitor the 2015 cotton harvest and follow up on its findings through in-country technical support programs has established a close political and legal relationship between the Government of Uzbekistan and the World Bank that entails close coordination between the parties on important decisions concerning cotton production in Uzbekistan. The presence of in-country Bank management and regular contact between the parties further demonstrates the proximity of the World Bank to the principal perpetrator of the crime, the Government of Uzbekistan.

Based on the evidence presented above, it appears that the Bank has indeed been complicit in the mobilization and use of forced labor in Uzbekistan for purposes of economic development and consequently, it incurs international legal responsibility for its internationally wrongful acts. The practical legal implications of this will be explored in the section below.<sup>301</sup>

## **B. THE WORLD BANK MIGHT BE HELD LIABLE IN THE U.S. FOR AIDING AND ABETTING THE UZBEK GOVERNMENT'S FORCED LABOR SYSTEM AND NOT FULFILLING ITS CONTRACTUAL OBLIGATIONS TO UZBEK FARMERS**

### **1. The World Bank might be held liable under the Alien Tort Statute for providing loans to the Government of Uzbekistan when it knew the funds would likely be used to perpetrate its forced labor system**

If it is determined that the World Bank does incur international legal responsibility for providing loans to the Government of Uzbekistan, as contemplated above, it might be held liable in U.S. federal courts under the ATS. The ATS has three requirements: (1) the tort claim must be brought by a non-U.S. citizen; (2) the defendant must be directly or indirectly responsible for the violations and be personally served with the lawsuit while living in or visiting the U.S.; and (3) the underlying violations are limited to human rights abuses prohibited by customary international law.<sup>302</sup>

With respect to the first requirement, an ATS claim could be initiated by an Uzbek victim of forced labor. With respect to the second requirement, the World Bank is headquartered in Washington, D.C. and as demonstrated above, could be held indirectly responsible under international law for financial complicity in the perpetration of widespread and systematic forced labor by the Government of Uzbekistan. Under the ATS, the Bank's loans to the Government of Uzbekistan may be considered aiding and abetting an international crime. Applying the D.C. District Court and D.C. Circuit's standards for corporate ATS liability to the facts presented above on the Bank's international legal responsibility, the Bank might be held liable for forced labor violations in Uzbekistan that it knew about and assisted through financial support in the

form of tailored loans. There is a real possibility, with the *Sainovic* “substantial effect” standard, that the D.C. federal courts could find a direct relationship between the Bank’s loans and the perpetration of forced labor by the Uzbek government. Furthermore, the Second Circuit’s decision in *Khulumani v. Barclays National Bank* suggests that tailored loans, such as those for the RESP II, that directly support a crime might be more likely to meet the substantial effect requirement for aiding and abetting liability.

With regard to extraterritorial application of the ATS, the Ninth Circuit recently found that companies incorporated in the U.S. can as a matter of law “touch and concern” the territory of the U.S. with enough force to warrant federal jurisdiction over ATS claims against them if “part of the conduct underlying [the] claims [against them] occurred within the U.S.”<sup>303</sup> In overturning the District Court’s ruling that corporations cannot be sued under the ATS, the Court reaffirmed its prior finding in *Sarei* that there is no categorical rule of corporate immunity and there are norms in international law that are “universal” or applicable to “all actors.”<sup>304</sup> It also recalled that the applicability of these norms turns on the “specific identity of the victims rather than the identity of the perpetrators.”<sup>305</sup> The D.C. District Court has also recognized certain circumstances justify a displacement of the presumption against extraterritorial application of the ATS.<sup>306</sup> It decided in *Doe v. Exxon Mobil Corp.* that the defendant’s U.S.-based incorporation and its U.S.-based decision making were sufficient to warrant such a finding.

Based on the D.C. District Court’s holdings in *Doe v. Exxon Mobil Corp.*, there is a real possibility that it could draw a similar conclusion in a case brought by Uzbek victims that the World Bank’s U.S. headquarters and U.S.-based decisions to approve and not suspend loans that were then used by the Uzbek government to perpetrate *jus cogens* violations do touch and concern the U.S. with sufficient force to displace the presumption against extraterritoriality. Moreover, the District Court has recognized that one of its criterion, important national interests, “might be triggered by the fact that the United States government is in some way culpable or, at least, integrally involved in the conduct giving rise to the claims at issue.”<sup>307</sup> A case against the World Bank would fit this paradigm as the U.S. government, by the weight of its vote, played an integral role in the World Bank Board of Directors’ decisions to provide agricultural loans to the Government of Uzbekistan. Questions of immunity, which may in some instances preclude the exercise of jurisdiction over international organizations headquartered in the U.S., will be considered below.

With regard to the last requirement, the U.S. Supreme Court has found that U.S. federal courts may exercise jurisdiction over ATS claims if they are based on specifically defined, universally accepted, and obligatory norms of international law.<sup>308</sup> The Ninth Circuit has confirmed that *jus cogens* norms meet these criteria and the D.C. Circuit has held that aiding and abetting liability does so as well.<sup>309</sup> In the case of Uzbekistan, the Government’s mobilization and use of forced labor for economic development is, as established above, a violation of the *jus cogens* norm defined in Article 1(b) of Convention No. 105. The D.C. federal courts, finding that Article 1(b) meets the *Sosa* standard, could then exercise jurisdiction over ATS claims brought against the World Bank for aiding and abetting this violation.<sup>310</sup>

## **2. The World Bank might be held liable under U.S. contract law for not fulfilling its contractual obligations to Uzbek farmers who are the intended beneficiaries of the RESP II agreement between the Bank and the Uzbek government**

The two conditions that must be satisfied for a U.S. court to determine that an Uzbek plaintiff is a third-party beneficiary of a contract between the World Bank and the Uzbek government are (1) recognition of the plaintiff’s right to performance would properly carry out the intention of the contracting parties and (2) performance of the promise alleged releases the World Bank from a debt or the circumstances indicate that the World Bank intends to give the plaintiff the benefit of the promised performance.<sup>311</sup>

The RESP II agreement between the World Bank and the Uzbek government clearly states that the project's objective is to, among other things, increase the profitability of agribusiness in World Bank-financed project areas. The contracting parties intended this to be carried out through the provision of infrastructure and other support to newly independent farmers. In the eight years since the project commenced, millions of U.S. dollars have been lent to Uzbek farmers to finance their agricultural machinery, processing equipment, and packaging equipment and materials.<sup>312</sup>

It is evident from the language of the RESP II agreement, the project design and sub-loan recipients, and the goods purchased with Bank loans that recognition by U.S. courts of an Uzbek farmer's right to performance would carry out the intention of the Bank and the Government when RESP II was agreed upon. It is also clear based on recent project implementation reports that the Bank still intends to give Uzbek farmers the benefit of the Uzbek government's promised performance of the contract.<sup>313</sup>

Despite the Government's good intentions on paper, it is likely there are some Uzbek farmers in World Bank-financed project areas who have not seen a net increase in the profitability of their agribusinesses. As documented by the Uzbek-German Forum for Human Rights, Uzbek farmers throughout the country are forced to meet strict quotas for harvesting cotton and required to sell their yield to the Government at prices so low they are not able to make a profit let alone hire voluntary labor to pick cotton. Even though Uzbek farmers at World Bank-financed project sites might be able to sell their cotton to non-government purchasers,<sup>314</sup> there may be some who are still unable to generate a profit due to the demands of the authorities. Under these circumstances, an Uzbek farmer, as a third-party beneficiary of the World Bank-Uzbek government agreement, would be justified in suing the Bank for material breach of contract.<sup>315</sup>

### **C. THE POLITICAL PROHIBITION PROVISIONS OF THE WORLD BANK ARTICLES OF AGREEMENT DO NOT EXCULPATE THE WORLD BANK FROM FINANCIAL COMPLICITY IN THE PERPETRATION OF WIDESPREAD AND SYSTEMATIC FORCED LABOR BY THE GOVERNMENT OF UZBEKISTAN**

The Political Prohibition Provisions of the World Bank Articles of Agreement generally prohibit consideration of non-economic factors in the decisions of the Bank and its officials, but there are some exceptional situations where the Bank's obligations under international law supersede the restrictions found in the Articles.<sup>316</sup> Over the last twenty years, the World Bank Legal Vice Presidency, the legal arm of the IBRD and IDA, has never disputed that its legal doctrine requires the Bank to refrain from lending to governments when the funds provided are used in violation of *jus cogens* norms.<sup>317</sup> International law scholars with expertise on the laws pertaining to IFIs have echoed this view in their assessments of when *jus cogens* principles may be relevant to the operations of the World Bank.<sup>318</sup>

In the case of Uzbekistan, the World Bank has approved loans for several projects related to cotton production that violate the *jus cogens* prohibition against State mobilization and use of forced labor for economic development.<sup>319</sup> On their face, the loan agreements do not conflict with *jus cogens*,<sup>320</sup> but their execution involves the violation of a peremptory norm since all of the funds provided by these agreements are used for cotton production which, given the State system and the pervasive 'climate of fear,' means they contribute to violations of the *jus cogens* prohibition against forced labor at all World Bank-financed project sites. It follows that all agreements between the Government of Uzbekistan and the World Bank that pertain to agriculture or irrigation are, by operation of the *jus cogens* exception to the Political Prohibition Provisions, void and terminated.<sup>321</sup> Since there is currently no mitigation measure that would effectively prevent a violation of the *jus cogens* prohibition against State mobilization and use of forced labor for economic development, all rights, obligations, and legal situations created by the Bank and the Government of Uzbekistan through the execution of their loan agreements are, to the extent they conflict with the

*jus cogens* norm, extinguished immediately.<sup>322</sup> Therefore, the World Bank can no longer justify their continued performance of their purported obligations under the loan agreements with the Government of Uzbekistan.<sup>323</sup> And to the extent the Bank attempts to use its Articles of Agreement as a shield against the legal consequences of its decisions to continue providing loans to the Government of Uzbekistan, it should be mindful that the operation of *jus cogens* vis-à-vis the Articles renders the Political Prohibition Provisions invalid.<sup>324</sup>

## **D. THE WORLD BANK MIGHT NOT BE IMMUNE FROM SUIT IN THE U.S.**

U.S. federal courts have generally held that the World Bank Group enjoys absolute immunity from civil suit but the jurisprudence on this issue is evolving and exceptional circumstances may lead the D.C. Circuit to restrict the Bank's immunity. The two exceptions to restrictive immunity that would most likely be invoked in a suit against the World Bank are implied waiver and commercial activity.

The decision by the D.C. District Court in *Jam* means the general rule of absolute immunity will continue to be upheld in the near term. Notably, however, the Court's opinion notes that it is only the D.C. Circuit that can decide whether recent U.S. Supreme Court jurisprudence on the FSIA justifies a change in the Circuit's position on international organization immunity. The plaintiffs in that case appear confident that the Supreme Court's decisions will lead the Circuit to rule in their favor.<sup>325</sup>

It is also important to note that a ruling against the plaintiffs in *Jam* may have little bearing on potential tort and breach of contract claims against the World Bank by Uzbek forced laborers. Unlike the case against the IFC, a case brought against the World Bank for its loans to the Government of Uzbekistan could involve allegations of *jus cogens* violations and failure to fulfill obligations to intended third party beneficiaries. The more serious nature of the human rights violations, coupled with the arguably more substantial benefits that would accrue to the Bank if it were to provide remedy to the Uzbek victims, could tip the scale in favor of declaring immunity waived for federal and state tort claims against the World Bank. The courts might also abrogate the Bank's immunity for potential breach of contract claims which could be brought by Uzbek farmers who were intended beneficiaries of the RESP II. The direct commercial relationship between the Bank and the Uzbek agribusinesses is evident in the language of the Bank agreement with the Uzbek government. The nature of the commercial activities between the Bank, the Government, and the agribusinesses, especially with respect to loans for machinery used to enhance cotton production, are further proof that the Bank's acts were private in character and performed "in the manner of a private player within the market."<sup>326</sup> Thus, claims from the farmers for non-fulfillment of contractual obligations could legitimately be characterized as "arising purely from [the Bank's] external activities."<sup>327</sup>

It is also important to consider other cases pending against international organizations headquartered in the U.S. While the issue of international organization immunity in *Georges, et al. v. United Nations, et al.* turns on a different law, a U.S. Supreme Court decision on UN immunity would have broad policy implications for future claims brought against international organizations such as the IBRD, IDA, and IFC. The Supreme Court may be convinced to hold the UN accountable for the harms it caused in Haiti, paving the way for the D.C. Circuit to one day decide that the WBG should be held accountable for its complicity in the human rights abuses perpetrated by the Government of Uzbekistan.



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## IV. POLICY IMPLICATIONS OF THE WORLD BANK'S LOANS TO THE GOVERNMENT OF UZBEKISTAN

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The legal implications of the World Bank's loans to the Government of Uzbekistan raise serious questions about the prudence and effectiveness of the Bank's policies and strategies in countries where gross human rights abuses are perpetrated by the State. The following are two policy implications the Bank must seriously consider if it intends to fulfill its mission of alleviating poverty in the world.

### **A. THE BANK NEEDS TO RECOGNIZE THAT ITS UNCONDITIONAL ENGAGEMENT WITH THE GOVERNMENT OF UZBEKISTAN HAS UNDERMINED ITS MISSION TO ALLEVIATE POVERTY AND DAMAGED ITS REPUTATION WHICH IS ESSENTIAL TO ITS VERY EXISTENCE**

It is no secret that the Bank prioritizes issuance of loans over the human and environmental costs inflicted on local communities where its projects are implemented.<sup>328</sup> Civil society groups and UN experts have long called for the establishment of a Bank human rights policy to guide its loan decisions and stronger safeguards that ensure the effective protection of human and labor rights in the communities affected by the Bank's funding.<sup>329</sup> The Bank, however, has continued to fight legalistic battles over human rights conditionality and recently decided to adopt a new environmental and social framework that civil society organizations have decried as a "huge step backward for human rights."<sup>330</sup>

At the core of the Bank's refusal to adopt a human rights policy is its concern that other IFIs such as the newly established Asian Infrastructure Investment Bank will be more competitive if the Bank establishes and adheres to higher standards.<sup>331</sup> This fear is not only misguided but misplaced; what the Bank should be concerned about instead is the detrimental effect its unconditional engagement with repressive governments has on its mission of alleviating poverty.

The Bank itself recognized in 1998 that aid is only effective in countries with "good governance."<sup>332</sup> It subsequently increased its efforts to measure good governance, including by producing an annual ranking of its aid recipients on various aspects of good governance, including human rights.<sup>333</sup> But in the 10 years since the former World Bank General Counsel, Roberto Dañino, left office, the Bank has regressed considerably on the issue of human rights and aid to repressive governments. The Bank's engagement with the Government of Uzbekistan is a prime example of the harm that can be done when human rights abuses are neither considered during the loan-making process nor adequately addressed subsequent to civil society claims of rights violations at Bank-financed sites.<sup>334</sup>

Since 2013, when the first complaint concerning the RESP II was filed with the Inspection Panel, the Government of Uzbekistan has increased its intimidation and harassment of forced labor monitors and further institutionalized its system of forced labor by utilizing the judiciary and law enforcement to ensure citizens' compliance with orders to pick cotton.<sup>335</sup> Meanwhile, the proceeds of the annual cotton harvest, which are derived in part from World Bank project funds, continue to flow into an opaque fund controlled



by Government elites ostensibly to the exclusion of all others in society.<sup>336</sup> The outcome of the World Bank's decisions to provide loans to the Government are stark: systematic human rights abuses continue to be perpetrated at World Bank-financed project sites and the Uzbek people as a whole have not benefited economically from the Bank's projects.<sup>337</sup>

Instead of alleviating poverty, the World Bank's loans have exacerbated the intolerable conditions Uzbek citizens lived in prior to the World Bank's engagement with their Government. The net loss to the Bank is not only mission failure, it is also a crisis of credibility.<sup>338</sup> The Bank's repeated failures in Uzbekistan have stripped it of any legitimacy it may have once had; without correction, its feared irrelevance in the global development arena is all but secured.<sup>339</sup>

## **B. THE ONGOING FAILURE OF THE BANK TO PREVENT AND REMEDIATE HARMS CAUSED BY ITS LOANS REQUIRE IMMEDIATE AND SUBSTANTIAL REFORM OF THE BANK'S LAWS, POLICIES, PROCEDURES, AND PRACTICES**

The example of Uzbekistan, one of the most egregious cases of IFI-supported human rights abuses in recent memory, should reinvigorate discussions within the Bank of an appropriate human rights policy which would prevent the reoccurrence of the unlawful conduct described in this report. Comprehensive reforms are needed to ensure the Bank no longer contributes to the perpetration of human rights abuses in the countries where they operate. These necessarily include a more transparent and rights-centered loan-making process, reform of the structure and function of the Inspection Panel, and an amendment to the Political Prohibition Provisions of the Bank's Articles of Agreement. These and other recommendations for reform are detailed below.



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## V. CONCLUSION

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For the last 10 years, the World Bank has justified its position on human rights by citing the Political Prohibition Provisions of its Articles of Agreement. It has regularly claimed that the Provisions prevent it from considering human rights in its loan decisions let alone mainstream human rights in its operations. The consequences of this approach in Uzbekistan — gross human rights abuses, endemic corruption, and intractable poverty — have been well-documented by civil society, the UN, and the ILO.

While the Provisions may appear to preclude any consideration of non-economic factors, the Bank has acknowledged that there are some exceptional situations in which its international legal obligations trump the obligations imposed on it by the Articles. The peremptory force of *jus cogens* vis-à-vis incompatible loan agreements constitutes one such situation. As established above, the prohibition against State mobilization and use of forced labor for economic development, as defined in Article 1(b) of Convention No. 105, has attained the status of a *jus cogens* norm and by its operation, all of the Bank's project agreements that support any aspect of cotton production in Uzbekistan must be declared void and terminated immediately. The Bank's *jus cogens* obligations also require it to stop providing loans which are used in any way for Uzbek cotton production until the violation of Article 1(b) of Convention No. 105 ceases to exist. Currently, there are no mitigation measures sufficient to ensure a violation of this *jus cogens* norm does not occur in Uzbekistan.

The international legal obligation of the World Bank, its member States, and its officers to adhere to *jus cogens* requirements supersedes any policy or business considerations that may have guided their engagement with the Government of Uzbekistan. The violation of Article 1(b) of Convention No. 105, as with violations of all *jus cogens* norms, entails potential civil or criminal liability in national and international jurisdictions. The Bank's role as a lender, given the unique circumstances of its engagement with Uzbekistan, may not absolve it from legal accountability for its involvement in the Government's systematic perpetration of forced labor. The member States on the Bank's Board of Directors and their individual representatives should also take note of the legal liabilities they could face.<sup>340</sup>

To avoid liability, the World Bank, its member States, and its officers should heed their legal obligations and institute the policy, procedural, and practical reforms needed to ensure they no longer contribute to *jus cogens* violations in Uzbekistan and other countries. A more forward-thinking and holistic approach to human rights will also be needed to fix the reputational damage and mission failure exemplified by the Bank's engagement with the Government of Uzbekistan.

Many of the legal and policy implications shared in this report are also applicable to the other IFIs operating in Uzbekistan and other similarly repressive countries where gross human rights violations occur on a regular basis. These lenders should be aware of the legal risks they face by engaging with repressive governments without a comprehensive human rights policy that is implemented at all levels of their operations.

Corporations, another key actor responsible for sustaining the forced labor system in Uzbekistan, should also carefully assess their legal risks when deciding whether to operate in or source their products from countries known to violate fundamental human rights norms. While the law on financial complicity is as yet unsettled, corporations and IFIs alike would be wise to take all necessary precautions to avoid potential liability, especially when the risk of harm is substantial or real. In these circumstances, it may be best for the company or IFI to refrain from entering into a financial agreement that could assist the party involved in the human rights abuse.



## VI. RECOMMENDATIONS

### RECOMMENDATIONS TO THE WORLD BANK

#### Immediate recommendations<sup>341</sup>

- Suspend disbursements until the Uzbek government demonstrates meaningful progress reforming the root causes of forced labor, its financial system that incentivizes officials to use coercion and repression of citizens who report violations;
- Refrain from approving loans that affect any aspect of cotton production until government reforms and independent civil society reports indicate the risk of harm to Uzbek citizens is no longer substantial or real;
- Engage and work with the Uzbek government to develop and implement a time-bound plan to reform root causes of forced labor in the agricultural sector, including the steps recommended to the government in the March 2016 UGF report;
- Ensure robust and fully independent third-party monitoring of compliance with core labor conventions in the project areas;
- Establish a confidential and accessible grievance mechanism and provide effective remedies, including legal and financial, to any person who is subjected to forced labor in the project areas;
- Take all necessary measures to prevent reprisals against community members, journalists, and independent organizations for monitoring or reporting on human rights violations in these areas, for engaging with the Bank's project monitors, or for filing complaints, including by seeking an enforceable commitment from the government that it will not interfere with independent reporting and engagement; and
- Raise concerns about the safety and access of independent monitors publicly and at the highest levels and make clear that their ability to work unimpeded is a vital sign of the government's good faith and requirement for World Bank financing.

#### Longer-term recommendations

- Adopt the human rights impact assessment recommended by Juan Pablo Bohoslavsky, the UN Independent Expert on the effects of foreign debt and other related international financial obligations of States on the full enjoyment of all human rights, particularly economic, social and cultural rights, for all current and future loans.<sup>342</sup> The due diligence analysis should take into consideration, at a minimum, the following information and factors: (1) the amount, type, objective and timing of the proposed

loans; (2) information from post-disbursement monitoring of earlier loans, especially from credible, independent civil society sources; (3) the growth of debt and the sustainability of public funds to service further debt; (4) the type and character of gross human rights violations and significant changes in the human rights record of the country in question; (5) the nature of the authoritarian regime; and (6) actions and statements by international organizations. As noted by the Independent Expert, the impact assessment should be viewed as a continuous process;

- Insert human rights conditions into all loan agreements and strictly enforce them based on the results of periodic human rights impact assessments conducted by independent human and labor rights experts. The experts should be recommended by the UN and the ILO, but approved by local communities and their representatives. The results of the assessments should be based on a thorough and reasoned analysis of the factors above and made publicly available ahead of consultations with the communities affected by the projects. The experts' final recommendations, after consultation with local communities and a period for additional civil society comments, should be binding on the Bank;
- Adopt the Independent Expert's recommendations for conducting a micro- and macro-analysis at the time lending decisions are made. The following questions should be asked before approving new loans and when considering whether to resume lending after a period of suspension: (1) Whether the money would directly serve, or be easily diverted, to finance human rights violations; (2) Whether financial resources provided to the Government would make the regime politically stronger or extend its life; and (3) Whether the loan would improve the enjoyment of economic and social rights of marginalized people, or would more likely be used to sustain clientelistic relation, or whether funding spent in the social sector would rather free government funds for repressive investments than improve the overall human rights situation;
- Heed the Independent Expert's observation that it may sometimes be best not to lend on any condition, as financial inflows could impair the human rights situation, either immediately or over the longer term. In this respect, carefully consider the ways in which the regime in question may impose economic models that violate fundamental social, economic and cultural rights and how these rights violations are linked with violations of civil and political rights. The breadth of rights violations should be given substantial weight in the Bank's loan-making process;
- Make the minutes of all Board meetings, including internal deliberations on loans and the actual vote, more accessible to the public;
- Reform the structure and function of the Bank's Inspection Panel. Require all members of the Panel to be recommended by the ILO and UN, but approved by local communities and their representatives. Ensure the Panelists are independent experts not employed by the Bank and only subject to discipline by the ILO and the UN. Limit their terms to five years. Broaden the Panel's responsibilities to include dispute resolution and problem solving. Allow it to initiate investigations on its own, and register Requests for Inspection, throughout and after the project cycle. Make its recommendations binding on the Bank and subject to appeal by complainants to an external adjudicative body overseen by the UN. Ensure the Panel is designed and functions in accordance with the UN Guiding Principles on Business and Human Rights;
- Adopt a new resolution that refers to the 1999 Clarifications and clearly states action plans and policy commitments of Bank management and borrowing countries are no longer acceptable reasons for the Panel to recommend against suspension of loans or a full investigation of alleged safeguard violations if the risk of harm at World Bank-financed project sites remains high. Require an interim suspension of loans if the Panel finds in its initial investigation a plausible link between Bank funds and harms alleged by complainants.



- Establish a procedure and a fund for victims harmed by Bank-financed projects to obtain redress, including compensation or other effective remedies. An independent committee of human rights experts should be convened and tasked on an ad hoc basis to issue binding decisions regarding harms caused to local communities by Bank-financed projects;
- Amend the Bank's Articles of Agreement to explicitly require consideration of human rights risks, especially *jus cogens* violations, in all decisions made by Bank management, the Board of Directors, and the Board of Governors. Add a clause to the Articles that provides for the establishment of an independent ad hoc committee of human rights experts to issue binding decisions on whether local communities are harmed by Bank-financed projects and the reparations that must be provided by the Bank to fully remedy the harms. Explicitly state in the clause that the Bank waives its immunity from suit if it fails to provide this alternate forum for redress;
- If the Bank is unsure of its international legal obligations, it should request an advisory opinion from the International Court of Justice pursuant to Art. 66(c) of the VCLTIO.<sup>343</sup>



## ENDNOTES

1. The author would like to thank David Sloss, Beth Van Schaack, Eric Gottwald, and Judy Gearhart for their invaluable comments. All errors and omissions remain the responsibility of the author alone.
2. ILO, *Profits and Poverty: The Economics of Forced Labor*, 1, 7 (2014).
3. More than 1 million annual victims of forced labor in Uzbekistan are likely not included in the ILO estimate of 2.2 million forced laborers in 2012. The ILO has acknowledged that the apparent decrease in the proportion of forced labor that is state-imposed “could be due in part to the fact that far fewer data are available on state-imposed forced labour relative to the other forms, pointing to a need for further research in this area.” In 2016, the ILO will conduct a quantitative survey of recruitment practices in Uzbekistan’s cotton sector which may result in a more accurate assessment of the current state of state-imposed forced labor in the world.
4. Daniel Roger Maul, *The International Labour Organization and the Struggle against Forced Labour from 1919 to the Present* (2007).
5. Brian Campbell & Matthew Fischer-Daly, *International Labor Rights Forum, The System of Forced Labor Cotton Production in Uzbekistan*, 4 (2014), [http://www.cottoncampaign.org/uploads/3/9/4/7/39474145/systemfl\\_uzbekistan\\_2014analysis.pdf](http://www.cottoncampaign.org/uploads/3/9/4/7/39474145/systemfl_uzbekistan_2014analysis.pdf); Mansur Mirovalev & Andrew E. Kramer, *In Uzbekistan, the Practice of Forced Labor Lives on During the Cotton Harvest*, N.Y. Times, December 17, 2013, [http://www.nytimes.com/2013/12/18/world/asia/forced-labor-lives-on-in-uzbekistans-cotton-fields.html?\\_r=0](http://www.nytimes.com/2013/12/18/world/asia/forced-labor-lives-on-in-uzbekistans-cotton-fields.html?_r=0).
6. Bakhodyr Muradov & Alisher Ilkhamov, *Open Society Foundations, Uzbekistan’s Cotton Sector: Financial Flows and Distribution of Resources* (2014), <https://www.opensocietyfoundations.org/sites/default/files/uzbekistans-cotton-sector-20141021.pdf>; see Brian Campbell & Matthew Fischer-Daly, *supra* note 5.
7. Uzbek-German Forum for Human Rights, *The Cover-Up: Whitewashing Uzbekistan’s White Gold* (2016), <http://uzbekgermanforum.org/wp-content/uploads/2016/03/Cotton-Report-2015.pdf>.
8. *Id.*
9. For the purposes of this report, the “World Bank Group” refers to the IBRD, IDA, and IFC while the “World Bank” refers only to the IBRD and IDA. Where there is a distinction between the three organizations, the author specifies the organizations concerned.
10. First agricultural project in Uzbekistan supported by the IBRD: The World Bank, Cotton Sub-Sector Improvement Project, Projects and Operations, <http://www.worldbank.org/projects/P009122/cotton-sub-sector-improvement-project?lang=en> (last visited September 2, 2016); second agricultural project in Uzbekistan supported by the IBRD: The World Bank, Rural Enterprise Support Project, Projects and Operations, <http://www.worldbank.org/projects/P046043/rural-enterprise-support-project?lang=en> (last visited September 2, 2016); third agricultural project in Uzbekistan supported by the IBRD (RESP II): The World Bank, Rural Enterprise Support Project, Projects and Operations, <http://www.worldbank.org/projects/P109126/rural-enterprise-support-project-phase-ii?lang=en> (last visited September 2, 2016); additional funding for the third IBRD agricultural project in Uzbekistan provided by the IDA: The World Bank, Additional Financing for the Second Rural Enterprise Support Project, Projects and Operations, <http://www.worldbank.org/projects/P126962/additional-financing-second-rural-enterprise-support-project?lang=en&tab=financial> (last visited September 2, 2016); funding for an active agricultural project in Uzbekistan provided by the IDA: The World Bank, South Karakalpakstan Water Resources MGMT Improvement, Projects and Operations, <http://www.worldbank.org/projects/P127764/south-karakalpakstan-water-resources-improvement-project?lang=en&tab=financial> (last visited September 2, 2016); and a recently approved agricultural project in Uzbekistan financed by the IFC: World Bank Group, International Finance Corporation, Indorama Kokand, Summary of Investment Information, <http://ifcextapps.ifc.org/IFCExt%5Cspiwebsite1.nsf%5C%5CCDB4928A7751013385257EB40070100E> (last visited September 2, 2016).
11. The legal implications of IFC loans for the IFC and its private sector partners, to the extent they are different from that of IBRD and IDA loans, are outside the scope of this report. They may be covered in a future report.

12. Matthew Fischer-Daly, International Labor Rights Forum, Uzbekistan GSP Post-Hearing Brief (2016); Uzbek-German Forum for Human Rights, *supra* note 7, at 13, 16.
13. Uzbek-German Forum for Human Rights, Uzbek Government Continued Systematic Forced Labor to Weed the Cotton Fields in 2015 (2015), <http://uzbekgermanforum.org/wp-content/uploads/2015/09/Weeding-Report-2015.pdf>; Uzbek-German Forum for Human Rights, The Government's Riches, the People's Burden (2015), [http://uzbekgermanforum.org/wp-content/uploads/2015/04/cotton\\_harvest\\_Online.pdf](http://uzbekgermanforum.org/wp-content/uploads/2015/04/cotton_harvest_Online.pdf); Uzbek-German Forum for Human Rights, *supra* note 7.
14. Uzbek-German Forum for Human Rights, *supra* note 7, at 16; *see also* Muradov & Ilkhamov, *supra* note 6.
15. Uzbek-German Forum for Human Rights, *supra* note 7, at 16-18; Cotton Campaign, Comments Concerning the Ranking of Uzbekistan by the U.S. Department of State in the 2016 TIP Report, 1 (Jan. 2016), [http://www.cottoncampaign.org/uploads/3/9/4/7/39474145/cc\\_comments\\_tip\\_uzbekistan\\_30january2016\\_with\\_endorsements.pdf](http://www.cottoncampaign.org/uploads/3/9/4/7/39474145/cc_comments_tip_uzbekistan_30january2016_with_endorsements.pdf).
16. Uzbek-German Forum for Human Rights, *supra* note 7, at 17.
17. *Id.* at 21.
18. *Id.* at 25-26; *see also* Cotton Campaign, *supra* note 15, at 3.
19. Uzbek-German Forum for Human Rights, *supra* note 7, at 27-28.
20. *Id.* at 30.
21. *Id.* at 16.
22. Uzbek-German Forum for Human Rights, *supra* note 7.
23. *Id.*
24. *Id.*
25. Bank Information Center, Tools for Activists: World Bank Group, Part 1: World Bank Group Basics, 7-20, <http://www.bankinformationcenter.org/wp-content/uploads/2013/01/Tools+for+Activists+WBG.pdf> (last visited September 2, 2016). The IBRD and IDA, the two public sector arms of the World Bank Group, are jointly owned by 185 member States who each have a seat on the Board of Governors. While the Board of Governors has ultimate decision-making power, it usually reserves this for decisions on broad institutional policies and priorities. Currently, day-to-day decisions, including approval on loans, are made by the 25 member States on the Board of Directors who are represented by individual "Executive Directors" (see IBRD Roster of Executive Directors and Alternates, Feb. 2016; the six permanent member States on the Board of Directors are China, France, the U.K., Japan, Germany, and the U.S. The other 19 member States on the Board are elected by the remaining States on the Board of Governors). The size of each State's economy determines the weight of its vote on the Board. The United States, the largest economy in the world, possesses 16% of the vote. The six States with the next largest economies possess a combined 27% of the vote. Decisions on loans are based on a simple majority of votes of those present at the full Board meetings held twice a week.
26. The World Bank, *Implementation Completion Report on a Loan in the Amount of US\$66 Million to the Republic of Uzbekistan for a Cotton Sub-Sector Improvement Project*, Report No.: 25411 (March 25, 2003), [http://www-wds.worldbank.org/external/default/WDSContentServer/WDSP/IB/2003/05/30/000094946\\_03052104025020/Rendered/PDF/multiopage.pdf](http://www-wds.worldbank.org/external/default/WDSContentServer/WDSP/IB/2003/05/30/000094946_03052104025020/Rendered/PDF/multiopage.pdf).
27. The World Bank, *Implementation Completion and Results Report on Loan/Credit in the Amount of US\$36.1 Million to the Government of Uzbekistan for a Rural Enterprise Support Project*, Report No.: ICR 0000711 (February 28, 2009), [http://www-wds.worldbank.org/external/default/WDSContentServer/WDSP/IB/2009/06/02/000333037\\_20090602010527/Rendered/PDF/ICR7110P0460431CoDisclosed051291091.pdf](http://www-wds.worldbank.org/external/default/WDSContentServer/WDSP/IB/2009/06/02/000333037_20090602010527/Rendered/PDF/ICR7110P0460431CoDisclosed051291091.pdf).
28. *Id.*
29. World Bank Group, World Bank Group-Uzbekistan Partnership: Country Program Snapshot (2015), <https://www.worldbank.org/content/dam/Worldbank/document/Uzbekistan-Snapshot.pdf>. This amount, calculated on April 4, 2016, is based on the assumption that the total amount committed by the World Bank Group is disbursed evenly throughout the duration of the four agricultural projects; this estimate does not take into account the additional USD 40 million in loans to Indorama Kokand Textile that was approved by the IFC in December 2015.
30. The World Bank, Rural Enterprise Support Project Phase II, Projects and Operations, <http://www.worldbank.org/projects/P109126/rural-enterprise-support-project-phase-ii?lang=en>; the remaining amount to be disbursed was calculated on April 4, 2016 and is based on the assumption that the total amount committed by the World Bank Group is disbursed evenly throughout the duration of the project.
31. Bank Information Center, Uzbekistan Rural Enterprise Support Project, <http://www.bankinformationcenter.org/feature/uzbekistan-rural-enterprise-support-project/> (last visited September 2, 2016); this amount, calculated on April 4, 2016, is based on the assumption that the total amount committed by the World Bank Group has been disbursed evenly throughout the duration of the project.

32. *Id.*
33. See Letter to the World Bank Inspection Panel, Request for Inspection, 7-8 (Sept. 4, 2013), <http://ewebapps.worldbank.org/apps/ip/PanelCases/89-Request%20for%20Inspection%20%28English%20and%20Russian%29.pdf>.
34. The World Bank Inspection Panel, <http://ewebapps.worldbank.org/apps/ip/Pages/AboutUS.aspx> (last visited September 2, 2016); the Inspection Panel is an “independent accountability mechanism” administered by the World Bank to review complaints from people and communities who believe they have been, or are likely to be, adversely affected by a project funded by the IBRD or IDA. The Panel, consisting of three members appointed by the WBG Board of Directors, assesses allegations of harm to people or the environment and reviews whether the Bank followed its operational policies and procedures. It does not, however, have problem solving and dispute resolution functions and its findings are final recommendations that are neither binding on Bank management and the Board nor appealable to a higher body. The Board can decline to approve the Panel’s recommendation not to conduct a full investigation but this has never happened in the 23 years of the Panel’s existence.
35. Letter to the World Bank Inspection Panel, *supra* note 33; Daniel C., K.M.G Genovese, M. Van Huijstee & Singh S., SOMO, Glass Half Full? The State of Accountability in Development Finance, 64 (2016), [http://www.somo.nl/publications-en/Publication\\_4275/picture/image\\_view\\_fullscreen](http://www.somo.nl/publications-en/Publication_4275/picture/image_view_fullscreen) (follow “Download whole publication”).
36. The World Bank, Inspection Panel, Notice of Registration, Request Number RQ 13/07 (Sept. 23, 2013), <http://ewebapps.worldbank.org/apps/ip/PanelCases/89-Notice%20of%20Registration%20%28English%29.pdf>; The World Bank, Inspection Panel, Management Response to Request Number RQ 13/07 (Nov. 5, 2013), <http://ewebapps.worldbank.org/apps/ip/PanelCases/89-Management%20Response%20and%20Addendum%20%28English%29.pdf>.
37. The Inspection Panel, Report and Recommendation on Request for Inspection, Republic of Uzbekistan: Second Rural Enterprise Support Project (P109126) and Additional Financing for Second Rural Enterprise Support Project (P126962), Report No. 83254-UZ, ¶70 (Dec. 2013), <http://ewebapps.worldbank.org/apps/ip/PanelCases/89-Eligibility%20Report%20and%20Recommendation%20%28English%29.pdf>.
38. *Id.*
39. *Id.* ¶80 (“[I]t is the Panel’s view that as long as Bank financing is supporting in some measure cotton production and there is a residual possibility that there can be child/forced labor on farms receiving project support [], then it is plausible that the Project can contribute to perpetuating the harm of child and forced labor. The information reviewed by the Panel indicates that it cannot be ruled out that the project has and may still be supporting cotton production either directly or indirectly through the different project components, including the credit line, and that this production may be using labor practices of concern to the Requesters. While the Panel cannot make definitive findings on these linkages at this stage in the process, the Panel considers that there is a plausible link between the Project and the harm alleged in the Request, and that the Bank’s support through the Project may be contributing to a perpetuation of this alleged harm”).
40. *Id.* ¶¶101-104.
41. One of the unique features of the Uzbek system of forced labor is also one of its root causes: patronage; see Cotton Campaign, Letter to the World Bank President concerning the Inspection Panel’s Decision not to Investigate RESP II (Jan. 29, 2015) (explaining that the Bank’s mitigation measures are not feasible without removing the financial incentives underpinning the State’s forced labor system), [http://www.cottoncampaign.org/uploads/3/9/4/7/39474145/letter\\_to\\_wb\\_president\\_january2015.pdf](http://www.cottoncampaign.org/uploads/3/9/4/7/39474145/letter_to_wb_president_january2015.pdf); see also Cotton Campaign, World Bank Should Postpone the South Karakalpakstan Water Resource Management Improvement (P127764) and Horticulture Development Project (P133703) (2014), [http://www.cottoncampaign.org/uploads/3/9/4/7/39474145/cottoncampaign\\_ltr\\_worldbank\\_may2014\\_appendix.pdf](http://www.cottoncampaign.org/uploads/3/9/4/7/39474145/cottoncampaign_ltr_worldbank_may2014_appendix.pdf).
42. ILO, Third Party Monitoring of the Use of Child Labour and Forced Labour during the Uzbekistan 2015 Cotton Harvest, 2 (2015), [http://www.ilo.org/wcmsp5/groups/public/---ed\\_norm/---ipec/documents/publication/wcms\\_427620.pdf](http://www.ilo.org/wcmsp5/groups/public/---ed_norm/---ipec/documents/publication/wcms_427620.pdf).
43. The Inspection Panel, Final Eligibility Report and Recommendation on a Request for Inspection, Republic of Uzbekistan: Second Rural Enterprise Support Project (P109126) and Additional Financing for the Second Rural Enterprise Support Project (P126962), Report No. 93222-UZ, ¶¶34, 37 (Dec. 2014), <http://ewebapps.worldbank.org/apps/ip/PanelCases/89%20-%20Final%20Eligibility%20Report%20%28English%29.pdf>; according to the Bank, the Panel may recommend against a full investigation of a case if it considers Bank management’s response to a complaint and its proposed plan of action to be adequate. In a 1999 clarification to the Panel’s founding instrument, the Bank stated, “the Inspection Panel will satisfy itself as to whether the bank’s compliance or evidence of intention to comply is adequate, and reflect this assessment in its reporting to the Board.” The Panel cited this language in its final recommendation but noted that future complaints based on new evidence could be considered. In March 2016, the Panel clarified that they would not register new complaints based on new evidence of forced labor at RESP II sites unless the evidence is related to new issues.
44. The World Bank, Inspection Panel, Uzbekistan: Second Rural Enterprise Support Project, Case Tracker, <http://ewebapps.worldbank.org/apps/ip/Pages/ViewCase.aspx?CaseId=92>; see also Jeff Tyson, Is the World Bank’s Inspection Panel Working the Way it Should?, DEVEX (Nov. 10, 2015), <https://www.devex.com/news/is-the-world-bank-s-inspection-panel-working-the-way-it-should-86973>.

45. ILO, *supra* note 42, at 6 (Uzbek trade unions are considered by many international observers to be state-controlled. International civil society organizations consider most accredited NGOs in Uzbekistan to be state-controlled or lacking complete independence from the government).
46. *Id.* ¶1, 8, at 2-3.
47. *Id.* at 2.
48. Uzbek-German Forum for Human Rights, *supra* note 7, at 4-6; Fischer-Daly, *supra* note 12 (explaining methodology for determining over one million forced laborers during 2015 autumn cotton harvest).
49. WorldBankGroup, International Finance Corporation, Indorama Kokand, Summary of Investment Information, <http://ifcextapps.ifc.org/ifcext/spiwebsite1.nsf/78e3b305216fcd8a85257a8b0075079d/cdb4928a7751013385257eb40070100e?opendocument> (last visited September 2, 2016).
50. Complainant No. 1, Dmitry Tikhonov, Elena Urlaeva, and Complainant No. 4, Submission to the Compliance Advisory Ombudsman Concerning the International Finance Corporation Projects in Uzbekistan (June 30, 2016), [http://www.cottoncampaign.org/uploads/3/9/4/7/39474145/160630cao\\_submission\\_ifc-indorama\\_public\\_version.pdf](http://www.cottoncampaign.org/uploads/3/9/4/7/39474145/160630cao_submission_ifc-indorama_public_version.pdf).
51. Reparation for Injuries Suffered in the Service of the United Nations, Advisory Opinion, 1949 I.C.J. Reports 174, 179 (Apr. 11).
52. Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt, Advisory Opinion, 1980 I.C.J. Reports ¶37 (May 28).
53. Daniel D. Bradlow, International Law and the Operations of the International Financial Institutions, 11 (2010); Statute of the International Court of Justice, art. 38, Oct. 24, 1945 (art. 38 states that the primary sources of international law are international treaties, customary international law, and general principles of law accepted by all nations).
54. The IBRD, IDA, and IFC each have separate Articles of Agreement.
55. Bradlow, *supra* note 53, at 12.
56. Customary international law consists of two elements: State practice (general and consistent practice) and *opinio juris* (adherence that follows from a sense of legal obligation); see American Law Institute, *Restatement of the Law, Third, the Foreign Relations Law of the United States*. St. Paul, Minn.: American Law Institute Publishers, §102(2) (1987); I.C.J. Advisory Opinion, *supra* note 52, ¶37.
57. Vienna Convention on the Law of Treaties, art. 53, May 23, 1969, 1155 U.N.T.S. 331; see Evarist Baimu and Aristeidis Panou, *Responsibility of International Organizations and the World Bank Inspection Panel: Parallel Tracks Unlikely to Converge?*, in 3 *The World Bank Legal Review, International Financial Institutions and Global Legal Governance* 147, n.4 (Hassane Cissé, Daniel D. Bradlow, Benedict Kingsbury eds., 2011) (“As International Organizations, International Financial Institutions are obliged to act consistently with peremptory norms of international law and applicable rules of customary international law”).
58. International Law Commission, Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law, Rep. of the Study Group of the International Law Commission, U.N. Doc. A/CN.4/L.682 (April 13, 2006).
59. Rep. of the Int’l Law Comm’n, 56th Sess., April 23 - June 1, July 2 - Aug. 10, 2001, ¶4, at 283, ¶6, at 284, U.N. Doc. A/56/10; Ian Brownlie, *Principles of Public International Law*, 515 (Oxford: Oxford University Press 5th ed. 1998); Anthony Aust, *Handbook of International Law*, 11 (Cambridge University Press, 2005); Eduardo Jimenez de Arechaga, *International Law in the Past Third of a Century*, in 159 *Recueil des Cours (Collected Courses of The Hague Academy of International Law)* 9, 64-67 (1978-1) (Sijthoff & Noordhoff eds., 1979): “The substantive contents of *jus cogens* are likely to be constantly changing in accordance with the progress and development of international law and international morality. *Jus cogens* is not an immutable natural law but an evolving concept: the last phrase in the definition envisages the modification of *jus cogens* by the same process which led to its establishment.”
60. IBRD Articles of Agreement, art. IV §10; see IBRD Articles of Agreement, art. 1 for the five purposes of the Bank.
61. *Id.* at art. III §5(b).
62. *Id.* at art. V §5(c).
63. Hassane Cissé, *Should the Political Prohibition in Charters of International Financial Institutions be Revisited? The Case of the World Bank*, in 3 *The World Bank Legal Review, International Financial Institutions and Global Legal Governance*, 59 (Hassane Cissé, Daniel D. Bradlow, Benedict Kingsbury eds., 2011).
64. Steven B. Herz, International Organizations in U.S. Courts: Reconsidering the Anachronism of Absolute Immunity, 31 *Suffolk Transnat’l L. Rev.* 471 (2008), available at [https://works.bepress.com/steven\\_herz/1/download/](https://works.bepress.com/steven_herz/1/download/); Ibrahim Shihata, “The World Bank and Human Rights”, presented at International Commission of Jurists Conference on Economic, Social and Cultural Rights (Abidjan, 1998); Ibrahim F. I. Shihata, Human Rights, Development, and International Financial Institutions, 8 *Am. U. J. Int’l & Pol’y* 27, 35 (1992); Daniel D. Bradlow, International Law and the Operations of the International Financial Institutions,



- 23 (2010) (“*Jus cogens* principles are of limited application in the normal course of the IFI’s operations. This should not, however, be interpreted to mean that *jus cogens* principles may not have some relevance in exceptional circumstances.”).
65. Report of the Special Rapporteur on Extreme Poverty and Human Rights, G.A., U.N. Doc. A/70/274 (Aug. 4, 2015) (by Philip Alston).
  66. Ibrahim F. I. Shihata, Human Rights, Development, and International Financial Institutions, 8 Am. U. J. Int’l & Pol’y 27, 35 (1992); Ibrahim Shihata, The World Bank Legal Papers, Legal Opinion of the General Counsel of the World Bank Group (1995).
  67. Ibrahim F. I. Shihata, *supra* note 66.
  68. Roberto Dañino, *The Legal Aspects of the World Bank’s Work on Human Rights: Some Preliminary Thoughts*, in Human Rights and Development: Towards Mutual Reinforcement, (Philip Alston & Mary Robinson eds., Oxford University Press, 2005).
  69. Ana Palacio, *The Way Forward: Human Rights and the World Bank*, in World Bank Development Outreach, World Bank Institute (Oct. 2006), <http://go.worldbank.org/RR8FOU4RGo>.
  70. Roberto Dañino, *The Task at Hand: Human Rights and the World Bank*, Caretas, Oct. 7, 2015, available at <http://chrgj.org/wp-content/uploads/2015/10/Danino-Caretas.jpg>.
  71. See Evarist Baimu and Aristeidis Panou, *Responsibility of International Organizations and the World Bank Inspection Panel: Parallel Tracks Unlikely to Converge?*, in 3 The World Bank Legal Review, International Financial Institutions and Global Legal Governance 171 (Hassane Cissé, Daniel D. Bradlow, Benedict Kingsbury eds., 2011) (“[T]here is uncertainty about the Bank’s international obligations – with the exception of its obligation to respect peremptory norms of international law and applicable rules of customary international law [.]”).
  72. Report of the Special Rapporteur on Extreme Poverty and Human Rights, *supra* note 65.
  73. *Id.*
  74. *Id.*
  75. Reports of the Int’l Law Comm’n on the Second Part of its Seventeenth Session and on its Eighteenth Session, U.N. Doc. A/6309/Rev.1, in Vol. II Yearbook of the International Law Commission, 247-249, U.N. Doc. A/CN.4/SER.A/1966/Add.I (1966); it should be noted that the ILC added the topic of *jus cogens* to its program of work in 2015 and the appointed Special Rapporteur was tasked with producing reports on the nature of *jus cogens*, the requirements for the elevation of a norm to the status of *jus cogens*, and the consequences or effects of *jus cogens*. In the course of his work, the Special Rapporteur may establish an illustrative list of norms of *jus cogens*. His first report on the nature of *jus cogens* was released March 8, 2016 and presented at the sixty-eighth session of the ILC.
  76. Rep. of the Int’l Law Comm’n, 56th Sess., April 23 - June 1, July 2 - Aug. 10, 2001, ¶3, at 283, U.N. Doc. A/56/10.
  77. *Id.*
  78. Vienna Convention on the Law of Treaties, *supra* note 57.
  79. International Law Commission, Fragmentation of International Law, *supra* note 58, ¶375.
  80. See Antônio Augusto Cançado Trindade, *Jus Cogens: The Determination and the Gradual Expansion of its Material Content in Contemporary International Case Law*, 10 (2008); see also The Juridical Condition and the Rights of the Undocumented Migrants, Advisory Opinion OC-18/03, Inter-Am. Ct. H.R. (ser. A) No. 18 (Sept. 17, 2003); Prosecutor v. Furundžija, Case No. IT-95-17/1-T, Judgement, (Int’l Crim. Trib. for the Former Yugoslavia Dec. 10, 1998); Prosecutor v. Krstic, Case No. IT-98-33-T, Judgement, Int’l Crim. Trib. for the Former Yugoslavia Aug. 2, 2001).
  81. International Law Commission, Fragmentation of International Law, *supra* note 58.
  82. Reports of the Int’l Law Comm’n, *supra* note 75, at 248.
  83. The International Law Commission Special Rapporteur on *Jus Cogens* supports this view in his first report, suggesting that neither natural law nor positive law (created by States) are sufficient alone to explain the peremptoriness of certain international legal obligations. He concludes, “it may even be ... that the binding and peremptory force of *jus cogens* is best understood as an interaction between natural law and positivism.” See ILC Special Rapporteur, First Report on *Jus Cogens*, ¶59, U.N. Doc. A/CN.4/693 (Mar. 2016) (by Dire Tladi).
  84. The Worker Vice-Chairperson presented the following text for consideration by the Committee on Forced Labor: “Recognizing that prohibition of forced or compulsory labour should be considered a peremptory norm of international law and that forced or compulsory labour violates the human rights and dignity of millions of women and men, girls and boys, contributes to the perpetuation of poverty and stands in the way of the achievement of decent work for all.” The Employer Vice-Chairperson supported the proposed text. See International Labour Conference, May - June 2014, Report of the Committee on Forced Labour, Fourth Item on the Agenda: Supplementing the Forced Labour Convention, 1930 (No. 29), to Address Implementation

Gaps to Advance Prevention, Protection and Compensation Measures, to Effectively Achieve the Elimination of Forced Labour, ¶ 66, ILC.103/PR/9(Rev.).

85. *Id.* ¶¶ 67-71, 73.
86. *Id.* ¶¶ 68-70, 73.
87. *Id.* ¶75.
88. *Id.* ¶76.
89. *Id.* ¶¶77, 79-80.
90. Separately, forms of forced labor that have a possession element could be assimilated to the *jus cogens* prohibition of slavery.
91. ILO, Convention concerning the Abolition of Forced Labour (No. 105), art. 1(b), June 25, 1957, [http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100\\_ILO\\_CODE:C105](http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C105).
92. International Law Commission, Fragmentation of International Law, *supra* note 57, at 182.
93. *Id.* at 190; *see also* ILC Special Rapporteur, *supra* note 82, ¶74-Draft conclusion 3 (“peremptory norms of international law (*jus cogens*) are those norms of general international law *accepted and recognized by the international community of States as a whole* as those from which no modification, derogation or abrogation is permitted”) (emphasis added).
94. International Law Commission, Fragmentation of International Law, *supra* note 58, at 190.
95. *See* *Khulumani v. Barclay National Bank, Ltd.*, 504 F.3d 254, 267 (2d Cir. 2007) (Katzmann, J., concurring). Judge Katzmann noted that in determining the content of international law, U.S. courts have consulted authorities that provide an authoritative expression of the views of the international community even if, strictly speaking, the authority is not meant to reflect customary international law. In this regard, one might consider statements by the ILO and the UN OHCHR as indicative of the international community’s acceptance and recognition of a norm as *jus cogens*. Given the unique mandate conferred upon the ILO by the international community, it is reasonable to conclude that statements by the ILO secretariat should be considered authoritative views on international law as applied to issues with a labor dimension; *see also* Antônio Augusto Cançado Trindade, *supra* note 80, at 6; The Juridical Condition and the Rights of Undocumented Migrants, Advisory Opinion OC-18/03, Inter-Am. Ct. H.R. (ser. A) No. 18, ¶¶65-73 (Sept. 17, 2003) (Trindade, J., concurring). Statements and actions by the ILO’s social partners uniquely represent the opinions and views of employers and workers, individuals that *jus cogens* norms are intended to protect. Similarly, the OHCHR has a unique mandate from the international community to promote and protect all human rights, including those secured by *jus cogens* norms. Its statements concerning the normative status of Art. 1(b) of Convention No. 105 should be considered an authoritative expression of the views of the international community.
96. The content of international law is determined by the sources of law identified by the Statute of the International Court of Justice: international conventions, customary international law, “general principles of law recognized by civilized nations,” “judicial decisions,” and the works of scholars. Thus, it can be said that the opinions of distinguished international law scholars such as the ILO Committee of Experts should bear considerable weight in the determination of the normative status of Article 1(b) of Convention No. 105. *See also* Antônio Augusto Cançado Trindade, *supra* note 80, at 6 (“General or customary international law emanates not so much from the practice of States [], but rather from the *opinio juris communis* of all the subjects of International Law”).
97. ILC Special Rapporteur, *supra* note 83, ¶74
98. 1 Lassa Oppenheim & Hersch Lauterpacht, *International Law: A Treatise*, 4-5 (7th ed. 1948).
99. *See* ILO Declaration on Fundamental Principles and Rights at Work and its Follow Up, International Labour Conference, 86th Session (June 18, 1998; Annex revised June 15, 2010), <http://www.ilo.org/declaration/lang--en/index.htm>.
100. *Id.*
101. ILO, Protocol of 2014 to the Forced Labour Convention, 1930, June 11, 2014, [http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100\\_ILO\\_CODE:Po29](http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:Po29) (removing the transitory provisions from the Convention); International Labour Conference, 96th Session, 2007, Report of the Committee of Experts on the Application of Conventions and Recommendations, Third Item on the Agenda: Information and Reports on the Application of Conventions and Recommendations, General Survey concerning the Forced Labour Convention, 1930 (No. 29), and the Abolition of Forced Labour Convention, 1957 (No. 105), Eradication of Forced Labour, Report III (Part 1B), ¶196, ILC96-III(1B)-2007-02-0014-1-En (noting that the transitional period expired long ago and therefore the transitory provisions are no longer applicable); ILO Declaration on Fundamental Principles and Rights at Work and its Follow Up, International Labour Conference, 86th Session (June 18, 1998; Annex revised June 15, 2010), <http://www.ilo.org/declaration/lang--en/index.htm> (stating that the rights protected by Convention Nos. 29 and 105 apply to all people in all States regardless of the level of economic development); International Labour Conference, 101st Session, 2008, Report of the Committee of Experts on the Application of Conventions and Recommendations, Third Item on the Agenda: Information and Reports on the Application of Conventions and Recommendations, General Survey on the Fundamental Conventions Concerning Rights at Work in Light of the ILO Declaration on Social Justice for a Fair Globalization,

- Report III (Part 1B), ¶¶277, 281, ILC.101/III/1B (explaining that the “normal civic obligations” and “minor communal services” exceptions do not apply to Article 1(b) of Convention No. 105).
102. International Labour Conference, 96th Session, 2007, General Survey concerning the Forced Labour Convention, 1930 (No. 29), and the Abolition of Forced Labour Convention, 1957 (No. 105), ¶167, ILC96-III(1B)-2007-02-0014-1-En; see Daniel Roger Maul, *supra* note 4, at 492 (discussing the distinction the ILO made between training-orientated and work-orientated labor services, with the former approved for young professional graduates and the latter prohibited as a violation of Article 1(b) of Convention No. 105).
  103. *Id.* ¶170.
  104. *Id.*
  105. Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), 1986 I.C.J. 14, ¶190 (recalling that both States and the ILC viewed the prohibition of aggressive use of force as “a conspicuous example of a rule having the character of *jus cogens*”).
  106. U.N. Charter art. 2, ¶4, and art. 51 (stating that the threat or use of force against another State is prohibited, except as self-defense after an armed attack or when authorized by the Security Council under Chapter VII of the UN Charter to maintain international peace and security).
  107. See Definition of Aggression, G.A. Res. 3314 (XXIX) (Dec. 14, 1974), available at <https://documents-dds-ny.un.org/doc/RESOLUTION/GEN/NR0/739/16/IMG/NR073916.pdf?OpenElement>.
  108. ILC Special Rapporteur, *supra* note 83, ¶63.
  109. ILC Special Rapporteur, *supra* note 83, ¶71; see Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), 2007 I.C.J. 71, ¶161; see also Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 556, 573 (July 8) (Koroma, J., dissenting) (*jus cogens* has “humanitarian underpinnings” and is based on “values of member States”).
  110. *Siderman de Blake v. Republic of Argentina*, 965 F.2d 699, 715 (9th Cir. 1992).
  111. ILC Special Rapporteur, *supra* note 83, ¶63.
  112. See Case Concerning the Application of the Convention of 1902 Governing the Guardianship of Infants (Netherlands v. Sweden), 1958 I.C.J. 55 (Nov. 28) (Moreno Quintana, J., separate opinion) (noting that theories of peaceful co-existence of the international community of States propounded by leading philosophers since the 16th century have all been based on respect for these principles and rights.).
  113. *Somerset v. Stewart*, 1 Lofft 1 (1772); *The Slave Grace*, 2 Hagg. 94 (1827).
  114. Rozes, *Remarques sur l’ordre public en droit du travail*, *Droit Social* 311 (1977); Judgements of Nov. 4, 1975, Tribunal d’instance d’Angers, and of Dec. 1975, Conseil des Prud’hommes de Vannes (Sect. Comm.).
  115. Judgement of May 3, 1911, Tribunal civil de Grasse, 39 *Clunet* 814 (1912) (the intolerable results mentioned by the court were no right to legal aid in Switzerland for French workers injured on the job and no substantially similar Swiss legal protections for workers hired in France to work in Switzerland).
  116. Daniel Roger Maul, *supra* note 4, at 485-486.
  117. *Id.* at 483-484.
  118. *Id.* at 484-486.
  119. *Id.* at 485-488.
  120. See ILO, Convention concerning the Abolition of Forced Labour (No. 105), art. 1(b), June 25, 1957, [http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:11300:0::NO:11300:P11300\\_INSTRUMENT\\_ID:312250:NO](http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:11300:0::NO:11300:P11300_INSTRUMENT_ID:312250:NO). There are currently 173 parties to ILO Convention No. 105, second most of all international conventions. Further, the 2005 and 2007 ILO global surveys indicated near universal abolition of the conduct prohibited in Art. 1(b) and a strong sense of legal obligation among non-compliant States to reform their practices.
  121. Daniel Roger Maul, *supra* note 4, at 488-490.
  122. ILO Constitution, Preamble, April 1919, [http://www.ilo.org/dyn/normlex/en/f?p=1000:62:0::NO:62:P62\\_LIST\\_ENTRIE\\_ID:2453907:NO](http://www.ilo.org/dyn/normlex/en/f?p=1000:62:0::NO:62:P62_LIST_ENTRIE_ID:2453907:NO).
  123. Jean-Jacques Rousseau, *The Social Contract*, 844 (1762) (describing the loss of freedom as “incompatible with man’s nature”).
  124. *Id.* (“No man has any natural authority over his fellow man”); Sir Reginald Coupland, *The British Anti-Slavery Movement*, 74 (1933) (noting that William Wilberforce, one of the leading anti-slavery activists in England, was driven in his work by the

belief that all humans are equal in the eyes of God).

125. Daniel Roger Maul, *supra* note 4, at 480.
126. See Jean-Jacques Rousseau, *supra* note 123, at 844 (“To renounce one’s liberty is to renounce one’s quality as a man, the rights and also the duties of humanity. For him who renounces everything there is no possible compensation.”).
127. ILO, Convention concerning the Abolition of Forced Labour (No. 105), art. 1(b), June 25, 1957, [http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:11300:0::NO:11300:P11300\\_INSTRUMENT\\_ID:312250:NO](http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:11300:0::NO:11300:P11300_INSTRUMENT_ID:312250:NO) (175 ratifications, with 2 denunciations, as of September 2, 2016).
128. Convention on the Prevention and Punishment of the Crime of Genocide, December 9, 1948, [https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg\\_no=IV-1&chapter=4&clang=\\_en](https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-1&chapter=4&clang=_en) (147 ratifications as of September 2, 2016); Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, December 10, 1984, [https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg\\_no=IV-9&chapter=4&clang=\\_en](https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-9&chapter=4&clang=_en) (159 ratifications as of September 2, 2016).
129. ILO, A Global Alliance against Forced Labour, 25 (2005).
130. *Id.*
131. International Labour Conference, 96th Session, 2007, Report of the Committee of Experts on the Application of Conventions and Recommendations, Third Item on the Agenda: Information and Reports on the Application of Conventions and Recommendations, General Survey concerning the Forced Labour Convention, 1930 (No. 29), and the Abolition of Forced Labour Convention, 1957 (No. 105), Eradication of Forced Labour, Report III (Part 1B), xi, ILC96-III(1B)-2007-02-0014-1-En.
132. *Id.* at 49.
133. *Id.*
134. *Id.* at 91-92.
135. *Id.* at 92.
136. Turkmenistan and North Korea are two of the rare examples.
137. Brazil’s Supreme Federal Tribunal, the highest court in the country, has held that the prohibition of all forms of forced labor is a peremptory norm of international law; Jane Doe 1 v. Reddy, 2003 U.S. Dist. Lexis 26120 (N.D. Cal. 2003) (noting that many cases and international instruments made clear that “modern forms of slavery violated *jus cogens* norms of international law, no less than historical chattel slavery”). Although this is an unpublished decision and thus has no precedential value in US courts, the Court’s judicial reasoning on the subject of forced labor is persuasive due to its stature in the US judicial system; Sideman de Blake v. Republic of Argentina, 965 F.2d 699 (9th Cir. 1992) (finding that “[t]he universal and fundamental rights of human beings identified by Nuremberg – rights against genocide, enslavement, and other inhumane acts – are the direct ancestors of the universal and fundamental norms recognized as *jus cogens*”); John Doe I, et al., v. UNOCAL Corp., et al., 395 F.3d 932 (9th Cir. 2002) (noting that forced labor “is so widely condemned that it has achieved the status of a *jus cogens* violation”).
138. ILO, <http://www.ilo.org/global/about-the-ilo/lang--en/index.htm>.
139. Khulumani, *supra* note 95, at 267 (“courts also consult authorities that provide an authoritative expression of the views of the international community even if, strictly speaking, the authority is not meant to reflect customary international law”); International Law Commission, Report on the Work of the Sixty-Seventh Session, Chapter VI, ¶71 (the delegations agreed that the practice of international organizations can contribute to the formation of customary international law). By extension, the practice of international organizations can be one of the sources for identifying *jus cogens*.
140. However, State-controlled trade unions could delegitimize the process.
141. ILO, Protocol of 2014 to the Forced Labour Convention, 1930, June 11, 2014, [http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100\\_ILO\\_CODE:P029](http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:P029); ILO Declaration on Fundamental Principles and Rights at Work, *supra* note 99.
142. Daniel Roger Maul, *supra* note 4, at 494; ILO Declaration on Fundamental Principles and Rights at Work, *supra* note 99.
143. International Labour Conference, *supra* note 84, at ¶¶ 75-76.
144. *Id.* at ¶¶ 79-80.
145. UN Office of the High Commissioner for Human Rights, <http://www.ohchr.org/EN/AboutUs/Pages/Mandate.aspx>.
146. *Id.* at <http://www.ohchr.org/EN/AboutUs/Pages/WhatWeDo.aspx>.
147. *Id.*
148. UN Office of the High Commissioner for Human Rights, Comments and Recommendations of UN OHCHR in relation to the Draft Environmental and Social Framework, 17, n.32 (Mar. 15, 2016), available at <https://consultations.worldbank.org/Data/>

hub/files/20160315\_memorandum\_ohchr\_esf\_with\_annexes.pdf.

149. *Id.*
150. Compare Christian Tomuschat, *The International Law of State Immunity and Its Development by National Institutions*, 44 *Vanderbilt Journal of Transnational Law* 1105 (2011), with Antônio Augusto Cançado Trindade, *supra* note 80.
151. Antônio Augusto Cançado Trindade, *supra* note 80, at 10.
152. *Id.* at 6.
153. *Id.* at 28.
154. ILO 2007 Survey, *supra* note 102, ¶63.
155. ILO 2007 Survey, *supra* note 102, ¶167.
156. ILO 2007 Survey, *supra* note 102, ¶143, n.328.
157. International Commission of Jurists, *Corporate Complicity and Legal Accountability*, Volume 1: Facing the Facts and Charting a Legal Path, Report of the International Commission of Jurists Expert Panel on Corporate Complicity in International Crimes, 4 (2008); Independent Expert on the Effects of Foreign Debt and Other Related International Financial Obligations of States on the Full Enjoyment of All Human Rights, particularly Economic, Social and Cultural Rights, Report on Financial Complicity: Lending to States Engaged in Gross Human Rights Violations, U.N. Doc. A/HRC/28/59 (Dec. 22, 2014) (by Juan Pablo Bohoslavsky).
158. Juan Pablo Bohoslavsky & Abel Escriba-Folch, *Rational Choice and Financial Complicity with Human Rights Abuses: Policy and Legal Implications*, in *Making Sovereign Financing and Human Rights Work* (2014), at 27.
159. *Id.*
160. *Id.* at 27-28.
161. International Law Commission, *Draft Articles on the Responsibility of International Organizations* (hereinafter “ARIO”), in Vol. II Part Two Yearbook of the International Law Commission (2011); G.A. Res. 66/100, U.N. Doc. A/RES/66/100 (Feb. 27, 2012).
162. Committee on Legal Affairs and Human Rights, *Report on Accountability of International Organizations for Human Rights Violations*, Council of Europe, 8, ¶20, Report Doc. 13370 (Dec. 17, 2013) (by José María Beneyto).
163. Compare Chatham House, *Legal Responsibility of International Organisations in International Law*, Summary of the International Law Discussion Group meeting held at Chatham House (Feb. 10, 2011), with Committee on Legal Affairs and Human Rights, *Report on Accountability of International Organizations for Human Rights Violations*, Council of Europe, 8, ¶20, Report Doc. 13370 (Dec. 17, 2013) (by José María Beneyto).
164. ECHR: *Behrami and Behrami v. France and Saramati v. France, Germany, and Norway*, Eur. Ct. H.R. (2007); *Al-Jedda v. The United Kingdom*, Eur. Ct. H.R., ¶84 (2011); National Courts: *R (on the application of Al-Jedda) v. Secretary of State for Defence*, [2007] UKHL (appeal taken from EWCA); HR 6 September 2013, *The State of the Netherlands v. Hasan Nuhanović*.
165. ARIO, *supra* note 161, art. 3.
166. ARIO, *supra* note 161, art. 4.
167. ARIO, *supra* note 161, Chapter IV.
168. ARIO, *supra* note 161, Chapter IV, art. 14.
169. Giorgio Gaja, Special Rapporteur, *Third Report on Responsibility of International Organizations*, ¶28, U.N. Doc. A/CN.4/553 (May 13, 2005) (“An international organization could incur responsibility for assisting a State, through financial support or otherwise, in a project that would entail an infringement of human rights of certain affected individuals.”); see International Law Commission, *Responsibility of International Organizations: Comments and Observations Received from International Organizations*, 28, U.N. Doc. A/CN.4/637 (Feb. 14, 2011) (The World Bank asked the ILC to explicitly indicate in its commentary that financial assistance does not, as a rule, incur responsibility); see also ARIO, *supra* note 161, Chapter IV, art. 14 (the Article does not exclude financial support from IFIs from the scope of international responsibility and the commentary on the Article does not suggest such assistance should be exempted; this lack of recognition indicates that the ILC disagreed with the World Bank and decided to adopt the view expressed in the Special Rapporteur’s third report.).
170. International Law Commission, *Draft Articles on Responsibility of States for Internationally Wrongful Acts*, with Commentaries, in Vol. II Part Two Yearbook of the International Law Commission, 66, ¶5 (2001) (the commentary on Article 16 of the Articles on Responsibility of States notes, “there is no requirement that the aid or assistance should have been essential to the performance of the internationally wrongful act; it is sufficient if it contributed significantly to that act.”).



171. See Evarist Baimu and Aristeidis Panou, *Responsibility of International Organizations and the World Bank Inspection Panel: Parallel Tracks Unlikely to Converge?*, in 3 *The World Bank Legal Review*, International Financial Institutions and Global Legal Governance 164 (Hassane Cissé, Daniel D. Bradlow, Benedict Kingsbury eds., 2011). The authors, both World Bank legal counsels, supported this view in their assessment of the applicability of the ARIO to World Bank operations (“It has been argued that [] there *might* be an additional condition [.]”) (emphasis added).
172. International Law Commission, Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries, in Vol. II Part Two Yearbook of the International Law Commission, 66, ¶5 (2001) (the commentary on Article 16 of the Articles on Responsibility of States notes the additional requirement that “the relevant State organ intended, by the aid or assistance given, to facilitate the occurrence of the wrongful conduct and the internationally wrongful conduct is actually committed by the aided or assisted State.”).
173. International Law Commission, Draft Articles on the Responsibility of International Organizations, with Commentaries, in Vol. II Part Two Yearbook of the International Law Commission, art. 14, ¶6 (2011). The example provided was from an internal document issued by the UN Legal Counsel that concerned the logistic/service support given by the UN Organization Mission in the Democratic Republic of the Congo to the armed forces in that country, and the risk of violations by the armed forces of international humanitarian law, human rights law, and refugee law. The Legal Counsel noted that the UN’s obligation to cease its support if the risk materialized flowed from customary international law and the UN Charter.
174. Prosecutor v. Furundžija, Case No. IT-95-17/1-T, Judgement, ¶209 (Int’l Crim. Trib. for the Former Yugoslavia Dec. 10, 1998) (The ICTY clarified that “the act of assistance need not have caused the act of the principal.” Rather, it suffices that “the acts of the accomplice make a *significant* difference to the commission of the criminal act by the principal.”) (emphasis added); Prosecutor v. Kunarac, IT-96-23-T & IT-96-23/1-T, Judgement, ¶391 (Furthermore, the acts of the accomplice have the required “substantial effect” where “the criminal act most probably would not have occurred in the same way [without] someone act[ing] in the role that the [accomplice] in fact assumed.”); Prosecutor v. Tadic, ICTY-94-1, Judgement, ¶688 (Int’l Crim. Trib. for the Former Yugoslavia May 7, 1997).
175. It should be noted here that the Special Court for Sierra Leone (SCSL) and the International Criminal Court (ICC) have adopted a shared intent or purpose standard for accomplice liability that diverges from the jurisprudence of the majority of the post-World War II cases (e.g. the *Flick, I.G. Farben, Krupp, Zyklon B*, and *Roehling* cases), the ICTY, and the International Criminal Tribunal for Rwanda. The SCSL and ICC, unlike the other tribunals, are mandated only to try those with the greatest responsibility for international crimes. This, some scholars say, resulted in a narrowing of the scope of their applicable laws. These courts’ deviation from the internationally-accepted norm for accomplice liability is contemplated in Article 10, Part II of the Rome Statute of the ICC which cautions that the applicable laws set forth in the Statute should not be read to limit customary international law. For ICTY jurisprudence that supports the knowledge standard, see Prosecutor v. Furundžija, Case No. IT-95-17/1-T, Judgement, ¶191, ¶¶232-235, ¶243 (Int’l Crim. Trib. for the Former Yugoslavia Dec. 10, 1998), <http://www.un.org/icty/furundzija/trialc2/judgement/index.htm>; Prosecutor v. Kvočka, Case No. IT-98-30/I-T, Judgement, ¶253, ¶255 (Int’l Crim. Trib. for the Former Yugoslavia Nov. 2, 2001) (“[T]he aider or abettor must have intended to assist or facilitate, or *at least have accepted that such a commission of a crime would be a possible and foreseeable consequence of his conduct*” (emphasis added)), <http://www.icty.org/x/cases/kvocka/tjug/en/kvo-tj011002e.pdf>; and Prosecutor v. Blagojevic and Jokic, Case No. IT-02-60, Judgement ¶726 (Int’l Crim. Trib. for the Former Yugoslavia Jan. 17, 2005), <http://www.un.org/icty/blagojevic/trialc/judgement/index.htm>.
176. A notable exception is U.S. federal tort law. In *Doe v. Unocal*, a U.S. case brought under the Alien Tort Statute (ATS), the court applied a slightly modified version of this standard. Some U.S. courts continue to apply this standard in ATS cases involving allegations of aiding and abetting human rights abuses.
177. International Commission of Jurists, *Corporate Complicity and Legal Accountability*, Volume 1, *supra* note 157, at 8; *see also* International Commission of Jurists, *Corporate Complicity and Legal Accountability*, Volume 2: Criminal Law and International Crimes, Report of the International Commission of Jurists Expert Panel on Corporate Complicity in International Crimes, 39 (2008) (discussing complicity of financiers and concluding that (1) the criminal liability of a financier will depend on what s/he knew about how his or her services and loans will be utilized and the degree to which these services actually effect the commission of a crime; and (2) criminal liability may be less likely for a lender or financier who supports a general project as opposed to the financier who knowingly facilitates specific criminal activities through funding them).
178. *Id.* These elements reflect the results of the ICJ’s survey of both criminal and civil laws in common law and civil law jurisdictions, as well as their study of the jurisprudence of international criminal tribunals. While the ICJ’s report only considered the law with respect to complicity of corporations and banks, it is contended here that the elements could also apply to international financial institutions. Their applicability, in this report, is limited to the analysis below on the World Bank’s violations of international law. Potential legal liability of the World Bank under U.S. laws is assessed against the current standards in various U.S. jurisdictions where claims concerning alleged complicity in international crimes have been heard.
179. International Commission of Jurists, *Corporate Complicity and Legal Accountability*, Volume 1, *supra* note 157, at 9; *see also* Chimene Keitner, *Conceptualizing Complicity in Alien Tort Cases*, at 95, 60 *Hastings L.J.*61 (2008), [http://repository.uchastings.edu/faculty\\_scholarship/321](http://repository.uchastings.edu/faculty_scholarship/321) (“The [ICTY] [] made clear that the defendant’s acts or omissions must have a ‘substantial effect on the commission of the offence.’ This does not amount to a requirement of ‘but for’ causation”).

180. International Commission of Jurists, *Corporate Complicity and Legal Accountability*, Volume 1, *supra* note 157, at 18.
181. *Id.* at 21.
182. *Id.* at 18.
183. *Id.* at 23-26.
184. Practical assistance or aid includes financial support, as contemplated by the drafters of the ARIO. Significant effect, as used in this rule, is synonymous with substantial effect, the element included in the ICTY's definition of aiding and abetting liability. This requirement, although not present in the text of Article 14 of the ARIO, is included here because it is an element of indirect responsibility included in the Articles on Responsibility of States for Internationally Wrongful Acts and an element in the customary international law definition of aiding and abetting criminal liability.
185. Article 14(b) of the ARIO is adopted in this standard. In other words, the act in question must violate international law binding on the organization at the time the organization contributed to the breach in order for the organization to incur international responsibility.
186. *See* Trial of the Major War Criminals before the International Military Tribunal, Vol. 1, 304-307 (Nuremberg, 14 November 1945 – 1 October 1946). This element is not explicitly part of the definition of aiding and abetting liability adopted by the international criminal tribunals. It is also not one of the requirements in Article 14 of the ARIO. However, its inclusion is firmly rooted in the jurisprudence of the Nuremberg Military Tribunal. In the trial of Walther Funk, the Tribunal considered evidence regarding the objective circumstances of Funk's alleged involvement in the Nazi regime's crimes against concentration camp victims. Funk's position as President of the Reichsbank (national bank of Germany) and member of the government's Central Planning Board entailed close involvement in the regime's policies and practices. During the trial, the Tribunal determined that Funk was indirectly involved in the utilization of concentration camp labor through his directives to the Reichsbank to establish a revolving fund of 12 million Reichsmarks to the credit of the regime's Schutzstaffel (paramilitary organization) for the construction of factories to use concentration camp laborers. The Tribunal also found that the Reichsbank, under his leadership, agreed to receive the personal belongings taken from the victims who were exterminated in the concentration camps. With respect to the latter crime, the Tribunal concluded that upon an assessment of all available evidence before it, including the objective circumstances surrounding Funk and his connection to the regime, it believed "Funk either knew what was being received or was deliberately closing his eyes to what was being done." His conviction demonstrates that an actor or institution's close proximity to the principal perpetrator of a crime can be evidence that the actor or institution knew that its assistance would likely contribute to the perpetration of the crime.
187. Alien Tort Statute, 28 U.S.C. § 1350 (1789).
188. Center for Justice and Accountability, The Elements of an ATS Case, <http://cja.org/what-we-do/litigation/legal-strategy/the-alien-tort-statute/>; *Filartiga v. Pena-Irala*, 630 F.2d 876, 890 (2d Cir. 1980), *available at* <http://hrp.law.harvard.edu/wp-content/uploads/2011/04/filartiga-v-pena-irala.pdf>; *Sosa v. Alvarez-Machain*, 542 U.S. 692, 724-25, 732 (2004); *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659 (2013) (establishing a "touch and concern" test for extraterritorial application of the ATS that requires claims to "touch and concern the territory of the United States" with "sufficient force" to displace the presumption against extraterritoriality).
189. Center for Justice and Accountability, The Violations: Torture, Extrajudicial Killing and Other Abuses, <http://cja.org/what-we-do/litigation/legal-strategy/the-alien-tort-statute/>.
190. *Filartiga v. Pena-Irala*, 630 F.2d 876, 890 (2d Cir. 1980), *available at* <http://hrp.law.harvard.edu/wp-content/uploads/2011/04/filartiga-v-pena-irala.pdf>.
191. John Doe I, *supra* note 137.
192. Center for Justice and Accountability, The ATS in the Modern Era, <http://cja.org/what-we-do/litigation/legal-strategy/the-alien-tort-statute/>; *see* David Smith, *General Motors Settles with Victims of Apartheid Regime*, The Guardian, March 2, 2012, <https://www.theguardian.com/world/2012/mar/02/general-motors-settles-apartheid-victims>. The *In re South African Apartheid Litigation* suite of cases also resulted in a settlement, albeit one "without prejudice" agreed to by one of the defendants, General Motors, despite a U.S. court dismissing the plaintiffs' claims.
193. Rachel Chambers, The Unocal Settlement: Implications for the Developing Law on Corporate Complicity in Human Rights Abuses, Human Rights Brief 13, no. 1 (2005), *available at* [https://docs.escri-net.org/usr\\_doc/Chambers.pdf](https://docs.escri-net.org/usr_doc/Chambers.pdf).
194. John Doe I, *supra* note 137, at 964.
195. Rachel Chambers, *supra* note 193.
196. There is presently a circuit split on the availability of corporate liability under the ATS, as well as the *mens rea* and *actus reus* required for proving aiding and abetting liability under the ATS. There is also disagreement between the circuits on extraterritorial application of the ATS.
197. Note, however, that banks have been sued under the ATS for lending to the principal perpetrators of human rights abuses.

The Second Circuit's decision in *Khulumani v. Barclays National Bank* suggests that general loans are unlikely to meet the substantial effect requirement of aiding and abetting liability, but tailored loans that directly support a crime might.

198. The U.S. Supreme Court held that in order to qualify as a “law of nations” under the ATS, a legal rule must be “accepted by the civilized world and defined with a specificity comparable to the features of the 18th-century paradigms.” *Sosa v. Alvarez-Machain*, 542 U.S. 692, 725 (2004).
199. The U.S. Supreme Court elaborated that claims that meet the jurisdictional threshold may still be dismissed on prudential grounds, or in other words, because of the political question doctrine. *Sosa v. Alvarez-Machain*, 542 U.S. 692, 733, at n. 21 (2004) (discussing the U.S. policy of case-specific deference to the political branches, and noting, with reference to the *In re South African Apartheid Litigation* suite of cases, “in such cases, there is a strong argument that federal courts should give serious weight to the Executive Branch’s view of the case’s impact on foreign policy.”).
200. *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004); note, however, that the Court also emphasized the need for “judicial caution” in recognizing new claims under the ATS in light of fundamental changes in both the common law and international law as well as the foreign relations issues that this litigation can generate.
201. *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659 (2013).
202. *John Doe I, et al. v. Nestle USA, et al.*, 766 F.3d 1013, 1028 (9th Cir. 2014).
203. *Id.*
204. *Al-Shimari v. CACI, et al.* 758 F.3d 516 (4th Cir. 2014) (The Fourth Circuit overturned the District Court’s dismissal of the case, distinguishing the facts of the case from *Kiobel*, and noting that there is no absolute bar to ATS claims, especially when the defendant is a U.S. corporation).
205. *Doe v. Exxon Mobil Corp.*, 2015 U.S. Dist. LEXIS 91107, at 26 (D.D.C. Jul. 6, 2015) (holding that while a “defendant’s United States citizenship is insufficient on its own to displace the presumption” against extraterritoriality, it will be overcome in the context of claims sufficiently touching and concerning the United States “by virtue of some combination of (1) substantial and specific domestic conduct relevant to the ATS claims, (2) United States citizenship or corporate status of the defendant, and (3) the presence of important national interests.”).
206. *Doe v. Exxon Mobil Corp.*, 654 F.3d 11 (D.C. Cir. 2011). It may also be useful to consider the two-pronged “conduct-regulating” approach used by Judge Katzmman in *Khulumani*. See Chimene Keitner, *supra* note 179 (discussing and endorsing Judge Katzmman’s two-pronged approach which consists of (1) applying the *Sosa* requirements to the underlying violation for purposes of establishing subject matter jurisdiction, and (2) applying a customary international law analysis to define the defendant’s mode of liability for contributing to the underlying violation). Keitner concludes, “provided the underlying violation meets the *Sosa* standard, claims for aiding and abetting that violation also give rise to federal subject matter jurisdiction because aiding and abetting liability is sufficiently well established under international law.”
207. *Doe v. Exxon Mobil Corp.*, *supra* note 206, at 39; *Doe v. Exxon Mobil Corp.*, *supra* note 205, at 15 (recalling that the D.C. Circuit recognized the existence of aiding and abetting liability under the ATS where the primary violations of customary international law were committed by state actors).
208. *Id.* at 34, 39.
209. *Id.* at 35.
210. *Id.* at 41 (The Court observed, “[the analysis of the Second Circuit] conflates the norms of conduct at issue in *Sosa* and the rules for any remedy to be found in federal common law at issue here ... by way of example, in legal parlance one does not refer to the tort of “corporate battery” as a cause of action. The cause of action is battery; agency law determines whether a principal will pay damages for the battery committed by the principal’s agent.”). Following the D.C. Circuit’s reasoning, it can be said that the customary international law analysis should be applied to the norm of conduct in Article 1(b) of Convention No. 105, and not to international organization liability for contributing to the perpetration of the offense.
211. *Id.* at 41-42, 50 (quoting Judge Edwards’s concurring opinion in *Tel Oren v. Libyan Arab Republic*, 726 F.2d 774, 778, “the law of nations never has been perceived to create or define the civil actions to be made available by each member of the community of nations; by consensus, the states leave that determination to their respective municipal laws.”).
212. *Id.* at 57; see *John Doe I, et al. v. Nestle USA, et al.*, 766 F.3d 1013, 1022 (9th Cir. 2014). The Ninth Circuit reached the same conclusion, but used a “norm-by-norm” analysis instead of a review of federal common law. It stated, “norms that are ‘universal and absolute,’ or applicable to ‘all actors,’ can provide the basis for an ATS claim against a corporation.”
213. *Doe v. Exxon Mobil Corp.*, *supra* note 205.
214. *Id.* at 17-18.
215. *Id.* at 18.
216. *Id.* at 20.

217. *Id.* at 19.
218. *Id.* at 22-23.
219. *Id.* at 25.
220. *Doe v. Exxon Mobil Corp.*, 527 Fed. Appx. 7 (D.C. Cir. 2013).
221. *Prosecutor v. Sainovic*, Case No. IT-05-87-A, Appeal Judgement (Int'l Crim. Trib. For the Former Yugoslavia, Jan. 23, 2014).
222. *Prosecutor v. Jovica Stanisic, Franko Simatovic*, Case No. IT-03-69-A, Judgement (Int'l Crim. Trib. for the Former Yugoslavia, Dec. 9, 2015), [http://www.icty.org/x/cases/stanisic\\_simatovic/acjug/en/151209-judgement.pdf](http://www.icty.org/x/cases/stanisic_simatovic/acjug/en/151209-judgement.pdf).
223. *Doe v. Exxon Mobil Corp.*, *supra* note 205, at 33 (“The Court concludes that ‘specific direction’ is not an element of aiding and abetting liability under customary international law and that the standard articulated by the Court of Appeals previously in this case and by this Court today remains unchanged.”).The *Sainovic* and D.C. Circuit standards are the same as the *Furundzija* standard.
224. *Id.* at 28.
225. *Id.* at 28-29.
226. *Id.* at 29-30.
227. *Id.* at 30.
228. *Id.* at 30-32.
229. *Id.* at 43-44.
230. *Id.* at 45-46.
231. Restatement (Second) of Contracts § 304 (2009).
232. Anthony Jon Waters, *The Property in the Promise: A Study of the Third Party Beneficiary Rule*, 98 Harv. L. Rev. 1109, 1111 (1985) (“In the United States, since the New York Court of Appeals decided *Lawrence v. Fox* in 1859, it has become generally accepted that a third party (one not party to the contract) may enforce a contractual obligation made for his or her benefit.”)
233. Restatement (Second) of Contracts § 302 (2009).
234. *Beckett v. Air Line Pilots Assoc.*, 995 F.2d 280, 286 (D.C. Cir. 1993); *SEC v. Prudential Sec.*, 136 F.3d 153, 159 (D.C. Cir. 1998). It is important to note that both these cases dealt with consent decrees. The standard, however, is applicable to other third-party beneficiary claims in D.C. courts. For the general rule, see Restatement (Second) of Contracts § 302 (2009) (noting that the requisite intention concerns whether a beneficiary has a right to performance of the promise, not whether the parties intended for the beneficiary to be able to enforce the promise).
235. *Airco Alloys Div. v. Niagara Mohawk Power Corp.*, 430 N.Y.S.2d 179, 185-86 (4th Dep’t 1980); *4th Ocean Putnam Corp.*, 66 N.Y.2d at 45 (explaining that a property owner is only an incidental beneficiary where the demolition work on property was performed not to benefit the owner but to protect the public).
236. Restatement (Second) of Contracts § 302, reporter’s note, cmt. a (2009).
237. Restatement (Second) of Contracts § 302 (2009).
238. Restatement (Second) of Contracts § 302 (2009).
239. Restatement (Second) of Contracts § 302 (2009).
240. Restatement (Second) of Contracts § 308 (2009); *Modern Law of Contracts* § 20:15 (2010).
241. Restatement (Second) of Contracts § 302, cmt. c (2009).
242. Restatement (Second) of Contracts § 302, cmt. a, c (2009).
243. Some of these international organizations also have claim to immunity under specific domestic statutes, administrative acts, common law doctrines, and customary international law. These alternate sources of immunity are outside the scope of this report.
244. *International Organization Immunity Act*, 22 U.S.C. § 288 (1945).
245. Aaron I. Young, *Deconstructing International Organization Immunity*, 314, *Georgetown Journal of International Law* (2013), <https://www.law.georgetown.edu/academics/law-journals/gjil/recent/upload/zsx00113000311.PDF>.
246. *See*, however, *OSS Nokalva, Inc. v. European Space Agency*, 617 F.3d (3d Cir. 2010) (The Third Circuit found, contrary to the D.C. Circuit, that Congress intended the IOIA would adapt with the law on foreign sovereign immunity); *see also* *Osseiran v.*

- Int'l Fin. Corp., 552 F.3d (D.C. Cir. 2009) (in some cases the D.C. Circuit has engaged in a balancing act and determined that the organization in question would benefit from waiving immunity to the type of suit filed by the type of plaintiff at bar).
247. OSS Nokalva, *supra* note 246.
  248. Jonathan M. Katz, *U.S. Court upholds United Nations' Immunity in Cholera Suit*, N.Y. Times, August 18, 2016, <http://www.nytimes.com/2016/08/19/world/americas/united-nations-cholera-haiti.html>.
  249. EarthRights International, Tata Mundra Coal Power Plant (2016), <https://www.earthrights.org/legal/tata-mundra-coal-power-plant>.
  250. Jam, et al. v. International Finance Corporation, Memorandum Opinion of Judge Bates, Civil Action No. 15-612 (JDB), 12-13 (D.D.C. 2016), *available at* <https://www.unitedstatescourts.org/federal/dcd/171393/31-o.html>.
  251. These two exceptions to restrictive immunity were invoked by the plaintiffs and are the most commonly invoked exceptions for cases involving allegations of human rights abuses by foreign states.
  252. *Cf. Abelesz v. Magyar Nemzeti Bank*, 692 F.3d 661 (7th Cir. 2012); *Fir Tree Capital Opportunity Master Fund, LP v. Anglo Irish Bank Ltd.*, No. 11 Civ. 0955 (PGG), 2011 WL 6187077 at \*14 (S.D.N.Y. Nov. 28, 2011).
  253. *Mendaro v. World Bank*, 717 F.2d 610, 617 (D.C. Cir. 1983) (“when the benefits accruing to the organization as a result of the waiver would be substantially outweighed by the burdens caused by judicial scrutiny of the organization’s discretion to select and administer its programs, it is logically less probable that the organization actually intended to waive its immunity.”).
  254. *Atkinson v. Inter-American Dev. Bank*, 156 F.3d 1335, 1338 (D.C. Cir. 1998) (“[Immunity] should be construed as not waived unless the particular type of suit would further [the organization’s] objectives.”).
  255. *Osseiran*, *supra* note 246, at 840 (“[The relevant question is thus] ‘whether a waiver of immunity to allow this type of suit, by this type of plaintiff, would benefit the organization over the long term.’”).
  256. *Mendaro*, *supra* note 253.
  257. 28 U.S.C. § 1603(d) (2010).
  258. 28 U.S.C. § 1605(a)(2) (2010).
  259. 28 U.S.C. § 1605(a)(2) (2010).
  260. 504 U.S. 607, 614 (1992) (the U.S. Supreme Court noted, “the issue is whether the particular actions that the foreign state performs (whatever the motive behind them) are the type of actions by which a private party engages in “trade and traffic or commerce.”).
  261. *UNC Lear Services, Inc. v. Kingdom of Saudi Arabia*, 581 F.3d 210 (5th Cir. 2009), *cert. denied*, 130 S. Ct. 1689 (2010).
  262. *Kirkland v. Societe Air France*, 429 F.3d 288, 295 (D.C. Cir. 2005).
  263. *Fir Tree Capital Opportunity Master Fund, LP v. Anglo Irish Bank Ltd.*, No. 11 Civ. 0955 (PGG), 2011 WL 6187077, at \*14 (S.D.N.Y., Nov. 28, 2011).
  264. *Jam*, *supra* note 250, at 9 (the Court acknowledged that the plaintiffs did bring one claim for breach of contract but then asserted that the claim, as characterized, did not arise purely from IFC’s external activities).
  265. EarthRights International, Tata Mundra Coal Power Plant (2016), <https://www.earthrights.org/legal/tata-mundra-coal-power-plant> (The Plaintiffs appealed the decision in April 2016).
  266. Uzbek-German Forum for Human Rights, *supra* note 7.
  267. ILO, Third-Party Monitoring of the Use of Child Labour and Forced Labour during the Uzbekistan 2015 Cotton Harvest (2015), [http://www.ilo.org/wcmsp5/groups/public/---ed\\_norm/---ipec/documents/publication/wcms\\_427620.pdf](http://www.ilo.org/wcmsp5/groups/public/---ed_norm/---ipec/documents/publication/wcms_427620.pdf).
  268. Uzbek-German Forum for Human Rights, *supra* note 7.
  269. *Id.*
  270. ILO, *supra* note 267.
  271. Uzbek-German Forum for Human Rights, *supra* note 7.
  272. *Id.*
  273. *Id.*
  274. *See* International Labour Conference, 104th Session, 2015, Report of the Committee of Experts on the Application of Conventions and Recommendations, Third Item on the Agenda: Information and Reports on the Application of Conventions and Recommendations, General Report and Observations Concerning Particular Countries, Report III (Part 1A), 175, ILC.104/



III(1A).

275. International Bank for Reconstruction and Development, International Development Association, Progress Report to the Board of Executive Directors on the Implementation of the Management Actions in Response to the Request for Inspection of the Uzbekistan Rural Enterprise Support Project – Phase 2 (P109126) and Additional Financing for Second Rural Enterprise Support Project (P126962), 7, ¶7 (Nov. 5, 2014) (“All relevant RESP II project documents have been amended to comply with the applicable national and international laws and regulations against forced labor, in addition to child labor.”); Annex 2a: Rural Enterprise Investment Regulations (excerpts), 17, art. XIII, ¶85 (Nov. 5, 2014) (“The PFIs/Lease Companies and the RRA shall monitor use of child and/or forced labor during the monitoring visits to the sub-borrowers. *Upon the detection of the use of child and/or forced labor, the sub-borrower will be disqualified from borrowing from the Credit Line and/or from benefiting from the Matching Grant Program.*”) (emphasis added).
276. Uzbek-German Forum for Human Rights, *supra* note 7, at 9.
277. World Bank project areas include the regions of Andijan (Ulugnor district), Bukhara (Alat district), Fergana (Yazyavan district), Karakalpakstan (Beruni, Ellikkala, Turtkul districts), Kashkadarya (Mirishkor district), Namangan, Samarkand, Syrdarya (Bayavut district), and Tashkent.
278. Uzbek-German Forum for Human Rights, *supra* note 7, at 17-18.
279. *Id.* at 18.
280. Uzbek-German Forum for Human Rights, *supra* note 7.
281. Uzbek-German Forum for Human Rights, *supra* note 7, at 27.
282. *Id.* at 31.
283. *Id.* at 38.
284. *Id.* at 47.
285. ILO, Forced Labor and Human Trafficking, Casebook of Court Decisions, A Training Manual for Judges, Prosecutors and Legal Practitioners, 24 (2009).
286. *Id.* at 26.
287. *Id.* at 24.
288. *Id.*
289. UN Human Rights Committee, Concluding Observations on the Fourth Periodic Report of Uzbekistan, ¶¶12, 14, 21 (Aug. 17, 2015) (“The Committee is concerned about reports of deaths in custody and denial of adequate medical care”; “The Committee remains concerned about reports that torture continues to be routinely used throughout the criminal justice system”; “The Committee remains concerned about the insufficient independence and impartiality of the judiciary.”); United States Department of State, Country Report on Human Rights Practices, Uzbekistan (2015) (“Uzbekistan is an authoritarian state ... The executive branch under President Islam Karimov dominated political life and exercised near complete control over the other branches of government ... The most significant human rights problems included: torture and abuse of detainees by security forces; denial of due process and fair trial; disregard for the rule of law; and an inability to change the government through elections.”); UN Committee against Torture, Concluding Observations on the Fourth Periodic Report of Uzbekistan, ¶7 (Dec. 10, 2013) (“The Committee is concerned about numerous, ongoing and consistent allegations that torture and ill-treatment are routinely used by law enforcement, investigative and prison officials, or at their instigation or with their consent, often to extract confessions or information to be used in criminal proceedings.”); Uzbek-German Forum for Human Rights, *supra* note 7, at 39.
290. Uzbek-German Forum for Human Rights, *supra* note 7, at 40.
291. *Id.* at 39.
292. *Id.*
293. *Id.* at 40, n.106.
294. *Id.* at 39, n.104.
295. *Id.* at 39-40.
296. *Id.* at 40, n.111.
297. *Id.* at 40.
298. ARIO, *supra* note 161, Chapter IV.

299. On a separate but related note, the WBG may be exacerbating the abuses and harm through its IFC loan to Indorama for cotton production in Uzbekistan.
300. The World Bank, Inspection Panel, Notice of Registration, Request Number RQ 13/07 (Sept. 23, 2013), <http://ewebapps.worldbank.org/apps/ip/PanelCases/89-Notice%20of%20Registration%20%28English%29.pdf>; Uzbek-German Forum for Human Rights, *Human Rights Organizations Call on the World Bank to Reevaluate Funding in Uzbekistan* (Sept. 8, 2013), <http://uzbekgermanforum.org/human-rights-organizations-call-on-the-world-bank-to-reevaluate-funding-in-uzbekistan/>.
301. It should be noted here that the member States on the WBG Board of Directors may also incur international legal responsibility if it is determined that they exercised direction and “effective control” of the organization in its complicity in the Government of Uzbekistan’s violation of Article 1(b) of Convention No. 105. And of even more serious consequence, the individual representatives of the member States on the Board of Directors and Board of Governors could incur individual criminal responsibility if it is established that they aided and abetted the Government of Uzbekistan’s violation of Article 1(b) of Convention No. 105. The potential civil liability of the member States on the Board of Directors and the potential criminal responsibility of the Executive Directors and Governors may be explored in another publication by the author.
302. Alien Tort Statute, *supra* note 187; *Filartiga v. Pena-Irala*, 630 F.2d 876, 890 (2d Cir. 1980); *Sosa v. Alvarez-Machain*, 542 U.S. 692, 724-25, 732 (2004).
303. *John Doe I, et al. v. Nestle USA, et al.*, *supra* note 202, at 1028.
304. *Id.* at 1022.
305. *Id.* at 1021.
306. *Doe v. Exxon Mobil Corp.*, *supra* note 205.
307. *Id.* at 25.
308. *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004).
309. *In re Estate of Marcos, Human Rights Litigation*, 978 F.2d 493 (9th Cir. 1992) (concluding that the “violation of a *jus cogens* norm of international law, properly invokes the subject-matter jurisdiction of the federal courts under § 1350”); *In re Estate of Marcos, Human Rights Litigation*, 25 F.3d 1467, 1471-72 (9th Cir. 1994) (affirming subject-matter jurisdiction under the ATS by finding that “[t]he allegations in this case satisfy the specific, universal and obligatory standard. ‘Under international law, ... official torture violates *jus cogens*.’”); *Sarei v. Rio Tinto, PLC*, 487 F.3d 1193, 1197 (9th Cir. 2007) (holding in part that “[p]laintiffs here have alleged several claims asserting *jus cogens* violations that form the least controversial core of modern day [ATS] jurisdiction.”); *Doe v. Exxon Mobil Corp.*, *supra* note 206, at 32 (“These authorities and sources confirm that aiding and abetting liability is clearly established in the law of nations and consequently such liability is available under the ATS.”).
310. *See Chimene Keitner*, *supra* note 206.
311. Note that this section does not contemplate potential litigation in D.C. courts. It is unclear based on publicly available information whether the World Bank and Uzbek government intended to create an *enforceable* third party right for Uzbek farmers at Bank-financed project sites. It is also uncertain whether D.C. courts would require a plaintiff to prove this additional element. To the author’s knowledge, there has yet to be a case brought against the World Bank in D.C. federal court seeking to enforce a third-party beneficiary’s right to performance of a project agreement.
312. World Bank, Uzbekistan – Rural Enterprise Support Project Phase II: P109126 – Implementation Status and Results Report – Sequence 15, June 23, 2016, [http://www-wds.worldbank.org/external/default/WDSContentServer/WDSP/ECA/2016/06/23/090224bo843f86c8/1\\_o/Rendered/PDF/Uzbekistan000RoReport000Sequence015.pdf](http://www-wds.worldbank.org/external/default/WDSContentServer/WDSP/ECA/2016/06/23/090224bo843f86c8/1_o/Rendered/PDF/Uzbekistan000RoReport000Sequence015.pdf).
313. *Id.* (stating the project development objective has not changed since Board approval of the project objective).
314. World Bank-Government of Uzbekistan Financing Agreement (C4433-UZ Confirmed), Article V, 5.01, October 8, 2008 (“The Additional Effectiveness conditions consist of the following: (a) the Recipient has enacted a governmental resolution to enable farmers in the Project Area to market produce in excess of prevailing production volumes contracted to the state.”), [http://www-wds.worldbank.org/external/default/WDSContentServer/WDSP/ECA/2008/10/28/469457807109A9C1852574F0004FA106/1\\_o/Rendered/PDF/C4433oRESPII.pdf](http://www-wds.worldbank.org/external/default/WDSContentServer/WDSP/ECA/2008/10/28/469457807109A9C1852574F0004FA106/1_o/Rendered/PDF/C4433oRESPII.pdf). It is unclear whether the term “produce” as used in this provision and incorporated in the governmental resolution includes cotton.
315. *See Brazell v. Windsor*, 682 S.E.2d 824, 826 (S.C. 2009) (A material breach is generally characterized as a (i) substantial failure to perform; (ii) a breach so substantial as to defeat the purpose of the contract; or (iii) *one so substantial as to defeat the object of the contract.*) (emphasis added). Termination of the contract under these circumstances is an appropriate remedy and damages, injunctive relief, or specific performance may be awarded to the plaintiff.
316. *Hassane Cissé*, *supra* note 63; *Ibrahim F. I. Shihata*, *supra* note 66; *Daniel D. Bradlow*, *supra* note 64. While the IBRD and IDA have separate Articles of Agreement, both treaties, referred to in this report jointly as the “World Bank Articles of Agreement,” contain “political prohibition provisions” that are substantively the same. Only the IBRD Articles are referenced in this report.

317. The World Bank Legal Vice Presidency’s position on the operation of *jus cogens* vis-à-vis the Articles of Agreement and international agreements to which the Bank is a party, as expressed by former World Bank General Counsel Ibrahim Shihata, is consistent with Arts. 53 and 64 of the VCLT and VCLT between States and International Organizations or between International Organizations (VCLTIO), which state, in pertinent part, “A treaty is void, if, at the time of its conclusion, it conflicts with a peremptory norm of general international law” and “If a new peremptory norm of general international law emerges, any existing treaty which is in conflict with that norm becomes void and terminates.” While it is not clear if the Bank has officially adopted Shihata’s view, former World Bank General Counsel Roberto Dañino recently noted that formulation of the Bank’s legal doctrine does not require approval of the Board of Directors. Roberto Dañino, *supra* note 70.
318. Daniel D. Bradlow, *supra* note 64; Henry G. Schermers & Niels M. Blokker, *International Institutional Law: Unity within Diversity*, 832-35 (2003) (noting that International Financial Institutions are obliged to act consistently with peremptory norms of international law).
319. *See* Agricultural Projects in Uzbekistan, *supra* note 10.
320. Indeed, following the Inspection Panel’s decision in 2013 not to recommend a full investigation, specific clauses prohibiting child and adult forced labor were inserted into the loan agreement for the RESP II.
321. *See* International Law Commission, Juan Manuel Gomez-Robledo, Special Rapporteur, Third Report on the Provisional Application of Treaties, ¶122 (2015) (noting that “the 1986 Vienna Convention has not entered into force; however, its rules have full legal effect, because they reflect norms of customary international law.”); UN Audiovisual Library of International Law, The Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations, <http://www.un.org/law/avl/>, (“[A]s happens with other codified international legal rules, the Convention is, regardless of its formal status, accepted as the applicable law and is widely used as a handy written guide in practice.”). This conclusion is consistent with Art. 64 of the VCLTIO. Although this treaty is not yet in force (it needs four more ratifications), its rules have full legal effect because they reflect norms of customary international law and are generally accepted as the applicable law. The first 72 articles of the VCLTIO were retained *mutatis mutandis* the text of the relevant articles of the VCLT and many international organizations, including the UN and the ILO, have either confirmed their signature or acceded to the treaty; *see* Rafael Nieto-Navia, *International Peremptory Norms (Jus Cogens) and International Humanitarian Law*, 19 (Mar. 2001) (The ILC, in preparing the final text of the VCLT, concluded that a treaty which conflicts with a peremptory norm of international law is void if and because its object is identified as being illegal.); *see also* Vol. II, *Yearbook of the International Law Commission*, 154-155 (1953), and Vol. II, *Yearbook of the International Law Commission*, 52 (1963) (Rules of statutory interpretation provide that the object of a treaty can be ascertained by identifying the goal of the drafters. When it is unclear if the goal of the drafters is illegal, the performance of the treaty can be evidence of its illegality. Sir Hersch Lauterpacht, Sir Gerald Fitzmaurice, and Sir Humphry Waldock, the second, third, and fourth Special Rapporteurs appointed by the ILC to prepare the Draft Articles on the Law of Treaties, all agreed that a treaty is invalid if the “performance” or “execution” of it involves an “infraction” or “infringement of a general rule or principle of international law having the character of *jus cogens*.”).
322. This conclusion is consistent with Art. 71(2)(b) of the VCLTIO, which states, “In the case of a treaty which becomes void and terminates under Article 64, the termination of the treaty ... (b) does not affect any right, obligation or legal situation of the parties created through the execution of the treaty prior to its termination, *provided that those rights, obligations or situations may thereafter be maintained only to the extent that their maintenance is not in itself in conflict with the new peremptory norm of general international law*” (emphasis added). The operation of *jus cogens* on the World Bank-Uzbekistan loan agreements may be retroactive to the date they were signed by both parties (*see* Art. 53 of the VCLTIO). For the purposes of the Cotton Campaign, and with due consideration for the complex legal issues that would arise from termination of the World Bank-Uzbekistan loan agreements, the author believes the rights, obligations, and legal situations provided for in the loan agreements should be extinguished now.
323. This conclusion is consistent with Art. 71(2)(a) of the VCLTIO, which states, “[i]n the case of a treaty which becomes void and terminates under Article 64, the termination of the treaty (a) releases the parties from any obligation further to perform the treaty.”
324. International Law Commission, *Fragmentation of International Law*, *supra* note 58, at 367 (“conflict of a treaty with *jus cogens* renders the treaty – or a separable provision thereof – invalid. It makes no difference whether the treaty is bilateral or multilateral”); the ILC has confirmed that even the Charter of the United Nations is not exempt from the customary rule governing conflict between *jus cogens* and a treaty (“the Charter of the United Nations constitutes no exception”); International Commission of Jurists, *Corporate Complicity and Legal Accountability*, Volume 2, *supra* note 177, at 49 (“International criminal law is not concerned with commercial reciprocity or competition, or moral equivalency; it serves to protect the fundamental and non-derogable rights of all human beings to life, personal integrity, and dignity ... as such, [business] arguments do not and should not shield the participants from responsibility if the elements of the crime are made out”).
325. Jam, *supra* note 250; Corporate Crime Reporter, *District Court Rules World Bank Can’t be Sued* (Mar. 28, 2016, 1:21 PM), <http://www.corporatecrimereporter.com/news/200/district-court-rules-world-bank-cant-be-sued/> (The Plaintiffs appealed the decision in April 2016).

326. Saudi Arabia v. Nelson, 507 U.S. 349, 360 (1993).
327. Jam, *supra* note 250, at 9.
328. World Bank Internal Audit Department (IAD), *Advisory Review of the Bank's Safeguard Risk Management* (June 16, 2014).
329. Letter from the UN Special Procedures Mandate-Holders to the World Bank President concerning the World Bank's Draft Environmental and Social Framework, Dec. 12, 2014, <http://www.ohchr.org/Documents/Issues/EPoverty/WorldBank.pdf>; The Editorial Board, *The World Bank Should Champion Human Rights*, N.Y. Times, June 27, 2016, [http://www.nytimes.com/2016/06/27/opinion/the-world-bank-should-champion-human-rights.html?\\_r=0](http://www.nytimes.com/2016/06/27/opinion/the-world-bank-should-champion-human-rights.html?_r=0).
330. Report of the Special Rapporteur on Extreme Poverty and Human Rights, *supra* note 65, at 6, 12; Letter from U.S. House Reps. Maxine Waters (D-CA) and Gwen Moore (D-WI) to U.S. Treasury Secretary Jacob J. Lew, June 27, 2016, [http://democrats.financialservices.house.gov/uploadedfiles/6.24.2016\\_letter\\_to\\_sec\\_lew\\_final.pdf](http://democrats.financialservices.house.gov/uploadedfiles/6.24.2016_letter_to_sec_lew_final.pdf) (expressing concern over the Bank's proposed safeguards on worker rights); Upasana Khatri, *World Bank's New Environmental and Social Framework is a Huge Step Backward for Human Rights*, EarthRights International, Aug. 17, 2016, available at <https://www.earthrights.org/blog/world-banks-new-environmental-and-social-framework-huge-step-backward-human-rights>.
331. Report of the Special Rapporteur on Extreme Poverty and Human Rights, *supra* note 65, at 14-15.
332. James H. Lebovic & Erik Voeten, *The Cost of Shame: International Organizations and Foreign Aid in the Punishing of Human Rights Violators*, 83 (2009).
333. *Id.*
334. See UN Office of the High Commissioner for Human Rights, *supra* note 148, at 21-24.
335. Uzbek-German Forum for Human Rights, *supra* note 7.
336. *Id.*
337. *Id.*
338. *Id.*; see Evarist Baimu and Aristeidis Panou, *Responsibility of International Organizations and the World Bank Inspection Panel: Parallel Tracks Unlikely to Converge?*, in 3 *The World Bank Legal Review, International Financial Institutions and Global Legal Governance 172* (Hassane Cissé, Daniel D. Bradlow, Benedict Kingsbury eds., 2011) (the authors, both World Bank legal counsels, noted, “[] the Bank is concerned not only with its legal accountability but equally – if not more – with its public reputational accountability.”).
339. See Ruth W. Grant and Robert O. Keohane, *Accountability and Abuses of Power in World Politics*, 99 *Am. Pol. Sci. Rev.* 29, 36-37 (2005) (“the category of public reputational accountability is meant to apply to situations in which reputation, widely and publicly known, provides a mechanism for accountability even in the absence of other mechanisms as well as in conjunction with them.”).
340. International Commission of Jurists, *Corporate Complicity and Legal Accountability, Volume 2*, *supra* note 177, at 49 (“International criminal law is not concerned with commercial reciprocity or competition, or moral equivalency. It serves to protect the fundamental and non-derogable rights of all human beings to life, personal integrity and dignity. As such, these arguments do not and should not shield the participants in crimes from responsibility if the elements of the crime are made out”).
341. Uzbek-German Forum for Human Rights, *supra* note 7, at 61-62 (all except recommendation 2 are pulled from this report).
342. The following factors are adapted from the recommendations prepared by the UN Independent Expert. For the full recommendations, see the Independent Expert's Report on Financial Complicity, *supra* note 157.
343. Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations, art. 66(c), March 21, 1986, [http://legal.un.org/ilc/texts/instruments/english/conventions/1\\_2\\_1986.pdf](http://legal.un.org/ilc/texts/instruments/english/conventions/1_2_1986.pdf), (“if the United Nations or an international organization that is authorized in accordance with Article 96 of the Charter of the United Nations is a party to the dispute, it may request an advisory opinion of the International Court of Justice in accordance with Article 65 of the Statute of the Court”).