

C Lumina

An assessment of the human rights obligations of the World Bank and the International Monetary Fund with particular reference to the World Bank's Inspection Panel*

Summary

The International Bank for Reconstruction and Development ("the World Bank") and the International Monetary Fund (IMF) were created in the aftermath of the Bretton Woods Conference to, *inter alia*, assist in the reconstruction of member states and to provide a framework which facilitates the exchange of goods, services and capital, respectively. Over the years, however, the Bank and the IMF have developed new roles and have become the most important sources of development finance or facilitators of such assistance to developing countries. The assumption of new roles has cast attention on the place of human rights in the activities of the two institutions. In particular, concerns have been raised about the adverse effects of the policies and activities of the two institutions, especially on human rights. Nevertheless, the two institutions deny that they have any legal obligations to protect and promote human rights. On the assumption that development and human rights are strongly interlinked, this paper examines the human rights implications of the policies and activities of the two institutions and explores the extent to which they are bound, as specialised agencies of the United Nations, to promote and protect human rights.

Opsomming

'n Evaluering van die menseregteverpligtinge van die Wêreldbank en die Internasionale Monetêre Fonds, met spesifieke verwysing na die Wêreldbank se Ondersoekpaneel

Die Internasionale Bank vir Heropbou en Ontwikkeling ("die Wêreldbank") en die Internasionale Monetêre Fonds (IMF) is in die lewe geroep tydens die nadraai van die Bretton Woods-konferensie, om onder andere te help met die heropbou van lidlande en om 'n raamwerk te verskaf wat die uitruiling van goedere, dienste en kapitaal

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onderskeidelik bevorder. Oor die jare heen het die Bank en die IMF egter nuwe rolle ontwikkel en het hul die belangrikste bronne van ontwikkelingsfinansies of fasiliteerders van sodanige hulp aan ontwikkelende lande geword. Die aanname van nuwe rolle het die aandag gevestig op die plek van menseregte in die werksaamhede van die twee instellings. Daar is veral kommer uitgespreek oor die nadelige uitwerking van die beleide en werksaamhede van dié twee instellings, veral op menseregte. Nietemin ontken die twee instellings dat hul enige wetlike verpligtinge het om menseregte te beskerm en te bevorder. Met die aanname dat ontwikkeling en menseregte onderling verbind is, ondersoek hierdie referaat die menseregte-implikasies van die beleide en werksaamhede van die twee instellings en verken die mate waarin hul, as gespesialiseerde agentskappe van die Verenigde Nasies, verbind word om menseregte te bevorder en te beskerm.

1. Introduction

The International Bank for Reconstruction and Development (IBRD, which together with the International Development Association, is also known as the World Bank) and the International Monetary Fund (IMF or the Fund) were created following the Bretton Woods Conference of 1944.¹ According to Article 1 of the Articles of Agreement of the World Bank, its main purposes are, *inter alia*, to assist in the reconstruction and development of its member states, to promote private foreign investment, to promote the long-term balanced growth of international trade and the maintenance of an equilibrium in balances of payments of its members thereby “assisting in raising productivity, the standard of living and conditions of labour” in these states. The key purpose of the IMF is to provide a framework which facilitates the exchange of goods, services and capital among countries and which sustains sound economic growth.² Neither institution’s mandate contains references to human rights or any similar notion.³

Over the years, however, both institutions have developed new roles and have become the most important sources of development finance or facilitators of such assistance to the developing countries. It has become increasingly difficult to ascertain the mandate of each institution although in principle the Bank has primary responsibility for funding specific projects while the IMF oversees the monetary and exchange rate policies of its members and provides structural liquidity loans. The assumption of new roles has cast attention on the place

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- 1 United Nations Monetary and Financial Conference, Bretton Woods, New Hampshire, USA, 1944. The two institutions are often called the “Bretton Woods institutions”. Members of the World Bank must also be members of the IMF (there are currently 184 member states of each institution). The World Bank Group consists of the International Bank for Reconstruction and Development (IBRD); the International Finance Corporation (IFC) set up in 1956 to facilitate direct assistance to the private sector without government guarantees; the International Development Association (IDA) established in 1960 to provide ‘soft’ loans to developing countries; the Multilateral Investment Guarantee Agency (MIGA); and the International Centre for the Settlement of Investment Disputes (ICSID).
 - 2 *Articles of Agreement of the International Monetary Fund*, art 1. The text is available at <http://www.imf.org/external/pubs/ft/aa/> (accessed on 1 June 2006).
 - 3 The closest reference to human rights in the Bank’s Articles of Agreement is Article 1 (iii) which refers, *inter alia*, to the Bank’s assisting in “raising... standards of living and conditions of labour” in its member states.

of human rights in the activities of the two institutions. In particular, concerns have been raised about the adverse effects of the policies and activities of the two institutions, especially on human rights.

It is notable that this awareness and criticism of the negative impacts of the projects and policies of the two institutions has emerged in an international climate in which the concept of development has been reconceptualised as a “comprehensive economic, social, cultural and political process, which aims at the constant improvement of the well-being of the entire population and of all individuals”⁴ — and not merely as an economic process. In terms of this new paradigm, human rights are the end purpose of development. Thus, the United Nations, its agencies and treaty bodies such as the Committee on Economic, Social and Cultural Rights (CESCR),⁵ have increasingly emphasised that “the realms of trade, finance and investment are in no way exempt from human rights obligations and principles” and that “the international organisations with specific responsibilities in these areas should play a positive and constructive role in relation to human rights”.⁶

This paper examines the human rights obligations of the two institutions with particular reference to the work of the Bank’s Inspection Panel and explores the extent to which these institutions are bound, as specialised agencies of the United Nations and subjects of international law, to promote and protect human rights. The paper is based on the assumption that development and human rights are strongly interlinked.

4 See the Declaration on the Right to Development, adopted by General Assembly Resolution 41/128 of 4 December 1986. See also McGoldrick 1996. While the Declaration is not legally binding and the right to development remains a controversial concept (see Piron 2002), the normative status of the right to development has been reinforced in annual resolutions of the General Assembly and the Commission on Human Rights and in declarations adopted at various world conferences including the 1992 Rio Conference on Environment and Development; 1993 Vienna World Conference on Human Rights; 1995 World Summit for Social Development; 1995 Fourth World Conference on Women; 2000 Millennium Summit; 2001 World Conference on Racism, Racial Discrimination, Xenophobia and Related Intolerance; and the 2002 World Summit on Sustainable Development. The global commitment to the promotion and implementation of the right to development is reflected in, *inter alia*, the establishment by the UN Commission on Human Rights of an open-ended Working Group on the Right to Development to explore methods of implementation of the right and the appointment by the Commission of an Independent Expert on the Right to Development.

5 The CESCR is the body of independent experts established under ECOSOC Resolution 1985 of 28 May 1985 to monitor the implementation of the International Covenant on Economic, Social and Cultural Rights (ICESCR) by its states parties. The Committee renders authoritative interpretations of the provisions of the Covenant (called General Comments) and considers reports which the states parties are obliged (in terms of Article 16 of the Covenant) to submit to it concerning the measures they have adopted and the progress they have made in achieving the observance of the rights set out in the Covenant.

6 See, for example, Sub-Commission Resolution 1998/12, United Nations Economic and Social Council, Sub-Commission on the Prevention of Discrimination and Protection of Minorities, *Human Rights as the Primary Objective of Trade, Investment and Financial Policy*, Doc.E/CN.4/Sub.2/Res/1998/12, 20 August 1998.

2. The World Bank, the IMF and human rights

As stated above, the Articles of Agreement of both the World Bank and the IMF do not include references to human rights or any similar notion. The Bank claims that its Articles of Agreement prohibit it from taking political considerations into account in its lending decisions and from imposing political or human rights conditions on borrowing countries.⁷ In terms of Article IV, section 10 of its Articles of Agreement:⁸

The Bank and its officers shall not interfere in the political affairs of any member; nor shall they be influenced in their decisions by the political character of the member or members concerned. Only economic considerations shall be relevant to their decisions, and these considerations shall be weighed impartially in order to achieve the purposes stated in Article 1.

The Bank's reluctance to include human rights concerns in its operational policies and projects seems to be based on a narrow interpretation of the above provision. Indeed it has been cogently argued that the provision is not as "restrictive" as the Bank claims.⁹ Thus, the Articles have allowed the Bank sufficient flexibility to change and adapt its policies over time. For example, since the late 1980s, the Bank has been insisting on recipient countries addressing issues of corruption, governance and the rule of law as prerequisites for sustainable development.

The Articles of Agreement of the IMF contain similar injunctions. For example, Article IV, section 3(b) enjoins the IMF to "respect the domestic social and political policies of members".

Nevertheless, the policies and activities of both institutions have been criticised for their negative human rights implications.¹⁰ These policies, it has been contended, have "systematically undermined democratic principles and eroded human rights protections in many countries".¹¹ While the Bank claims

7 *Articles of Agreement of the International Bank for Reconstruction and Development* (as amended on 17 December 1965). It is interesting to note, however, that the Bank has not consistently adhered to this injunction. For example, in 1946, the Bank rejected a loan application by the Polish Government justifying its decision on the ground that "political tensions and uncertainties in or among its members ... have a direct effect on economic and financial conditions in those countries and upon their credit position". See IBRD, *Third Annual Report 1947-1948*: 14. In 1947, the Bank President John McCloy recommended acceptance of a loan application by the Netherlands, stating that: "[T]he Government of the country rests on solid democratic principles and has given proof of stability and wise administration". Recommendations of the President to the Executive Directors on the Netherlands Loan Application, R – 121, 6 August 1947, 8. Cited in Mason & Asher 1973: 153.

8 As amended on 16 February 1989. Available at <http://www.worldbank.org/WBSITE/EXTERNAL/EXTABOUTUS/0,,contentMDK:20049557~menuPK:58863~pagePK:43912~piPK:440> (accessed on 1 June 2006).

9 Horta 2002: 229.

10 See, for instance, Clark 2002: 206 and Ibhawoh 1999.

11 See Global Exchange, "How the International Monetary Fund and the World Bank undermine Democracy and Erode Human Rights: Five Case Studies," September

that the advancement of human rights is impossible without development,¹² it continues to provide financial assistance to governments that routinely violate human rights and whose commitment to alleviating poverty is questionable.¹³ It has also been argued that providing financial support to an authoritarian government often leads to a further strengthening of the repressive apparatus of its regime, making the country's human rights situation worse.¹⁴

The World Bank has often been criticised for infringing human rights or ignoring human rights through its projects in developing countries and through its structural adjustment lending.¹⁵ One criticism is that the disproportionate impact of the Bank's structural adjustment policies on the poorest sectors of the populations of recipient countries has undermined or violated economic and social rights and subverted the Bank's overall development objectives.¹⁶ In regard to Bank-supported projects, it has been asserted that:

The World Bank's extractive industry projects have only worsened poverty, created enormous social conflicts, violated fundamental human rights, and contributed directly to the destruction of ancient cultures and to the devastation of our natural resources. They have benefited the countries of the North, their transnational corporations, and a handful of the elite and corrupt class of our countries.¹⁷

The validity of such criticism is confirmed by the report of the Bank's own official Extractive Industrial Review which mentions respect for human rights as one of the main enabling conditions for Bank-funded extractive industries to contribute effectively to the Bank's overall goal of poverty alleviation through sustainable development.¹⁸

At first glance, the range of World Bank financed projects and programmes in areas such as health, education, legal and judicial reform (good governance), environment, corruption, etc, seem supportive of the implementation of various

2001. Available at <http://www.globalexchange.org/campaigns/wbimf/imfwbReport2001.html>.pf (accessed on 1 June 2006). The Global Exchange is a membership-based international human rights non-governmental organisation founded in 1988. It seeks to promote global social, economic and environmental justice through raising public awareness of the root causes of injustice and lobbying the US government and private institutions to support policies that promote sustainable development. See <http://www.globalexchange.org/about/ProgramSummary.html> (accessed on 12 September 2006).

12 World Bank 1998.

13 See Ibhawoh 1999: 158.

14 Horta 2002: 228.

15 See, for example, Bradlow 1996; Turk 1991; Tomasevski 1989: 75-102.

16 See Horta 2002: 227.

17 Carlos Zorrilla of the Ecuadorean organisation Defensa y Conservacion Ecologica de Intag (DECOIN), quoted in Oxfam 2003.

18 See *Striking a Better Balance: Vol 1: The World Bank Group and Extractive Industries*, Final Report of the Extractive Industries Review, December 2003. Available at <http://www.iris36.worldbank.org/domdoc/PRD/Other/PRDDContainer.nsf/All+Documents/85256D240074B56385-M> (accessed on 12 September 2006). The World Bank has acknowledged the "social cost" of adjustment in several official publications. See, for example, Demery *et al* 1993 and Grootaert 1993.

economic, social and cultural rights as well as the advancement of civil and political rights through the creation of an enabling environment for the enjoyment of such rights. However, this is arguably an off-shoot of the Bank's main focus on economic and social development. The Bank itself has asserted that it does promote human rights (especially economic, social and cultural rights) through its activities:

The Bank is joining hands with developing countries and other international agencies in the alleviation of poverty, in combating disease, malnutrition, illiteracy and in fighting for the preservation of the environment. It is also seeking an enhanced role for women in development and trying to establish a partnership with developing countries in the gigantic task of economic development. In doing so, the Bank is not only promoting economic and social human rights but is no doubt playing a catalytic role in creating conditions in which all basic rights can develop and flourish.¹⁹

On the occasion of the fiftieth anniversary of the Universal Declaration of Human Rights, the Bank asserted that it contributed directly to the fulfilment of the human rights set out in the Declaration:

Through its support of primary education, health care and nutrition, sanitation, housing, and the environment, the Bank has helped hundreds of millions of people attain crucial economic and social rights. In other areas, the Bank's contributions are necessarily less direct, but perhaps equally significant. By helping to fight corruption, improve transparency and accountability in governance, strengthen judicial systems, and modernise financial sectors, the Bank contributes to building environments in which people are better able to pursue a broader range of human rights.²⁰

However, this claim has been the subject of much debate, with many commentators questioning the positive impact of the activities of the Bank. Research has shown that large sections of the populations of the countries receiving assistance from the Bank, who are the most vulnerable and susceptible to human rights violations, rarely benefit from the Bank's activities. For instance, the Bank's involvement in projects requiring involuntary resettlement of communities has resulted in impoverishment of the displaced communities and has had particularly serious impacts on indigenous peoples and ethnic minorities.²¹

According to one commentator, the impoverishment and disempowerment of displaced persons constitutes an infringement of the Bank's mandate of

19 Shihata 1991: 133.

20 World Bank 1998: 3.

21 Bartolome *et al* "Displacement, Resettlement, Rehabilitation, Reparation and Development" 7 WCD Thematic Review I.3, Working Paper 2000, cited in Clark 2002. The Bank's Operational Policy 4.12 which together with Bank Policy 4.12 replaces Operational Directive 4.30 (Involuntary Resettlement) states that the Bank's experience shows that "involuntary resettlement under development projects, if unmitigated, often gives rise to severe economic, social and environmental risks: production systems are dismantled; people face impoverishment..." See also the *Chixoy Dam Case* discussed below.

poverty alleviation and is inconsistent with the provisions of international human rights law concerning the right to an adequate standard of living, the right to adequate housing, the right to property, and the right to work.²²

Further, the Bank's practice and policy in regard to involuntary resettlement contradicts the position adopted by the CESCR that "instances of forced eviction are prima facie incompatible with the requirements of the (International Covenant on Economic, Social and Cultural Rights) and can only be justified in the most exceptional circumstances and in accordance with the relevant provisions of international law".²³ The CESCR has indicated that the Covenant requires that "international agencies should scrupulously avoid involvement in projects ... which promote or reinforce discrimination against individuals or groups contrary to the provisions of the Covenant or involve large-scale evictions or displacement of persons without the provision of all appropriate protection and compensation".²⁴ The CESCR has further stated that forced evictions may also lead to violations of the rights to life, security of the person, privacy, family life, and property.

While the World Bank acknowledges that it has an obligation to respect human rights, it denies that it has any legal obligation to promote human rights.²⁵ In 1998, the Bank stated that:

[C]reating the conditions for the attainment of human rights is a central and irreducible goal of development. By placing the dignity of every human being — especially the poorest — at the very foundation of its approach to development, the Bank helps people in every part of the world build lives of purpose and hope. And while the Bank has always taken measures to ensure that human rights are fully respected in connection with the projects it supports, it has been less forthcoming about articulating its role in promoting human rights within the countries in which it operates.²⁶

According to Skogly, the Bank's failure to acknowledge the importance of human rights promotion is retrogressive.²⁷ In her view:

Unless human rights are recognised as rights, and their promotion is conducted with a conscious view to the entitlement aspect of rights, the positive results of the social, economic, cultural, civil and political conditions remain mere "good" that may be removed by the same actors as provided the "goods" in the first place. Adversely, if the content of these goods were recognised as rights, this would imply a recognition that legitimate

22 Horta 2002.

23 UN Committee on Economic, Social and Cultural Rights, "The Right to Adequate Housing", General Comment No 4 (art 11(1)), para 19 (1991). See also "The Right to Adequate Housing: Forced Evictions", General Comment No. 7 (art 11(1)), paras 7-10, 14 and 18 (1997).

24 See General Comment No 4 (art 11(1)), para 19 (1991); General Comment No. 7 (art 11(1)), paras 7-10, 14 and 18 (1997).

25 See World Bank 1998. See also Tomasevski 1995: 409.

26 World Bank 1998: 2.

27 Skogly 2002: 233-234.

claims could be advanced in case of lack of fulfilment of the content of the rights. In other words, the link between a right and an obligation is missing, and without it, the people affected have no remedy if their rights are unfulfilled, or indeed are violated.²⁸

In practice, the policies and activities of the Bank and the Fund affect millions around the world.²⁹ The most adversely affected tend to be the poor living in the developing countries where Bank and Fund-induced reductions in public expenditure have directly impacted on these countries' ability to fulfil their human rights obligations concerning, for instance, the right to health, the right to work and the right to education. In one of its concluding observations, the CESCR noted the negative impact of structural adjustment programmes on poverty, employment, income distribution and availability of social services.³⁰

Despite this state of affairs, the Bank has eschewed undertaking a systematic evaluation of the human rights impact or implications of its programmes. Conversely, the Bank has attempted to implement a kind of human rights framework through the adoption of various "Operational Directives" on Involuntary Resettlement,³¹ on Indigenous Peoples,³² on Environmental Assessment,³³ and on Poverty Reduction.³⁴ Although these Operational Directives (which are official policy statements by the Bank now referred to as "Operational Policies")³⁵ make reference to human rights-related issues, they do not include explicit references to existing human rights standards. Thus, for instance, the Operational

28 Skogly 2002: 233-234.

29 The effect of structural adjustment programmes and other policies of the World Bank and the IMF on social and political conditions has been the subject of intense controversy. The debate largely focuses on the negative social implications of the policies on sections of the populations of the countries undertaking World Bank and IMF reforms. See, for example, Pisani 2003; SAPRIN 2001; Akermark 2001; Cheru 1999; Ibhawoh 1999; Fox & Brown 1998; Sadasivam 1997; Lawyers' Committee for Human Rights 1995; Mkandawire & Olukoshi 1995; Nanda *et al* 1993; Skogly 1993; Mosley *et al* 1991; Campbell & Loxley 1989; Onimode 1989; Osunsade & Gleason 1992; Zuckerman 1989; Lipton 1988; and Cornia *et al* 1987. It should be noted that since the early 1990s structural adjustment programmes have largely been replaced by the Poverty Reduction Strategy Paper process. Further, World Bank operational guidelines require analysis of the impact of adjustment programmes on the poor.

30 Committee on Economic, Social and Cultural Rights, *Concluding Observations of the Committee on Economic Social and Cultural Rights: Mexico*, Doc.E/C.12/1/Add.41, 8 December 1999.

31 Operational Directive 4.30 *Involuntary Resettlement replaced by Operational Policy/Bank Policy 4.12 Involuntary Resettlement* (revised April 2004).

32 Operational Directive 4.20 *Indigenous Peoples* replaced by Operational Policy/Bank Policy 4.10 *Indigenous Peoples*.

33 Operational Directive 4.00, Annex A, *Environmental Assessment* replaced by Operational Policy and Bank Policy 4.01 *Environmental Assessment* (revised August 2004).

34 Operational Directive 4.15 *Poverty Reduction* dated December 1991 replaced by Operational Policy 1.00 *Poverty Reduction* (revised August 2004).

35 See World Bank, *World Bank Operational Manual*, available at <http://wbln0018.worldbank.org/institutional/manuals/opmanual.nst/05TOCpages/The%20World%20Bank%20Operational%20Manual?OpenDocument> (accessed on 1 June 2006).

Directive on Indigenous Peoples states the Bank's objective in relation to them as being to "ensure that the development process fosters full respect for their dignity, human rights, and cultural uniqueness".³⁶ The Directive further provides that:

In many cases, proper protection of the rights of indigenous peoples will require the implementation of special project components that may lie outside the primary project's objectives. These objectives can include activities related to health and nutrition, productive infrastructure, linguistic and cultural preservation, entitlement to natural resources, and education.³⁷

Operational Policy 1.00 on Poverty Reduction states that the Bank's support for poverty reduction focuses on actions which are consistent with its mandate to "increase opportunity, enhance empowerment, and strengthen security", while Operational Policy 4.01 on Environmental Assessment states that environmental assessments should take into consideration "human health and safety, and social aspects (involuntary resettlement, indigenous peoples and cultural property)". The latter Operational Policy also requires that project-affected groups be publicly consulted and relevant information disclosed to them. Clearly, these provisions refer to human rights-related issues.

It should be noted, however, that the above and the other directives/policies make no explicit reference to relevant international human rights standards such as several provisions of the CESC: the right to work (Article 6), right to an adequate standard of living (Article 22), right to health (Article 12), and right to education (Article 13), all of which are particularly prone to being affected by the displacement of populations. Nevertheless, as we shall see, human rights issues indirectly arise in the requests made to the Bank's Inspection Panel.

The official position of the IMF is that the question of protecting or promoting human rights is one that is completely outside the scope of its mandate and activities. The institution firmly rejects the notion that it has any legal obligations in regard to human rights and has declared that it is not obliged to promote human rights around the world. In its view, the promotion and protection of human rights is the exclusive preserve of the state concerned. The Fund has argued that "nothing prevents member countries from incorporating human rights into their poverty reduction strategies".³⁸

Nevertheless, constant criticism has constrained the institution to pay close attention to "mitigating the adverse transitional impact of adjustment on the poor and other vulnerable groups in society".³⁹ The Fund acknowledges the significance of human rights:

36 Operational Policy/Bank Policy 4.10 which replaces Operational Directive 4.20 states that it "contributes to the Bank's mission of poverty reduction and sustainable development by ensuring that the development process fully respects the dignity, *human rights*, economies, and cultures of Indigenous Peoples" (emphasis added).

37 Operational Directive 4.20, para. 15.

38 See Leite 2001.

39 Osunsade & Gleason 1992: 7.

Human rights and macroeconomic stability are far from incompatible. Rather, they both play crucial roles in the fight against poverty. By supporting sound economic policies and encouraging constructive dialogue within civil society, the IMF contributes to human rights.⁴⁰

Other than this relatively insignificant focus on certain social costs of adjustment, the IMF refuses to engage with human rights issues.

3. Conditionality and human rights

In order to obtain loans and other international financial assistance from the World Bank and the Fund, countries must agree to the conditions set.⁴¹ Economic conditionality is generally an accepted element of such financial assistance as reflected in, for example, Article III, section 4 of the Articles of Agreement of the World Bank which stipulates the “conditions on which the Bank may guarantee or make loans”.⁴² The rationale for this is that the Bank must have guarantees concerning repayment of the loan and the settlement of interest and other charges of the loan and that the guarantor will be in a position to meet its obligations under the loan.

Economic conditionality takes many forms, including cutbacks in public expenditure, privatisation and market liberalisation. In the 1980s and 1990s, for example, a number of heavily indebted African states agreed to structural adjustment policies such as eliminating subsidies on basic foodstuffs, removing assistance given to farmers and re-orienting their agricultural production to export production. These “reforms” not only jeopardised food security in the region but they also contributed to community instability. While the stated aims of this economic conditionality have been “free trade, market liberalisation and fiscal stability”, these policies have resulted in forced cutbacks to health services, education and other social services.

Retrenchments have led to growing poverty and the attendant consequences of illiteracy and poor health as families struggle to make ends meet in economies where basic necessities such as water are “commodified”. Governments have been constrained to charge their own citizens for the use of public schools and public hospitals, the overwhelming majority of who cannot afford to pay for these essential services owing to factors such as high unemployment occasioned by privatisation and the attendant retrenchments. These are all serious human rights concerns. Many human rights guaranteed by international human rights instruments such as the Universal Declaration of Human Rights of 1948 and the two international covenants, including the right to work, protection against unemployment, basic education, an adequate standards of living, health, etc, have all come under threat from these policies.

40 Leite 2001.

41 For a discussion of the different types and approaches to conditionality, see Stokke 1996: 1-87. See also Lumina 2004: 329-347.

42 See also *IMF Guidelines on Conditionality*, Section A: Principles, Selected Decisions and Documents of the IMF, Twenty-Ninth Issue (as updated as of 30 June 2005) available at [http://www.imf.org/external/pubs/ft/sd/index.asp?decision=12864-\(02/102\)](http://www.imf.org/external/pubs/ft/sd/index.asp?decision=12864-(02/102)) (accessed on 1 June 2006).

Another adverse impact of economic conditionality has been the inability of governments, struggling to settle an overwhelming foreign debt, to respond effectively to the HIV/AIDs crisis in many countries. Export earnings are channelled towards servicing foreign debts and not towards purchasing the requisite pharmaceuticals.

Controversially, the international financial institutions and other aid donors have introduced political conditionality, that is, conditions concerning the core functions of state such as legislation, civil service reform, transparency, accountability, and corruption.⁴³ Other elements of political conditionality include the institution of multiparty political systems, the holding of democratic elections and respect for human rights and the rule of law.⁴⁴ Over the last decade or so, both the IMF and the World Bank have placed emphasis on what is termed “good governance”. In 1997, the Executive Board of the IMF adopted a Guidance Note on Governance which placed the promotion of transparency and accountability in borrower countries at the core of the Fund’s efforts to ensure good use of public resources.⁴⁵ According to the IMF, the rationale for the use of conditionality related to governance is the institution’s concern with macroeconomic policy design and implementation as the main means to safeguard the use of IMF resources.⁴⁶ It is notable that there is no direct reference to human rights in the IMF’s concept of “governance”.

For the World Bank, there are three aspects of governance: (1) the form of political regime; (2) the process by which authority is exercised in the management of a country’s economic and social resources for development; and (3) the capacity of a government to design, formulate, and implement and discharge functions. The Bank maintains that by “helping fight corruption, improve transparency and accountability in governance, strengthen judicial systems, and modernise financial sectors contributes to building environments in which people are better able to pursue a broader range of human rights”.⁴⁷ Although the first aspect is clearly outside the Bank’s mandate, the Bank has put pressure on countries such as Kenya and Malawi to effect political transformation. Further, it is arguable that political conditionality has, whilst inducing political change in some countries, eroded the sovereignty of the states receiving the development assistance in contravention of international law.⁴⁸

43 See Lumina 2004.

44 Lumina 2004. See also Stokke 1996.

45 See “IMF Adopts Guidelines Regarding Governance Issues,” *IMF Survey* 26(15) 1997: 233-238.

46 See “IMF Adopts Guidelines Regarding Governance Issues,” *IMF Survey* 26(15) 1997: 233-238. Cf Welch 2001, who criticises the IMF for insisting on transparency and efficiency (good governance) in borrower countries while it maintains a high level of secrecy in its operations.

47 See World Bank, “Conclusions of the Board’s Second Review of the Inspection Panel”, paras 15-16 (20 April 1999), available at <http://www.worldbank.org/html/extdr/ipwg/seconreview.htm> (accessed on 2 June 2006).

48 In terms of international law, the choice of a political and economic system is one to be made solely by the country concerned provided such country is not in breach of its international obligations. See *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States)* (Merits) 1986 ICJ Rep 14, 126.

4. Towards accountability: The World Bank Inspection Panel

The World Bank Inspection Panel is a three-member, non-judicial body established by Resolution 93-10 of the Bank's Executive Directors in 1993 to ensure accountability in the operations of the Bank with respect to its policies and procedures and to address the harm occasioned to people affected by Bank-funded projects.⁴⁹ Any two or more individuals or groups of individuals who are of the view that their interests have been or are likely to be directly affected by a project financed by the World Bank can request the Panel to investigate their complaint. An Executive Director of the Bank or the International Development Association can also submit a request for inspection. In exceptional circumstances where local representation is not available, a non-local representative can file a claim on behalf of local affected parties.

The Panel's function is to examine whether the World Bank has followed its own policy guidelines with respect to the design, appraisal and implementation of the project in question.⁵⁰ However, the Panel may only make recommendations to the Bank's Executive Directors concerning the need for investigation and with respect to any subsequent failure by the Bank to follow its operational policies and procedures. The Panel has no power to take binding decisions: these are the preserve of the Executive Directors who may even refuse an investigation in circumstances where the Panel has recommended one.⁵¹ It also does not conduct general evaluations of the positive or negative aspects of a Bank policy. Thus, the Panel's powers are merely advisory and investigatory — the latter in a qualified sense.⁵²

49 See Umana 1998. The powers of the Panel are set out in Article 12 of Resolution No. IBRD 93-10 which establishes the Panel. For the purposes of the Inspection Panel, the World Bank comprises both the IBRD and the International Development Association (IDA). The current members of the Panel are Edith Brown Weiss (USA), Chair; Tongroj Onchan (Thailand); and Werner Kiene (Austria).

50 The Bank's Board has emphasized that: "The Panel's mandate does not extend to reviewing the consistency of the Bank's practice with *any* of its policies and procedures, but, as stated in the Resolution, is limited to cases of alleged failure by the Bank to follow its operational policies and procedures *with respect to the design, appraisal and/or implementation of projects*, including cases of alleged failure by the Bank to follow-up on the borrower's obligations under loan agreements, with respect to such policies and procedures" (emphasis in original). See *Review of the Resolution Establishing the Inspection Panel: 1996 Clarification of Certain Aspects of the Resolution*, 17 October 1996. See also *1999 Clarification of the Board's Second Review of the Inspection Panel*, para. 13.

51 See, for example, Itaparica Resettlement and Irrigation Project, Brazil (1997). The Report and Recommendation of the Panel is available on the website of the Panel at <http://wbln0018.worldbank.org/ipn/ipnweb.nsf>. According to the Panel's 1996 review of the Resolution establishing it, the term "affected party" which the Resolution describes as "a community of persons such as an organisation, association, society or other grouping of individuals" includes two or more persons who share some common interests or concerns.

52 It is, however, empowered to determine the eligibility of a request for inspection "independently of any views that may be expressed by (the Bank's) Management". See *1999 Clarification of the Board's Second Review of the Inspection Panel*, para 6.

Another concern in regard to the Panel's work is that Board members are often denied access to relevant information by Bank staff and management. For example, in the China/Tibet project,⁵³ neither the Board members nor the general public were ever allowed access to the resettlement plan which provided the poverty alleviation rationale for the project. The plan was deemed to be the property of the Chinese government and therefore not released.⁵⁴

It should be noted that the mandate of the Panel is circumscribed by the fact that it operates within the Bank's own policies, that is, its mandate is to evaluate the performance of the Bank on the basis of the latter's own policies. It is in no way a human rights monitoring body. Nevertheless, with further development the Panel can potentially make a contribution to ensuring that human rights elements are included in the work of the World Bank.

A number of points in regard to the Panel's mandate are worthy of note. First, in terms of the resolution establishing the Panel, complaints cannot be brought by a "single individual" — only an organisation, association, society or group of individuals may do so. Requests may be filed if the affected party's rights or interests have been or are likely to be affected. By implication, requests for inspection may be filed at any stage of the process and may therefore have an impact on the continuation of a project. Both these aspects distinguish the Panel process from the standard international human rights complaints procedures which provide for a right of petition to the individual victim of a human rights violation (and exceptionally, allows third parties to complain on behalf of the victim), subject to the exhaustion of all available domestic remedies.

Second, the request must relate to "an action or omission by the Bank" concerning its "operational policies and procedures". Consequently, there is no right to a general complaint about the Bank violating human rights or failing to fulfil its obligations under international human rights law, unlike in the case of its policy concerning the environment where the Bank has expressly stated

53 China Western Poverty Reduction Project (Credit No. 3255 — CHA and Loan No. 4501 — CHA). In June 1999, the International Campaign for Tibet, a US-based non-governmental organisation, filed a request on behalf of affected people living in the project area, for an inspection asking the Inspection Panel to investigate the Bank's compliance with its social and environmental policies in the design of the China Western Poverty Reduction Project which involved the resettlement of some 58,000 Chinese farmers into an area considered to be a part of Tibet. The organisation alleged violations of the Bank's policies on information disclosure, indigenous peoples, involuntary resettlement and environmental assessment which the requesters believed constituted a serious threat to the lives and livelihoods of affected peoples in the area and irreparable damage to the environment. The Panel's report concluded that management was "substantially in compliance with the provisions of Annex B of OD 4.00 (Environmental Policy for Dam and Reservoir Projects)" but in violation of several provisions of the Bank's operational directives on environmental assessment, indigenous peoples, involuntary resettlement and disclosure of information. See <http://www.siteresources.worldbank.org/EXIN/SPECTIONPANEL/Resources/CHINA-InvestigationReport.pdf> (accessed on 12 September 2006).

54 See Clark 2002: 210.

that it shall not “finance projects that contravene any international environmental agreement to which the member country concerned is a party”.⁵⁵

Third, the Panel is required during an in-country investigation to keep a profile of its activities that is as low as possible “in keeping with its role as a fact-finding body on behalf of the Board”.⁵⁶ The methods it employs to investigate situations must not give rise to the impression that it is investigating the borrower country’s performance. Further, although the Panel may consult with the affected communities, it is prohibited from maintaining any contact with the media prior to or during the course of an investigation.

Finally, the reference in the Bank’s Operational Directive on Indigenous Peoples⁵⁷ to “benefits to indigenous communities” seems to reflect a concern with the rights of indigenous peoples. In its Operational Policy 4.10 (which replaces Operational Directive 4.20) the Bank states that the Operational Policy “contributes to the Bank’s mission of poverty reduction or sustainable development by ensuring that the development process fully respects the dignity, *human rights*, economies and cultures of indigenous peoples”. The Operational Policy also emphasises informed consultation and participation (essentially political rights) of affected communities in Bank-funded projects.⁵⁸ However, this is not always the case in practice. For example, the Chad/Cameroon Oil and Pipeline Project has been criticised for its lack of a mechanism for the “assessment of the legal recognition of indigenous people’s rights to land and forests” contrary to the Bank’s own policy on Indigenous Peoples.⁵⁹

In similar vein, Operational Policy 4.12 on Involuntary Resettlements contains safeguards designed to address and mitigate impoverishment risks occasioned by involuntary resettlement. The Operational Policy requires that displaced persons should be “meaningfully consulted and should have opportunities to participate in planning and implementing resettlement programs”.⁶⁰ It further requires that displaced persons should be assisted in their efforts to improve their livelihoods and standards of living. However, this does not appear to have been the case thus far. Close to two million people have been forcibly removed from their homes and land to make way for Bank-financed projects.⁶¹ While Bank policy requires that resettled people should not be left worse off than before, an internal Bank review of 192 projects involving involuntary resettlement

55 See Shihata 1994: 141.

56 See 1999 *Clarification of the Board’s Second Review of the Inspection Panel*, para 12.

57 Operational Directive 4.20, September 1991.

58 The rights of participation and consultation are embedded in the Bank’s Operational Policies. See, for example, Operational Policy 4.01 *Environmental Assessments*, para 14 (public consultation of project-affected groups and disclosure of relevant information); Operational Policy 4.12 *Involuntary Resettlements* (meaningful consultation and participation of displaced persons); and Operational Policy/Bank Policy 4.10 *Indigenous Peoples* (free, prior and informed consultation with the affected communities).

59 Horta 2002: 234.

60 Operational Policy/Bank Policy 4.12, para 13 (a).

61 Horta 2002: 237.

between 1986 and 1993 found that only one project had adequately compensated and rehabilitated the affected people.⁶²

Operational Policy 4.12 has come under attack in respect of its provision that people without recognised legal rights to lands will not be fully consulted or compensated for loss of land when relocated as a consequence of Bank projects. The policy has been criticised as representing a “severe regression from the provisions of international law”⁶³ such as the ILO Convention on Indigenous and Tribal Peoples⁶⁴ which states that the rights of ownership and possession of indigenous and tribal peoples over their traditional land shall be recognised.

Given the rather limited powers of the Panel, one may ask: what is its significance? It has been argued that the importance of the Panel lies in the fact that it is the first body that allows third parties that have no legal relationship with an international organisation to hold that organisation directly responsible for its actions.⁶⁵ Since the Bank is primarily bound by its own rules and policies and in a formal sense is not governed by international law, an independent body such as the Panel is necessary to provide oversight in relation to whether the Bank is in fact meeting its own standards. The Panel publishes annual reports and the Bank is itself obliged to make all the complaints, findings and recommendations of the Panel as well as the Executive Director’s decisions publicly available.⁶⁶ In addition, the Panel is enjoined to enhance public awareness of the results of its investigations through “all available information sources”.⁶⁷ It is noteworthy that in its 1999 Clarification of the Board’s Second Review of the Inspection Panel, the Board reaffirmed the Resolution establishing the Panel, the importance of the Panel’s function and its independence and integrity.

In regard to protection of human rights, it is quite clear from the above that although the Panel’s mandate does not explicitly cover human rights issues, these form part of the concerns raised with the Panel. As of July 2006, the Panel had received 41 requests for inspection ranging from countries as diverse as Argentina, Brazil, China/Tibet, Kenya, India, Lesotho, Nepal, Nigeria, Romania, and Paraguay.⁶⁸ Many of the cases have raised concerns regarding protection

62 See World Bank 1996, *World Bank Operational Manual: Resettlement and Development: The Bankwide Review of Projects Involving Involuntary Resettlement 1986-1993* (March 1996), available at http://www.wds.worldbank.org/servlet/WDSContentServer/WDSP/B/1996/03/00009265_3980728143956/Rendered/PDF/multi_page.pdf (accessed on 28 November 2005).

63 Horta 2002: 237.

64 ILO Convention No. 169 Concerning Indigenous and Tribal Peoples in Independent Countries, 27 June 1989.

65 See Skogly 2002: 231-250; Bradlow 1996: 248.

66 See *Inspection Panel Operating Procedure*, paras 41 and 56. Available at <http://web.worldbank.org/WBSITE/EXTERNAL/EXTINSPECTIONPANEL/O,,contentMDK:20175161~menuPK:64129751~piPK:64128378~theSitePK:380794,00.html> (accessed on 12 September 2006).

67 See *Inspection Panel Operating Procedure*, paras 41 and 56.

68 There were 10 requests from Latin America, 10 from Africa, 7 from South Asia, 2 from East Asia and the Pacific, and 1 from Eastern Europe. See <http://www>.

of the environment, involuntary resettlement or displacement of populations and indigenous peoples, inadequate compensation for involuntarily resettled populations, and failure to consult with those affected by the Bank's projects. All of these are human rights issues. Illustratively, the reference in some requests to failure to consult with those affected relates to the right to participation which is guaranteed by both the Universal Declaration of Human Rights of 1948 (UDHR)⁶⁹ and the International Covenant on Civil and Political Rights of 1966 (ICCPR).⁷⁰ The reference to adequate compensation for involuntarily resettled people concerns the right to property, which is guaranteed by the UDHR (Article 17) as well as by Article 14 of the African Charter on Human and Peoples' Rights, Article 21 of the American Convention on Human Rights, and Article 1 of Protocol 1 to the European Convention on Human Rights. It should be noted that due or just compensation is an accepted principle of international law which is also guaranteed by many national constitutions.⁷¹

5. Making the Bank and the Fund legally accountable for human rights

There has been much, albeit still unresolved debate, concerning the question whether the World Bank and the IMF may legitimately concern themselves with human rights or are under a legal obligation to do so.⁷² As stated above, there is nothing in the Articles of the two institutions that would suggest the existence of a legal obligation to promote and protect human rights. Further, the two institutions have consistently denied that human rights rules are binding on them.

Nevertheless, it is arguable that the fact that the institutions have international legal personality which confers upon them certain rights and obligations means that they are obliged to at least *respect* human rights.⁷³ In the *WHO v Egypt Case*,⁷⁴ the International Court of Justice stated that international organisations

worldbank.org/WBSITE/EXTERNAL/EXTINSPECTIONPANEL/0,,ContentMDK:0221606~menuPK:64129250~pagePK:64129751~piPK:64128376~theSitePK:380794.00.html (accessed on 12 September 2006).

69 Article 21.

70 Article 25.

71 See *Chorzow Factory (Claim for Indemnity) Case (Germany v Poland) (Merits)* 1928 PCIJ, Ser. A, No. 17; UN General Assembly Resolution on Permanent Sovereignty over Natural Resources, GA Res. 1803 (XVII) 1962, paras 1-4, 8; 17 UN GAOR Supp (No 17), 15-16. See also the Constitution of the Republic of South Africa 1996, s 25, and Constitution of the Republic of Zambia, 1996, s 16.

72 Skogly provides a useful analysis of the legal basis for holding the international financial institutions to human rights obligations which proceeds on the assumption that human rights are part of the international legal order in which these institutions operate. See Skogly 2003.

73 For a discussion of the implications of the international legal personality of intergovernmental organisations, see Schermers & Blokker 2004.

74 The Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt 1980 ICJ Rep 89-90. See also Legality of the Threat or Use of Nuclear Weapons Opinion (WHO Advisory Opinion) 1996 ICJ Rep 66.

are subjects of international law and, as such, are bound by any obligations incumbent upon them under general rules of international law, under their constitutions or under international agreements to which they are parties.⁷⁵

It should be noted that both organisations are specialised agencies of the United Nations. Consequently, in common with all other UN agencies and organisations, they have certain obligations arising under the UN Charter including the implementation of the two international Covenants. Thus, the International Covenant on Economic, Social and Cultural Rights (ICESCR) describes the role of the specialised agencies in its implementation in Part IV, which deals with the procedures for its implementation. In its General Comment No. 3 (1990) concerning the nature of states parties' obligations, the CESR noted that:

A final element of article 2(1), to which attention must be drawn, is that the undertaking given by all States parties is to 'take steps, individually and through *international assistance and cooperation, especially economic and technical* ...' The Committee notes that the phrase 'to the maximum of its available resources' was intended by the drafters of the Covenant to refer to both the resources existing within a State and those available from the international community through *international cooperation and assistance*. Moreover, the specific provisions contained in articles 11, 15, 22 and 23 further underline the essential role of such cooperation in facilitating the full realisation of the relevant rights (emphasis added).

It is noteworthy that a UN Sub-Commission on the Protection and Promotion of Human Rights study which examined the role of the Bank and other international financial institutions in the context of globalisation and human rights, concluded that in circumstances where the international financial institution's activities "have resulted in the exacerbation of poverty, a diminution of standards of livelihood, and a further distortion of existing social and global imbalances, we believe it is only just that there be a mechanism to bring those institutions into account".⁷⁶

In terms of Article 16(2)(b) of the ICESCR, the UN Secretary General is obliged to transmit copies of State reports to the specialised agencies in cases where the reports or part of them are relevant to any given agency. Article 18 makes it possible for the Economic and Social Council to make arrangements for receiving reports from the specialised agencies on the progress achieved in the observance

75 It is notable that the obligations of international financial institutions depend on the treaties ratified by the individual member states of these organisations (see Bradlow & Grossman 1995: 428). In this regard, states can be held accountable for human rights violations committed by third parties including international organisations through the activities of the latter. See, for example, *Bernard Ominayak, Chief of the Lubicon Lake Band v Canada*, Communication No. 167/1984, Report of the Human Rights Committee, Vol II, GAOR, Forty-fifth Session, Suppl. No. 40 (A/45/40), 1-30 and *Social and Economic Rights Action Centre (SERAC) & Another v Nigeria* (2001) AHRLR 60 (ACHPR 2001).

76 UN Sub-Commission on the Protection and Promotion of Human Rights, "Globalization and its Impact on the Full Enjoyment of Human Rights", Report prepared by J Oloka-Onyango & D Udagama, Doc.E/CN.4/Sub.2/2001/10 (August 2001), para 72. Available at <http://www.unhchr.ch/huridocda/huridoca.nst/Documents?OpenFrameset> (accessed on 1 June 2006).

of the provisions of the Covenant. This implies that the Covenant envisages a role for the specialised agencies in implementing provisions of the Covenant within their fields of operation. In terms of Article 20, the specialised agencies may submit comments to reports required to be transmitted to the UN Commission on Human Rights in terms of Article 19. Article 22 provides that ECOSOC may provide the specialised agencies with such information from the State reports which may assist them in deciding on international measures than can potentially contribute to the implementation of the Covenant.

In terms of Article 40 of the ICCPR, the Secretary General of the UN may, after consultation with the Human Rights Committee, transmit to the specialised agencies concerned copies of such parts of the State reports as may be relevant to their field of operation.

The foregoing arguments would seem to lend succour to the claim that the Bank and the IMF are obliged to respect human rights in their operations. By implication, they should ensure that their policies and activities do not in any way make the human rights situation in the recipient countries worse. Thus, they may be obliged to refrain from providing support to human rights repressive regimes or at the very least, to ensure that the policies of the two institutions do not threaten or infringe human rights. As Bradlow and Grossman argue, "international organisations ... are both subjects of international law and bound by its norms",⁷⁷ including human rights.

It is notable that the possibility of holding the World Bank directly accountable for human rights violations is currently under test in the *Chixoy Dam Case*⁷⁸ submitted by the Centre for Housing Rights and Evictions to the Inter-American Court of Human Rights against the government of Guatemala, the World Bank and the Inter-American Development Bank (IBD). In this case, the petitioners allege violations of the human rights of the indigenous Rio Negro community in Guatemala, which occurred in the context of the brutal forced displacement of the community to make way for the construction of the World Bank and IBD-funded Pueblo Viejo-Quixal Hydroelectric Project (Chixoy Dam). The petition seeks to hold the directors of the World Bank and the IBD accountable in respect of the violations. While the case is yet to be decided, it has important implications for the direct accountability of international financial institutions such as the World Bank and the IBD for human rights violations occasioned in the context of projects funded by them.

6. Conclusion

The Bank and the IMF were established with specific mandates which did not include human rights elements. This is understandable, since at the time of the establishment of these institutions, human rights were still in their infancy. Clearly,

77 Bradlow & Grossman 1995: 411-442.

78 The *Chixoy Dam Case*, Petition submitted by the Centre for Housing Rights and Evictions (COHRE) on behalf of the survivors of the Rio Negro Community and similarly situated communities in Guatemala. The petition is available at http://www.cohre.org/view_page.php?page_id+168#i535 (accessed on 12 September 2006).

their Articles prohibit the institutions from taking into account political considerations in their lending decisions, but this has not stopped them from “interpreting” the Articles to see a power to prescribe political conditions under the guise of “good governance”.

Since 1946, significant progress has been made in the articulation of international standards on human rights, including recognition of the right to development. These human rights standards take primacy over all other international law. Given the power that these institutions wield and the undeniable impact or implications of their activities for human rights, there is an urgent need for the two institutions Articles of Agreement to be reviewed to take into account human rights elements. Further, the Bank and the IMF need to recognise that, as subjects of international law, they are obliged to respect the international human rights standards that are legally binding on their constituent states. Significantly, they need to ensure that their policies are consistent with international human rights standards.

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