

THE WORLD BANK AND HUMAN RIGHTS: MISSION IMPOSSIBLE ?

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The recent years have seen a gradual *rapprochement* and increasing dialogue between the human rights and development communities. The interdependence of the two spheres has been promoted in a number of forums. Firstly, Amartya Sen and other scholars have spearheaded the conceptual integration of development and human rights and paved the way for a rights-based approach.² Secondly, the United Nations Declaration on the Right to Development has sparked a process of policy analysis, with the aim of identifying the contents of such a right and its corresponding duties and responsibilities.³ Thirdly, this rich debate at the academic and policy levels has been heeded by a number of international development organizations, which have begun to explore the operational implications of the relationship between development and human rights.⁴

This trend towards a rights-based approach to development has been paralleled by a strategic evolution in the human rights community. Against the backdrop of globalization and the increasing influence and impact of non-state actors, academics, policy-makers and advocates are devolving their attention from the state-centered human rights regimes to

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² Amartya Sen’s approach is most comprehensively laid out in his *Development as Freedom* (New York: Anchor Books, 1999). See also his *Choice, Welfare and Measurement* (Oxford: Blackwell, 1992) and *Resources, Values and Development* (Cambridge, MA: Harvard University Press, 1984). For an international legal approach see e.g. Dominic McGoldrick, “Sustainable Development and Human Rights: An Integrated Conception,” *International and Comparative Law Quarterly* 45 (1996).

³ The Declaration was adopted by General Assembly resolution 41/128 of 4 December 1986 and is available at <http://www.unhcr.ch/html/menu3/b/74.htm>. For an overview and the main documents of the deliberations on the right to development see http://www.unhcr.ch/html/menu2/10/e/rtd_main.htm.

⁴ See *infra* at II. 1)

other players. The Global Compact⁵, corporate social responsibility⁶ and transnational social networks⁷ are just some of the concepts that are increasingly shaping the human rights discourse. In this context, it has not been left unnoticed that the expansion of functions and responsibilities of international organizations has created a number of gray areas. A significant disjuncture exists between the actual powers of international institutions and the legal and political options to hold them accountable. This is particularly true for the international financial institutions, with the IMF and the World Bank at the center of attention.

The World Bank has attracted a fair share of controversy over its human rights scorecard.⁸ This should not come as a surprise because, despite its decreasing relative share in capital transfers to developing countries, the Bank remains a potent player, whose influence goes far beyond financing projects. Through structural adjustment lending, country dialogue and its catalytic guarantor role, its impact on the livelihoods of people in the developing world is considerable. A number of high-profile projects such as the Narmada Dam⁹ or the Chad-Cameroon Pipeline¹⁰ have highlighted the Bank's significant, direct and often harmful involvement in areas of human rights concern.

Unlike the controversy over the Bank's environmental record, which eventually led to the establishment of a comprehensive framework of environmental policies and

⁵ The UN Global Compact is an initiative of Secretary-General Kofi Annan to engage world business leaders in the challenges of development, particularly with regard to its environmental, social and human rights aspects. For more on the Compact see their website at <http://www.unglobalcompact.org>.

⁶ For the growing number of resources on business and human rights see e.g. <http://www.business-humanrights.org>.

⁷ An excellent overview of concepts and examples of transnational social networks is to be found in Margaret E. Keck and Kathryn Sikkink, *Activists beyond Borders: Advocacy Networks in International Politics* (Ithaca: Cornell University Press, 1998).

⁸ see e.g. Lawyers Committee for Human Rights, *The World Bank: Governance and Human Rights* (New York: Lawyers Committee for Human Rights, 1995); Jonathan Fox and L. David Brown (eds), *The Struggle for Accountability: The World Bank, NGOs and Grassroots Movements* (Cambridge, MA: MIT Press, 1998). For specific project-related human rights concerns see the resources at the website of the Bank Information Center, a NGO that monitors Bank activities, at <http://www.bicusa.org>.

⁹ See in particular Bradford Morse et al., *Sardar Sarovar: The Report of the Independent Review* (Ottawa: Resource Futures International, 1992) and William Fisher (ed) *Towards Sustainable Development: Struggling over India's Narmada River* (London: M.E. Sharpe, 1995).

¹⁰ For a critical review of this project see Peter Rosenblum, "Pipeline Politics in Chad," *Current History* 99 (2000). See also the Bank's website at <http://www.worldbank.org/afr/ccproj>.

institutional capacity within the organization¹¹, allegations of human rights violations have been met with more unease and ambiguity by the institution. As a result, the Bank – in contrast to many other development institutions - does not have a human rights policy, and oscillates in its activities between hiding behind its charter - which contain a prohibition of political activities and obligate the institution to take only economic considerations into account - and a steady expansion into “human rights territory” and *de facto* adoption of certain human rights conditionalities in its operations. This “identity crisis” is certainly not a new phenomenon, but has gained considerable momentum due to the growing scrutiny of the Bank’s *raison d’être* in the global marketplace.

This paper aims to resolve this apparent conflict by focusing on the Bank’s mandate as laid down in its Articles of Agreement and developed through subsequent practice. The first part examines the historical evolution of political and human rights issues in Bank policies and operations. The second part looks at the Bank’s mandate against the backdrop of changing development paradigms and pursues three lines of argumentation as to why human rights are relevant to the World Bank’s agenda. The conclusions offer some reflections on a World Bank human rights policy.

¹¹ See particularly Robert Wade, "Greening the Bank: The Struggle over the Environment, 1970-1995", in Devesh Kapur, John P. Lewis, and Richard Webb, *The World Bank: Its First Half Century, Volume II* (Washington, D.C.: Brookings Institution Press, 1997).

EVOLUTION OF HUMAN RIGHTS CONSIDERATIONS IN THE WORLD BANK

Throughout its existence, the World Bank faced a tension between a narrow, technocratic self-understanding as an economic development agency and various efforts to broaden its mandate.¹² As far as human rights issues are concerned, the Bank had its first major “skirmish” in the 1960s, when the United Nations General Assembly passed a series of resolutions successively “inviting”, “urging” and “requesting” the Bank to stop lending to South Africa and Portugal because of their respective *apartheid* and colonial policies. The Bank insisted on its apolitical character and approved a number of loans in defiance of the UN resolutions.¹³

Under McNamara’s presidency (1968-81), the World Bank saw a major expansion of activities. The emphasis on large-scale infrastructure projects and economic growth gave way to the broader paradigm of poverty alleviation. This was accompanied by a shift from projects to policy-based lending. Structural adjustment loans took off in the 1980s, and quickly evolved from macroeconomic policy reform to full-fledged re-engineering of public sector policies and institutions. Such a broad excursion into arguably political domains was justified with the need to create adequate “enabling environments” for economic development and make reforms “politically viable”.

The border between political and economic issues became increasingly blurred, and in 1989, a study on the long-term development prospects of Sub-Saharan Africa¹⁴ explicitly spelled out the importance of “good governance” as a condition for development. Even

¹² The most comprehensive and authoritative treatment of the evolution of the Bank’s mandate and policies is the two-volume “official history” Devesh Kapur, John P. Lewis, and Richard Webb, *The World Bank: Its First Half Century* (Washington, D.C.: Brookings Institution Press, 1997).

¹³ For a detailed review of this dispute, see Samuel A. Bleicher, “UN v. IBRD”, *International Organization* 24 (1970).

¹⁴ World Bank, *Sub-Saharan Africa – From Crisis to Growth: A Long-Term Perspective Study* (Washington, D.C.: World Bank, 1989).

more significantly, the study included "scrupulous respect for the law and human rights" in its concept of governance. The genie was out of the bottle, and, ever since, the Bank has been trying to maneuver the murky waters of governance. This adoption of governance issues did not remain unchallenged. Many borrower countries questioned this intrusion into their political autonomy but were mostly not in a position to challenge these activities. On the other hand, donor countries, prodded more or less gently by their NGOs, welcomed this move towards accountability, transparency and the rule of law.

To provide some clarity and guidance in this situation, the Chief Counsel of the Bank was tasked to examine the scholastic question where economics ends and politics begins. His memos and publications¹⁵ offered a conservative interpretation of the Bank's mandate but also left open the possibility to consider human rights issues in certain situations.

Around the same time, in the early 1990s, the Bank strengthened and expanded its operational policy framework. The increasing complexity of activities made it necessary to cover in a more systematic fashion various operational parameters. This included an increased emphasis on participation of stakeholders as well as the "safeguard policies", which deal with environmental, social and legal implications of Bank operations.¹⁶ Two of these policies - involuntary resettlement and indigenous peoples – are of direct relevance for human rights issues and cover some of the most controversial aspects of Bank operations.¹⁷

¹⁵ See generally Ibrahim F.I. Shihata, *Prohibition of Political Activities in the Bank's Work: Legal Opinion by the Senior Vice President & General Counsel*, July 12, 1995. This memorandum, addressed to the Bank's Executive Directors, sets forth the most authoritative and complete statement of the Bank's policy regarding human rights considerations. The 1995 Memorandum elaborated upon and refined some of the arguments and positions set forth in Shihata's 1990 memorandum on issues of "governance," which likewise includes an important statement of the Bank's contemporary position on human rights. See generally Ibrahim F.I. Shihata, *Issues of "Governance" in Borrowing Members: The Extent of Their Relevance Under the Bank's Articles of Agreement*, *Legal Memorandum of the General Counsel*, Dec. 21, 1990; see also Ibrahim F.I. Shihata, Human Rights, Development, and International Financial Institutions, in Ibrahim F.I. Shihata, *The World Bank in a Changing World: Selected Essays and Lectures, Volume II* (The Hague: Martinus Nijhoff Publishers, 1995).

¹⁶ On the importance of the World Bank operational policies beyond the organization's activities, see particularly Benedict Kingsbury, Operational Policies of International Institutions as Part of the Law-Making Process: The World Bank and Indigenous Peoples, in Guy S. Goodwin-Gill and Stefan Talmon (eds), *The Reality of International Law: Essays in Honour of Ian Brownlie* (Oxford: Clarendon Press, 1999).

¹⁷ For the text of these policies, see the Bank's Operational Manual, available at <http://wbln0018.worldbank.org/institutional/manuals/opmanual.nsf/textonly>.

While these policy reforms were considered an important step towards greater accountability, serious flaws in their implementation permeated many operations. A highly critical report on the Bank’s involvement with the controversial Narmada Dam in India¹⁸, and an internal review of the organization’s operations (Wapenhans Report)¹⁹ highlighted the disconnect between policy guidance and implementation on the ground. As a result of these reports, the calls for an accountability mechanism became more pervasive, and finally, in 1994, the Inspection Panel was established. This quasi-judicial organ represents an interesting addition to the landscape of human rights institutions as, for the first time, individuals harmed by the activities of a multilateral development bank were given some form of recourse.²⁰

The establishment of the Inspection Panel coincided with a change in leadership at the Bank. Under President Wolfensohn, the organization continued the unrelenting expansion of its operational scope, and ventured into further new areas such as cultural development, post-conflict reconstruction and anti-corruption. The importance of governance issues was solidified, and the most recent capital replenishment for the concessionary lending arm of the Bank, IDA, explicitly introduced a governance conditionality. The IDA12 Agreement²¹ notes that “good governance is critical to the economic development process and to the effectiveness of development assistance”, whereby governance is understood to contain four dimensions: accountable and competent public institutions, transparent economic and social policies and practices, a predictable and stable legal framework and participation by affected groups and civil society. The agreement further stipulates that “governance is a broad-based concept intended to

¹⁸ Bradford Morse et al., *Sardar Sarovar: The Report of the Independent Review* (Ottawa: Resource Futures International, 1992).

¹⁹ Willi Wapenhans et al., *Effective Implementation: Key to Development Impact: Report of the World Bank's Portfolio Management Task Force*. (Washington, D.C.: World Bank, 1992).

²⁰ History and cases of the Inspection Panel are documented in Lori Udall, *The World Bank Inspection Panel: A Three Year Review* (Washington, D.C.: Bank Information Center, 1997); Alvaro Umaña (ed), *The World Bank Inspection Panel: The First Four Years (1994-1998)* (Washington, D.C.: World Bank, 1998); and Ibrahim F.I. Shihata, *The World Bank Inspection Panel: In Practice*, Second Edition (Oxford: Oxford University Press, 2000).

²¹ *Additions to IDA Resources: Twelfth Replenishment - A Partnership for Poverty Reduction* available at <http://www.worldbank.org/ida/ida12/ida12report.pdf>.

encompass all factors that impact on a country’s ability to assure sustained economic and social development and reduce poverty” and noted that addressing those factors is compatible with IDA’s mandate, including its political affairs provision. Good governance thus became an allocation criterion for IDA resources, which represent the majority of loans to least-developed countries.

Despite this significant redefinition of the politics-economics divide, there was still cautious resistance in the Bank to openly acknowledging the nexus between civil and political rights and good governance and development. In commemoration of the 50th anniversary of the UDHR, the Bank published in 1998 *Development and Human Rights*, which emphasized the important contributions of the organization in securing and promoting economic, social and cultural rights but also noted the more indirect impacts of governance lending on building a favorable environment for a “broader range of human rights.”

Shortly after the IDA replenishment and its broad endorsement of governance as a performance criterion, President Wolfensohn launched an initiative to redefine the Bank’s development paradigm. The Comprehensive Development Framework (CDF)²² “takes a holistic approach to development. It seeks a better balance in policymaking by highlighting the interdependence of all elements of development - social, structural, human, governance, environmental, economic, and financial. “ For the purposes of this study, the most remarkable element of the CDF is its acknowledgement that “[w]ithout the *protection of human and property rights*, and a comprehensive framework of laws, no equitable development is possible.” (emphasis added) The bold language of the CDF represents a challenge and opportunity for the Bank to review and revisit its Articles of Agreement and their interpretation.

²² For a number of documents and other resources on the CDF, see the Bank’s website at <http://www.worldbank.org/cdf>.

HUMAN RIGHTS AND THE WORLD BANK MANDATE

Any analysis of the Bank's ability to protect and promote human rights must depart from the text of its constituent instrument, the Articles of Agreement.²³ Article I establishes the purposes of the Bank as a number of essentially economic and financial activities to assist the reconstruction (of Europe after WWII) and development of its members. To implement these objectives, the Bank is, according to its Article IV/10, prohibited from any political activity. The provision reads:

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

The key concepts of "development", "political" and "economic", while intuitively clear, remain undefined in the Articles of Agreement. Together with the evolving practice of the organization in a number of "non-economic" areas, this ambiguity has fuelled a rather protracted debate inside and outside the Bank about human rights issues in Bank operations. Opinions range from a narrow functionalist interpretation of the Bank's mandate precluding an involvement in human rights matters to the postulation of an affirmative duty of the organization to protect and promote human rights in line with evolving international law and the changing nature of development challenges.²⁴ We shall

²³ Articles of Agreement of the International Bank for Reconstruction and Development, opened for signature Dec. 27, 1945, 60 Stat. 1440, 2 U.N.T.S. 134, as amended Feb. 19, 1989, available at <http://www.worldbank.org/html/extdr/backgrd/ibrd/arttoc.htm>.

²⁴ See generally Victoria E. Marmorstein, "World Bank Power to Consider Human Rights Factors in Loan Decisions," 13 *Journal of International Law and Economics* (1978); Robert W. Kneller, "Human Rights, Politics, and the Multilateral Development Banks," 6 *Yale Studies in World Public Order* (1980); Daniel D. Bradlow, "The World Bank, the IMF, and Human Rights," 6 *Transnational Law and Contemporary Problems* (1996); Halim Moris, "The World Bank and Human Rights: Indispensable Partnership or Mismatched Alliance?," 4 *ILSA Journal of International and Comparative Law* (1997); John D. Ciorciari, "The Lawful Scope of Human Rights Criteria in World Bank Credit Decisions: An Interpretive Analysis of the IBRD and IDA Articles of Agreement," 33 *Cornell International Law Journal* (2000);

disaggregate the issue here and examine three arguments for the relevance and importance of human rights concerns in Bank operations.

1) HUMAN RIGHTS ISSUES HAVE BECOME PART OF THE BANK’S MANDATE

This proposition represents the most extensive interpretation of the Bank’s responsibilities and is predicated on a particular variant of constitutional interpretation, which, in this context, postulates that the Bank’s Articles of Agreement must be considered an evolving, dynamic instrument. Or, in the words of *Brown*: “Sound constitutional interpretation, in international organizations as in national government, balances insistence upon the legally formulated consensus of the past, awareness of the political configuration of the present, and consciousness of the community’s requirements and demands for the future.”²⁵

The view that many issues associated with economic development were not yet on the radar screen of the Bretton Woods negotiators is supported by the Bank’s own subsequent practice, which has undergone significant adjustments in the past. The Bank’s operational policies contain now a variety of binding provisions on environmental impacts, the need for social assessments and the protection of cultural property in Bank operations. Similarly, the good governance theme has all but erased the boundaries of economic and financial assistance.

If we, therefore, accept the principle of interpreting the Bank’s mandate dynamically and in synchrony with changing paradigms of international development, we must examine the nexus between development and human rights. To make a strong case for the integration of human rights concerns with the purposes and objectives of the Bank, one needs to demonstrate that development represents a bundle of interlocking concepts of very broad environmental, socioeconomic, legal and institutional implications, including the protection and promotion of human rights.

²⁵ Bartram S. Brown, *The United States and the Politicization of the World Bank. Issues of International Law and Policy* (London: Kegan Paul International 1992).

As noted in the introduction, such an acknowledgement is gaining ground among policy-makers, scholars and development practitioners. The rights-based approach to development has become the logical sequel to the concept of sustainable development with its “triple bottom line” of economic, social and environmental sustainability. While it is beyond the scope of this paper to examine in detail the evolution and content of the rights-based approach, some of the basic concepts and developments shall be introduced here.

The theoretical underpinnings of this new development paradigm have been developed by the economist Amartya Sen in his early work on entitlements²⁶ and, more recently, in *Development as Freedom*.²⁷ There are two important postulates in Sen’s work: Firstly, development is redefined as the process of expanding people’s substantive freedoms or capabilities to lead the lives they value. This includes such “functionings” as good health, literacy and education, the ability to participate in the life of the community, and the freedoms of expression and association. In other words, development covers the whole range of economic, cultural, social as well as civil and political rights.

This comprehensive list of freedoms highlights the second feature of the rights-based approach to development: All human rights are part and parcel of development. According to Sen, this integration occurs at two levels. Firstly, the different types of basic freedoms are causally interdependent. For example, the civil freedom of association allows people to participate in decisions that affect their ability to benefit economically and socially from the process of development. Secondly, and in addition to this instrumental linkage, there exists a more fundamental “conceptual integrity” between all human freedoms, and, beyond that, with other elements of the development process.

This “constitutive connection” lies also at the heart of the right to development. Adopted in 1986 by the United Nations General Assembly, the Declaration on the Right to Development²⁸ states in its Preamble that “all human rights and fundamental freedoms are

²⁶ *Poverty and Famines: An Essay on Entitlement and Deprivation* (Oxford: Oxford University Press 1981), *Commodities and Capabilities* (Amsterdam: Elsevier Publishers 1985).

²⁷ See supra note 1.

²⁸ See supra note 2.

indivisible and interdependent and that, in order to promote development, equal attention and urgent consideration should be given to the implementation, promotion and protection of civil, political, economic, social and cultural rights...” The basic precepts of the right to development were further elaborated in a number of working groups and, lately, through the reports of the Independent Expert on the Right to Development.²⁹

The latter has defined development as the “improvement of a “vector” of human rights, composed of various elements including the right to food, the right to health, the right to education, the right to housing and other economic, social and cultural rights, as well as all the civil and political rights together with the rates of growth of GDP and other financial, technical and institutional resources that enable any improvement in the well-being of the entire population and the realization of the rights to be sustained.”³⁰ Each element of the vector is a human right just as the vector itself is a human right, since the right to development is an integral part of those rights.

A major part of the follow-up activities to the Declaration on the Right to Development consists in developing an operational framework and program for the realization and implementation of a right, which is *stricto sensu* not legally binding. While the major duty-holders in implementing the right to development remain the states, an important complementary responsibility falls upon international organizations in the context of international co-operation, which Article 4 of the Declaration considers “essential in providing [developing] countries with appropriate means and facilities to foster their comprehensive development.”

In response to this call, a number of international organizations and programs reviewed their existing development policies and adopted rights-based approaches. For example, UNICEF’s programming framework³¹ is guided by basic human rights principles, particularly those that undergird the Convention on the Rights of the Child (CRC) and the

²⁹ Prof. Arjun K. Sengupta, who was appointed in 1998 by the Commission on Human Rights, has produced three reports, which are available at <http://www.unhchr.ch/html/menu2/7/b/mdev.htm>.

³⁰ Para. 9 of the third report of the Independent Expert, UN Doc. E/CN.4/2001/WG.18/2.

³¹ See <http://www.unicef.org/programme/rights/mainmenu.html>.

Convention on the Elimination of All Forms of Discrimination against Women (CEDAW). UNDP's policy document *Integrating Human Rights with Sustainable Development*³² and its *Human Development Report 2000*³³ outline a comprehensive strategy towards the realization of the right to development. Outside the UN system, the European Union's new charter for development co-operation, the Cotonou Agreement³⁴, contains numerous references to human rights, and stresses that the parties to this agreement "undertake to promote and protect all fundamental freedoms and human rights, be they civil and political, or economic, social and cultural."

This *tour de force* of both the conceptual benchmarks as well as the evolving practice aims to highlight the increasing convergence of the international community towards a rights-based approach to development and the corresponding right to development. Such a consensus is usually the necessary first step in the formation of a legal obligation, be it in the form of customary law or an international convention.

What does all this imply for the interpretation of the World Bank's mandate? One of the reports from the Working Group on the Right to Development calls on "the international financial institutions [to] give the highest priority to an action-oriented approach to the right to development in its multidimensional aspects".³⁵ One can distill two basic implications from this cryptic phraseology: Firstly, there is room, if not need, for the consideration of all human rights issues as part of a more holistic approach to development in the operations of the World Bank. Secondly, such considerations must not be limited to "doing no harm" but extend to the adoption of a policy framework that mainstreams human rights concerns.

In sum, a strong argument can be made that the Bank's Articles of Agreement permit the consideration of human rights issues, as long as such policies and practices do not

³² Available at <http://magnet.undp.org/Docs/policy5.html>.

³³ UNDP, *Human Development Report 2000: Human Rights and Human Development* (New York: Oxford University Press, 2000), available at <http://www.undp.org/hdr2000>.

³⁴ The agreement is the European Union's framework for development co-operation with 77 countries in Africa, the Caribbean and the Pacific. For the text and other resources, see http://europa.eu.int/comm/development/cotonou/index_en.htm.

³⁵ Report of the Intergovernmental Group of Experts on the Right to development on its second session, UN Doc. E/CN.4/1998/29, available at <http://www.unhchr.ch/html/menu2/10/e/wgrtd.htm#3wg>.

violate the (considerably narrowed) political activity prohibition of Article IV/10. The evolving notion of what constitutes development together with the Bank’s past practice of integrating non-economic issues into its work suggest that there are no major legal obstacles to adopting a rights-based approach to development. Whether such a step is politically feasible or whether the organization has the necessary capacity to fulfill this extended mandate is another issue.

2) HUMAN RIGHTS ISSUES REPRESENT AN ECONOMIC CONSIDERATION

Although the rights-based approach to development and the right to development have begun to permeate wide areas of international development policy, they are not yet enshrined in an international convention like the concept of sustainable development, whose integration of economic, environmental and social concerns marks a number of global legal instruments.³⁶ Furthermore, it might be hard to argue that the principles of rights-based development have already become international customary law given the short timeframe since the adoption and active implementation of this approach.

Hence, the normative implications of development as a process of human rights improvement might not suffice to justify a deviation from the Bank’s core mandate of economic development. Such a conclusion can also be reached in reference to the practices of other agencies: Despite adopting the rights-based approach to development, UNICEF is not venturing too far from its core responsibilities in the area of child protection. A more holistic assessment of the criteria and requirements of development from a human rights perspective does not automatically obviate the main duties and responsibilities laid down in the constituent instruments of the respective organizations and developed further through subsequent practice.

³⁶ See e.g. Günther Handl, “The Legal Mandate of Multilateral Development Banks as Agents of Change Toward Sustainable Development,” *American Journal of International Law* 92 (1998).

While such a conservative interpretation seems to limit the powers of the Bank to get involved in human rights issues as part of its general mandate, there is another “transmission belt” through which human rights concerns can legally find their way into Bank operations: Article IV/10’s reference to “economic considerations” can be interpreted to encompass certain human rights issues.

How is this different from the argument that human rights considerations are implicitly part of the development mandate of the Bank? Under the second reading, the Bank may not consider the protection of human rights - for its own sake or in the context of an expanded development paradigm - as part of its mandate. Rather, it may consider human rights issues only “in order to assess the net effect of individual development projects and programs on human welfare.”³⁷ Or, to use Sen’s distinction, the Bank has to limit itself to an assessment of the causal interdependence between human rights and economic development but stay clear of a more pro-active acknowledgment of the “conceptual integrity” of the development process.

This instrumental view of human rights issues has been the official legal position of the World Bank. Developed and formulated predominantly by its former Chief Counsel, Ibrahim Shihata, in a series of memoranda and related writings³⁸, it distinguishes between economic, cultural and social rights, and civil and political rights. Shihata notes, for example, that “while there are limits on the possible extent to which the World Bank can become involved with human rights, especially those of civil and political nature, the bank certainly can play, and has played, within the limits of its mandate, a very significant role in promoting various economic and social rights.”³⁹ The memo then goes on to list various Bank activities in support of the rights to health and education, and vulnerable members of society such as women or indigenous peoples. Shihata concludes this section on ESCR with a little jibe in the direction of the Bank’s critics by pointing out that “the Bank’s extensive

³⁷ Ibrahim F.I. Shihata, *Prohibition of Political Activities in the Bank's Work: Legal Opinion by the Senior Vice President & General Counsel*, July 12, 1995.

³⁸ See supra note 14.

³⁹ Ibrahim F.I. Shihata, *Prohibition of Political Activities in the Bank's Work: Legal Opinion by the Senior Vice President & General Counsel*, July 12, 1995.

role in the above-mentioned [economic and social] fields may not be clearly understood or appreciated.”⁴⁰

With regard to civil and political rights, the former Chief Counsel takes a much more cautionary approach. He argues:” The indivisibility of human rights and their relevance to human development are not questioned here. By themselves, they cannot mean, however, that the Bank, which is basically a financial, economic development institution, should ignore its specialized mandate and the limitations of its Articles. What is at issue is the specialization of each international organization and the requirements of its respective charter. Nothing in the Bank's Articles of Agreement contravenes human rights law in order to call for the argument that the latter prevails over the former. The Bank cannot, in my view, use its operations as a reward for the countries, which respect political rights or a punishment for those, which do not. Such a criterion is not only alien to the Articles of Agreement; it runs counter to the above-quoted provisions of these Articles which enjoin the Bank from interference in the political affairs of its members.”⁴¹

Shihata acknowledges, however, two exceptions: The first one concerns the participation of affected people in the design and implementation of projects: “Such participation and consultation, to be useful at all, require a reasonable measure of free expression and assembly. The Bank would,...., be acting within proper limits if it asked that this freedom be insured when needed for the above purposes.”⁴² The second exception deals with “an extensive violation of political rights which takes [such] pervasive proportions [that it] could impose itself as an issue in the Bank’s decisions. This would be the case if the violation had *significant* economic effects.....”⁴³ The memo further emphasizes that “the case for a direct and obvious economic effect has to be established in a *clear* and *unequivocal* manner based on objective analysis, not on academic assertions or political pressure.”⁴⁴ (emphases added) Both exceptions apply the logic of instrumentality in a very restrictive

⁴⁰ Ibid.

⁴¹ Ibid.

⁴² Ibid.

⁴³ Ibid.

⁴⁴ Ibid.

manner, whereby the violation of civil and political rights must directly jeopardize the economic objectives of the Bank in order to become an "economic consideration" in the sense of Article IV/10.

The links between human rights violations, political stability and economic development are, however, often more varied and indirect. For example, like any other international investor, the World Bank has to consider various non-economic factors in determining the credit-worthiness of a country. Country risk analysis encompasses the potential political, social and economic hazards associated with investing in a country. There is no doubt that a poor human rights record could be a significant (negative) risk factor.

Another important linkage between human rights and economic development evolves around the growing conditionalities other donors attach to human rights conditions in borrower countries, directly affecting the latter's chances to receive foreign aid or participate in debt reduction programs such as the HIPC initiative.

Last but not least, there is mounting empirical (and often Bank-sponsored) evidence about the nexus between the protection of civil and political rights and key economic variables. Using the Freedom House Index⁴⁵, Kormendi and Meguire⁴⁶ found that civil liberties were positively associated with investment and per capita income growth rates. Another study⁴⁷ showed that rates of return on World Bank-financed projects in various developing countries over the 1974-93 period were higher in nations with greater civil liberties.

The difficulties in trying to separate the wheat of an "economic consideration" from the chaff of political interference are no more evident than in the Bank's good governance

⁴⁵ Freedom House's assessments and rankings of the state of civil liberties and political freedoms are available at their website at www.freedomhouse.org.

⁴⁶ Roger C. Kormendi and Philip G. Meguire, "Macroeconomic Determinants of Growth," *Journal of Monetary Economics* 16 (1985).

⁴⁷ Jonathan Isham, Daniel Kaufmann and Lant Pritchett, "Civil Liberties, Democracy, and the Performance of Government Projects", *The World Bank Economic Review* 11(1997).

agenda. Each of the guiding principles, formulated by the former Chief Counsel for the benefit of Bank staff, raises more questions than it answers:

While the bank should be able to acquire relevant knowledge of the political situation in the country involved...[t]his should not, however, mean that the Bank staff would become the arbiters of the political feasibility of the measures they propose to borrowing countries on economic grounds.⁴⁸

This statement neglects the importance and requirement of country risk analysis, whose very purpose is to gauge the political viability of Bank operations. In a similar vein, the lack of “country ownership” (read: political support) has been recognized as one of the main problems with Bank loans.

*“The Bank should not advocate through its operations any particular political system or form of government.”*⁴⁹ This guideline espouses the basic principles of non-interference and non-discrimination, which a direct endorsement of any specific ideology or regime would undoubtedly violate. On the other hand, the Bank’s good governance agenda is largely driven by the ideals of a liberal democracy and the value systems of the most potent shareholders of the Bank.

*“The Bank’s advocacy of participatory development is laudable, does not, however, mean that the Bank has a role in the general political reform of borrowing countries.”*⁵⁰ This statement contradicts the acknowledgement, made in the same memorandum, that project participation without the necessary guarantees of free expression and assembly is not feasible. It also does not reflect the reality of Bank operations, with their emphasis on institutional and policy development and proclivity for creating “enabling environments”.

The ambiguity of these guidelines shows that it might be counterproductive to limit the scope of “admissible” human rights concerns. Too much empirical evidence exists about the different pathways along which civil liberties translate into economic variables. A country’s human rights record reflects the presence or absence of sociopolitical conditions

⁴⁸ Shihata, see supra note 38.

⁴⁹ Ibid.

⁵⁰ Ibid.

for the successful pursuit of development objectives, and should only in exceptional cases be irrelevant to a country's overall economic performance.

3) HUMAN RIGHTS ISSUES ARE INTERNATIONAL CONCERNS

If human rights considerations can be taken into account by the World Bank as part of its mandate or as a legitimate economic consideration, one still needs to contend with that part of the political activity prohibition of Article IV/10, which stipulates that "the Bank and its officers shall not interfere in the political affairs of any member; ..." In contrast to the second part of this provision ("...nor shall they be influenced in their decisions by the political character of the member or members concerned."), which represents the corollary to the functional mandate of the Bank, the first sentence has a slightly different purpose. Modeled along Article 2(7) of the UN Charter on non-intervention in domestic affairs, it emphasizes the fact that the Bank's members retain sovereign power and exclusive authority over certain matters even as they accept the obligations of membership in an international body.

What constitutes "political affairs" remains open to interpretation and is largely a moving target due to the changing parameters of sovereignty. In an Advisory Opinion of the Permanent Court of International Justice⁵¹, the predecessor of the ICJ, on the interpretation of a provision in the Covenant of the League of Nations similar to the Bank's clause, the justices noted that "the question whether a certain matter is or is not solely within the jurisdiction of a State is an essentially relative question; it depends upon the development of international relations." Legal evidence is mounting that "political affairs" refers to only those issues that are not subjects of concern for the international community as a whole. It is now well established that this does not include violations of fundamental human rights, which transcend a state's autonomous jurisdiction.⁵² Such rights represent

⁵¹ Nationality Decrees Issued in Tunis and Morocco, 1923 P.C.I.J. (ser.B) No.4.

⁵² see e.g. Louis A. Henkin et al., *International Law: Cases and Materials*, Third Edition (St. Paul, Minn.: West Publ. 1993); John D. Ciorciari, "The Lawful Scope of Human Rights Criteria in World Bank Credit Decisions: An Interpretive Analysis of the IBRD and IDA Articles of Agreement," 33 *Cornell International Law Journal* (2000).

obligations of an individual state to the international community as a whole; they have been deliberately excerpted from the state's sovereign power and consequently cannot be the subject of its "political affairs."

This principle was laid down in a couple of decisions by the International Court of Justice. In *Barcelona Traction, Light & Power Co. Ltd.*,⁵³ the ICJ asserted that a State bears certain obligations, including the protection of "the basic rights of the human person," in which "all States can be held to have a legal interest." Such obligations are *erga omnes* and can arise from "international instruments of a universal or quasi-universal character," while others "have entered into the body of general international law."

Shortly after its decision in *Barcelona Traction*, in an Advisory Opinion on the *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276*,⁵⁴ the International Court of Justice held that a violation of "fundamental human rights", as set out in the UN Charter and detailed in the Universal Declaration of Human Rights, constitutes a breach of a state's obligations vis-à-vis the international community.

These two landmark decisions as well as the subsequent development of the category of *ius cogens* have narrowed significantly the possibility of states to hide behind the principle of non-interference and engage in gross human rights violations. It has also given international organizations an opportunity, if not responsibility, to take human rights considerations into account in their operations.

⁵³ *Barcelona Traction, Light and Power Co., Ltd. (Belgium v. Spain)*, 1970 I.C.J. 3.

⁵⁴ 1971 I.C.J. 16.

CONCLUSIONS

All three propositions – human rights as part of the Bank’s mandate; human rights are “economic considerations”; human rights are not “political affairs” - make a strong case for what many scholars outside the Bank have emphasized for quite some time, namely that the protection and promotion of basic human rights is not off-limits to the Bank. Well-established principles of international law, the gradual adoption of a rights-based approach to development by the international aid community and the growing empirical evidence of economists and other social scientists about the interdependence between economic welfare and human rights make it increasingly difficult for the Bank to cling to a restrictive interpretation of its mandate. Even more so, as the debate seems to be moving on from acknowledging the Bank’s discretion to consider human rights issues to postulating its legal duty to promote and protect basic human freedoms.

A human-rights oriented interpretation is also in line with the Bank’s own practice, which has continuously stretched the mandate of a financier of economic development. The Bank has not shied away from investigating, inspecting, assessing and monitoring every conceivable aspect of its borrowers’ economies and beyond. As with other issues such as environmental protection or the conservation of cultural property, certain human rights issues have been integrated into operations and transformed into conditionalities with reference to the evolving concept of development or to their economic implications. In light of the emergence of rights-based approaches to development, and given the World Bank’s increasing involvement in human rights issues, the organization is under increasing pressure to address this challenge and develop its own set of policies, like other development organizations. Some of the operational policies on involuntary resettlement and indigenous peoples, as well as the establishment of the Inspection Panel, are positive steps in this direction but can not replace a more comprehensive set of principles and

operational guidelines to deal with the broad range of civil, political, economic and social rights Bank interventions invariably affect. Such a World Bank human rights policy must address both the significant opportunities to promote human rights through Bank operations and address those situations where Bank interventions conflict with or openly violate internationally recognized human rights. As with the adoption of comprehensive environmental guidelines in the 1980s, the Bank and its beneficiaries have much to gain from dealing with human right concerns in a proactive manner.