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The International Financial Institutions and Human Rights – Law and Practice

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The International Financial Institutions and Human Rights – Law and Practice[1]

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Executive Summary

The broader issue dealt with in the paper is to what extent multi-party development efforts are accountable to their intended beneficiaries. One mechanism for ensuring accountability is human rights. Traditionally, only States carried human rights obligations. International law has evolved, however, and now recognises that intergovernmental organisations, including the international financial institutions, are also bound by human rights law.

The World Bank has responded to some extent to this shift by creating the Inspection Panel. Beneficiaries can use the Inspection Panel to query compliance by the Bank with its own operational policies, some of which reflect human rights concerns.

Résumé

La vaste question traitée dans cet article est celle de voir dans quelle mesure les multiples acteurs qui sont impliqués dans les efforts de développement rendent compte de leurs actions aux bénéficiaires.

Les droits humains peuvent être un instrument utile pour garantir la responsabilisation des acteurs du développement. Traditionnellement, seuls les Etats étaient tenus aux obligations du droit international. Mais, le droit international a évolué; celui-ci reconnaît aujourd'hui que les organisations internationales, y compris les institutions financières internationales, sont aussi soumises à la législation sur les droits humains.

La Banque Mondiale a tenu compte de cette évolution en créant le Panel d'Inspection. Les bénéficiaires peuvent utiliser ce Panel d'Inspection en vue de respecter les politiques d'opération de la Banque dont certaines reflètent les préoccupations des droits humains.

Introduction

Human rights obligations of the international financial institutions (IFIs) may flow from different sources. They may originate in norms that are external to the organisations. They may also result from treaties entered into by the organisations, or from internal rules that bind staff.

Even if the existence of human rights obligations for international financial institutions can be established, it remains to be seen whether the IFIs can be held accountable in case of non-compliance. The International Court of Justice does not have jurisdiction to deal with cases brought against the IFIs. Domestic courts face jurisdictional immunity. The World Bank has, on the other hand, established an accountability mechanism: the World Bank Inspection Panel. Requests brought before the Inspection Panel offer valuable insights on World Bank impact on human rights.

1. The law

The international financial institutions[3] are intergovernmental organisations. They are subjects of international law, and thus capable of possessing rights and duties under international law. The extent of these rights and duties depends on the purposes and functions as specified or implied in the constituent documents of the organisations and developed in practice[4].

In its advisory opinion on Interpretation of the agreement of 25 March 1951 between the WHO and Egypt, the International Court of Justice clarified that as subjects of international law, international organisations are bound by:

Any obligation incumbent upon them under general rules of international law, under their constitutions or under international agreements to which they are parties[5].

The legal question thus is whether any of these sources contain human rights obligations incumbent upon the international financial institutions.

[3] The international financial institutions include IFAD, the International Fund for Agricultural Development, which mobilises financial resources to raise food production and nutrition levels among the poor in developing countries, the IMF, the International Monetary Fund, and the World Bank group consisting of the IBRD, International Bank for reconstruction and development, the IFC, the International Finance Corporation, which assists developing countries through investing in private sector projects, the IDA, International Development Association, which provides loans on concessional terms to poorer developing countries that may not be eligible for loans from the IBRD, ICSID, the International Centre for the Settlement of Investment Disputes and MIGA, the Multilateral Investment Guarantee Agency.

[4] International Court of Justice, Reparation for injuries suffered in the service of the United Nations, Advisory opinion, I.C.J. Reports 1949, 179-180.

[5] International Court of Justice, Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt. Advisory opinion, I.C.J. Reports 1980, 89-90.

1.1. Human rights obligations under general rules of international law

The international financial institutions are intergovernmental organisations enjoying international legal personality[6].

Intergovernmental organisations are subject to the reach of general rules of international law, i.e. custom and general principles of law[7]. Although the establishment of the existence of both customary rules and general principles of law relies on State practice and State legislation, it is generally accepted that their scope is not limited to States. If it were, States would be able to evade their international obligations by creating international organisations acting with impunity. In addition, treaty-based intergovernmental organisations, such as the IFIs, originate in international law, and it therefore follows that the general rules of that system of law apply.

Consequently, the international financial institutions are subject to the reach of international human rights law, in so far as human rights law is incorporated in international custom or in general principles of law[8]. There is no doubt that elements of human rights law have obtained the status of custom and of general principles of law[9].

In order to determine the exact substance and scope of the obligations of general human rights law as applicable to the international financial institutions, the legal capacities of the organisations need to be taken into account. These capacities are defined by the powers and functions entrusted to the organisations. Intergovernmental organisations are prohibited from acting ultra vires: they are not allowed to perform acts beyond their powers.

Consequently, the degree to which the international financial institutions are bound by affirmative duties to act[10] towards the realisation of general rules of human rights needs to be determined in the light of the constituent documents and subsequent practice of the organisations. The World Bank and the IMF can only be required to engage in activities for the realisation of human rights to the extent allowed by their respective purposes and functions. As argued below, the application of this test leads to a different result for the World Bank and the IMF.

[6] The constituent documents of the IFIs provide that that the institutions have 'full juridical personality' 'including i.a. the capacity to contract and to institute legal proceedings (Article VII, section 2, IBRD Articles of Agreement (27 December 1944), Article IX, section 2, IMF Articles of Agreement (22 July 1944)). The provisions do not explicitly state that the IFIs enjoy international legal personality, but there is no doubt that the organisations meet the requirements set by the International Court of Justice in Reparation for injuries. Compare Skogly, S. (2001), The human rights obligations of the World Bank and the International Monetary Fund. London: Cavendish, 64-71.

[7] Compare Amerasinghe, C.F. (1996), Principles of the institutional law of international organizations. Cambridge: Cambridge University Press, 240: "... there can be no doubt that under customary international law (...), international organizations can also have international obligations towards other international persons arising from the particular circumstances in which they are placed or from particular relationships". See also Skogly, S. (2001), 113: " ... obligations based on customary law and general principles of international law apply to all actors in the international community".

[8] Compare the Committee on accountability of international organisations of the International Law Association: " As part of the process of the humanisation of international law, human rights guarantees are increasingly becoming an expression of the common constitutional traditions of States and can become binding upon international organisations as general principles of law. The consistent practice of the UN General Assembly and of the Security Council points to the emergence of a customary rule to this effect". ILA Committee on accountability of international organisations, Third report presented to the New Delhi Conference (2002), part two, section three (available from the ILA website).

[9] For a detailed study, see Meron, T. (1989), Human rights and humanitarian norms in customary law. Oxford: Clarendon.

[10] Language borrowed from Handl, G. (1998), "The legal mandate of multilateral development banks as agents for change toward sustainable development", American journal of international law. Vol. 92, 662.

On the other hand, the international financial institutions are under a duty to respect the prohibitive general rules of human rights law. They are thus under an obligation not to violate or to become complicit in the violation of general rules of human rights law by actions or omissions attributable to them[11]. This obligation results from the starting point that the powers and functions of intergovernmental organisations should not be interpreted in such a way as to permit actions by these organisations that are contrary to prohibitive general rules of international law.

It is difficult, however, to determine the exact content of the general rules of human rights law. The International Court of Justice has not ruled on whether the Universal Declaration of Human Rights constitutes customary international law[12]. Lists of rights that have achieved this status have been put forward, both in legislation and in legal writings, usually accompanied by the proviso that the lists need to be open-ended in order to allow taking into account new developments. Skogly makes an appealing argument in favour of an approach suggesting that aspects of most civil, cultural, economic, political and social rights have attained the status of general rules[13].

A clear disadvantage of having to rely on custom and general principles is that it opens up the space for challenges to the status of the rule, if only because there is no standing mechanism with the authority to review and determine whether specific human rights obligations have achieved the necessary status or not. Consequently, the importance of recognition by the international financial institutions themselves that they have a legal responsibility for human rights, either on the basis of self-regulation or as a consequence of treaties entered into should not be underestimated.

[11] Compare Tomuschat: " Nobody doubts, for instance, that international organizations are committed to abide by universally or regionally applicable human rights standards". See Tomuschat, C. (2001), "International law: ensuring the survival of mankind on the eve of a new century. General course on public international law", Receuil des cours. Vol. 281, 138; even more specifically: "It has been suggested, for example, that the World Bank is not subject to general international norms for the protection of human rights. In our view, that conclusion is without merit, on legal or policy grounds (...). See Sands, P., Klein, P. (2001), Bowett's Law of international institutions. London: Sweet & Maxwell, 459.

[12] In United States diplomatic and consular staff in Teheran the International Court of Justice held that "wrongfully to deprive human beings of their freedom and subject them to physical constraint in conditions of hardship is manifestly incompatible with the principles of the Charter of the United Nations, as well as with the fundamental principles enunciated in the Universal Declaration of Human Rights", and constitutes a violation of international law (International Court of Justice, United States diplomatic and consular staff in Teheran (United States v. Iran)), ICJ Reports 1980, 43). In Barcelona Traction, Light and Power Company, the ICJ held that all States have a legal interest in protecting certain rights: the Court explicitly mentions genocide and "the principles and rules concerning the basic rights of the human person, including protection from slavery and racial discrimination" (International Court of Justice, Barcelona Traction, Light and Power Company (Belgium v. Spain), ICJ Reports, 1970, par. 33-34. In East Timor the Court confirmed that the right of peoples to self-determination had an erga omnes character (International Court of Justice, Case concerning East Timor (Portugal v. Australia), ICJ Reports, 1995, 102). Note that this right includes a prohibition to deprive a people of its own means of subsistence. This prohibition is sometimes invoked by those allegedly adversely affected by IFI interventions.

[13] See Skogky, S. (2001), 120-123. On the Universal Declaration of Human Rights as customary law, see also De Feyter, K. (2001), World development law. Antwerp: Intersentia, 246-248.

1.2. Human rights obligations under IFI constitutions and other internal instruments

1.2.1. Articles of Agreement

There are no references to human rights in the constituent documents of the international financial institutions.

Article 1 of the IBRD Articles of Agreement sets out the World Bank's purposes. These include assistance to the reconstruction and development of the territories of its members, i.a. by "encouraging international investment for the development of

the productive resources of members, thereby assisting in raising productivity, the standard of living and conditions of labour in their territories"[14].

The World Bank group provides finance for the developmental needs of borrowing countries. Clearly, development extends beyond the macroeconomic realm, and includes environmental, social, human and institutional components. The Bank's current approach to development, as evidenced by its comprehensive development framework[15], is to achieve the interdependence of all elements of development - "social, structural, human, governance, environmental, macroeconomic, and financial"[16].

The multi-dimensional approach to development equally includes the protection and promotion of human rights, as evidenced by the UN Agendas for development[17], successive UNDP Human development reports[18], and the UN Declaration on the right to development[19]. The Bank does not disagree. In a paper published on the occasion of the 50th anniversary of the Universal Declaration of Human Rights, the Bank acknowledged that "creating the conditions for the attainment of human rights is a central and irreducible goal of development"; that "the world now accepts that sustainable development is impossible without human rights", and that "the Bank contributes directly to the fulfilment of many rights articulated in the Universal Declaration" etc[20].

If it is agreed that the Articles of Agreement need to be interpreted in the light of the current concept of development, then clearly the mandate of the Bank extends to financing for the promotion and protection of human rights. There is nothing in the definition of the purposes of the Bank precluding the application of affirmative duties to act towards the realisation of general rules of human rights. Both from a legal and a policy perspective, the multidimensional approach to development (as endorsed by the Bank) requires that the human rights dimension to Bank fields of activity such as poverty reduction, health services or education is taken into account[21].

Those resisting any consideration of human rights in World Bank activities sought refuge in Article IV, 10 of the IBRD Articles of Agreement:

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

[14] Article I, par. i, IBRD Articles of Agreement (27 December 1944).

[15] Compare Wolfensohn, J. (1999), A proposal for a comprehensive development framework, 1999, available from the World Bank group website (www.worldbank.org/cdf).

[16] The Bank's Operational Directive on Poverty (discussed infra, section 2,A,a) explains that the Bank's approach to poverty reduction has evolved over time: "Cumulatively, this evolution increased recognition that economic growth alone is not a sufficient objective of development - or adequate measure of success - and that investments in human resources contribute to increasing incomes and reducing poverty" (see OD 4.15 on Poverty Reduction (December 1991), par. 2). Compare also Boisson de Chazournes, L., "Issues of social development: Integrating human rights into the activities of the World Bank" in Institut International des Droits de l'Homme (ed.) (2001), Commerce mondial et protection des droits de l'homme, Bruxelles: Bruylant, 54-64.

[17] An agenda for development. Report by the Secretary-General. UN doc. A/48/935 (6 May 1994), and the subsequent report adopted by the UN General Assembly, UN doc. A/51/45 (16 June 1997). The latter report perceives of respect for human rights as one of the indispensable foundations of development (par. 27).

[18] The UNDP Human development reports have contributed significantly to the integration of human rights into development. See in particular UNDP Human development report 2000, Oxford: Oxford University Press, where human rights appear as the central theme.

[19] UN Declaration on the right to development, UN GA resolution 41/128 (4 December 1986). According to the Declaration, States should "eliminate obstacles to development resulting from failure to observe civil and political rights, as well as economic, social and cultural rights" (Art. 6, par. 3). Note that Article 1 of the Agreement establishing the European Bank for Reconstruction and Development (29 May 1990) defines the purpose of the Bank as "to foster the transition towards open market-oriented economies and to promote private and entrepreneurial initiative in the central and eastern European countries committed to and applying the principles of multiparty democracy, pluralism and market economics".

[20] Gaeta, A., Vasilara, M.(1998), Development and human rights: the role of the World Bank, Washington: the World Bank, 2-3. Compare also Sfeir-Younis, A., Economic, social and cultural rights and development strategies: human rights economics in international relations. UN doc. E/C.12/2001/8 (15 March 2001), 4, where the World Bank Special Representative to the UN asserts that the World Bank has a major history of assisting countries in the implementation of economic, social and cultural rights.

[21] Handl convincingly argues with respect to sustainable development, that as the development banks expand their functions to include a wide array of activities, they must also be deemed subject to a commensurately expanded reach of general or customary international law. See Handl, G. (1998), 657. On the other hand, the author does recognise that the development banks are subject only to functionally limited obligations regarding the enhancement of human rights (Handl, G. (1998), 663).

economic considerations shall be weighed impartially in order to achieve the purposes stated in Article I.

The former General Legal Counsel of the World Bank, Ibrahim Shihata[22], clarified, however, that the scope of Article IV, 10 was limited. The provision does not bar the Bank from financing human rights related projects, nor does it suggest that the Bank should enjoy impunity when it becomes involved in human rights violations. The issue addressed by Article IV, 10 is human rights conditionality strictu sensu: the Bank should not refuse assistance, because of prevailing violations of human rights[23] in the Borrower's country. In Shihata's view, even this prohibition is not absolute:

(...) Political situations, which have effects on the country's economy or on the feasibility of project implementation or monitoring (...) should (...) be taken into account. Human rights may, under this opinion, become a relevant issue if their violation becomes so pervasive as to raise concerns relating to the matters mentioned above[24].

The Bank's current position on conditionality is that it is barred from exercising human rights conditionality, except as a consequence of UN Security Council action[25], or unless the economic consequences of human rights violations are so pervasive that the project under consideration is not feasible. This is a respectable position, given the variety of views on conditionality. Economic sanctions are often counterproductive from a human rights perspective. The trend is towards targeting individuals at fault, rather than societies[26]. In the exceptional cases where sanctions may be useful, current Bank policy allows sufficient latitude.

The Articles of Agreement of the International Monetary Fund do not refer to human rights. The purposes of the IMF, as defined[27], do not even refer to development. They do not differentiate between countries on the basis of level of development reached. The IMF traditionally portrays itself as a monetary agency, not as a development agency[28].

Article I of the IMF Articles of Agreement does refer to the promotion and maintenance of high levels of employment and real income and to the development of the productive resources of the members, and the notion that the correction of maladjustment in the members' balance of payments should not include "measures destructive of national and international prosperity"[29]. In 1978, a reference to the effect of IMF measures on social policies was included in the Articles in a section dealing with

[22] See Shihata, I. (1991), The World Bank in a changing world. Dordrecht: M.Nijhoff, 97-134.

[23] On the disagreements in the 1960s and 1970s between the UN General Assembly and the World Bank on support to South Africa and Portugal, see Marmorstein, V. (1978), "World Bank power to consider human rights factors in loan decisions", Journal of international law and economics, 113-136.

[24] See Shihata, I. (1991), 107.

[25] Under the UN-IBRD Relationship Agreement, the Bank is required to take note of the obligations of its members "to carry out the decisions of the UN Security Council", and has undertaken "to have due regard for the decisions of the Security Council under Articles 41 and 42 of the UN Charter" (See Article VI, par. 1, Agreement between the UN and the IBRD (1947). The Bank is thus under an obligation, via the obligation resting on its members, to respect an economic embargo imposed by the UN Security Council in the context of the maintenance of international peace and security. Starting from the 1990s, the UN Security Council has given increasing weight to widespread and systematic violations of civil and political rights in arriving at the determination that a threat to international peace and security existed, and thus as a basis for the taking of economic and military sanctions. See also infra, under section A, 3, a.

[26] Compare Garfield, R. (1999), The impact of economic sanctions on health and well being, London: Relief and Rehabilitation Network.

[27] Articles of Agreement International Monetary Fund (22 July 1944).

[28] See Williams, M. (1994), International economic organisations and the third world, Hertfordshire: Harvester Wheatsheaf, 55.

[29] Art. I, par ii and v respectively. The IMF General Counsel, François Gianviti, states that under the latter provision, the IMF "has taken the view that its conditionality could include the removal of exchange and trade restrictions, but also the avoidance of measures that may be damaging to the environment or to the welfare of the population". See Gianviti, F., Economic, social and cultural rights and the International Monetary Fund, UN doc. E/C.12/2001/WP.5 (7 May 2001), par. 50.

the Fund's overseeing of the compliance of its members with the purposes set out in Article I. While exercising surveillance over the exchange rate policies of its members, the Fund was to respect "the domestic social and political policies of members", and "to pay due regard to the circumstances of members"[30].

[30] Art. IV, section 3, b.

Today, it is debatable whether the IMF still is a purely monetary agency[31]. In the 1980s, the IMF became involved with long-term assistance, and thus with development, as a consequence of its role in debt rescheduling. More recently, in response to mounting criticism of the IFIs, the Executive Boards of the World Bank and the IMF jointly endorsed the comprehensive development framework (CDF) and poverty reduction strategies as the central mechanisms for lending to low-income developing countries. The approach does not change the division of responsibilities between the international financial institutions, but enhances the development impact of the partnership. The CDF text reconfirms the importance of the macroeconomic framework, but goes on to state:

[31] Gianviti still maintains this position, see Gianviti, F., (2001), par. 56.

We cannot adopt a system in which the macroeconomic and financial is considered apart from the structural, social and human aspects, and vice versa. Integration of each of these subjects is imperative at the national level and among global players.

In short, the primary responsibility of the IMF remains macroeconomic stabilisation and surveillance, but it is an inevitable consequence of the CDF approach that the IMF increasingly considers its impact on the development objectives for which the World Bank is primarily responsible.

On the other hand, it is unclear whether the reorientation of the IFIs in the direction of poverty reduction will survive the test of time. Some have advocated a back to basics approach, which would include taking the IMF out of long-term involvement in countries, making its operations remote from human rights[32].

[32] For an overview of IMF reform proposals, see Bird, G. (2001), "A suitable case for treatment? Understanding the ongoing debate about the IMF", Third world quarterly, Vol. 22:5, 823-848. See also different contributions in Nayyar, D. (Ed.) (2002), Governing globalization. Oxford: Oxford University Press and Einhorn, J. (2001), "The World Bank's mission creep", Foreign affairs. Vol. 80, 5: 22-35.

The IMF Articles of Agreement do not include a provision comparable to Article IV, 10 of the IBRD Articles of Agreement, but "the practice of the organisation has nevertheless been to exclude any questions not of an economic or financial nature from its decision-making processes"[33]. In August 1997, however, the Executive Board of the IMF adopted Guidelines regard-

[33] Boisson de Chazournes, L. in Institut International des droits de l'homme (Ed.)(2001)51.

ing governance issues[34], which enabled management "to seek information about the political situation in Member Countries as an essential element in judging the prospects for policy implementation". The Guidelines identify a number of governance problems, including corruption and the quality of key administrative functions of government as integral to the IMF's normal activities. Certainly, the concerns addressed are relevant from a human rights perspective.

Nevertheless, it is far from evident to construct affirmative duties on behalf of the International Monetary Fund to act for the realisation of general rules of human rights on the basis of the IMF's purposes and functions. The key obligation under the general rules of human rights as applicable to the IMF is a prohibitive one, i.e. the prohibition to violate, or become complicit in human rights violations.

The IMF General Counsel, François Gianviti, denies that the IMF is under a duty to ensure that its actions do not adversely affect human rights, or do not undermine the Borrower's compliance with human rights obligations. In Gianviti's view[35], it is up to the Borrower, not to the Fund, to raise considerations related to the implementation of human rights. The IMF has no general mandate to ensure that its members abide by their international obligations. Only obligations relevant to the Fund's purposes, i.e. the Borrower's financial obligations to the Fund and other lenders can be considered by the Fund[36]. The reference in the IMF Articles of Agreement to the need to respect the domestic social and political policies of members, further constrains the Fund's ability to raise social development issues.

No doubt, the primary responsibility for raising human rights obligations in financial discussions lies with the Borrower. The Borrower's responsibility for human rights remains unabated in the context of negotiations with the IMF. As soon as the government raises human rights objections in discussions with the IMF, however, these objections come within the realm of Article IV, 3,b of the IMF Articles of Agreement. The social policies of the Borrower may well include international commitments to economic, social and cultural rights, and in such circumstances Article IV, 3, b functions as a requirement to take into account human rights effects, rather than as an impediment, as Gianviti argues. Once the Borrower raises human rights obligations as having an impact on what the government is willing to accept in order to obtain IMF assistance, the IMF cannot reasonably argue that these obligations are irrelevant to its work, as defined in the Articles of Agreement.

[34] See Guidelines regarding governance issues (4 August 1997), published in IMF Survey (1997), Vol. 26: 234-238. The Guidelines on conditionality (Decision No. 6056(79/38), Executive Board IMF (2 March 1979)), adopted by the Executive Board of the Fund in 1979, limit the performance criteria the IMF may "normally" use to macro-economic variables. In 1991, the then Special Rapporteur of the UN Sub-Commission on the prevention on discrimination and protection of minorities on structural adjustment, Danilo Türk, proposed the adoption by the Fund of basic policy guidelines on structural adjustment and economic, social and cultural rights, that could serve as a basis for dialogue between the financial institution and human rights bodies. The suggestion was well received by the human rights bodies, but not by the Fund. Danilo Türk's final report is UN doc. E/CN.4/Sub.2/1992/16.

[35] Gianviti, F. (2001), par 28-36.

[36] On the principle of specialisation, and the strained relationship between the principle and the current holistic approach to development, compare De Feyter, K. (2001), 71-72, 80-81, and 103. Specialisation can co-exist with a comprehensive approach to development, on the condition that care is taken to avoid damage to other, equally important aspects of development, for which the organisation is not primarily responsible. Compare also Norton: "Effective social policy can, in particular, ease the task of adjustment during times of crises, helping build support for necessary refocus and ensuring that the burden of adjustment does not fall disproportionately on the poorest and most vulnerable groups in society"; see Norton, J. (1999) "A "New International Financial Architecture?" - Reflections on the possible law-based dimension", The International lawyer. Vol. 33: 920-921

On the other hand, even if the Borrower does not raise human rights obligations, the autonomous obligation of the IMF under general rules of human rights prohibiting the organisation as an international legal person from becoming involved in human rights violations still stands. Consequently, the IMF would be well advised to engage in an in-house human rights impact assessment of the measures it proposes. Human rights impact assessment is not current IMF practice.

In addition, it is of interest to note, however, that Gianviti acknowledges that Fund involvement depends on an assessment of whether a program is viable and likely to be implemented:

This means that, if a program is so strict that it is likely to generate strong popular opposition, it may not be implemented, and the Fund should not support it[37].

[37] Gianviti, F. (2001), par. 51.

The statement opens the door for civil society. Under current policy, the IMF may well consider human rights impact if civil society actors manage to mobilise sufficiently "strong popular opposition" on the basis of a platform demonstrating that proposed measures are "so strict" as to adversely affect human rights.

1.2.2. World Bank operational policies and guidelines related to poverty reduction strategies

The World Bank has issued a variety of instructions to staff, determining standards for the conduct of operations[38]. Operational Policies, Bank Procedures and the older Operational Directives are binding on staff, unless their wording suggests otherwise. Potentially, these guidelines can be used as mechanisms to ensure that World Bank funded projects are consistent with international law"[39]. This section reviews to what extent the current guidelines reflect human rights.

No single World Bank operational policy on human rights exists, although no legal obstacle prevents the adoption of such a policy. Whether the Bank should have one operational policy on the whole range of human rights is an issue for debate. Such an instrument would raise the profile of human rights in Bank practice, and would allow addressing the relevance of human rights to World Bank activities in a systematic way. On the other hand, inevitably the World Bank human rights standards would be self-defined. It is the essence of self-regulation that norms reflect the standards of the relevant professional group. A

[38] The World Bank's Operational Manual contains the following typology of the different instruments through which Bank Management (after Board approval) issues instructions to staff responsible for determining the Bank's position on granting loans for specific projects:

Operational Policies (OPs) are short, focused statements that follow from the Bank's Articles of Agreement, the general conditions, and policies approved by the Board. OPs establish the parameters for the conduct of operations; they also describe the circumstances under which exceptions to policy are admissible and spell out who authorises exceptions.

Bank Procedures (BPs) explain how Bank staff carries out the policies set out in the OPs. They spell out the procedures and documentation required to ensure Bank wide consistency and quality.

Good Practices (GPs) contain advice and guidance on policy implementation for example, the history of the issue, the sectoral context, analytical framework, best practice examples.

Operational Directives (ODs) contain a mixture of policies, procedures, and guidance. The ODs are gradually being replaced by OPs/BPs/GPs, which present policies, procedures and guidance separately.

[39] The UN Committee on Economic, Social and Cultural Rights has urged the Bank and other agencies to fully respect such guidelines in so far as they reflect the obligations in the Covenant" UN Committee on Economic, Social and Cultural Rights, General Comment no. 7(1997): The right to adequate housing: forced evictions, par. 19.

tentative World Bank operational policy on human rights would differ from general international human rights law, for better or for worse.

The alternative would be to adopt an instrument committing Bank staff to observe existing international human rights law, while ensuring that detailed levels of human rights protection are incorporated in specific Bank policies particularly relevant to human rights, such as the policies on involuntary resettlement and structural adjustment.

Only one current Operational Directive uses human rights terminology. Operational Directive 4.20 on Indigenous peoples states[40]:

The Bank's broad objective towards indigenous people, as for all the people in its member countries, is to ensure that the development process fosters full respect for their dignity, human rights, and cultural uniqueness. More specifically, the objective at the center of this directive is to ensure that indigenous peoples do not suffer adverse effects during the development process, particularly from Bank-financed projects, and that they receive culturally compatible social and economic benefits[41].

The Operational Directive has a broad personal scope, including all "social groups with a social and cultural identity distinct from the dominant society that makes them vulnerable to being disadvantaged in the development process"[42]. On the other hand, in the on-going revision process, there appears to be a move away from the broader language towards a narrower focus on indigenous peoples and similarly disadvantaged groups[43]. The Bank's human rights approach thus remains ad hoc. Indigenous peoples are an issue in Bank practice, and therefore they are singled out as subjects of human rights.

References to rights to natural resources appear sporadically in the operational policies[44].

International environmental law figures more prominently in the operational policies[45]. OP 4.01 on Environmental assessment is exemplary. This operational policy states that environmental assessment will i.a. take into account:

Obligations of the country, pertaining to project activities, under relevant international environmental treaties and agreements. The Bank does not finance project activities that would contravene such country obligations, as identified during the EA.[46].

[40] OD 4.20 (September 1991), par. 6.

[41] OD 4.20 is under revision, and will be replaced by Operational Policy/Bank Procedure 4.10 on Indigenous Peoples. A consultation process with external stakeholders is currently on going. The most recent draft (23 March 2001) available from the World Bank website, moves the reference to human rights up to the first paragraph of the text in a section entitled 'Overview'. The proposed text states, "the broad objective of this policy is to ensure that the development process fosters full respect for the dignity, human rights and cultures of indigenous peoples, thereby contributing to the Bank's mission of poverty reduction and sustainable development". Note the deletion of the reference to "all the people", that appears in the current text.

[42] OD 4.20 (September 1991), par. 3. Compare also draft OP 4.10 (23 March 2001), par. 4: "social groups with a social and cultural identity that is distinct from the dominant groups in society and that makes them vulnerable to being disadvantaged in the development process". For an application stressing the need to interpret the scope of the Operational Directive as applying to all groups with a vulnerable status, see Inspection Panel, Investigation Report on Nepal: Arun III Proposed hydroelectric project (22 June 1995), par. 110-113. All Inspection Panel reports are available from the Inspection Panel website: www.worldbank.org/ipn.

[43] Compare also the findings on the non-applicability of OD 4.20 to project-affected ethnic groups in Chad in Inspection Panel, Investigation report on Chad-Cameroon petroleum and pipeline project (17 July 2002), par. 202.

[44] In human rights treaties, the right to exploit natural resources appears as a component of the right to self-determination. In identifying projects, which require the informed participation of indigenous peoples, OD 4.20 refers to projects "affecting indigenous peoples and their rights to natural and economic resources" (OD 4.20(September 1991), par. 8.). OP 4.36 on Forestry requires from client countries that they "safeguard the interests of forest dwellers, specifically their rights of access to and use of designated forest areas" (OP 4.36 (September 1993), par. D,iv). OD 4.30 on Involuntary resettlement refers to customary rights to the land or other resources held by people adversely affected by the project (OD 4.30 (June 1990), par. 3,e.) and to the need to treat customary and formal rights as equally as possible (Ibid., par. 17). The conversion process of OD 4.30 into a new OP/BP 4.12 is almost complete. The draft OP 4.12 introduces distinctions as to the compensation that should be provided by the Borrower between those holding rights to land recognised under domestic law and those holding no such rights. For a critique from an NGO coalition, see an open letter by the Forest Peoples Programme to the Executive Directors of the World Bank and the IMF, headed "Concerns about the weakening of World Bank safeguard policies" (2 March 2001), available from the organisation.

[45] For additional examples, see Boisson de Chazour-nes, L., "Compliance with operational standards: the contribution of the World Bank Inspection Panel" in Alfredsson, G. & Ring, R. (Eds.)(2001), The Inspection Panel of the World Bank. The Hague: M.Nijhoff, 78.

[46] OP 4.01 on Environmental assessment (January 1999), par. 3

OP 4.36 on Forestry goes one step further, in insisting that the Borrower provides a level of protection equal to the level guaranteed at the international level, even if the Borrower has not previously accepted such obligations. The operational policy simply states:

The Bank does not finance projects that contravene applicable international environmental agreements[47].

[47] Ibid., par. 2.

No legal obstacle prevents the adoption of a similar statement prohibiting the Bank from financing projects that contravene applicable international human rights law. The legal nature of both branches of law is similar. They both consist of relatively succinct binding provisions of treaty law and customary law, clarified by a whole series of declarations, resolutions, guidelines, codes of conduct, and authoritative comments by expert bodies intended to ensure best practices as new situations emerge[48]. It is submitted that the different treatment of international environmental and international human rights law contradicts the logic of the Bank's self-adopted rules, and the logic of international law in the field of sustainable development[49].

[48] Compare Birnie, P., "International environmental law: its adequacy for present and future needs" in Hurrell, A., Kingsbury, B. (Eds.) (1992), The international politics of the environment. Oxford: Clarendon Press,83.

[49] The international law in the field of sustainable development has been described as "a broad umbrella accommodating the specialised fields of international law which aim to promote economic development, environmental protection and respect for civil and political rights"; it is based on "an approach requiring existing principles, rules and institutional arrangements to be treated in an integrated manner". See Sands, P. (1995) "International law in the field of sustainable development", British yearbook of international law1995, 379.

It could be argued that the operational policies, even if they do not use human rights language, still offer a degree of human rights protection.

In the area of civil and political rights, a number of provisions pertaining to required levels of participation of project-affected groups are relevant. Clauses vary considerably, from general encouragements to actively involve beneficiaries and NGOs[50] to fairly specific requirements insisting on regular consultations by the Borrower[51].

[50] OP 4.15 (December 1991) on Poverty reduction, par. 39.

[51] See OD 4.30 (June 1990) on Involuntary resettlement, par. 8 and OD 4.20 on Indigenous peoples, par. 8 and 14,a, OP 4.04 (June 2001) on Natural habitats, par. 10.

In the area of economic, social and cultural rights the operational directives on poverty reduction and on adjustment lending policy are of particular interest. The Operational Directive on Poverty reduction recognises that sustainable poverty reduction i.a. requires "improved access to education, health care, and other social services"[52]. The section on structural adjustment[53] states:

[52] OD 4.15 on Poverty reduction, par. 3.

[53] Compare also OD 8.60 on Adjustment lending policy (December 1992). OD 8.60 is hugely ambivalent on how the balance between structural adjustment and the provision of social services is to be struck. The OD only requires a specific focus on poverty reduction in the course of adjustment operations when country circumstances so determine, - not on a systematic basis. On the other hand, even if a specific focus is absent, the Bank "should support the government's efforts to reduce poverty and mitigate the social costs of adjustment". Compare with the UN Committee on Economic, Social and Cultural Rights' recommendation that "the goal of protecting the rights of the poor and vulnerable should become a basic objective of economic adjustment". See UN Committee on Economic, Social and Cultural Rights, General Comment no.2 (1990) on international technical assistance measures, par. 9

Within the overall spending envelope given by the macroeconomic framework, special efforts should be made to safeguard, and increase where appropriate, budgetary allocations for basic health, nutrition, and education, including programs that benefit the most vulnerable groups among the poor. Institutional reform and development should also be supported as necessary to ensure that the benefits of policy reach the poor[54].

The Operational Directive does not, however, include recognition of the need to ensure a minimum essential level of economic, social and cultural rights[55].

Finally, although there is no doubt that the operational policies are binding on staff (wording permitting), Bank practice may well fall below the standards. The effectiveness of self-regulation depends on the internal discipline of the organisation, and on the commitment of Board and staff at different levels to implementation[56].

Operational policies govern the granting of loans by the World Bank for specific projects. They do not cover the area of poverty reduction strategies[57]. Those strategies are part of the IFIs approach to debt relief[58]. Briefly: debt relief is i.a. conditioned on the adoption and implementation of a poverty reduction strategy by the relevant country. PRSP Strategies are intended to be country-driven, i.e. to be prepared and developed transparently with broad participation of civil society, key donors and other relevant international financial institutions.

Ultimately, the PRSP takes the form of a tri-partite agreement between the government, the IMF and the World Bank[59]. This means that government needs to present the PRSP for approval to the Executive Boards of the World Bank and the IMF. Approval is given on the basis of a Joint IMF/World Bank Staff Assessment (JSA). Guidelines for Joint Staff Assessments have been adopted[60]. Human rights terminology or references to the human rights obligations of governments are absent from these JSA Guidelines[61]. There is no requirement for Bank and Fund

[54] Ibid., par. 24. A fascinating elaboration of the role of the World Bank in social protection is World Bank (2001), Social protection sector strategy. From safety net to springboard. Washington: World Bank.

[55] The UN Committee on Economic, Social and Cultural Rights is of the view that the realisation of minimum essential levels of economic, social and cultural rights is the minimum core obligation under the International Covenant on Economic, Social and Cultural Rights. See UN Committee on Economic, Social and Cultural Rights, General Comment no. 3 (1990) on the nature of States parties' obligations, par. 10.

[56] The findings of the Inspection Panel on staff compliance with operational policies are sobering. See in particular, Inspection Panel, Investigation report on the China Western poverty reduction project (28 April 2000), par. 34.

[57] The poverty reduction strategies are an "operational vehicle, which can be a specific output of the comprehensive development framework or of processes based on CDF principles". See Joint note by James Wolfensohn and Stanley Fischer, "The Comprehensive development framework and poverty reduction strategy papers" (5 April 2000).

[58] The Executive Boards of the IMF and the World Bank endorsed the adoption of the poverty reduction strategy paper approach on 21 December 1999 [see IMF Press release no. 99/65 (22 December 1999)].

[59] On progress made so far, consider IMF/IDA (2001), Poverty reduction strategy papers. Progress in implementation, Washington: IMF/IDA.

[60] The Guidelines appear as Annex 2 to IMF/IDA (2001) 22-27. The JSA "must make an overall assessment for the Executive Boards as to whether or not the strategy presented in the PRSP constitutes a sound basis for concessional assistance from the Fund and the Bank" (JSA Guidelines, par. 2).

[61] E.g. in the section on indicators of progress in poverty reduction, reference is made to the international development goals, and to "indicators and targets which appropriately capture disparities by social group, gender and region" (JSA Guidelines, par. C.1), but not to indicators and benchmarks developed to monitor and assess the enjoyment of economic, social and cultural rights. On such indicators and benchmarks, see International Human rights internship program, Asian Forum for human rights and development (2000), Circle of rights. Washington: IHRIP, 365-391. For a general human rights critique of the poverty reduction strategies, see Cheru, F., "The Highly Indebted Poor Countries (HIPC) Initiative: a human rights assessment of the poverty reduction strategy papers", UN doc. E/CN.4/2001/56 (18 January 2001), par. 25.

staff to take into account the human rights obligations of the Borrower. Some of the assessment criteria are relevant from a human rights perspective[62].

The poverty reduction strategies are in effect a country's development plan on attacking poverty in the up-coming period, involving also external actors. If human rights are not integrated into such plans, they stand little chance of being prioritised. The Office of the UN High Commissioner for human rights was late in identifying the risk, but, in 2001, at the request of the UN Committee on ESC rights, put together a team of experts to draft guidelines on the integration of human rights into the poverty reduction strategies. The target audience of the guidelines are "practitioners involved in the design of the strategies", primarily States, but also other actors committed to the eradication of poverty[63].

[62] They include the existence of mechanisms used to consult the poor and their representatives, the extent to which the PRSP has estimated the likely impact of its proposed policy measures on the poor and included measures to mitigate any negative impacts; the existence of measures to promote fair and equitable treatment of poor men and women under the law and avenues of recourse, including with respect to property rights; proposals on steps to be taken to improve transparency and ensure accountability of public institutions and services vis-à-vis the needs and priorities of the poor (See JSA Guidelines, par. A.1, D.5, D.6, D.7).

[63] At the time of writing, an electronic version of the Draft Guidelines: a human rights approach to poverty reduction strategies (10 September 2002) was available from the OHCHR website. The team of experts were Paul Hunt, Manfred Nowak and Siddiq Osmani.

1.3. Human rights obligations under international agreements to which the IFIs are parties

Human rights obligations for the international financial institutions may also result from international agreements to which they are parties. Two completely different types of agreements are discussed below:

- The relationship agreements the international financial institutions concluded with the United Nations through which the IFIs obtained the status of UN specialised agencies;
- The loan agreements the World Bank concludes with Borrower countries.

1.3.1. Relationship agreements

An organisation wishing to be recognised as a United Nations specialised agency needs to be brought into relationship with the central bodies of the UN[64]. This is achieved through the conclusion of a relationship agreement between the United Nations and the relevant intergovernmental organisation.

[64] In practice via the Economic and Social Council, see art. 63, UN Charter. Relationship agreements need to be approved by the UN General Assembly. On relationship agreements, see Manin, A., "Article 63" in Cot, J., Pellet, A. (Eds.) (1991), La Charte des Nations Unies. Paris: Economica, 977-990, Sands, P., Klein, P. (2001), 79-83.

Such relationship agreements contain provisions on information sharing, but more importantly in this context, they also include an obligation on behalf of the specialised agency to assist in achieving the objectives of international economic and social co-operation as defined in Article 55 UN Charter. Uni-

versal respect and observance of human rights appears as one of the major goals of international economic and social co-operation in Article 55 of the UN Charter. In addition, the Charter identifies the promotion and encouragement of respect for human rights as one of the principal purposes of the UN[65].

[65] Art. 1, par. 3 UN Charter (26 June 1945).

Both the World Bank and the International Monetary Fund have concluded relationship agreements with the United Nations[66]. Consequently, the IFIs are under an obligation to contribute to the universal respect for, and observance of human rights. The UN Committee on Economic and Social Rights has admirably summarised the human rights implications of obtaining the status of a specialised agency:

[66] Agreement between the UN and the IBRD (15 April 1948), and Agreement between the UN and the IMF (15 April 1948). Article 1, par. 2 of the UN-IBRD Relationship Agreement states that the Bank is a specialised agency with wide responsibilities in economic and related fields within the meaning of Article 57 of the UN Charter. The Article also adds that the Bank is, and is required to function as, an independent organisation.

In negative terms this means that the international agencies should scrupulously avoid involvement in projects which, for example, involve the use of forced labour in contravention of international standards, or 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. In positive terms, it means that, wherever possible, the agencies should act as advocates of projects and approaches, which contribute, not only to economic growth or other broadly defined objectives, but also to enhanced enjoyment of the full range of human rights[67].

[67] UN Committee on Economic, Social and Cultural Rights, General Comment No. 2 (1990), UN doc. E/1990/23, Annexe III, par. 6.

In other words, although the legal basis of the obligations is different, the result is similar to what is achieved when the obligations are derived from general rules of international law.

1.3.2. Loan agreements

The international financial institutions have the capacity under international law to conclude agreements necessary for the achievement of their objectives. Loan agreements concluded by the World Bank with Borrower States belong to this group[68].

[68] According to Skogly, IMF practice is not to enter into treaties with Member States. Stand-by arrangements, the legal instruments through which resources are made available to members are not legally binding, but are governed by 'soft law'. See Skogly, S. (2001), 30-32.

The loan agreements are treaties concluded between a State and an international organisation, governed by international law[69], that are equally binding for the Borrower and for the Bank. Depending on the attitude adopted by the domestic legal system to international law, loan agreements may supersede domestic law[70].

[69] Amerasinghe, C. (1996), Principles of the institutional law of international organizations, Cambridge: Cambridge University Press, 1996, 246. See also Skogly, S. (2001), 28-30.

[70] For an example, see Inspection Panel, Report and recommendation on request for inspection on India: Eco-development project (21 October 1998), par. 63.

From the Bank's perspective, the loan agreements are important instruments for ensuring consistency with operational procedures[71]. By including the provisions of operational policies in loan agreements, binding international obligations are created both for the Borrower and for the Bank. Through the loan agreements, the operational policies become law for both parties. In any case, the agreements give the Bank the right to insist on compliance by the Borrower, which may be particularly helpful when domestic legislation provides less protection to beneficiaries than World Bank standards[72].

On the other hand, the loan agreements are also a source of legal obligation for the Bank. The failure on the part of the Bank to implement its obligations under a loan agreement involves its international responsibility[73]. Responsibility arises directly from the breach of the obligations, as long as the conduct is attributable to the organisation[74].

From a human rights perspective, the inclusion of provisions offering human rights protection to persons affected by projects would be a step forward. Although those suffering human rights violations as a consequence of non-compliance with the agreement would not have standing to invoke the agreement directly, they might be able to resort to tort law. The argument would be that the Bank had breached its duty to take care by not contemplating the injurious effect of non-compliance on the affected persons. In determining what the standard of care is, a domestic court might well take into account the Bank's own professional standards as evidenced by the operational policies[75]. If such a claim were attempted, the Bank would no doubt argue that the Borrower rather than the Bank should be held responsible for lack of implementation[76]. On the other hand, a finding on joint responsibilities would certainly be possible[77].

[71] Shihata, I. (1991), 183.

[72] Whether the Bank actually insists on compliance, is a different matter. In Argentina/Paraguay: Yacyreta hydroelectric project the requesters argued that the Bank had failed to ensure the adequate execution of environmental mitigation and resettlement activities by not supervising and enforcing the relevant legal covenants. Management replied that it was an essential principle of Bank operations that the exercise of legal remedies was not a requirement, but a discretionary tool, to be applied only after other reasonable means of persuasion had failed. The Inspection Panel conceded that there was some room for flexibility, but also pointed out that the Panel's constituent resolution identifies the failure by the Bank to follow up on the borrower's obligations under loan agreements with respect to operational policies as a ground for possible requests. The Bank was under an obligation to ensure timely implementation of the loan agreement, and, in the case under review, had failed to do so by accepting repeated violations of major covenants in the agreements. See Inspection Panel Report and recommendation on Argentina/Paraguay: Yacycreta hydroelectric (26 November 1996), par. 9, 28-31.

[73] Amerasinghe, C. (1996), 240.

[74] Compare Scobbie, I., "International organisations and international relations" in Dupuy, R.J. (Ed.) (1998), A handbook on international organizations, Dordrecht: M. Nijhoff, 887. It is generally accepted that the customary rules regulating State responsibility are, in principle, equally applicable to international organisations.

[75] Shihata argues that the mere failure by the Bank to observe its policies would rarely amount to a fault under applicable law: "these policies typically require high standards beyond what borrowers or their foreign financiers otherwise need to observe under national or international law". See Shihata, I. in Alfredsson, G., Ring, R. (Eds.) (2001), 42-43. It is a hypothesis worth testing.

[76] Compare Schlemmer-Schulte, who argues that the Panel's assessment of a failure by the Bank to comply with its own policies does not lead to Bank liability, but "the Panel's assessment however may indirectly contribute to the determination of borrower actions which could constitute a fault under domestic law (...) the Panel's determination of Bank actions could provide an analysis that constitutes a factual basis for those who wish to present a claim against the borrower under domestic law. See Schlemmer-Schulte, S. (1998), „The World Bank's experience with its inspection panel", Zeitschrift für ausländisches und öffentliches Recht und Völkerrecht. Vol.58, 2: 368.

[77] Joint responsibility could be construed by using a concept of complicity between multiple tortfeasers. In a paper on business complicity in human rights abuses, Clapham and Jerbi develop a theory that may be useful here as well. The authors distinguish between direct, beneficial and silent complicity Clapham, A., Jerbi, S. (2001) "Categories of corporate complicity in human rights abuses", Hastings international and comparative law journal. Vol. 24: 339-350). Direct complicity requires intentional participation, but not necessarily any intention to do harm, only knowledge of the likely harmful effects of the assistance given. In our example, the argument could be made that the Bank could have foreseen that the loan agreement would not be implemented, if staff did not ensure proper follow-up. Primary responsibility might still be attributed to the Borrower, but the Bank could be held responsible for aiding or assisting the State in the commission of a wrongful act. Indirect complicity implies that benefits are derived from harm committed by somebody else. The authors quote the example of human rights violations committed by security forces in the context of a common operation. Silent complicity implies culpability for failing to exercise influence.

1.4. Jurisdictional immunity

The rationale for allocating privileges and immunities is "to enable organisations to function properly without undue interference in their affairs by States and thus ensure the independent discharge of the tasks entrusted to them"[78].

[78] Scobbie, I., in Dupuy, R.J. (Ed.)(1998), 833.

Such privileges and immunities are functional, i.e. limited to what is necessary for achieving the organisations' purpose[79]. The IBRD Articles of Agreement recognise that its immunities and privileges should "enable the Bank to fulfil the functions with which it is entrusted"[80]. The needs of organisations differ, and so do their immunities. On jurisdictional immunity in the courts of Member States, the IBRD Articles of Agreement provide:

[79] Amerasinghe, C. (1996), 370.

[80] IBRD Articles of Agreement (27 December 1944), art. VII, 1. Similarly, IMF Articles of Agreement (22 July 1944), art. IX, 1.

Actions may be brought against the Bank only in a court of competent jurisdiction in the territories of a member in which the Bank has an office, has appointed an agent for the purpose of accepting service or notice of process, or has issued or guaranteed securities. No actions shall, however, be brought by members or persons acting for or deriving claims from members. The property and assets of the Bank shall, wheresoever located and by whomsoever held, be immune from all forms of seizure, attachment or execution before the delivery of the final judgement against the Bank[81].

[81] IBRD Articles of Agreement (27 December 1944), art. VII, 3. In contrast, the IMF Articles of Agreement provide for immunity from every form of judicial process, except to the extent that the IMF waives its immunity for the purpose of any proceedings or by the terms of any contract. See IMF Articles of Agreement (22 July 1944), art. IX, 3.

The primary purpose of the provision was to provide immunity against suits brought by the Borrower in its own courts originating in loan agreements to which the State is a party[82]. One can understand the Bank's concern in not wishing to submit to the domestic courts of the party with which it is involved in a legal dispute. Still, the consequences are harsh. Borrowers have no legal remedy against the Bank, even when the Bank recognises internally that mistakes were made.

[82] Amerasinghe, C. (1996), 375.

The situation is different for adversely affected parties, however. Amerasinghe argues that there is a presumption of absence of immunity except in the circumstances mentioned above[83]. The immunity of the Bank is of a restricted kind, being limited to claims by member States or persons deriving claims from member States. The immunity therefore does not cover disputes with private parties, unless they derive their claims from member States or would prevent the Bank from fulfilling the functions for which it was established. A claim based on Bank negligence, as discussed above, would not come within that category. The Bank would still enjoy immunity in other respects, but the immunity standard would be "result-oriented", i.e. only

[83] Ibid.

shield against claims that threaten the Bank's existence or prevent it from fulfilling its core functions[84]. The case would be decided primarily under domestic, rather than international law[85]. No success could be hoped for without an independent judiciary that is at least minimally sympathetic to claims advanced by vulnerable groups within society.

Alternatively, the Bank could commit to a policy of waiving immunity in cases where parties claim their human rights have been adversely affected as a consequence of Bank actions or omissions. A suitable international forum for such a case might be the Permanent Court of Arbitration, which has adopted Optional Rules for arbitration between international organisations and private parties.

[84] Compare Reinisch, A. (2000), International organisations before national courts. Cambridge: Cambridge University Press. Dominicé has argued that the jurisdictional immunity of international organisations before domestic courts should not prevail over the human rights of private individuals adversely affected, particularly if the individual does not have access to any other tribunal. See Dominicé, C. (1999), « Observations sur le contentieux des organisations internationales avec des personnes privées », Annuaire Français de droit international. Vol. XLV: 625, 638.

[85] Note that on issues of immunity too, States are required under the IBRD Articles of Agreement "to make effective in terms of its own law the principles set forth in this Article"(Article VII, 10, IBRD Articles of Agreement (27 December 1944). Both the IBRD Articles of Agreement and the relevant domestic law would thus govern the dispute.

2. The practice

2.1. The World Bank Inspection Panel

The World Bank created the Inspection Panel in 1993[86]. The Panel members adopted its operating procedures in August 1994[87], and the Panel became operational in September of the same year.

The Inspection Panel is competent to receive requests for inspection presented to it by an affected party demonstrating:

That its rights or interests have been or are likely to be directly affected by an action or omission of the Bank as a result of a failure of the Bank to follow its operational policies and procedures with respect to the design, appraisal and/or implementation of a project financed by the Bank (including situations where the Bank is alleged to have failed in its follow-up on the borrower's obligations under loan agreements with respect to such policies and procedures) provided in all cases that such failure has had, or threatens to have, a material adverse effect.[88]

The Inspection Panel is limited to reporting on Bank compliance with its own policies. The Panel is not competent to establish violations of international law, including human rights law. On the other hand, nothing prevents the requesters from arguing that their human rights have been adversely affected by Bank action. In the three cases reviewed below, they did. Both the Management response and the Inspection Panel responded substantively to the human rights claims. Violations of human rights were considered, in so far as they were related to Bank conduct under the relevant operational policies.

[86] Resolution No.93-10 of the Executive Directors establishing the Inspection Panel for the IBRD (22 September 1993) and Resolution No. 93-6 for the IDA (22 September 1993).

[87] Inspection Panel for the IBRD and IDA, Operating procedures as adopted by the Panel (19 August 1994).

[88] Resolution No. 93-10 (22 September 1993), par. 12.

The Panel procedure is administrative rather than judicial in nature, allowing an important role for the Board in the different stages of the procedure. Panel reports are recommendatory only. The Executive Directors have decision-making power, both in whether or not to allow an investigation after the Panel's eligibility report, and in deciding on action after completion of the Panel's investigation. Board decisions are potentially a source of legal obligation for Bank staff, while the Inspection Panel's findings are not.

In practice, the Board never takes an express position on the findings of the Inspection Panel. The Board never identifies a specific Bank practice as a violation of Bank operational policies, and even less as a violation of human rights. The Board decides on action, not on law. Decisions on action after a Panel investigation are "case by case, tailor-made"[89], and in response to action points proposed by Management. At best, Board decisions constitute an implicit endorsement of the Panel's findings on non-compliance[90]. The Board of Executive Directors does not fulfil the functions usually associated with a decision-making body in the judicial process. The Board does not clarify the scope of the provisions in the operational policies. It does not interpret the legal implications of the policies. It does not facilitate internal application of the rules. It avoids establishing precedent. It does not deal with claimants. As a political body, the Board is concerned with maintaining cohesion among its diverse membership and good working relationships with staff, encouraging it to give precedence to pragmatism over principle. As such, the Board of Executive Directors is an unhelpful institution in promoting World Bank self-regulation on human rights.

The Inspection Panel procedure does not provide for compensation by the Bank to persons adversely affected by Bank action that was held to be in violation of Bank operational policies.

2.2. India: Ecodevelopment

The India: Ecodevelopment project demonstrates that in a multi-party development effort responsibility and accountability to project 'beneficiaries' will tend to dissipate, unless the project facilitators make and implement detailed agreements on how participatory rights will be ensured. As pointed out earlier, the right of people to participate in decisions that affect their lives is an essential element of a human rights approach to development projects. Participatory rights can be constructed

[89] Umana, A., "Some lessons from the Inspection Panel's experience" in Alfredsson, G., Ring, R. (Eds.) (2001), 139. The author is a former Chairperson of the Inspection Panel.

[90] Consequently, the legal impact of Inspection Panel reports is quite limited. In several reports, the Inspection Panel stresses that the investigation process has had a positive impact on the behaviour of relevant project staff, e.g. in Ecuador: Mining development and environmental control technical assistance, the Panel finds that there was a positive evolution toward the environmental dimensions of the Project, that "appears to have accelerated significantly after the Request was received" (Inspection Panel, Investigation report on Ecuador: Mining development and environmental control technical assistance project (23 February 2001), par. 7).

both on the basis of civil and political rights, and on the basis of economic, social and cultural rights. In fact, the need for consultation can also be justified from a purely economic rationale: knowledge is perceived of as a critical condition for optimum bargaining in a free market economy, both for decision-makers and consumers (i.e. affected populations)[91].

The India Ecodevelopment project targets seven national parks in India, including Nagarahole National Park in Karnataka State, southern India. The project aims at promoting conservation of the environment through the provision of incentives and alternatives to peripheral populations around the seven target parks. The key objective is to reduce pressure on the parks from the resource using communities, by providing for resource-substitution activities[92].

The Indian Wildlife Protection Act of 1972 prohibits persons from residing within a national park. In 1997, the Supreme Court of India, at the request of the World Wildlife Fund for Nature, urged State governments that had not yet done so to implement the act fully. The State government of Karnataka stopped providing basic services to tribal people inside the park, and did not include them in programs to be funded by the World Bank. Tribal NGOs were not part of the consultation process. The stage was thus set for a clash between the environmental agenda and indigenous peoples' rights.

Although the concept of ecodevelopment in India predated World Bank involvement, the Bank played a crucial role as the largest financial contributor to the project: the Bank was the key donor agency with responsibility for disbursing 71% of total funding[93]. The Bank did not, however, perceive itself as the key manager of the consultation process, although it did raise concerns about the indigenous people living inside the park, as mandated by World Bank Operational Directive 4.20. The loan agreement concluded by the Government of India and the Bank provided that no involuntary resettlement of people resident in the park would be carried out, and that any voluntary relocation would need to meet the Bank's criteria[94]. The overwhelming majority of the tribal residents wished to remain in the park. There was thus an obvious conflict between the loan agreement (an international treaty) and domestic Indian law[95]. Neither the Borrower, nor the Bank apparently pursued the conflict, and concentrated on other aspects of the project. In practice, none of the project facilitators felt responsible for implementing the provisions of the agreement dealing with the indigenous people, nor did they feel accountable to them.

[91] Compare Botchway, F. (2000), "The role of the State in the context of good governance and electricity management: comparative antecedents and current trends", University of Pennsylvania journal of international economic law. Vol. 21,790-793.

[92] See Mahanty, S. (2002), "Conservation and development interventions as networks: the case of India Ecodevelopment project, Karnataka", World development. Vol. 30,1371.

[93] Ibid.

[94] Inspection Panel, Report and recommendation on request for inspection on India: Ecodevelopment project (21 October 1998), par.54.

[95] Indian law provides that in such cases international law prevails.

The tribal rights alliance representing the tribals inside the park forced the other actors to open up a negotiating space for the indigenous, by filing a request with the Inspection Panel. The requesters argued "a violation of our basic right to determine our future and to oppose a project that we think will have a negative impact on our lives, livelihood and the survival of our people"[96]. The adivasi had been denied input on the basic assumptions and concepts of the project that clearly affected their traditional rights to use the resources of the park[97].

The request gave the Inspection Panel an opportunity to apply the human rights clause in the Operational Directive on Indigenous Peoples[98]. The Panel substantively concurred with the requesters, and recommended an investigation. In no uncertain terms, the Panel found that Management, notwithstanding a history of mistrust between the tribal people and the government, had denied the adivasi input, had overestimated the support for voluntary relocation, and had misconstrued the reality of the stay option. Tribal leaders had not been adequately informed, and documents not translated in the local language: "Information disclosure in a language understandable to the affected people is an obvious prerequisite to meaningful and informed consultation"[99]. The requesters had proposed an "Alternative People's Plan" to Bank representatives that was consulted with local leaders, but received no response. With a measure of irony, the Inspection Panel notes that the alternative plan "would appear to warrant at least some consideration as IDA struggles "...to ensure that the development process fosters full respect for their dignity, human rights and cultural uniqueness", quoting directly from Operational Directive 4.20[100].

The Inspection Panel came out strongly in favour of indigenous rights, and assisted the tribal organisations in achieving recognition. Perhaps predictably, however, both the Bank Management and the Karnataka State government criticised the Panel's findings. Bank Management denied all breaches of Bank policies. The Government of Karnataka argued that allowing the tribal groups to remain in the park would deprive them of the educational, health and socio-economic facilities available outside the park. The relationship between both actors and the tribal organisations remained adversarial[101].

The Board of Executive Directors agreed that the Panel's findings needed to be addressed, instructed Management to work with government officials at state and federal levels on measures to address them, and to report back in six months. The Panel would be asked to give comments separately. The Execu-

[96] Inspection Panel, Report and recommendation on request for inspection on India: Ecodevelopment project (21 October 1998), par. 37

[97] In addition, tribal organisations successfully went to Court to obtain a ban on the construction of a resort inside the park by the Taj hotels, of the Tata group companies, one of the largest business houses of India. The Public Interest Legal Support and Research Center, a lawyer's collective brought the claim on their behalf. See Cheria, A. e.a. (1997), A search for justice. A citizen's report on the adivasi experience in South India. Bangalore: José Sebastian, 184, 189-190.

[98] OD 4.20 on Indigenous peoples (September 1991), par. 6. Panel Inspector McNeill visited Delhi and the project site n 30 August-4 September 1998.

[99] Inspection Panel, Report and recommendation on request for inspection on India: Ecodevelopment project (21 October 1998, par. 42.

[100] Ibid, par. 49-50.

[101] Mahanty argues that the World Bank should have tried to broker the conflict at an earlier stage, since the lead agency (i.e. the state government) was heavily embroiled in the conflict. If real participation were to be achieved, a more detailed analysis of the groups involved and the space for dialogue would have been necessary in the planning stages. See Mahanty (2002), 1683.

tive Directors did not, however, allow a full investigation as recommended by the Panel[102].

[102] See IDA/IBRD Press release on India: Ecodevelopment (22 December 1998).

2.3. Nigeria: Lagos drainage and sanitation

The Nigeria: Lagos drainage and sanitation request is of interest for at least two reasons. First, because the requesters strongly relied on human rights treaties to make their case, and secondly, because the story unravelled in a period of tremendous political upheaval in Nigeria.

The aim of the IDA financed project was to improve the storm-water drainage system in parts of Lagos that suffered from regular inundation from heavy rains. The project implied the removal of a number of shelters built by the slum dwellers that intruded into the drainage right of way. The residents, only one of whom had a certificate of occupancy, were to be resettled and properly compensated.

The IDA's Executive Directors approved the relevant credit on 17 June 1993. Five days earlier presidential elections had been held in Nigeria. The elections had been organised by Nigeria's military ruler Babangida, and were to be the finale of Nigeria's transition towards multiparty-democracy[103]. International observers deemed the elections fair and free. The first results showed a victory for presidential candidate Abiola. On 26 June 1993, however, before the final results were made public, President Babangida "stopped the hands of the nation clock"[104] and announced the annulment of the elections. Thus commenced one of the worst periods of Nigeria's political history that was later characterised as a return to the dark ages and a period of predatory rule[105] that could have led to the total disintegration of the country[106]. General Abacha took power in a coup d'état in November 1993. Abacha's regime committed gross and systematic violations of human rights that continued unabated until his death on 8 June 1998[107]. On 16 June 1998 the Lagos drainage and sanitation request was filed.

[103] See Rotimi, A., Ihonvbere, J. (1994) "Democratic impasse: remilitarisation in Nigeria", Third world quarterly. Vol. 15,4: 669-689.

[104] Soyinka, W. (1996), The open sore of a continent. A personal narrative of the Nigerian crisis. Oxford: Oxford University Press, 143.

[105] Note Gordon, K. (2002), "Multinational enterprises in situations of violent conflict and widespread human rights abuses", OECD working paper on international investment, nr. 2002/1, par.42: "Money laundering authorities in Switzerland reported in 2000 that banks had reported receiving about US$ 480 million moved there by Nigeria's former president (General Abacha) and his entourage. Following on from the Swiss investigation, the Financial Services Authority of the United Kingdom found that US$ 1.3 billion from Nigeria had been "siphoned through" London Banks (...)".

[106] See Abubakar, D. (2001), "Ethnic identity, democratisation, and the future of the African State: lessons from Nigeria", African issues. Vol. 29, 1-2: 31-36.

[107] Abacha's successor restarted a process of democratic transition that led to presidential elections in February 1999 won by the current president in office, Olusugun Obasanjo. The three visits of Panel Inspector Ayensu occurred during this transition period, in September and October 1993.

At the origin of the request was a leading African human rights NGO, the Lagos-based Social and Economic Rights Action Center (SERAC). The requesters argued that the Bank and the military government of Nigeria had failed to consult with affected communities "in flagrant violation of the Bank's Operational Directive, the Constitution of the Federal Republic of Nigeria, the International Covenant on Economic, Social and Cultural Rights and other relevant international human rights

instruments[108]". The demolition of homes and destruction of properties constituted a massive violation of the rights of victims to adequate housing, education, adequate standards of living, security of person, a healthy environment, food, health, work, respect of dignity inherent in a human being, freedom of movement, family life, water, privacy, information and the right to chose one's own residence. Specific allegations were made as to incidents involving policy brutality and gender discrimination.

The Management response consisted of a factual denial that human rights violations had occurred. There was no evidence of police brutality in the context of the Bank-financed project; no gender discrimination had occurred; community leaders had not complained of human rights violations; there had been regular consultation. In short: "The Bank financed project had not violated anybody's rights"[109]. On the other hand, Management conceded that it did not have the resources to observe every activity that happened in the course of the project. The response repeatedly stressed that many of the alleged violations (such as forced evictions by heavily armed police) were unrelated to Bank-financed activities, and thus the sole responsibility of Nigeria: "In any case, the Bank does not have the authority to discipline officials of the Lagos State government"[110].

The Inspection Panel largely concurred with Management on the lack of factual evidence, and considered that many of the claims were exaggerated or untrue. The Panel did not recommend a full investigation to the Board.

Nevertheless, it is of interest that the Inspection Panel did not hesitate to review and conclude on the issue of human rights violations in connection with the project[111]. The Panel criticised IDA for overly relying on State officials to do the consultation with communities, and felt that much closer supervision by IDA should have been provided, while recognising the financial constraints, and the division of responsibilities as agreed upon in the loan agreement. In an obiter dictum the Panel acknowledged "the concerns and the efforts of SERAC for exhibiting such courage in defending the rights of the affected people during the past regime in Nigeria"[112]. The Panel added that it believed that its presence in the equation had made it possible for the requesters to develop a better dialogue with IDA staff in the resolution of outstanding issues.

SERAC expressed disappointment about the Panel's decision. The organisation felt that the Panel over-relied on assurances given by the Lagos State government and the Bank that evict-

[108] See the request for inspection, par.1, as attached to Inspection Panel, Report and recommendation on request for inspection on Nigeria: Lagos drainage and sanitation project (6 November 1998). The request also expressed the belief that "the actions and omissions described in the present Request are the responsibilities of the Bank because they have resulted from a project funded by it. The Bank therefore holds a clear legal obligation to ensure that the project is implemented in accordance with its own Operational Directives as well as applicable domestic and international law. Being a specialized agency of the United Nations, the Bank is bound by the U.N. Charter which recognizes the human rights of every individual" (Ibid., par.6). Neither Management, nor the Inspection Panel responded to the argument.

[109] Management response to claim 23, as attached to Inspection Panel, Report and recommendation on request for inspection on Nigeria: Lagos drainage and sanitation project (6 November 1998).

[110] Ibid.

[111] See in particular Inspection Panel, Report and recommendation on request for inspection on Nigeria: Lagos drainage and sanitation project (6 November 1998), par.31: "On the question of human rights violations in connection with the particular Project, the Panel did not find any prima facie evidence that IDA did neglect, fail, or refuse to consult with the host communities during the development planning and implementation of the Project, thus, Management does not appear to have violated applicable IDA Operational Directives". On the issue of police brutality, see par. 27, 39. On discrimination, par. 40. It is a matter for speculation what would have happened, had the Panel found prima facie evidence of human rights violations. In any case, the Panel would have to establish that such violations also constituted violations of the relevant Operational Directives; in this case e.g. the Operational Directives/Policies on Involuntary Resettlement, Poverty Reduction and Gender dimensions of development. The language in the policies certainly offers opportunities for an interpretation allowing to consider relevant human rights violations as violations of the operational policies as well.

[112] Ibid., par. 45. The political transition in Nigeria may have played a role in the Panel's recommendation not to pursue the request.

ed slum dwellers would be adequately compensated: in fact, some slum dwellers were cajoled into accepting inadequate sums. According to the organisation, the project exacerbated the flood damage: "Stagnant waste water now accumulates in open drainage channels that were never completed"[113].

[113] See Morka, K. (1999), "When wilful blindness doesn't cut it. Making the case for World Bank accountability to the women in Lagos slums", Access quarterly. Vol.1, 1: 5-10. Access quarterly is "the official magazine" of SERAC.

The handling of the Lagos drainage and sanitation project demonstrates the unease of the Bank in dealing with changing political circumstances. The Board of Executive Directors' decision to approve the project after elections day but before the final results were made public can be seen as testimony to the Bank's traditional position that political circumstances are irrelevant to decisions on loans. The timing of the decision also deprived the Bank, however, of a possibility to consider the impact of the annulment of the elections on the feasibility of project implementation and monitoring.

The continued ignorance of the political context by Bank staff – as evidenced by their reliance on State officials that were part of a political system that had demonstrated with the utmost arrogance that it did not value political participation – shows a real lack of sensitivity to the component of the project dealing with consultation and protection of persons evicted from the area. An argument can be made that the Bank's attitude in delegating consultation to its authoritarian partner amounted to a breach of its duty to take care.

The Panel's decision not to pursue the investigation appears to be inspired at least in part by the change in the political circumstances: the demise of the Abacha regime and a quick, credible transition process to democracy that the international community was keen to support. Clearly, the Inspector exhibited a degree of confidence in the willingness of the new regime to treat affected people properly, i.e. to compensate them in accordance with IDA policies.

2.4. Chad-Cameroon: Petroleum and pipeline

The Chad-Cameroon petroleum and pipeline project involves a huge number of actors. The project is the largest energy infrastructure development on the African content, at an estimated total cost of US$ 3.7 billion. It involves the drilling of 300 oil wells in the oil fields of the Doba region of southern Chad and the construction of a 1100 km. long export pipeline through Cameroon to an offshore loading facility.

Approximately 60% of the project cost comes from a Consortium of private actors, consisting of Exxon Mobile (US)(40%), Petronas (Malaysia)(35%) and Chevron (US)(25%). The companies were granted a 30-year concession to develop and operate the oil fields. The remainder of the funds was obtained through market rate loans arranged through the International Finance Corporation; export credit agencies (US and France) and commercial sources [ABN-Amro (The Netherlands) and Credit Agricole Indosuez (France) are the lead arranging banks]. The Governments of Cameroon and Chad have made equity investments in the two pipeline operating companies (3% of the project cost), that were facilitated by the IBRD (39.5 US million) and the European Investment Bank through the provision of loans.

The World Bank Group contribution to the project also includes two initiatives supported by the International Development Association: the petroleum sector management capacity building project (23.7 US million) which aims to build Chad's capacity to manage oil revenues and to use them efficiently for poverty reduction; and the management of the petroleum economy project (17.5 US million) to assist the government of Chad in building capacity to implement its petroleum revenue management strategy.

In financial terms the contribution of the World Bank group to the project is a minor one, but there is no doubt that its commitment was essential, not only in providing funding to the governments involved, but particularly in securing the support of other external actors. Exxon Mobile viewed the World Bank's involvement as central to reducing the risks of investing in the region and stresses the importance of the World Bank's role in advising the Government of Chad on directing oil revenues to poverty reduction and on good governance[114]. The European Investment Bank similarly highlighted the Bank's efforts to mitigate the environmental risks associated with the project, and announced that it "will continue to work closely with the World Bank to ensure this opportunity is properly developed and the relevant social and environmental-related conditions are met"[115].

The other project facilitators thus present the Bank's involvement as a safeguard that the environmental and human consequences of the project will be managed well. In doing so, they are also shifting the burden on the Bank, as if to deny any accountability of their own. The Bank, on the other hand, only accepts accountability for what it has agreed to with the two governments, and insists that they bear the primary responsibility. The governments in turn can argue they are only partially in

[114] See Gordon, K. (2002), Box 4 at 29. Consider also the following comment: "Due to the commitment of World Bank funds, the investment must comply with the Bank's policies (...). If the policies are genuinely respected, the project could mark an important beginning for the establishment of human rights standards for multinational corporations": Hernandez Uriz, G. (2001), " To Lend or not to lend: oil, human rights and the World Bank's internal contradictions", Harvard human rights journal, Vol. 14, Spring 2001, 198. Note that both Exxon Mobile and Chevron have adopted human rights policies; see Nordskag, M., Ruud, A., "Transnational oil companies and human rights. What they say and how they say it" in Eide, A., Ole Bergesen, H., Rudolfson Goyer, P. (Eds) (2000), Human rights and the oil industry. Antwerp: Intersentia, 146, 149-151.

[115] European Investment Bank Press release EXT 2001/018 (22 June 2001): "EUR 144 million for the Chad-Cameroon oil expert system".

control of the project given their dependency on external resources. As in the India: Ecodevelopment example, the result is an accountability gap.

The Board of the World Bank approved the project on 6 June 2000. On 22 March 2001, Ngarlejy Yorongar and more than 100 residents of the Doba area submitted the request for inspection. Mr. Yorongar is a member of parliament from the region, who was also running as an opposition candidate in Chad's presidential elections, taking place in May 2001. The request alleged that the pipeline project constituted a threat to local communities and that proper consultation had not taken place. After an on site visit in August, the Inspection Panel recommended an investigation on 17 September 2001[116]. The Board approved the investigation on 1 October 2001. After another on site visit, the Panel sent its investigation report to the Board on 17 July 2002[117]. On 12 September 2002 the Board recorded its approval of the actions and next steps put forth by the Bank Management in response to the Panel's findings[118].

Although the Inspection Panel's review of the project certainly deserves a more comprehensive analysis[119] only two aspects of the investigation are dealt with here: first, the impact of the overall human rights situation in Chad and secondly, the poverty reduction component of the project.

The requesters invoked the rights to life, to a healthy environment, to fair and equitable compensation, to resettlement not far from their native soil, to work, to respect for their customs and burial places, to social well being, to public consultation[120]. hey argued that there had not been respect for human rights in Chad since President Déby took power and that massive violations of human rights had occurred in the production zone[121]. Bank Management responded that human rights violations were only relevant to the Bank's work "if they may have a significant direct economic effect on the project". Management was of the view that this was not the case here: "The Project can achieve its developmental objectives"[122].

The Inspection Panel took "issue with Management's narrow view"[123] and quoted the paper produced by the Bank at the occasion of the fiftieth anniversary of the Universal Declaration of human rights to stress the Bank's role in promoting human rights within the countries in which it operates[124]. The requester was jailed in 1998 for speaking out against the project, and again briefly detained and tortured shortly after the May 2001 presidential elections, while the request was pending with

[116] Inspection Panel, Report and recommendation on request for inspection on Chad: Petroleum development and pipeline project (17 September 2000).

[117] Inspection Panel, Investigation report on Chad-Cameroon petroleum and pipeline project (17 July 2002)

[118] See IBRD/IDA Press release (18 September 2002): "Chad-Cameroon Pipeline project: outcome of the Inspection Panel Investigation".

[119] The Inspection Panel found that Management had not been in compliance with aspects of a number of Bank policies, dealing with environmental assessment, economic evaluation and poverty reduction.

[120] The Inspection Panel found that Management had been in compliance with operational policies on involuntary resettlement and cultural property.

[121] See Request for Inspection, par. 3 and 4, as annexed to Inspection Panel, Report and recommendation on request for inspection on Chad: Petroleum development and pipeline project (17 September 2000).

[122] Inspection Panel, Investigation report on Chad-Cameroon petroleum and pipeline project (17 July 2002), par. 212.

[123] Ibid., par. 214.

[124] See footnote 19.

the Inspection Panel[125]. This background no doubt contributed to the Panel's frustration with Management's economic effects approach. Relying explicitly on Amnesty International Annual Reports, the Panel concluded that the human rights situation remained "far from ideal": "It raises questions about compliance with Bank operational policies, in particular those that relate to open and informed consultation[126], and it warrants renewed monitoring by the Bank"[127].

In an unprecedented move, the Bank published the remarks made by the Chairman of the Inspection Panel, when he presented the investigation report to the Board[128]. Chairman Ayensu further developed the human rights theme. The Panel was convinced that the approach taken in the report "which finds human rights implicitly embedded in various policies of the Bank" was within the boundaries of the Panel's jurisdiction. He reiterated that the situation in Chad exemplified the need for the Bank to be more forthcoming about articulating its promotional role in human rights. He also invited the Board to study the wider ramifications of human rights violations as they relate to the overall success or failure of policy compliance in future Bank-financed projects.

Public documents provide no evidence of a reply by the Board to the Chairman's call. It is evident however, that the Management action plan as adopted by the Board in response to the Panel investigation does not address the concerns the Panel raises about the effects on the project of the overall human rights situation in Chad. Consequently, it remains to be seen whether the Panel's findings will have any impact on the conduct of Bank staff in the field.

The poverty reduction component of the project is of particular relevance from the perspective of economic, social and cultural rights. Bank Management insisted that its approach with regard to the petroleum revenue Management was to help the Government of Chad target the bulk of direct oil revenues from the project to expenditures in priority sectors for poverty alleviation[129].

The legal framework to ensure direction of oil revenues to poverty reduction is the Act concerning Oil Revenues Management, approved by Chad's National Assembly on December 30, 1998[130]. The Act provides that the large majority of revenues from the project will be spent on priority sectors, identified by the law as:

[125] The Bank's President James Wolfensohn personally intervened to obtain the release Mr. Yorongar (See Inspection Panel, Investigation report on Chad-Cameroon petroleum and pipeline project (17 July 2002), par. 213), by calling President Déby. Reportedly, the World Bank president was alerted by an NGO, not by Bank staff. See Horta, K. (2002), "Rhetoric and reality: human rights and the World Bank", Harvard human rights journal. Vol. 15, Spring 2002, 236.

[126] The Inspection Panel noted that in the 1995-1997 period consultations of local communities had taken place in the presence of gendarmes, and found that "consultations conducted in the presence of security forces were incompatible with the Bank's policy requirements". See Inspection Panel, Investigation report on Chad-Cameroon petroleum and pipeline project (17 July 2002), par. 134-135.

[127] Ibid., par. 217.

[128] IBRD/IDA Press release (18 September 2002): "Chairman's statement on Chad investigation".

[129] See Inspection Panel, Investigation report on Chad-Cameroon petroleum and pipeline project (17 July 2002), par. 267.

[130] Act No. 001/PR/99 concerning Oil Revenues Management appears as Annex 11 to the Bank's Project Appraisal Document, Report no. 19343 AFR. The Act was reportedly passed by 108 votes, without opposition. Yorongar was in prison at the time. The Parliament passed the Act during one three-hour session. See Hernandez Uriz, G. (2001), 222-223.

Public health and social affairs, education, infrastructure, rural development (agriculture and livestock), environment and water resources[131].

The Act does not determine the distribution of revenues among the sectors, leaving plenty of room for governmental discretion. 10% of royalties and dividends will be saved "for the benefit of future generations".[132] Five percent of the royalties will be allocated to "decentralized communities in the producing region"[133]. In addition, the Act establishes an Oil Revenues Control and Monitoring Board to authorize and monitor the disbursement and appropriation of the relevant funds[134].

The Investigation Panel raised various concerns about allocation of revenues for poverty reduction. First of all, the Panel stated that it had not found any analysis in Bank documents justifying the allocation of revenues between Chad and the Oil Consortium[135], questioning whether the estimated financial returns to Chad could be considered reasonable, given the magnitude of the project. Next, the Panel wondered whether the Oil Revenues Management Act had not defined the priority sectors too narrowly. The Panel in particular deplored that spending on the judiciary and the functioning of the legal system had not been included[136]. More generally, the investigation had revealed serious concerns about the failure to develop and strengthen the institutional capabilities of the Government of Chad to manage the project as a whole, including the capacity to successfully translate oil revenues into social objectives[137]. Consequently, the Panel insisted that the operation of the Act be subject of continuing monitoring, review and assessment by an independent body "such as the IAG"[138].

[131] Oil Revenues Management Act, art. 7.

[132] Ibid., art. 9.

[133] Ibid., art. 8,c. This amount can, however, be changed by presidential decree at five-year intervals. One of the major problems of oil exploitation in poor countries has been the environmental and human burden on the oil-producing regions, while revenues flow towards the capital. Current operational policies of the Bank do not provide standards on equitable revenue sharing within countries.

[134] Ibid., art. 15-19. Seven out of the nine members of the oversight committee are State officials; the remaining two members represent local NGOs and the trade unions. In June 2002, the NGO member expressed doubts about whether the Committee would be functioning properly by the time first direct oil revenues would be received (2003). See Assingar, D., "The Oversight Committee: a phantom institution" in Horta, K., Nguiffo, S., Djiraibe, D. (Eds.) (2002), The Chad-Cameroon oil and pipeline project: A call for accountability. N' Djamena: Association Tchadienne pour la promotion et la défense des droits de l'homme e.a., 9.

[135] Inspection Panel, Investigation report on Chad-Cameroon petroleum and pipeline project (17 July 2002), par.232-236. The relationship between Chad and the Oil Consortium is governed by the so-called Convention of Establishment, certain provisions of which supersede domestic law. It has been argued that as a consequence of the agreement, the companies involved bear very little, if any, legal responsibility for the impact of their activity on living conditions. See Breitkopf, S., "The World Bank response: PR replaces analysis" in Horta, K., Nguiffo, S., Djiraibe, D. (Eds.) (2002), 22-23.

[136] Ibid., par. 277. Only the Executive Branch of the government benefits from the revenues.

[137] The first project-related experience was not positive. In 2000 the Consortium of private companies paid a 'bonus' of US$ 25 million to the Chad Government, outside of the framework of the Oil Revenues Management Act. In November 2000, president Déby disclosed that US$ 4.5 million was spent on the acquisition of arms. The arms sale preceded the establishment of the International Advisory Group. Compare e.g. Nguiffo,S., Breitkopf, S. (2001), Broken promises. The Chad Cameroon oil and pipeline project; profit at any cost? Yaounde: CED, Friends of the Earth International, 12.

[138] Inspection Panel, Investigation report on Chad-Cameroon petroleum and pipeline project (17 July 2002), par. 279. The World Bank appointed the International Advisory Group (IAG) on 21 February 2001. The purpose of the IAG is to advise the World Bank and the governments on the overall progress in implementation of the project and in the achievement of their social, environmental and poverty alleviation objectives. Specific responsibilities include issues such as the misallocation of public revenue, the adequacy of civil society participation and progress in building institutional capacity. Human rights are not referred to in the terms of reference of the IAG. The powers of the IAG are recommendatory only. The IAG is composed of independent experts, and currently chaired by the former Prime Minister of Senegal, Mamadou Lamine Loum. The

The Management Action Plan endorsed by the Board in response to the investigation provided for "continuing and intensifying supervision of and assistance for" the Government's capacity -building to direct the oil revenues to poverty reduction[139].

Within the international community it is agreed that countries with high natural resource endowments need particularly strong institutions for public governance[140]. It is also clear that countries with a history of civil strife such as Chad do not have such institutions. This puts the World Bank group in the uncomfortable position of having "to ensure that systems are in place to avoid or mitigate adverse impacts"[141], including human rights violations that may occur in the context of the project. In addition, other actors use the Bank's involvement to deny a responsibility of their own. The Inspection Panel too is limited in its investigation to the role of the Bank, and is barred from discussing governmental or corporate responsibility.

Lack of governmental capacity may not be the only problem. The political will of the Government of Chad to use the oil revenues for poverty reduction and to refrain from using repression against critics of the project remains doubtful. Clearly, the Bank is still deeply ambivalent internally about its role in ensuring respect for human rights and the proper functioning of political institutions. As a consequence of that ambivalence, the Bank cannot effectively take up the safeguard role in human rights/ poverty reduction that other actors are happy to entrust it with. Instead, the Bank is on the defensive, constantly in doubt on how to marry the commitment to its own operational policies with reluctance to address or act instead of deficient State institutions. In the meantime, the project continues: on a tightrope, and with darkness surrounding the safety net.

Group is to visit Cameroon and Chad at least twice a year; NGOs had lobbied for a permanent presence. The critical reports of the group can be found on www.gic-iag.org. For the terms of reference of the IAG, see World Bank News release 2001/235/S (21 February 2001): "World Bank appoints international advisory group on the Chad-Cameroon Petroleum development and pipeline project".

[139] See IBRD/IDA Press release (18 September 2002): "Chad-Cameroon Pipeline project: outcome of the Inspection Panel Investigation".

[140] Compare Gordon, K. (2002), 13.

[141] Inspection Panel, Investigation report on Chad-Cameroon petroleum and pipeline project (17 July 2002), par. 76.

Conclusion

The international financial institutions are subject to the reach of international human rights law to the extent that human rights are incorporated in international custom or in general principles of law. The exact substance and scope of the human rights obligations of the IFIs needs to be determined in the light of the powers and functions entrusted to them.

It has been argued here that both the World Bank and the International Monetary Fund are under an obligation not to violate or to become complicit in violations of general rules of human rights law. In addition, the World Bank is under affirmative duties to act for the realization of general rules of human rights law that are relevant to its purposes and functions. To some extent those duties are reflected in current World Bank operational policies.

The adoption of an explicit commitment by the IFIs that they will refrain from engaging in activities that contravene applicable international human rights law would be helpful in ending the debate about the existence of human rights obligations for the IFIs. With respect to the Bank, an argument has been made that it should insist on the inclusion of human rights clauses in loan agreements, and should accept to litigate cases with parties that claim that their rights have been violated as a consequence of Bank activity.

The review of selected cases investigated by the World Bank Inspection Panel has shown that a human rights accountability gap may well develop in the context of multi-party development projects of the type the Bank typically supports. Such an accountability gap can only be addressed if the project facilitators conclude detailed agreements on how accountability is distributed among them.

As a public financial institution, it is an appropriate role for the Bank to insist that mechanisms for sharing accountability are effective in providing human rights protection, both in the areas of civil and political rights (consultation mechanisms) and economic, social and cultural rights (poverty reduction). Such a course of action would be in line with the Bank's obligations under general rules of human rights law. In this respect, there is a long way to go. The review of the Inspection Panel cases shows that the Bank has great difficulty in coping with the impact of the overall domestic human rights situation on projects it supports, and in dealing with governments that are hostile to the human rights inspired provisions in the Bank's own operational policies.

Bibliography

Abubakar, D. (2001), *"Ethnic identity, democratisation, and the future of the African State: lessons from Nigeria",* **African issues.** Vol. 29, 1-2: 31-36

Alfredsson, G. & Ring, R. (Eds.)(2001), **The Inspection Panel of the World Bank.** The Hague: M.Nijhoff

Amerasinghe, C.F. (1996), **Principles of the institutional law of international organizations.** Cambridge: Cambridge University Press

Bird, G. (2001), *"A suitable case for treatment? Understanding the ongoing debate about the IMF",* **Third world quarterly,** Vol. 22, 5: 823-848

Botchway, F. (2000), *"The role of the State in the context of good governance and electricity management: comparative antecedents and current trends",* **University of Pennsylvania journal of international economic law.** Vol. 21: 781-832

Cheria, A. e.a. (1997), **A search for justice. A citizen's report on the adivasi experience in South India.** Bangalore: José Sebastian

Clapham, A., Jerbi, S. (2001) *"Categories of corporate complicity in human rights abuses",* **Hastings international and comparative law journal.** Vol. 24: 339-350

Cot, J., Pellet, A. (Eds.) (1991), **La Charte des Nations Unies.** Paris: Economica

De Feyter, K. (2001), **World development law.** Antwerp: Intersentia

Dominicé, C. (1999), *"Observations sur le contentieux des organisations internationales avec des personnes privées",* **Annuaire Français de droit international.** Vol. XLV: 623-648

Dupuy, R.J. (Ed.) (1998), **A handbook on international organizations,** Dordrecht: M. Nijhoff

Eide, A., Ole Bergesen, H., Rudolfson Goyer, P. (Eds.) (2000), **Human rights and the oil industry.** Antwerp: Intersentia

Einhorn, J. (2001), *"The World Bank's mission creep",* **Foreign affairs.** Vol. 80, 5: 22-35

Gaeta, A., Vasilara, M.(1998), **Development and human rights: the role of the World Bank,** Washington: the World Bank

Garfield, R. (1999), **The impact of economic sanctions on health and well being,** London: Relief and Rehabilitation Network

Handl, G. (1998), *"The legal mandate of multilateral development banks as agents for change toward sustainable development",* **American journal of international law.** Vol. 92: 643-665

Hernandez Uriz, G. (2001), *"To Lend or not to lend: oil, human rights and the World Bank's internal contradictions",* **Harvard human rights journal,** Vol. 14, Spring 2001: 197-231

Horta, K. (2002), *"Rhetoric and reality: human rights and the World Bank",* **Harvard human rights journal.** Vol. 15, Spring 2002: 227-243

Horta, K., Nguiffo, S., Djiraibe, D. (Eds.) (2002), **The Chad-Cameroon oil and pipeline project: A call for accountability.** N' Djamena: Association Tchadienne pour la promotion et la défense des droits de l'homme e.a.

Hurrell, A., Kingsbury, B. (Eds.) (1992), **The international politics of the environment.** Oxford: Clarendon Press

Institut International des Droits de l'Homme (Ed.) (2001), **Commerce mondial et protection des droits de l'homme,** Bruxelles: Bruylant

Mahanty, S. (2002), *"Conservation and development interventions as networks: the case of India Ecodevelopment project, Karnataka",* **World development.** Vol. 30, 8: 1369-1386

Marmorstein, V. (1978), *"World Bank power to consider human rights factors in loan decisions",* **Journal of international law and economics**, 113-136

Meron, T. (1989), **Human rights and humanitarian norms in customary law.** Oxford: Clarendon

Morka, K. (1999), *"When wilful blindness doesn't cut it. Making the case for World Bank accountability to the women in Lagos slums",* **Access quarterly.** Vol.1, 1: 5-10

Nayyar, D. (Ed.) (2002), **Governing globalization.** Oxford: Oxford University Press

Nguiffo,S., Breitkopf, S. (2001), **Broken promises. The Chad Cameroon oil and pipeline project; profit at any cost?** Yaounde: CED, Friends of the Earth International

Norton, J. (1999) *"A "New International Financial Architecture?" - Reflections on the possible law-based dimension",* **The International lawyer.** Vol. 33, 4: 891-926

Reinisch, A. (2000), **International organisations before national courts.** Cambridge: Cambridge University Press

Rotimi, A., Ihonvbere, J. (1994) *"Democratic impasse: remilitarisation in Nigeria",* **Third world quarterly.** Vol. 15,4: 669-689

Sands, P. (1995) *"International law in the field of sustainable development",* **British yearbook of international law.** Vol. 66: 303-381

Sands, P., Klein, P. (2001), **Bowett's Law of international institutions.** London: Sweet & Maxwell

Schlemmer-Schulte, S. (1998), *„The World Bank's experience with its inspection panel",* **Zeitschrift für ausländisches und öffentliches Recht und Völkerrecht**. Vol.58, 2: 353-388

Shihata, I. (1991), **The World Bank in a changing world.** Dordrecht: M.Nijhoff

Skogly, S. (2001), **The human rights obligations of the World Bank and the International Monetary Fund.** London: Cavendish

Soyinka, W. (1996), **The open sore of a continent. A personal narrative of the Nigerian crisis.** Oxford: Oxford University Press

Tomuschat, C. (2001), *"International law: ensuring the survival of mankind on the eve of a new century. General course on public international law",* **Receuil des cours.** Vol. 281

Williams, M. (1994), **International economic organisations and the third world,** Hertfordshire: Harvester Wheatsheaf

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