

‘DOING IT QUIETLY’: THE WORLD BANK’S ENGAGEMENT WITH HUMAN RIGHTS

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Since the World Bank was established, its approach to human rights has evolved significantly. In the past, the Bank has been restricted by narrow interpretations of the legal framework within which it operates. The Bank’s increasingly sophisticated understanding of development has led to the broadening of its mandate. Human rights are now generally considered to fall, to some extent at least, within the lawful scope of its operations. The door has been opened for the Bank to make a meaningful commitment to international human rights law.

The Bank has not yet given a clear indication of how it will make this commitment. However, recent formal and informal policy statements suggest that the Bank’s intention is to engage with human rights, but to ‘do it quietly’. Such an approach constitutes an inadequate recognition of the established link between human rights and development. It may also fall below the standard required of the Bank under international human rights law.

It is argued that a more explicit commitment to human rights law should be made through the inclusion of human rights standards in the Bank’s operational policies and guidelines. Such a course would assist the Bank in its mission to alleviate poverty and would ensure greater respect for the human rights of those people in developing countries who are the intended beneficiaries of Bank projects.

[G]enerally the best way for us to proceed has been a sort of step-by-step way, doing it quietly, trying to assert the delivery of rights, but not necessarily couching it in the terms of human rights.¹

– James Wolfensohn, *President of the World Bank, 1995-2005*

I INTRODUCTION

The World Bank’s mission is to ‘fight poverty with passion and professionalism for lasting results’.² This task is one of the most pressing, important and complex challenges facing the modern world. More than 60 years of Bank experience has shown that there is not one simple or obvious way to alleviate poverty. However,

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1 James David Wolfensohn, ‘Remarks on Human Rights and Sustainable Development: What Role for the Bank?’ (Speech delivered at the afternoon plenary of *Human Rights and Development: What Role for the Bank?*, Washington DC, 2 May 2002).

2 World Bank, *Mission Statement*, World Bank, <<http://www.worldbank.org>> at 10 December 2008.

some principles have been garnered from the Bank's broad experience. One of these principles, now widely accepted throughout the development community and within the Bank itself, is that sustainable development is impossible without human rights.³

The World Bank Group consists of five associated institutions: the International Bank for Reconstruction and Development ('IBRD'), the International Development Association ('IDA'), the International Finance Corporation ('IFC'), the Multilateral Investment Guarantee Agency ('MIGA') and the International Centre for the Settlement of Investment Disputes ('ICSID'). The IBRD and the IDA constitute the World Bank Group's loan and grant facilities respectively. They will be referred to collectively as 'the Bank' in this article. The IFC provides finance and advice for private sector projects.

Human rights are the basic rights and freedoms to which all humans are entitled. They are codified in the International Bill of Rights,⁴ made up of the *Universal Declaration on Human Rights*,⁵ the *International Covenant on Civil and Political Rights*⁶ and the *International Covenant on Economic, Social and Cultural Rights*.⁷

The rights enumerated in these documents not only promote development, but are an essential part of it. Amartya Sen, winner of the Nobel Prize for Economics, has argued influentially that expansion of freedom (which may also be seen as the realisation of human rights) is 'both (1) the *primary end* and (2) the *principal means* of development'.⁸

Sen's theory of the interdependence of development and human rights can be justified on both conceptual and practical levels. The conceptual link is outlined in The United Nations Development Program's *Human Development Report*:

The promotion of human development and the fulfilment of human rights share, in many ways, a common motivation, and reflect a fundamental commitment to promoting the freedom, well-being and dignity of individuals in all societies.⁹

This 'common motivation' is most obvious in the case of economic, social and cultural rights – freedom from poverty and 'the right ... to an adequate standard

3 World Bank, *Development and Human Rights: The Role of the Bank* (1998) World Bank, <<http://www.worldbank.org/html/extdr/rights/>> at 10 December 2008.

4 Mac Darrow, *Between Light and Shadow: The World Bank, the International Monetary Fund and International Human Rights Law* (2003) 127, 132.

5 *Universal Declaration of Human Rights*, GA Res 217A, UN GAOR, 3rd sess, 183rd plen mtg, UN Doc A/810 (1948) ('UDHR').

6 *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) ('ICCPR').

7 *International Covenant on Economic, Social and Cultural Rights*, opened for signature 19 December 1966, 993 UNTS 3 (entered into force 3 January 1976) ('ICESCR').

8 Amartya Kumar Sen, *Development as Freedom* (1999) 36.

9 United Nations Development Project ('UNDP'), *Human Development Report 2000* (2000) UNDP <http://hdr.undp.org/en/media/hdr_2000_en.pdf> at 10 December 2008, 19 ('*Human Development Report 2000*').

of living¹⁰ are almost synonymous. However, civil and political rights, such as the right to participate in public affairs and the right to freedom of expression, are also relevant. Such rights ensure government accountability, facilitate the minimisation of corruption and 'can be extremely important for enhancing the capabilities of people who are poor'.¹¹

On a practical level, human rights can also serve to focus development initiatives around the human person.¹² The experience of the World Bank has shown that such a focus aids effective and sustainable development.¹³

The beneficial effect of human rights on development has been written about extensively.¹⁴ This article does not aim to further explore or justify this link. Rather, the vital role of human rights in development and poverty alleviation is taken as a starting point. The World Bank has itself acknowledged the link between human rights and development and declared on the 50th anniversary of the *UDHR* that '[t]he world now accepts that sustainable development is impossible without human rights'.¹⁵ In 2004, former World Bank President James Wolfensohn gave a speech at a conference on human rights and development and stated:

I continue to read the Universal [D]eclaration [of Human Rights] and it refers ... to social security, equal employment, the right to adequate standards of living, motherhood, children, education, international order. All these are the things which, if you had asked me to indicate what is the agenda of our institution, I would have told you ... was the charter of our institution.¹⁶

It no longer seems necessary to ask whether the work of the Bank is related to human rights. Rather, the pertinent question is *how* the Bank should engage with human rights. Should the Bank 'do it quietly' with a view to asserting the delivery of rights? Or should the Bank's involvement be more robust, establishing explicit and enforceable links between its development projects and international human rights law?

Engagement with human rights could mean a lot of things. Often the Bank's human rights responsibilities are analysed in relation to the question of whether the Bank should refuse loans and grants to countries whose governments violate fundamental human rights. While there are interesting practical and

10 *ICESCR* art 11(1) recognises the right to an adequate standard of living.

11 UNDP, above n 9, 20.

12 Hans-Otto Sano, 'Development and Human Rights: The Necessary, but Partial Integration of Human Rights and Development' (2000) 22 *Human Rights Quarterly* 734, 751.

13 Roberto Dañino, 'The Legal Aspects of the World Bank's Work on Human Rights' (Speech delivered at the Human Rights and Development: Towards Mutual Reinforcement One Day Conference, New York University Law School, 1 March 2004).

14 See, eg, Hans-Otto Sano, above n 12; cf Jane Rueger, 'From Reluctant Champion to Development Ringmaster: Managing the Expanding Mission of the World Bank' (2003) 10 *Indiana Journal of Global Legal Studies* 201.

15 Wolfensohn, above n 1.

16 James David Wolfensohn, 'Human Rights and Development: Towards Mutual Reinforcement' (Speech delivered at the Dialogue on Human Rights and Development, New York City, 1 March 2004).

legal arguments for and against the Bank taking on this role (often described as acting as ‘human rights police’),¹⁷ it is not the purpose of this article to deal with them. Before any steps in such a direction could be considered, the Bank would first have to commit itself to complying with international human rights law in relation to its own policies and projects. The possibility and desirability of such a commitment is the subject of this article.

It is argued here that the Bank should not whisper when it speaks about human rights. Rather, the Bank has much to gain from declaring and actively committing to its obligation to uphold international human rights law.

Part II of this article examines the legal framework in which the Bank operates and analyses the Bank’s legal capacities and obligations in relation to human rights law. Part III discusses the role of human rights in Bank policy and practice, while Part IV looks at whether any institutional or practical considerations would impede the Bank’s increased commitment to human rights law.

II THE LEGAL FRAMEWORK

The Bank is governed by its *Articles of Agreement*,¹⁸ an international treaty that has been signed by all World Bank member countries.¹⁹ In addition to the rights enumerated in the *Articles of Agreement*, the Bank, as a subject of public international law,²⁰ has rights and duties under customary international law and the general principles of law as recognised by civilised nations.²¹ The question of what the Bank can, should and must do in terms of its engagement with international human rights law needs to be answered within the legal framework provided by these sources of law.

17 The term ‘human rights police’ was used in Jorge Daniel Taillant, ‘Human Rights Institutions and the International Financial Institutions’ (Paper presented at the Sustainable Justice 2002 Conference, Montreal, June 2002) cited in Adam McBeth, ‘Breaching the Vacuum: A Consideration of the Role of International Human Rights Law in the Operation of the International Financial Institutions’ (2006) 10 *International Journal of Human Rights* 385, 392. See also Shirin Ebadi, ‘Human Rights and Economic Development’ (Speech delivered at the Presidential Fellows Lecture Series, Washington DC, 3 May 2004). See generally Ibrahim Shihata, ‘The World Bank and Human Rights’ in I Shihata (ed), *The World Bank in a Changing World: Selected Essays and Lectures* (1995) vol 2, 567.

18 Each of the five bodies which make up the World Bank Group has its own *Articles of Agreement*. In this article I will refer to the *Articles of Agreement of the International Bank for Reconstruction and Development*, which are in all major respects the same as those of the IDA: *Articles of Agreement of the International Bank for Reconstruction and Development*, opened for signature 22 July 1944, 2 UNTS 134 (entered into force 27 December 1945) (*‘Articles of Agreement’* or *‘Articles’*).

19 The IBRD has 184 members, the IDA has 165 members, the IFC has 177 members, the MIGA has 164 members and the ICSID has 140 members. Further details can be found at: <<http://www.worldbank.org>> at 27 August 2005.

20 Darrow, above n 4, 126–7. The question of the Bank’s international legal personality will be discussed in greater depth later in this section.

21 These are the established sources of international law as set out in the *Statute of the International Court of Justice* art 38(1). Although there are arguably other sources of international law, discussion in this article is limited to these established sources.

A The Articles of Agreement

The *Articles of Agreement* outline the principles that govern the Bank's organisation, operations and management. The *Articles* contain three provisions that may affect the Bank's capacity to incorporate human rights law into its activities:

Article III, s 5(b) provides that:

[Funds must be used] without regard to political or other non-economic influences or considerations.

Article III, s 5(b) provides that:

[The Bank is required to] make arrangements to ensure that proceeds of any loan are used only for the purposes for which the loan was granted, with due attention to considerations of economy and efficiency and without regard to political and other non-economic influences or considerations.

Article IV, s 10 provides that:

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 purposes of the Bank as set out in art I are:

- (i) To assist in the reconstruction and development of territories of members by facilitating the investment of capital for productive purposes, including the restoration of economies destroyed or disrupted by war, the reconversion of productive facilities to peacetime needs and the encouragement of the development of productive facilities and resources in less developed countries.
- (ii) To promote private foreign investment by means of guarantees or participations in loans and other investments made by private investors; and when private capital is not available on reasonable terms, to supplement private investment by providing, on suitable conditions, finance for productive purposes out of its own capital, funds raised by it and its other resources.
- (iii) To promote the long-range balanced growth of international trade and the maintenance of equilibrium in balances of payments 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 labor in their territories.

- (iv) To arrange the loans made or guaranteed by it in relation to international loans through other channels so that the more useful and urgent projects, large and small alike, will be dealt with first.
- (v) To conduct its operations with due regard to the effect of international investment on business conditions in the territories of members and, in the immediate postwar years, to assist in bringing about a smooth transition from a wartime to a peacetime economy.

These articles establish that the Bank may only consider economic factors in its decision-making and may not take political considerations into account. The exact meaning and effect of these provisions is not clear. The Bank has argued on various occasions that human rights are, to some extent, political and/or non-economic considerations and therefore outside its mandate.²² In order to determine the accuracy of this interpretation, the following section analyses the above articles.

1 *Interpreting the Articles*

The effect of the *Articles* on the Bank's capacity to engage with human rights turns on the nature of 'political' as opposed to 'economic' considerations. To what extent are human rights 'political' and to what extent are they 'economic'? To answer this question, the meaning of the terms 'political' and 'economic' must be ascertained. The relevant interpretive methodology is set out in the *Vienna Convention on the Law of Treaties*.²³ While the *Articles* predate the *VCLT*, it is widely acknowledged that arts 31 and 32 of the *VCLT* codified pre-existing customary law on treaty interpretation and therefore should apply to pre-*VCLT* international agreements.²⁴ Articles 31 and 32 of the *VCLT* are set out below:

Article 31:

- (1) A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.
- (2) The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:
 - (a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty;

22 A more thorough discussion of Bank practice is contained in Part III of this article.

23 *Vienna Convention on the Law of Treaties*, opened for signature 23 May 1969, 1155 UNTS 331 (entered into force 27 January 1980) arts 31 and 32 ('*VCLT*').

24 John D Ciorciari, 'The Lawful Scope of Human Rights Criteria in World Bank Credit Decisions: An Interpretive Analysis of IBRD and IDA Articles of Agreement' (2000) 33 *Cornell International Law Journal* 331, 340. Ciorciari cites Michael Akehurst, *A Modern Introduction to International Law* (5th ed, 1984) 121 and Louis Henkin, Hans Smit and Oscar Schachter, *International Law: Cases and Materials* (3rd ed, 1993) 416–17.

- (b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.
- (3) There shall be taken into account, together with the context:
- (a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;
 - (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;
 - (c) any relevant rules of international law applicable in the relations between the parties.
- (4) A special meaning shall be given to a term if it is established that the parties so intended.

Article 32:

Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of Article 31, or to determine the meaning when the interpretation according to Article 31:

- (a) leaves the meaning ambiguous or obscure; or
- (b) leads to a result which is manifestly absurd or unreasonable.

The means of interpretation codified in art 31 are to be applied in a 'single combined operation'.²⁵ The interpretation conferred by the ordinary meaning of the terms, the object and purpose of the *Articles*, subsequent practice and relevant rules of international law interact to shed light on the best interpretation.²⁶

(a) The Ordinary Meaning of the Terms

Former World Bank General Counsel Ibrahim Shihata analysed dictionary definitions and epistemology to conclude that 'political' factors involved a relation to political principles, convictions or opinions of a particular party or individual, whereas 'economic' factors include the management of a nation's money, finances and resources.²⁷

25 Ian Brownlie, *Principles of Public International Law* (6th ed, 2003) 603.

26 As Bank members have not issued a subsequent agreement on the interpretation of the treaty, this particular interpretative tool is not useful in the current analysis: Ciorciari, above n 24, 350. Similarly, no agreements or instruments were made in connection with the conclusion of the *Articles*.

27 Ibrahim Shihata, 'Prohibition of Political Activities in the Bank's Work' (Legal Opinion by the Senior Vice President and General Counsel, 12 July 1995).

It is not evident from these definitions, nor has it been made clear by the Bank, how human rights should be classified.²⁸ Further, it is not obvious that a clear distinction between the political and the economic can be made.²⁹ As has been noted, ‘there is nothing in this world more political than money’.³⁰ Each field informs and interacts with the other.

(i) *Political Factors*

Article IV(10) instructs the Bank not to interfere in the ‘political affairs of any member’.³¹ Arguably, human rights should not be excluded as political factors³² because political factors are, by definition, limited to issues which are of domestic rather than international concern. This is an idea that gains support from relevant international law and is discussed below in section (d).

Shihata has advanced the interpretation that ‘political considerations’ means ‘political rights’ and that art IV(10) therefore serves to exclude such rights from the scope of Bank considerations.³³ However, no evidence is provided to show that the ordinary meaning of ‘political’ is political rights.³⁴ In fact, it seems unlikely that this is the correct interpretation, given that the *Articles* were drafted in the 1940s and the division of human rights in the *UDHR* into two categories (civil and political versus economic social and cultural) did not occur until the 1950s.³⁵

The current view from within the Bank as to the ordinary meaning of the political prohibitions is much narrower, seeing the prohibition as requiring only that ‘the Bank distance itself from partisan politics, from favouring political factions, and

- 28 See generally Herbert Morais (Former Bank Chief Counsel), ‘The Globalization of Human Rights Law and the Role of International Financial Institutions in Promoting Human Rights’ (2000) 33 *George Washington International Law Review* 71, 88–9.
- 29 Ibid 92. However, as Shihata points out, ‘[t]he distinction between the two sets of considerations is explicitly established and required by the Articles of Agreement and must therefore be accorded a meaning that is both legally defensible and operationally helpful’: Ibrahim Shihata, ‘Political Limitations on the Bank’s Work’ in Ibrahim Shihata (ed), *The World Bank in a Changing World: Selected Essays and Lectures* (2000) vol 3, 156. This essay was based on a legal opinion issued by the author in his capacity as the General Counsel of the World Bank and submitted to the Board of Executive Directors on 12 July 1995.
- 30 Lars Schoultz, ‘Politics, Economics, and US Participation in Multilateral Development Banks’ (1982) 36 *International Organizations* 537, 574. cited in Rueger, above n 14, 201.
- 31 Article IV(10) is cited above in full.
- 32 Victoria E Marmorstein, ‘World Bank Power to Consider Human Rights Factors in Loan Decisions’ (1978–1979) 13 *Journal of International Law and Economics* 113, 124–5.
- 33 Ibrahim Shihata, ‘Human Rights, Development and International Financial Institutions’ (Speech delivered at the Conference on Human Rights, Public Finance and the Development Process, American University, Washington DC, 24 January 1992), published in (1992) 8 *American University Journal of International Law and Policy* 558.
- 34 The historical accounts of the Bretton Woods negotiations do not suggest that the drafters were considering political rights when they drafted the *Articles*. See discussion of the *travaux préparatoires* below.
- 35 On this ‘split’ between categories of rights, see Asbjorn Eide and Allan Rosas, ‘Economic, Social and Cultural Rights: A Universal Challenge’ in Asbjorn Eide, Catarina Krause and Allan Rosas (eds), *Economic, Social and Cultural Rights* (1995) 15, 16.

from active participation in [the] political life [of a state]'.³⁶ Under this definition, human rights need not necessarily be considered 'political'.

(ii) Economic Factors

The early view taken by the Bank was that 'economic factors' should be construed narrowly so as to exclude human rights. However, this limited interpretation has lost support.³⁷ It is now recognised by the Bank that 'lack of respect for human rights can seriously affect the economic rate of return or even the viability of investment projects'.³⁸

The most obvious way in which human rights violations can constitute an economic consideration is where they affect a country's ability to repay a loan. The Bank is required to take this factor into consideration as a relevant economic issue under art III(4)(v).³⁹ Studies by economists, private lenders and the World Bank itself have shown that human rights violations and the threat to internal stability and capital investment they sometimes entail can affect a nation's economic development and thus its capacity to service its debts.⁴⁰

The capacity of human rights violations to produce an economic effect was publicly acknowledged by the Bank as early as 1974 when all loans to Uganda were suspended during Idi Amin's regime with the Bank stating that:

The Bank and its affiliates are forbidden by their *Articles of Agreement* to act from political motives; but the Bank Group cannot ignore conditions of obvious internal political instability or uncertainty which may directly affect the economic prospects of the borrower. To this extent, therefore, a country's political situation is taken into account in the investigation of proposals for financing.⁴¹

36 Dañino, above n 13.

37 World Bank, *Human Rights and Sustainable Development: What Role for the Bank? Summary of Proceedings* (2002) World Bank <[http://lnweb18.worldbank.org/essd/essd.nsf/ed184c367402e19e85256a4f00766cac/509e61fd645ffbce85256bf10075a272/\\$FILE/May2-Summary-ext.pdf](http://lnweb18.worldbank.org/essd/essd.nsf/ed184c367402e19e85256a4f00766cac/509e61fd645ffbce85256bf10075a272/$FILE/May2-Summary-ext.pdf)> at 10 December 2008.

38 Dañino, above n 13.

39 Article III(4) of the *Articles of Agreement* states that:

The Bank may guarantee, participate in, or make loans to any member ... subject to the following conditions: ... (v) In making or guaranteeing a loan, the Bank shall pay due regard to the prospects that the borrower, and, if the borrower is not a member, that the guarantor, will be in position to meet its obligations under the loan; and the Bank shall act prudently in the interests both of the particular member in whose territories the project is located and of the members as a whole.

40 See, eg, Arup Banjeri and Hafez Ghanem, 'Does the Type of Political Regime Matter for Trade and Market Practices?' (1997) 11 *World Bank Economic Review* 171; Genoveva Hernández Uriz, 'To Lend or Not to Lend: Oil, Human Rights, and the World Bank's Internal Contradictions' (2001) 14 *Harvard Human Rights Journal* 197. Jack Donnelly cautions against overstating the link between human rights and economic growth, but does not deny that it exists: Jack Donnelly, 'Human Rights, Democracy and Development' (1999) 21 *Human Rights Quarterly* 608, 609–10.

41 World Bank Group, *Policies and Operations* (1974) 43, cited in Marmorstein, above n 32, 128.

Human rights violations can have an economic impact. For example, human rights abuses can provoke civil disobedience which threatens the political and therefore economic stability of the country.⁴² However, the *Articles* do not specify *how much* economic impact a human rights violation must have in order to constitute a valid consideration under the Bank's mandate. Shihata has stated that violations must be 'preponderantly economic' and must have a 'direct and obvious economic effect'.⁴³ This apparently strict standard remains vague.

(b) *Objects and Purposes of the Treaty*

Article I lists the Bank's objectives and relevantly includes the reconstruction and development of member nations through, among other things, 'the encouragement and development of productive facilities and resources'.

Initially, development was thought to mean 'economic advancement'.⁴⁴ However, institutional constitutions have been and should be dynamically interpreted. This is particularly the case with institutions such as the Bank that 'by nature of their respective mandates, must be able to respond to the world's changing needs'.⁴⁵ Since the Bank's inception, the international community's understanding of development has evolved to cover a range of cultural, social, civil and political, as well as economic, issues.⁴⁶

This shift has been supported by authors such as Amartya Sen who argue that development should be viewed as a process of expanding freedoms or capability.⁴⁷ According to Sen, the ideal approach is to focus on the ultimate aim of expanding substantive freedoms, rather than particular means, such as growth of the Gross National Product or rise of personal incomes.⁴⁸

The prevailing view of development is that poverty cannot be addressed without considering a wide variety of issues,⁴⁹ including rights-related considerations. This view is reflected by the fact that human development and institutional change have been prioritised on the Bank's agenda.⁵⁰ The Bank's *Articles* can clearly be read in light of this conception of development. The argument that was presented in the introduction, and which runs through this article, is that

42 Marmorstein, above n 32, 127.

43 Shihata, above n 27, 29–30 and Ciorciari, above n 24, 353.

44 Rueger, above n 14, 201.

45 Darrow, above n 4, 121, citing Shihata.

46 Ciorciari, above n 24, 355; see also *Declaration on the Right to Development*, GA Res 41/128, UN GAOR, 41st sess, 97th plen mtg, UN Doc A/Res/41/128 (4 December 1986).

47 Sen, above n 8, 3–5, 81.

48 *Ibid* 3.

49 James Wolfensohn, 'A Proposal for a Comprehensive Development Framework (A Discussion Draft)' (Memorandum presented to the World Bank's Board Management, 21 January 1999); see also Daniel Bradlow and Claudio Grossman, 'Limited Mandates and Intertwined Problems: A New Challenge for the World Bank and IMF' (1995) 17 *Human Rights Quarterly* 411, 414.

50 Human development lending has risen by 30 per cent per year since 2000: World Bank, *2004 Annual Review of Development Effectiveness* (2005) World Bank, <http://www.wds.worldbank.org/servlet/WDS_IBank_Servlet?pcont=details&eid=000090341_20050420101808> at 10 December 2008.

a greater understanding of, and engagement with, human rights would have a positive effect on development.

(c) *Subsequent Practice*

Subsequent practice provides minimal contribution to the interpretation of the relevant articles.⁵¹ As will be discussed in Part III of this article, the Bank's approach has been changed to such a degree over the years that there is no clear, consistent subsequent practice that is capable of aiding interpretation.⁵²

Nevertheless, Bank practice has at least evinced a willingness, in some circumstances, to consider human rights as 'economic'.⁵³ The Bank's policy-based lending in areas such as 'reform of the civil service ... legal and judicial reform ... combating corruption [and] family planning'⁵⁴ demonstrate that human rights issues are being considered.

The Bank's governance projects demonstrate that the Bank has been willing to consider some human rights issues to be economic matters: '[t]he World Bank defines governance as "the manner in which power is exercised in the management of a country's economic and social resources for development"'.⁵⁵ A growing consensus in the international development community has recognised that good governance is a precondition for economic and social development.⁵⁶ The importance of governance in the Bank's lending practices was solidified by the IDA's decision to introduce 'good governance' as an allocation criterion in its loans.⁵⁷ Good governance is conditioned upon accountability, transparency and the rule of law.⁵⁸ As such, governance-based projects and conditionalities are closely linked to those civil and political rights included in the *ICCPR*, including art 14 of the *ICCPR* which deals with equality before the law, art 19 of the *ICCPR* which deals with freedom of expression and art 25 of the *ICCPR* which deals with the right to take part in public affairs.

The emerging trend is that human rights issues have the capacity to be economic considerations, but the required extent of their economic effect remains undefined.

51 Ciorciari, above n 24, 531.

52 Bradlow and Grossman, above n 49, 430.

53 Ciorciari, above n 24, 355.

54 Morais, above n 28, 89. See also *ibid* 90.

55 Morais, above n 27, 93, citing World Bank, *Governance: The World Bank Experience* (1994) xiv.

56 *Ibid* 94.

57 Gernot Brodnig, *The World Bank and Human Rights: Mission Impossible?* (Working Paper No T-01-05, Carr Centre for Human Rights, John F Kennedy School of Government, Harvard University, 2005) Harvard University, <<http://www.hks.harvard.edu/cchrp/Web%20Working%20Papers/BrodnigHR&WorldBank.pdf>> at 11 April 2008.

58 Canan Gunduz, *Human Rights and Development: The World Bank's Need for a Consistent Approach* (Working Paper No 04-49, Development Destin Studies Institute, The London School of Economics, Working Paper, 2004) London School of Economics, <<http://www.lse.ac.uk/collections/DESTIN/pdf/WP49.pdf>> at 11 April 2008, [17].

(d) *Relevant Rules of International Law*

Rules of international law contribute little to the ‘economic considerations’ debate. However, the *Charter of the United Nations* (‘UN Charter’) may be used to suggest that ‘political affairs’ refer to domestic rather than international concerns. If human rights are international rather than domestic issues, they fall outside the ambit of ‘political affairs’.

It has been argued that a connection can be drawn between the political prohibition in the *Articles of Agreement* and a similar prohibition in the *UN Charter*.⁵⁹ Article 2(7) of the *UN Charter* prohibits the United Nations from intervening in ‘matters which are essentially within the domestic jurisdiction’⁶⁰ of a member state.

Human rights ‘transcend domestic jurisdiction’.⁶¹ In *Barcelona Traction, Light and Power Co Ltd (Belgium v Spain) (Second Phase)*, the International Court of Justice (‘ICJ’) stated that states have an obligation to the entire international community to protect certain basic human rights.⁶² In a subsequent advisory opinion, the ICJ stated that violations of fundamental human rights constitute breaches of the *UN Charter*, though it did not specify which human rights are ‘fundamental’.⁶³

If it is accepted that there is a link between ‘domestic jurisdiction’ in the *UN Charter* and ‘political affairs’ in the *Articles*, then it can be concluded that at least some human rights violations – those which are considered ‘basic’ or ‘fundamental’ – are excluded from what may rightly be considered ‘political’. For example, the ICJ has found that the international law against racial discrimination cannot be considered to be a domestic matter.⁶⁴

Regardless of whether this link is found, the cases cited above evince the idea that at least some human rights issues transcend sovereign boundaries.

The view that human rights issues should not be dealt with exclusively in the domestic domain has a degree of support within the Bank. In a 2004 speech, Roberto Dañino, former Senior Vice-President and General Counsel, stated that:

In interpreting the meaning of these political prohibitions, we need to recognize that the concepts of sovereignty and interference have also

59 See Brodnig, above n 57, [18], where he contends that the political prohibition in the Bank’s *Articles* was in fact modelled along art 2(7). See also Ciorciari, above n 24, 356–7.

60 *UN Charter* art 2(7).

61 Marmorstein, above n 32, 124.

62 *Barcelona Traction, Light and Power Co Ltd (Belgium v Spain) (Second Phase)* [1970] ICJ Rep 3, 33–4. The ICJ held that ‘[i]n view of the importance of the rights involved, all States can be held to have a legal interest in their protection; they are *erga omnes*. Such obligations derive, for example, in contemporary international law, from the outlawing of acts of aggression, and of genocide, as also from the principles and rules concerning the basic rights of the human person, including protection from slavery and racial discrimination’.

63 *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (Advisory Opinion)* [1971] ICJ Rep 50.

64 See above n 62 and accompanying text.

evolved. In the modern world, sovereignty is no longer an absolute shield against scrutiny of states for international norms...

The significance of this for the Bank is that, in my opinion, it can and must take into account human rights violations in its process of making economic decisions. Moreover, because of the way international law has evolved with respect to concepts of sovereignty and interference, and the range of issues that are considered to be of global concern, in doing so the Bank will not fall foul of the political prohibitions in the *Articles*.⁶⁵

Rules of international law can also dictate what the Bank must do, regardless of its mandate. The Bank's international legal obligations are examined below in Part II(B).

(e) *Supplementary Means of Interpretation*

The preparatory materials may be used to confirm the meaning of 'political' and 'economic' that have resulted from the application of art 31. In this case, the preparatory materials do not expose a single dominant factor which inspired the distinction between political and economic considerations. Three historical reasons for the relevant prohibitions within the *Articles* have been identified.⁶⁶ They are: first, a desire to attract members, particularly the Soviet Union, regardless of their political ideology; second, to insulate Britain from American economic dominance; and third, to allow the institution to function free from destabilising politicisation.⁶⁷ The important thing to note is that none of the reasons presented would be frustrated by the Bank's consideration of human rights issues.⁶⁸

If the motivation behind the political prohibition was to attract members of various political ideologies, its intended scope would be narrow.⁶⁹ The Bank would be prohibited from using its capacity to grant loans to promote any one form of government. As human rights violations are not inherent in any one political ideology, they would not be excluded from consideration under the prohibition.⁷⁰

Similarly, a definition of 'political' designed to protect Britain's post-war economic ties would not be affected by the Bank's consideration of human rights. Freedom to regulate economic systems and relations is not bound to human rights.

Shihata has argued that it is the need to promote the effective functioning of the Bank that was the motivating factor behind the inclusion of the political prohibition in 1944 and which remains the reason why human rights should not be considered.⁷¹ That is, the effective operation of the Bank, including its

65 Dañino, above n 13, 6–7.

66 Gunduz, above n 58, 14.

67 Ibid; see also Ciorciari, above n 24, 367–70.

68 See analysis in Ciorciari, above n 24, 367–70.

69 Darrow, above n 4, 167.

70 Ibid.

71 Shihata, above n 29, 163–6.

ability to secure loans on the open market, would be jeopardised by consideration of political factors.⁷² However, as has been discussed, human rights violations can and do have economic consequences. To the extent that this is the case, consideration of human rights violations does not conflict with the original aims of the *Articles*.

2 Limitations Imposed by the Articles of Agreement

The lack of clarity regarding the meaning of ‘political’ and ‘economic’ factors has afforded the Bank a wide discretion in interpreting its own mandate. This discretion is further broadened by art IX (a)-(b), which gives the Bank power to interpret its own charter.⁷³ It was recognised from the time of the Bank’s establishment that ‘proper limitation of the Bank’s activities depends ultimately on the character of the men responsible for its operations’.⁷⁴

Of course, any limitations that do exist within the *Articles* should not be disregarded. Shihata expressed this idea in the following terms:

I cannot subscribe to the view that such an interpretation may correctly reach the point of contradicting the text – that is, of amending it – when the power of amendment requires the approval of higher organs, and a much greater majority, than does the power of interpretation.⁷⁵

An act which constituted a blatant violation of the *Articles* would be considered null and void.⁷⁶ However, when the relevant terms are analysed in the context of international law and with the benefit of decades of research on development, it is clear that human rights are neither non-economic nor are they necessarily political. Further, the *travaux préparatoires* do not indicate an intention that the *Articles* have this effect. In conclusion, there is no definitive indication in the *Articles of Agreement* that the consideration of human rights or the incorporation of the existing human rights legal framework into Bank activities would place the Bank outside its legal mandate.

B Obligations under International Law

The Bank may be subject to obligations and restrictions under international law in addition to those set out in its *Articles*. This section discusses the sources of international law and determines which of these sources are likely to create human rights obligations applicable to Bank practice. However, first it is necessary

⁷² Ibid 164.

⁷³ *Articles of Agreement of IDA* art X (a)–(b). See John Head, ‘For Richer or For Poorer: Assessing the Criticisms Directed at the Multilateral Development Banks’ (2004) 52 *University of Kansas Law Review* 241, 271.

⁷⁴ United States Treasury, *Questions and Answers on the Bank for Reconstruction and Development*, Question Number 22 (first issued on 2 February 1944 and reissued, without change with respect to this question, on 10 June 1944) in Shihata, above n 29, 165.

⁷⁵ Shihata, above n 33, 34.

⁷⁶ Shihata, above n 29, 157.

to establish whether the Bank is in fact capable of holding international legal obligations.

1 *International Legal Personality*

To hold rights and obligations under international law, an organisation must have international legal personality. Generally, international legal personality denotes 'the ability to act within a system of international law as distinct from national law'.⁷⁷ Traditionally, only states held international legal personality.⁷⁸ However, the sphere of international legal subjects has widened and is now understood to include some international organisations.⁷⁹

The Bank may have international personality despite the absence of an express grant to that effect in the *Articles of Agreement*.⁸⁰ To ascertain whether the Bank is a subject of international law, it is necessary to consider the nature of the Bank as set out in the *Articles* and Bank practice. The indications of international personality in these two sources must relate to the Bank as an institution, rather than to its individual members, which are states.

Article VII(2) of the *Articles of Agreement* describes the Bank's status as one of 'full juridical' personality, and, in particular the capacity: (i) to contract; (ii) to acquire ... property; (iii) to institute legal proceedings'. This juridical personality is not necessarily effective internationally. However, it sets up an important distinction between the Bank and its members. This distinction is maintained throughout the Agreement. Broches gives as an example the final paragraph of art I which states that '[t]he Bank shall be guided in all its decisions by the purposes set forth above' and points out that it is the Bank, not its individual members, who are subject to this requirement.⁸¹ The distinction between the Bank and its members is also made clear in art IX(a), which allows the Executive Directors to interpret the Agreement so as to resolve disputes 'between any member and the Bank or between any members of the Bank'.⁸²

(a) *Indications of the Bank's International Personality*

In *Reparations for Injuries Suffered in the Service of the United Nations (Advisory Opinion)*, the ICJ discussed the international legal personality of the UN and held that:

77 Martin Dixon, *Textbook on International Law* (5th ed, 2005) 104.

78 Ibid 105 and McBeth, above n 17, 389–90.

79 Aron Broches, *Selected Essays: World Bank, ICSID, and Other Subjects of Public and Private International Law* (1995) 14–15; Dixon, above n 77, 113–114 and *Reparations for Injuries Suffered in the Service of the United Nations (Advisory Opinion)* [1949] ICJ Rep 174.

80 Henry G Schermers and Niels M Blokker, *International Institutional Law* (4th rev ed, 2003) 988–9 and Brownlie, above n 25, 650.

81 Broches, above n 79, 21.

82 Ibid 21–2 and *Articles of Agreement of IBRD* art IX(a).

the Organisation was intended to exercise and enjoy, and is in fact exercising and enjoying, functions and rights that can only be explained on the basis of the possession of a large measure of international personality ... it could not carry out the intentions of its founders if it was devoid of international personality.⁸³

The Bank's international legal personality can be demonstrated on the same basis. First, the *Articles* enable the Bank to enter into agreements governed by international law.⁸⁴ The Bank has in fact entered into many such agreements,⁸⁵ including the Bank's *Relationship Agreement*⁸⁶ with the UN. The Bank's loan and guarantee agreements are also agreements under international law.⁸⁷

The existence of the Bank's privileges and immunities are another strong indicator of international personality.⁸⁸ Sections 3–9 of art VII of the *Articles of Agreement* provide for Bank immunities. Additional provisions for privileges and immunities are found in the *Specialized Agencies Convention*.⁸⁹

The functions and activities of the Bank provide further evidence that the Bank's founders intended that the Bank have international legal personality. Article I, for example, states that among the Bank's purposes is the promotion of 'balanced growth of international trade' and the conduct of activities with 'due regard to the effect of international investment on business conditions'. Both of these are purely international functions.⁹⁰ Further, the Bank is provided with large amounts of capital over which individual member states retain minimal control.⁹¹ The practicalities of such an arrangement necessitate that the Bank has the capacity to act as an institution with its own legal personality.

(b) *The Effect of the Bank's International Legal Personality*

Once it is established that the Bank holds international legal personality, the next step is to determine what duties and obligations follow. The legal duties of bodies with legal personality have no pre-determined or uniform content and will vary

83 *Reparations for Injuries Suffered in the Service of the United Nations (Advisory Opinion)* [1949] ICJ Rep 174, 179.

84 *Articles of Agreement of IBRD* art V(8).

85 Broches, above n 79, 22.

86 *Agreement between the United Nations and the International Bank for Reconstruction and Development*, GA Res 124(II), UN GAOR, UN Doc A/349 (15 November 1947) ('*Relationship Agreement*'). Available in *Agreements between the United Nations and the Specialized Agencies and the International Atomic Energy Agency* (1961) 54.

87 Broches, above n 79, 22.

88 Sigrun Skogly, *The Human Rights Obligations of the World Bank and the International Monetary Fund* (2001) 67, citing *Reparations for Injuries Suffered in the Service of the United Nations (Advisory Opinion)* [1949] ICJ Rep 174, 179 as authority for this statement.

89 *Convention on the Privileges and Immunities of Specialized Agencies*, opened for signature 21 November 1947, UN 179(II) (entered into force 2 December 1948) arts 3, 5, 6 ('*Specialized Agencies Convention*').

90 Skogly, above n 88, 66.

91 Broches, above n 79, 21.

according to the organisation.⁹² Despite having international legal personality, the Bank and other international organisations are not automatically ascribed the same rights and obligations as states.⁹³ Instead, they have personality 'for whatever purpose is recognised under the system of international law'.⁹⁴ In terms of the Bank's human rights obligations, it is not immediately clear that the Bank can be ascribed the same duties that held by states.

As a starting point, the ICJ has recognised that international organisations with legal personality are 'bound by any obligations incumbent upon them under general rules of international law'.⁹⁵ This view can be justified in a number of ways. First, the Bank is a creation of its member states and states bound by international law should not be able to evade those laws by acting collectively.⁹⁶ Second, to the extent that the Bank is a legal entity distinct from its members, its subjugation to international law is a corollary of its capacity to act on the international plane. As Schermers and Blokker put it:

[International organisations] are established under international law. Their constitutional roots are in international law. No superiority over international law can be pleaded on their behalf.⁹⁷

At this point it is relevant to look at each of the sources of international human rights law and ascertain the extent to which each applies to the Bank.

2 Content of the Bank's International Human Rights Obligations

International legal obligations derive from the established sources of international law as set out in the *Statute of the International Court of Justice*. These sources are: international conventions, international custom and the general principles of law as recognised by civilised nations.⁹⁸

(a) International Conventions

Treaties are contracts between international actors and as such are only binding on the parties to the treaty.⁹⁹ There are practical and theoretical difficulties associated with the participation of international organisations in law-making multilateral

92 Dixon, above n 77, 113.

93 Brownlie, above n 25, 649 and Dixon, above n 77, 104.

94 Dixon, above n 77, 104.

95 *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt (Advisory Opinion)* [1980] ICJ Rep 73.

96 Felice Morgenstern, *Legal Problems of International Organisations* (1986) 32.

97 Schermers and Blokker, above n 80, 97.

98 *Statute of the International Court of Justice* art 38(1).

99 Gerald Fitzmaurice, 'Some Problems Regarding the Formal Sources of International Law' in F M van Asbeck et al (eds), *Symbolae Verzijl* (1958) 153, extracted in David John Harris, *Cases and Materials on International Law* (5th ed, 1998) 45.

conventions.¹⁰⁰ In practice, the Bank has not signed or ratified any human rights treaties. Nevertheless, human rights treaties are not wholly irrelevant to Bank practice and may have effect where they have crystallised to form customary international law, which binds entities irrespective of their ratification.¹⁰¹

The other treaty which is relevant to a discussion of the Bank's obligations under human rights law is the *UN Charter*. The Bank is a specialised agency of the United Nations as provided for in art 63 of the *UN Charter*.¹⁰² The relationship between the two institutions is governed by the *Relationship Agreement between the United Nations and the IBRD*.¹⁰³

The Bank, along with the International Monetary Fund ('IMF'), has a large degree of independence from the United Nations.¹⁰⁴ The *Relationship Agreement* states that:

The United Nations recognizes that the action to be taken by the Bank of any loan is a matter to be determined by the independent exercise of the Bank's own judgment in accordance with the Bank's *Articles of Agreement*. The United Nations recognizes, therefore, that it would be sound policy to refrain from making recommendations to the Bank with respect to particular loans or with respect to terms or conditions of financing by the Bank.¹⁰⁵

Some authors argue that this article frees the Bank from any legal obligation to abide by *UN Charter* principles.¹⁰⁶ However, this section merely provides for the Bank's functional independence. It does not deal with the Bank's substantive legal duties and the extent to which the Bank, as a specialised agency of the UN, is generally bound by *UN Charter* principles.¹⁰⁷ Indeed, other sections of the *Relationship Agreement* suggest that the Bank is not at liberty to operate inconsistently with *UN Charter* principles. Article I(2) states that the Bank has:

[W]ide international responsibilities, as defined in its *Articles of Agreement*, in economic and related fields within the meaning of Article 57 of the *Charter of the United Nations*. By reason of the nature of its international responsibilities and the terms of its *Articles of Agreement*,

100 See Morgenstern, above n 96, 34; Skogly, above n 88, 83 and Schermers and Blokker, above n 80, 995–6.

101 Schermers and Blokker, above n 80, 999.

102 *Draft Agreement between the United Nations and the International Bank for Reconstruction and Development*, GA Res 124(II), UN GAOR, UN Doc A/349 (15 November 1947) ('*Draft Agreement*') arts I(1)–(2).

103 The same relationship exists between the United Nations and the IDA: *Agreement on Relationship between the United Nations and the International Development Association*, 582 UNTS(II) 394 (entered into force 27 March 1961). Available in *Agreements between the United Nations and the Specialized Agencies and the International Atomic Energy Agency* (1961) 112.

104 Nigel D White, *The Law of International Organisations* (1996) 153.

105 *Draft Agreement*, above n 102, art IV(3).

106 Ciorciari, above n 24, 360.

107 David Kinley and Tom Davis, *Human Rights Criticism of the World Bank's Private Sector Development and Privatization Projects* (2004) 71–2.

the Bank is, and is required to function as, an independent international organisation.¹⁰⁸

This provision suggests that, while the Bank should function independently, it must do so within the bounds of the *UN Charter*. Such a reading is supported by art 59 of the *UN Charter* which allows the UN to create 'new specialized agencies required for the accomplishment of the purposes set forth in Article 55'.

Article 55 expresses the UN's responsibility to promote:

- (a) higher standards of living, full employment, and conditions of economic and social progress and development;
- (b) solutions of international economic, social, health, and related problems and international cultural and educational cooperation; and
- (c) *universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language or religion.*¹⁰⁹

The meaning of human rights is not expanded upon in the *UN Charter*.¹¹⁰ Rather, the *International Bill of Rights* is often referred to for codification and clarification of the meaning of human rights.¹¹¹ The ICJ has confirmed that, despite the imprecision of the *UN Charter* in this regard, it nevertheless imposes human rights obligations.¹¹²

At the very least it should be acknowledged that human rights are given such a level of importance in the *UN Charter* as to affirm their centrality in the UN system.¹¹³ Further, the UN system should be given special consideration for the important role it plays in international relations – art 103 of the *UN Charter* states that Charter obligations will prevail over other international treaty obligations in the event of a conflict.¹¹⁴

As the Bank was created by UN members with binding *UN Charter*-based human rights obligations, presumably in order to accomplish art 55 purposes, it is unlikely that the *UN Charter* is inconsequential or meaningless to the Bank. Instead, the

108 *Draft Agreement*, above n 102, art I (emphasis added). See Balakrishnan Rajagopal, 'Crossing the Rubicon: Synthesizing the Soft International Law of The IMF and Human Rights' (1993) 11 *Boston University International Law Journal* 81, 94.

109 Emphasis added.

110 Skogly, above n 88, 105–6.

111 Darrow, above n 4, 127.

112 *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (Advisory Opinion)* [1971] ICJ 50, [129].

113 *UN Charter* art 1(3) states that one of the purposes of the United Nations is 'to achieve international co-operation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all'.

114 This Article was examined by the Sub-Commission on the Promotion and Protection of Human Rights in 1999. The Sub-Commission found that an approach where the *Articles* are honoured first 'subordinates the international human rights instruments to the charters of the agencies in question when, as a matter of law, the reverse should be the case': cited in Darrow, above n 4, 129; see also Shihata, above n 29, 169.

more likely conclusion is that the Bank is required to act in accordance with UN objectives, including the observance of human rights.

(b) *International Customs*

Customary international laws are those norms which are supported by state practice along with *opinio juris* (state belief that compliance is obligatory).¹¹⁵ As set out in Part II(B)(1) above, organisations with international personality are obliged to comply with customary international law.¹¹⁶

A conservative list of customary international laws relevant to human rights is contained in the *Restatement (Third) of Foreign Relations Law of the United States* and includes:

- the murder or causing the disappearance of individuals;
- torture or other cruel, inhuman or degrading treatment or punishment;
- prolonged arbitrary detention;
- systemic racial discrimination; and
- consistent patterns of gross violations of international human rights.¹¹⁷

This list is not exhaustive and according to some authors should be expanded to include all of the rights listed in the *UDHR*.¹¹⁸

The customary laws set out in the *Restatement* cited above, with the exception of the last example, are also considered to be *jus cogens* obligations.¹¹⁹ *Jus cogens* norms are a special type of customary law; they are universally accepted laws that are non-derogable.¹²⁰ The major difference between customary law and *jus cogens* norms is that *jus cogens* norms are the strongest form of international law and will prevail over other rules of international law, including international treaty obligations, such as the *Articles*.¹²¹ It was argued in Part II(A) that the *Articles* do not exclude human rights being considered in any case. Therefore, in the context of this article, the distinction between customary law and *jus cogens* norms is irrelevant.

115 Sam Blay, Ryszard Piotrowicz and Martin Tsamenyi (eds), *Public International Law: An Australian Perspective* (2nd ed, 2005) 55.

116 Schermers and Blokker, above n 80, 1002.

117 *Restatement of the Law Third, Foreign Relations Law of the United States* (1986) s 702. ('*The Restatement*').

118 For a discussion of the different views on the customary status of human rights norms, see Bruno Simma and Philip Alston, 'The Sources of Human Rights Law: Custom, *Jus Cogens*, and General Principles' (1988–89) 12 *Australian Year Book of International Law* 82.

119 *The Restatement* s 702.

120 *VCLT* art 53.

121 See above n 118.

(c) *General Principles of International Law*

General principles of international law derive from principles developed in the legal systems of independent states¹²² or from principles widely recognised on the international plane.¹²³ Some authors and jurists argue that the general principles of international law add nothing to what has already been covered by treaties and custom.¹²⁴ However, as this source of law is listed separately in the *Statute of the ICJ*, it is generally acknowledged to add meaningful substance to it.

There has been debate as to whether human rights laws form such 'general principles'. The European Court of Justice has decided that, despite not being a party to the *European Convention on Human Rights*,¹²⁵ it was bound to ensure respect for basic human rights as human rights formed part of the general principles of European Community law.¹²⁶

Of course, Europe is significantly more homogeneous than the world as a whole and the presence of human rights in general principles of international law does not necessarily follow from its inclusion in general principles of European law. Nevertheless, given the large number of states to have signed human rights treaties and declarations, as well as the appearance of human rights provisions in many domestic constitutions, human rights have arguably 'become part of the general principles of law recognized by civilized nations'.¹²⁷ If this is the case then the World Bank, by virtue of its international personality, would be obliged to respect these human rights.

3 The Effect of the Legal Obligations of Member Countries

As discussed above, the Bank has its own legal personality and operates as an entity separate from its members. Therefore, the human rights obligations of member countries are not automatically transferred to the Bank.¹²⁸ Nevertheless, a measure of international legal obligation derives from the duties of member states. Bank projects usually operate as a partnership between the Bank and the

122 Sir Humphrey Waldock, 'General Course on Public International Law' (1962) 106 *Recueil des Cours* 54 and Harris, above n 99, 49.

123 Darrow, above n 4, 131 and Skogly, above n 88, 89.

124 Paul Guggenheim and Grigory I Tunkin are two such jurists listed in Waldock, above n 122, 54. For a discussion of general principles of law see Martin Dixon and Robert McCorquodale, *Cases and Materials on International Law* (4th ed, 2003) 43–7.

125 *Convention for the Protection of Human Rights and Fundamental Freedoms*, opened for signature 11 April 1950, 213 UNTS 222 (entered into force 3 September 1953).

126 *Wachauf v Germany* [1989] ECR 2609; *C-185/95P Baustahlgewebe GmbH v Commission* [1998] ECR I-8417, cited in Schermers and Blokker, above n 80, 997.

127 Ernst-Ulrich Petersmann, 'Time for a United Nations "Global Compact" for Integrating Human Rights into the Law of Worldwide Organizations: Lessons from European Integration' (2002) 13 *European Journal of International Law* 621, 633 and Simma and Alston, above n 118.

128 The view that the Bank does not take on the legal obligations of its member countries is the most widely accepted view. The alternative argument, that an organisation formed by states must be bound by the obligations of the states when power was transferred, has been made in Schermers and Blokker, above n 80, 995.

borrowing country. Borrowing countries with international legal obligations will retain those obligations for the purposes of the Bank project.¹²⁹ For example, if a state which has ratified the *ICESCR* borrows money for the development of a large infrastructure project, that state should recall its obligations under art 11 of the *ICESCR* which states:

The States Parties to the present Covenant recognise the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions.¹³⁰

This obligation should be kept in mind in the development of resettlement programs associated with the project. While the obligations under the *ICESCR* do not attach to the Bank, they may still be relevant to Bank projects.

4 *Practical Implications and Enforcement*

This section has demonstrated that the Bank may be ascribed human rights obligations under customary law (including *jus cogens*), general principles of law and through its relationship with the UN.

Human rights obligations can be imposed at three levels. Specifically, a party may be obliged to respect, protect or fulfil human rights objectives.¹³¹ Respecting human rights involves refraining from infringing upon a person or group's human rights. Protecting human rights involves ensuring that others do not violate human rights. Fulfilling human rights requires positive action towards the realisation of human rights.¹³²

Obligations to protect and fulfil human rights are generally imposed by international treaties to which the Bank is not a party. Moreover, the Bank is generally not considered to be institutionally capable of performing these functions which are best suited to states.¹³³ The World Bank is not a human rights organisation and, as yet, does not have the institutional capacity to take on such a role.¹³⁴

It is not the contention of this article that the Bank should use its capacity to grant or withhold loans as a human rights policing or enforcement mechanism. Rather, it is the Bank's capacity and legal obligation to *respect* human rights in the course of its operations that is at issue. This is the level of human rights obligation that is likely to be imposed on the Bank by international law.¹³⁵

129 Skogly, above n 88, 107.

130 *ICESCR* art 2(1).

131 See Ida Elisabeth Koch, 'Dichotomies, Trichotomies or Waves of Duties?' (2005) 5 *Human Rights Law Review* 81.

132 *Ibid.*

133 Skogly, above n 88, 151.

134 Kinley and Davis, above n 107, 63.

135 Chris Jochnick, 'Confronting the Impunity of Non-State Actors: New Fields for the Promotion of Human Rights' (1999) 21 *Human Rights Quarterly* 56, 75.

This Part has not gone into detail on the specific rights that the Bank is obliged to respect. Such an undertaking would require a thorough analysis of existing international human rights law and is beyond the scope of this article. In addition, there is no way of enforcing the Bank's human rights obligations.¹³⁶ However, the absence of an effective enforcement mechanism does not signify the absence of an obligation.¹³⁷

The important point is that the Bank should not operate in an isolated pocket of international law that remains untouched by human rights. The Bank's human rights obligations should be acknowledged through the Bank's internal operational guidelines and policies. The extent to which this occurs in practice is the subject of the next Part.

III PRACTICE AND POLICY

The lack of specificity in the relevant sections of the *Articles of Agreement* (Part II(A)), coupled with the Bank's freedom from enforced compliance with international law (Part II(B)) has left the Bank with the flexibility to make a policy-based decision as to the extent of its engagement with human rights principles. This Part examines the Bank's position on human rights.

In January 2006, Roberto Dañino issued a legal opinion confirming that the *Articles of Agreement* permit the Bank to recognise human rights in its policies and activities.¹³⁸ Nevertheless, Bank safeguards and operational policies contain few references to the international human rights framework. For instance, the new IFC safeguards, published a month after Dañino's legal opinion, do not engage in any significant or substantial way with international human rights law. As a result, the Bank's approach to human rights in its projects is neither easily identifiable nor consistent across project areas.

A Background

The first articulation of the Bank's position on human rights came in the mid-1960s when the Bank refused to comply with a United Nations request to stop loans to South Africa and Portugal in response to the serious human rights abuses taking place in those countries.¹³⁹ The Bank insisted that the violations did not constitute relevant 'economic considerations'.¹⁴⁰ This approach was in accordance with early development theory, which did not recognise the significant links between human rights standards and economic growth. In fact, during the Cold

136 McBeth, above n 17, 390.

137 Ibid.

138 Roberto Dañino, *Legal Opinion on Human Rights and the Work of the World Bank* (2006) World Bank, <<http://www.ifwatchnet.org/sites/ifwatchnet.org/files/DañinoLegalOpinion0106.pdf>> at 10 December 2008 ('*Legal Opinion*').

139 Ciorciari, above n 24, 352.

140 Marmorstein, above n 32, 122.

War, it was popularly claimed that human rights and development were in conflict and that in some circumstances human rights needed to be traded off to make way for development.¹⁴¹ The current understanding of the role of human rights in development necessitates a less dismissive response to the human rights concerns of the international community. This understanding is reflected in the Bank's current practice and policy.

The Bank characterised its role in relation to human rights in a 1998 report which stated:

The World Bank believes that creating the conditions for the attainment of human rights is a central and irreducible goal of development ... the Bank contributes to building environments in which people are better able to pursue a broad range of human rights.¹⁴²

In other words, the Bank sees itself as a facilitator of positive human rights outcomes, particularly in the field of economic and social rights. The Bank's mission statement is:

[T]o fight poverty ... and to help people help themselves and their environment by providing resources, sharing knowledge, building capacity and forging partnerships in public and private sectors.¹⁴³

This poverty alleviation function and the more specific Millennium Development Goals which guide the Bank's agenda are clearly linked to human rights.¹⁴⁴

There are two problems associated with the facilitator approach which has been taken by the Bank. The first is that Bank policy does not provide any clear guidelines or standards regulating the way in which the 'conditions for the attainment of human rights' are to be achieved. World Vision's analysis of the 1998 report makes this point:

The report ... fails to acknowledge that in order for such provision to help create the environment for the attainment of rights ... some degree of deliberate strategy is needed.¹⁴⁵

The absence of a 'deliberate strategy' is more injudicious when one considers that a large body of human rights law, practice and guidelines are already established and operative in the international arena.

The second issue is that the Bank's characterisation of its position is not always correct. In some cases the Bank steps outside its self-appointed role of mere facilitator and becomes involved in programs that have the specific aim of

141 Donnelly, above n 40, 609–610.

142 World Bank, above n 3.

143 See above n 2.

144 Kinley and Davis, above n 107, 61. There are eight Millennium Development Goals covering: poverty, education, gender equality, child mortality, maternal health, diseases, environment and global partnerships.

145 World Vision, *Doing the Rights Thing? The World Bank and the Human Rights of People Living in Poverty* (2003) World Bank, <<http://siteresources.worldbank.org/CSO/Resources/wvhumanrights.pdf>> at 10 December 2008.

fulfilling human rights. In other areas Bank projects have been responsible for negative human rights outcomes.¹⁴⁶ By downplaying the direct effect that it can have on people's enjoyment of their human rights, the Bank misses an opportunity – and perhaps an obligation – to structure its practices in a way that takes this fact into account.

B Bank Policy

The argument implicit in the 1998 report is that because the Bank promotes human rights in a variety of ways, there is no need for an overarching commitment to internationally established human rights laws.¹⁴⁷ This approach is reflected in the Bank's safeguard policies, which are the Bank's method of protecting the environment and the communities affected by Bank operations.¹⁴⁸ The safeguard policies (made up of the World Bank *Operational Policies and Directives*) cover the following 10 subject areas: environmental assessment, natural habitats, pest management, cultural property, indigenous peoples, involuntary resettlement, forestry, safety of dams, projects on international waterways, forced labour and harmful child labour.

The *Operational Policies* are of particular importance because they are the standards upon which the Inspection Panel, an independent forum established by the Executive Directors of the IBRD, assesses complaints against the Bank.¹⁴⁹ A complaint can be made to the Inspection Panel when an individual believes that the Bank operational policies have been violated. If the Panel finds this to be the case, it may respond in a number of ways, including withdrawing or restructuring the project, halting funding or providing compensation to affected people.¹⁵⁰

As discussed in Part II above, the Bank is not currently subject to effective enforcement mechanisms under international law. Consequently, the Inspection Panel is the main way in which the Bank can be held accountable for its actions.¹⁵¹ The Inspection Panel also plays an important role in clarifying obligations under the Bank's *Operational Policies* and shaping the future project design.¹⁵²

Beyond this, the *Policies* can affect the development of international best practice and even contribute to the development of international law. For example, the Bank's *Environmental Assessment Policy* has been used as a legislative model by both states and other multilateral investment banks.¹⁵³

146 See, eg, Kevin Danaher (ed), *50 years is Enough: The Case Against the World Bank and the International Monetary Fund* (1994).

147 Ruth Alsop (ed), *Power, Rights and Poverty: Concepts and Connections* (2005) 38.

148 See <<http://www.worldbank.org/safeguards>> at 10 December 2008.

149 See generally Ibrahim Shihata, *The World Bank Inspection Panel* (1994).

150 Jonathan Fox, 'The World Bank Inspection Panel and the Limits of Accountability' in Jonathan Pincus and Jeffrey Winters (eds), *Reinventing the World Bank* (2002) 131, 143–4.

151 McBeth, above n 17, 396.

152 Gunduz, above n 58, 32.

153 Darrow, above n 4, 146.

The Bank's current Operational Policies are virtually free of any mention of human rights and contain no reference to international human rights law.¹⁵⁴ One exception to this general rule is the *Indigenous Peoples Policy* which, while not referring explicitly to human rights instruments or the human rights obligations of the Bank or its member countries, takes a rights-based approach.¹⁵⁵ The current *Indigenous Policy*, which replaces the 1991 version, has been effective as of July 2005.¹⁵⁶ The policy objectives read as follows:

This policy contributes to the Bank's mission of poverty reduction and sustainable development by ensuring that the development process fully respects the dignity, human rights, economies, and cultures of Indigenous Peoples.¹⁵⁷

The commitment to human rights standards is unique to the *Indigenous Peoples Policy*, despite the fact that indigenous people are not the only group negatively affected by Bank projects. The absence of an overall human rights policy severely limits the scope for the Bank to be held accountable in instances where the human rights of other groups are violated.¹⁵⁸

1 The New Legal Opinion

Roberto Dañino's *Legal Opinion* was issued on 27 January 2006, only days before he formally resigned his position at the Bank. The new General Counsel, Ana Palacio, has confirmed that she will take the *Legal Opinion* as a starting point for future legal analysis on human rights within the Bank.¹⁵⁹

To a large extent, the legal arguments contained in the *Legal Opinion* mirror those set out in Part II(A) of this article. Dañino's conclusion is that:

[T]he Articles of Agreement permit, and in some cases require, the Bank to recognise the human rights dimensions of its development policies and activities since it is now evident that human rights are an intrinsic part of the Bank's mission.¹⁶⁰

The *Legal Opinion* constitutes an important formal recognition of what has been the Bank's informal practice for a number of years. It is intended to enable the

154 Margaret Wachenfeld, *Safeguard Policy Gap Analysis: Human Rights* (2003) IFC <[http://www.ifc.org/ifcext/policyreview.nsf/AttachmentsByTitle/Human+Rights+Gap+Analysis/\\$FILE/Human+Rights+Gap+Analysis.pdf](http://www.ifc.org/ifcext/policyreview.nsf/AttachmentsByTitle/Human+Rights+Gap+Analysis/$FILE/Human+Rights+Gap+Analysis.pdf)> at 10 December 2008.

155 For a discussion of the *Indigenous Peoples Policy*, see generally McBeth, above n 17, 395.

156 The Bank's 1991 *Indigenous Policy* took a similar approach. It read: 'The Bank's broad objective towards Indigenous people ... is to ensure that the development process fosters full respect for their dignity, human rights and cultural uniqueness': World Bank, 'Operational Policy 4.20' in *The World Bank Operational Manual* (1991).

157 World Bank, 'Operational Policy 4.10' in *The World Bank Operational Manual* (2005).

158 Gunduz, above n 58, 29.

159 One may ask exactly what the Bank is departing from: Ana Palacio, *The Way Forward: Human Rights and the World Bank* (2007) World Bank, <<http://www1.worldbank.org/devoutreach/article.asp?id=388>> at 10 June 2008.

160 *Legal Opinion*, above n 137, [25].

Bank to 'consider human rights explicitly as it engages with its member countries', but leaves the decision on whether such consideration is appropriate be made on a case by case basis.¹⁶¹

Perhaps the *Legal Opinion* indicates that the Bank is willing to begin to make more 'noise' around human rights than was indicated by Wolfensohn when he suggested that the Bank should 'do it quietly'. This is a positive step in that it has the potential to break down barriers around the use of the language of human rights within the Bank. The World Bank Institute's January 2007 issue of *Development Outreach* on human rights and development is an early indicator that this is in fact the direction that the Bank is taking.

However, the *Legal Opinion* does not consider that the Bank should make a formal commitment to respect human rights law in its operations. In this regard it falls short of the standard being advocated in this article.

2 The New IFC Standards

The IFC provides loans, equity, structured finance and risk management products and advisory services for private sector projects in developing countries. On 21 February 2006, after an extensive process of consultation and public comment, the Board of Directors of the IFC adopted a new set of environmental and social standards.¹⁶²

The new safeguards do not contain a stand alone human rights performance standard. The Board of Directors took the approach that the IFC was 'not a norm setter in the human rights area' and 'wanted to move away from the box-checking, compliance approach'.¹⁶³ Instead, human rights were to be woven into the performance standards.¹⁶⁴ The draft policy contains an integrated social and environmental assessment standard (*Performance Standard 1*) and a new performance standard on community health and safety (*Performance Standard 4*). These two additions are positive from a human rights perspective in that they potentially allow for greater emphasis on social impacts beyond the three specific social themes that exist in the current safeguards, namely involuntary resettlement, indigenous peoples and cultural property.

161 Ibid.

162 The Board of Directors of the IFC adopted the new standards on 21 February 2006: International Finance Corporation, 'IFC Adopts new Environmental and Social Standards' (Press Release, 21 February 2006). For more information on the IFC Safeguard Review, see International Finance Corporation, *Policies & Guidelines Update* (2005) IFC <<http://www.ifc.org/ifcext/policyreview.nsf/content/home>> at 10 December 2008. The IFC's previous safeguards relevant to this discussion were almost identical to those of the Bank's public sector lending arms. However, the Bank has not adopted the IFC's new safeguards.

163 International Finance Corporation, *IFC Safeguards Update: Discussion of Human Rights: Summary Notes* (2005) IFC <[http://www.ifc.org/ifcext/policyreview.nsf/AttachmentsByTitle/Feb+14+Human+Rights+Meeting/\\$FILE/Meeting+Summary+HR+EGI+-+IFC+Feb+14.pdf](http://www.ifc.org/ifcext/policyreview.nsf/AttachmentsByTitle/Feb+14+Human+Rights+Meeting/$FILE/Meeting+Summary+HR+EGI+-+IFC+Feb+14.pdf)> at 1 March 2006, 1.

164 International Finance Corporation, *IFC Sustainability Report 2004* (2004) IFC <[http://www.ifc.org/ifcext/sustainability.nsf/AttachmentsByTitle/p_2004SustReport_full/\\$FILE/2004SustReport.pdf](http://www.ifc.org/ifcext/sustainability.nsf/AttachmentsByTitle/p_2004SustReport_full/$FILE/2004SustReport.pdf)> at 15 September 2008, 39.

Performance Standard 1 states that the IFC:

[R]ecognizes that the roles and responsibilities of the private sector in respecting human rights are emerging as an important aspect of corporate social responsibility. The Performance Standards, developed by the IFC to help private sector clients address environmental and social risks and opportunities, are consistent with those emerging roles and responsibilities.¹⁶⁵

Further, Guidance Note 1 on *Social and Environmental Assessment and Management Systems* mandates that in assessing compliance with *Performance Standard 1*:

Applicable laws and regulations of the jurisdictions in which the project operates that pertain to social and environmental matters, including those laws implementing host country obligations under international law, will also be taken into account.¹⁶⁶

Presumably, obligations under international human rights treaties gain relevance here.

In light of the strong links between the work of the Bank and human rights law already discussed, the new safeguards are fairly weak when it comes to incorporating human rights into Bank policy. Importantly, they contain no commitment by the IFC that it will respect human rights in its activities. Instead, the safeguards constitute a continuation of the Bank's general approach to human rights issues over the last decade. While they evince an increasing willingness to integrate human rights goals into Bank work, they stop short of any explicit reference to the existing international human rights framework.

This interpretation of the policy is shared by many who submitted comments as part of the Bank's formal consultation process. In May 2005, the IFC published a *Comprehensive Indicative Draft* which provided a complete summary of the external comments received through public consultation on the draft *Policy and Performance Standards* between 16 August 2004 and 30 April 2005.¹⁶⁷ What emerges from the *Comprehensive Indicative Draft* is a general view that the draft policy does not go far enough in its integration of human rights standards.¹⁶⁸ The *Comprehensive Indicative Draft* reported that '[m]any civil society participants

165 International Finance Corporation, *IFC's Policy on Social and Environmental Sustainability* (2006) IFC <<http://www.ifc.org/ifcext/enviro.nsf/Content/SustainabilityPolicy>> at 15 September 2008.

166 International Finance Corporation, *IFC's Guidance Note 1: Social and Environmental Assessment and Management Systems* (2006) IFC <[http://www.ifc.org/ifcext/sustainability.nsf/AttachmentsByTitle/pol_GuidanceNote2007_intro_matrix/\\$FILE/2007+Updated+Guidance+Note_Intro+and+Matrix.pdf](http://www.ifc.org/ifcext/sustainability.nsf/AttachmentsByTitle/pol_GuidanceNote2007_intro_matrix/$FILE/2007+Updated+Guidance+Note_Intro+and+Matrix.pdf)> at 10 December 2008.

167 International Finance Corporation, *Comprehensive Indicative Draft: International Finance Corporation's Policy on Social and Environmental Sustainability* (2005) IFC <[http://www.ifc.org/ifcext/policyreview.nsf/AttachmentsByTitle/Indicative+Draft+v2+-+Comprehensive/\\$FILE/FINAL+Comprehensive+Indicative+Draft.pdf](http://www.ifc.org/ifcext/policyreview.nsf/AttachmentsByTitle/Indicative+Draft+v2+-+Comprehensive/$FILE/FINAL+Comprehensive+Indicative+Draft.pdf)> at 10 December 2008.

168 Ibid 3.

call on the IFC to clearly state its support for international law and respect for human rights.¹⁶⁹ It later stated that:

A number of civil society participants also suggest the performance standards explicitly require compliance with applicable human rights obligations, and ensure that client activities are consistent with the national and international obligations of the host country [in carrying out the project].¹⁷⁰

Rachel Kyte, Director of Environmental and Social Development at the IFC, defended the decision to move away from 'box-checking' by stating that '[w]e will have greater success promoting corporate responsibility throughout the emerging markets by putting the emphasis on performance and helping our clients rather than on compliance.'¹⁷¹ Time will tell whether this approach is successful in promoting better outcomes for the communities affected by Bank projects.

C Bank Programs

The traditional silence of Bank policy in relation to human rights has resulted in a discrepancy between the Bank's practices across project areas. History has shown that Bank projects are capable of violating human rights laws. One of the most consistently cited project areas in this regard is extractive industries.

On the other hand, in some cases the Bank goes beyond its self-allocated facilitator role and becomes involved in projects that aim to assist with the fulfilment of human rights. One example is the Bank's gender development program where the Bank plays a direct role in the provision of human rights, including civil and political rights which it has often dismissed from its scope of activity.¹⁷²

There are a number of reasons for the irregularity of Bank practice. One commentator has suggested that:

[T]he space left empty by the Bank's lack of consistency and clear guidelines has been occupied by the partisan politics of its members, as well as *ad hoc* reactions to strong external lobbying in particular cases.¹⁷³

It may also be that certain projects, particularly those directly relating to human development, are more suited to the incorporation of human rights standards and language.

Despite the differences in the nature of various Bank projects, there is no reason why all Bank projects would not benefit from the imposition of an overarching commitment to established human rights standards. One of the basic tenets of

169 Ibid 3.

170 Ibid 12.

171 Rachel Kyte, *Private Sector Development Blog* (2006) World Bank, <<http://psdblog.worldbank.org/psdblog/environment/index.html>> at 15 September 2008.

172 Other relevant programs include those relating to indigenous peoples, children and judicial reform: Darrow, above n 4, 158.

173 Gunduz, above n 58, 20–1.

human rights law is that it applies equally to all people.¹⁷⁴ This being the case, the possibilities for the advancement of human rights, or their violation, should not be seen to be any more important in projects such as gender development than they are in projects such as extractive industries.

1 *Extractive Industries*

The Bank's Extractive Industries ('EI') projects, which include oil, gas, mining and chemicals projects, have been one of the most widely criticised areas of Bank activity. Examples of human rights violations resulting from Bank extractive industries projects abound. For example, the Chad/Cameroon pipeline project has been criticised on a number of grounds including its lack of transparency in relation to public consultation, the inadequacy of compensation for around 150 families that have been forcibly resettled, deficiencies in environmental assessments and mismanagement of revenues.¹⁷⁵ Each of these issues has the potential to affect the human rights of people in Chad and Cameroon and should be weighed against the impact of oil revenues on poverty alleviation.

Largely as a result of public criticism of the Bank's EI projects, James Wolfensohn committed in 2000 to funding an extensive review into EI projects. The *Extractive Industries Review* ('EIR') criticised Bank EI projects for, among other things, the negative impact they had on the human rights of many affected populations. One of the key recommendations contained in the EIR was that the World Bank promote and respect all human rights in the course of all of its EI projects.¹⁷⁶ The report lists one of the ultimate goals of the EIR recommendations as being 'to strive for human rights based development'. The report states:

A system-wide policy needs to integrate and mainstream human rights into all areas of [World Bank Group] policy and practice ... It should systematically incorporate experienced, independent and reputable third parties to verify the status of human rights in all relevant projects. A central human rights unit is essential, with regional counterparts, together with a clear policy and mandate for monitoring, verification, and transparent annual audits.¹⁷⁷

In addition, the *Review* recommended enhanced human rights protections, including that the 'adoption of and demonstrated compliance with human rights

¹⁷⁴ See the UDHR.

¹⁷⁵ Gunduz, above n 58, 221–225; Korinna Horta, *Questions concerning the World Bank and Chad/Cameroon Oil and Pipeline Project: Makings of a New Ogoniland? Corporate Welfare disguised as Aid to the Poor?* (1997) Environmental Defence Fund, <<http://www.environmentaldefense.org/article.cfm?ContentID=1019&Page=1&subnav=&project=&colorback=ffffff>> at 15 August 2008.

¹⁷⁶ World Bank, *Striking a Better Balance: The Extractive Industries Review* (2004) World Bank, <<http://web.worldbank.org/WBSITE/EXTERNAL/TOPICS/EXTOGMC/0,,contentMDK:20306686~menuPK:336936~pagePK:148956~piPK:216618~theSitePK:336930,00.html>> at 10 December 2008.

¹⁷⁷ Ibid 7.

principles should be a prerequisite for companies seeking WBG support for extractive industries'.¹⁷⁸

Bank management published its response to the *EIR* in 2005. The response stated that:

The WBG [World Bank Group] shares a broader view of development today than when it was formed ... The WBG now gives much greater focus to social and human capital – with direct implications for the rights of those impacted by project ... Through our broader policies we help advance and protect important rights of members of the communities in which we operate.¹⁷⁹

In terms of specific commitments, the response stated that 'human rights is an issue that goes well beyond the EI sector' and that human rights issues would therefore be resolved with direct reference to overall Bank policy.¹⁸⁰ This was a meaningless commitment given the lack of codified human rights policy within the Bank.

We have seen in this section that the Bank accepts that it engages with human rights but refuses to reference its work to existing human rights law. However, in some areas, such as gender development, the Bank has elected to work outside this general framework.

2 Gender Development

The approach to human rights taken by the Bank in its safeguard policies and again in EI projects should not be considered to be the only option or a foregone conclusion. In other areas Bank activities are closely and explicitly linked with international human rights law. For example, gender development programs often reference the human rights contained in the *Convention on the Elimination of All Forms of Discrimination against Women* ('CEDAW').¹⁸¹

While there is a well established 'business case' for integrating gender into the work of the World Bank,¹⁸² the foundation of gender equality in human rights has also been recognised. The Bank's 2002 *Gender Strategy Paper* states:

178 Ibid.

179 World Bank, above n 176.

180 World Bank, *Extractive Industries and Sustainable Development: An Evaluation of World Bank Group Experience* (2005) World Bank, <<http://web.worldbank.org/WBSITE/EXTERNAL/TOPICS/EXTOGMC/0,,contentMDK:20306686~menuPK:336936~pagePK:148956~piPK:216618~theSitePK:336930,00.html>> at 10 December 2008.

181 *Convention on the Elimination of All Forms of Discrimination Against Women*, GA Res 34/180, UN GAOR, 34th sess, 107th plen mtg, UN Doc A/34/46 (3 September 1981).

182 The World Bank, *Integrating Gender into World Bank Work: A Strategy for Action* (2002) World Bank, <<http://siteresources.worldbank.org/INTGENDER/Resources/strategypaper.pdf>> at 10 December 2005.

The strategy is intended to establish an enabling environment that will foster country-led, country-specific strategies for changing gender patterns that are costly to growth, poverty reduction and human well-being

Greater attention to gender issues is also required by the commitment of the Bank and its member countries to the goals set forth in the United Nations Millennium Declaration, the Beijing Platform for Action, and [CEDAW], all of which have a strong gender dimension.¹⁸³

The practical implication of this approach was evident in a 2004 women's rights project in Chile. The project supports the University of Chile Law School in the design of a curriculum for the integration of international law related to women's human rights in domestic legal frameworks, human rights law training for legal practitioners and the creation of a network through web-based discussions for the exchange of information and technical assistance on women's rights.¹⁸⁴ In relation to this particular grant, a senior advisor in the Bank's MDH Department said:

The grant provides an excellent example of how the Bank can assist countries in the fulfilment of human rights commitments which they have already recognised through the signing and ratification of international treaties and conventions. Such projects demonstrate the Bank's important role in creating an enabling environment for the realization of human rights and linking human rights to development and poverty alleviation.¹⁸⁵

Another example of a Bank project which is not only designed to achieve human rights goals, but does so with specific reference to the international human rights framework, is a paralegal training project based in Kenya which aims to 'entrench women's human rights in the communities and ultimately reduce poverty'.¹⁸⁶

There is extensive research backing the adoption of this explicitly rights-based approach. World Bank research has shown that countries that adopt specific measures to protect women's rights and increase their access to schooling have less corruption and achieve faster economic growth.¹⁸⁷ Importantly, the Bank has found that:

Much of the recent debate about Gender and Development has pitted growth-oriented approaches against rights-oriented approaches, but the evidence we examined suggests that economic development and institutional change are complimentary – and that both are necessary.¹⁸⁸

183 Ibid.

184 World Bank, 'A Women's Human Rights Grant for Chile' (Press Release, April 5, 2004).

185 Ibid.

186 Enricha A Dulo and Pamela C Tuiyott, 'Promoting Women's Human and Economic Rights in Rural Kenya: The Case of Paralegals in Kenya' in Blanca Moreno-Dodson (ed), *Reducing Poverty, Sustaining Growth: What Works, What Doesn't and Why: A Global Exchange for Scaling Up Success* (2004) World Bank <<http://www.worldbank.org/wbi/reducingpoverty/docs/FullCases/AFR%20PDF/Kenya%20Paralegals%20SIDA.pdf>> at 10 December 2008.

187 World Bank, 'Countries that Reduce Gender Gaps Have Less Corruption and faster Growth, says New World Bank Study' (Press Release, 1 June 2000).

188 Darrow, above n 4, 21.

It is clear that in the area of gender development, the World Bank is not merely a facilitator of positive human rights outcomes. It goes further and actively promotes women's rights. The Bank utilises the international legal framework of women's rights in the design and conduct of its projects. The potential for the its activities in this sphere to encroach upon the political sphere (particularly those programs promoting legislative reform such as the Kenya project cited above) does not appear to have been problematic.

D Arguments for Change

The Bank has come a long way since the Portugal/South Africa loans incident in the 1960s. Human rights are now much more prevalent in Bank dialogue than they once were. However, the Bank has not gone far enough to integrate the international human rights framework into its work. Bank policy and practice should reflect reality, not the fictional notion that the Bank always takes a 'hands-off' approach to human rights, or that it is limited to performing the role of a mere facilitator. As McBeth notes, 'nothing can be gained by using alternative labels and insisting that human rights is not their business'.¹⁸⁹

To say that the Bank needs to go further is not to negate the positive work that the Bank can do when it does act as a facilitator. However, it is clear that the Bank sometimes goes beyond this role and occasionally acts to protect and fulfil human rights and in these cases it should make use of the well-developed international human rights framework. On the other hand, Bank projects have the capacity to cause negative human rights outcomes and so it is important that the Bank recognises its probable obligations under international law to respect human rights. Where projects do have the potential to impact upon the human rights of affected populations, a clear human rights-based operational policy which is directly referenced to the international human rights framework could act as a practical guide for staff and ameliorate the possibility of negative human rights outcomes.

Explicit recognition by the Bank of the role of human rights law in the development process would be an important step in the right direction and one which may pave the way for greater international recognition and enjoyment of human rights.

IV INSTITUTIONAL DIFFICULTIES AND PRACTICAL CONSIDERATIONS

Part II(A) established that the Bank's *Articles of Agreement* are not a particularly credible or legitimate limitation on the Bank's capacity to deal with human rights. However, practical and institutional obstacles should be considered in an evaluation of the utility or possibility of incorporating human rights law into Bank policy and operations.

¹⁸⁹ McBeth, above n 17, 393.

This Part cannot discuss all of these obstacles which are many and varied. Rather, its purpose is to assess the main or overarching arguments that have been made against broadening the scope of the Bank's engagement with human rights. These objections are based on both the nature of the Bank and the effect that such a course of action would have on the body of human rights law. It will be argued that none of the objections describe any harm that would outweigh the significant benefits associated with the Bank increasing its commitment to human rights law.

A Institutional Limitations

1 The Bank as a Financial Institution

The Bank is a financial institution and therefore economic considerations must be salient in its operations. Its funding, which is derived from donor states and the private capital market, is largely dependent on its capacity to remain politically relevant and financially viable. In other words, the Bank's continued operation relies, at least in part, on its ability to make loans.

This objective creates a 'loan approval culture' within the Bank and is potentially in conflict with the development and implementation of the Bank's operational policies.¹⁹⁰ Policies are often seen as 'obstacles to lending'¹⁹¹ and Bank staff have claimed that the Bank is 'losing ground due to increasing compliance costs'.¹⁹² Wolfensohn has stated that 'there are so many rules and safeguards now that it is very expensive for some borrowers to use us'.¹⁹³

The effect of policy decisions on the Bank's lending levels is currently relevant because lending, especially lending to middle income countries, has dropped significantly in recent years.¹⁹⁴ The 'constraints of excessively rigorous and demanding social/environmental safeguards attached to Bank projects' has been identified as a significant cause of this drop in lending.¹⁹⁵

Obviously, the effects of any changes on the viability of the Bank as an institution must be considered. There may be costs associated with the introduction of a human rights-based operational policy. These costs could include expenditure on staff training and institutional adaptation as well as the non-economic cost of decreased institutional relevance that may come along with a decrease in lending activity. However, these costs are likely to be mainly limited to the short term.

190 Gunduz, above n 58, 227.

191 Shannon Lawrence, *Retreat from the Safeguard Policies* (2005) Environmental Defence, <http://www.environmentaldefense.org/documents/4279_RetreatSafeguardPolicies_0105.pdf> at 10 December 2008, 7.

192 Ibid 9.

193 S Sanghera and S Fidler, 'World Bank Chief under Fire', *Financial Times* (London), 14 July 2000.

194 IBRD lending has gone from USD15–18 billion in the years between 1990–1997 to USD10–11 billion in 2000–2003: Johannes F Linn, 'The Role of World Bank Lending in Middle Income Countries' (Speech delivered at the OED Conference of the Effectiveness of Policies and Reforms, Washington DC, 4 October 2004).

195 Ibid.

Numerous private actors such as banks, export credit agencies and multinational corporations model their social and environmental policies on those of the World Bank.¹⁹⁶ As of January 2005, banks representing more than 80 per cent of global finance (the 'Equator Banks') have pledged to follow the World Bank's *IFC Policies*.¹⁹⁷ The positive implications for the implementation of human rights law aside, this phenomenon should soften any fears that the Bank will suffer any long term comparative disadvantage resulting from being one of the first to make human rights-related changes to its operating structures. If the Bank's competitors follow its lead and introduce similar human rights-based safeguards, the playing field will eventually be levelled.

In addition, there are other ways in which the Bank could compensate for any disadvantage resulting from a decrease in lending activity. These include, for example, simplifying existing policies, improving upon efficient policy implementation within the Bank and promoting to client countries the long term development value that is added by the inclusion of human rights safeguards.

Finally, and most importantly, even if a human rights operational policy did come with associated costs including a decrease in lending, this would need to be balanced against the benefits derived from the policy. After all, the Bank's ultimate mission is not to improve its credit rating or to be involved in the greatest number of development projects, but to reduce poverty. If this goal is better achieved by the greater incorporation of human rights into its work, then the short term scaling back of its lending activities seems a reasonable price to pay.

2 Policy implementation

Operational policies are of little use if they are not implemented and it is a well-documented fact that Bank policies are often violated.¹⁹⁸ In 2002, the Bank's Operational Evaluations Department produced a report stating that:

The Bank's performance on safeguard policies remains contentious. Implementation has been mixed ... Compliance shortfalls highlighted in highly visible projects have cast doubt on the integrity and quality of the assurance process.¹⁹⁹

196 Galit Sarfaty, 'Book Review: *Between Light and Shadow: The World Bank, the International Monetary Fund and International Human Rights Law* by Mac Darrow' (2004) 98 *American Journal of International Law* 398, 400.

197 Lawrence, above n 192, 7. The principles will be updated in accordance with the new IFC standards discussed previously.

198 Caroline Low and Hope Harrison, 'The World Bank, Human Rights and Development' in Ann Hershkowitz (ed), *The Elegant Report* (2004) 61.

199 Andres Liebenthal, *Promoting Environmental Sustainability in Development* (2002) World Bank <[http://inweb18.worldbank.org/oed/oeddoclib.nsf/DocUNIDViewForJavaSearch/4389E49A874A0EC785256B61005FA2B1/\\$file/environment.pdf](http://inweb18.worldbank.org/oed/oeddoclib.nsf/DocUNIDViewForJavaSearch/4389E49A874A0EC785256B61005FA2B1/$file/environment.pdf)> at 10 December 2008, 19.

Specific examples, particularly of the poor implementation of social policies such as the *Involuntary Resettlement Policy 4.12*, abound.²⁰⁰ While this factor is a real obstacle to effective implementation of human rights standards into Bank projects, the difficulty is not with the idea of a human rights-based policy per se, but rather with the Bank's management practices which allow for policies to be disregarded. The solution that follows from this problem is not to do away with operational policies or limit their scope, but to implement a plan for greater adherence to policy. It is not the purpose of this section to go into detail on what such a plan would involve, but some methods might include offering staff incentives for effective implementation or introducing stricter compliance monitoring mechanisms.

B The Language of Human Rights

1 The Risk of Normative Dilution

Darrow identifies one of the most significant concerns associated with the incorporation of human rights law into Bank operational policies as being the risk of 'normative dilution [of human rights] through inappropriate or insincere operationalisation'.²⁰¹ This risk is exacerbated by the Bank's loan approval culture and track record of poor policy implementation, both of which may leave the way clear for the misuse of human rights law.

In particular there is potential for human rights-based justifications to be used as a means of achieving political, instead of human rights, goals.²⁰² This may have the effect of devaluing human rights law.

While this concern is legitimate, it loses its strength in the face of the Bank's already significant engagement with human rights. In the absence of a clear human rights-based policy guideline, human rights-related activities have been selective and inconsistent. A stark example of the potential politicisation that comes from such a state of affairs occurred during the Cold War when, under US influence, the Bank cut off lending in Chile when Salvador Allende held power, but resumed it under Augusto Pinochet.²⁰³ The potential for the 'normative dilution' of human rights is much greater where human rights are used as a justification for policy decisions on an ad hoc basis.

200 World Bank, *Resettlement and Development – The Bankwide Review of Projects Involving Involuntary Resettlement 1986–1993* (1996) World Bank Environment Department, <http://www-wds.worldbank.org/servlet/WDS_IBank_Servlet?pcont=details&cid=000009265_3980728143956> at 10 December 2008.

201 Darrow, above n 4, 195.

202 Gunduz, above n 58, 229.

203 Ibid, 209. See also Eric Toussaint, *World Bank – IMF support to Dictatorships* (2004) Committee for the Abolition of Third World Debt, <http://www.cadtm.org/imprimer.php3?id_article=809> at 10 December 2008.

The utilisation of the human rights framework would promote consistency in the role that human rights plays in Bank operations. It would act to prevent the politicisation of human rights within the Bank rather than encourage it.

2 The Human Rights Taboo

In a 2004 speech, Wolfensohn told a room full of human rights advocates that:

[O]ne of the things that we have to do in our institution is to try and get things done but to some of our shareholders the very mention of the word human rights is inflammatory language ... We decide to just go around it and we talk the language of economics and social development.²⁰⁴

The difficulty that Wolfensohn identifies arises from the reluctance of donors and clients to expand the role of human rights in the international arena. It is not immediately obvious why human rights would be considered to be 'inflammatory language' to some of the Bank's shareholders. However, two obvious concerns come to mind, both of which stem from a misunderstanding of the nature of human rights.

The first is the perception that adherence to human rights law would cause ambiguities and operational constraints. This idea follows from the view that human rights have a 'strident and absolutist character' and therefore 'impair and even foreclose deliberation over complex issues'.²⁰⁵ Human rights law is not so inflexible and the legal framework acknowledges that human rights obligations sometimes conflict with other legitimate objectives and even compete against each other.²⁰⁶ It is for this reason that the use of the existing human rights framework would be helpful. Over half a century of dialogue, practice and jurisprudence has allowed human rights law to develop ways of dealing with these conflicts. Further, international human rights instruments have always contained permissible limitations to the rights they espouse.²⁰⁷ For example, the *ICESCR* obligates a state party to 'take steps ... to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognised in the present Covenant'.²⁰⁸ This is certainly not the absolutist language that many associate with human rights.

The second misconception is that Bank operations would be prohibitively restrained by legally enforceable obligations.²⁰⁹ It has already been stated that the Bank is unlikely to be subject to conventional human rights enforcement mechanisms. Rather, the more effective enforcement mechanism would be the Bank's own Inspection Panel which has been designed specifically for the Bank

204 Wolfensohn, above n 16.

205 Cass Sunstein, 'Rights and Their Critics' in Henry Steiner and Philip Alston (eds), *International Human Rights in Context* (2000) 333.

206 McBeth, above n 17, 397.

207 Kinley and Davis, above n 107, 60.

208 *ICESCR* art 2(1); see also Kinley and Davis, above n 107, 60.

209 Kinley and Davis, above n 107, 63.

bearing in mind the need for the Bank to function efficiently. A human rights-based policy would allow human rights to be contemplated at the initial stages of project design and considered in decisions between project alternatives.²¹⁰ In addition, human rights could play a role in project assessment and institute a level of human rights accountability on the Bank through the operation of the Inspection Panel.

Finally, some Bank members may also balk at the use of human rights language if they represent states known to be persistent human rights violators. These states sometimes argue that human rights are essentially domestic matters and that international human rights law is a Western construct. This argument was recently made by China when it entered into a deal with Zimbabwe disregarding Zimbabwe's pariah status in the West.²¹¹ Mr Hu Jintao, the President of China, stated that China 'trusts Zimbabwe's government and people have the ability to deal properly with their own affairs'.²¹²

Space precludes this complex issue from being explored.²¹³ Let it suffice to point out that there has been a proliferation of human rights conventions and declarations adopted and endorsed by the international community (including by China and Zimbabwe).²¹⁴ In 1993, 171 states adopted the *Vienna Declaration and Programme of Action*,²¹⁵ art 1 of which commits all states to:

fulfil their obligations to promote universal respect for, and observance and protection of, all human rights and fundamental freedoms for all in accordance with the Charter of the United Nations, other instruments relating to human rights, and international law. The universal nature of these rights and freedoms is beyond question.

In view of the already significant consensus in favour of human rights, to dismiss the applicability of human rights on the basis of objections from violating countries would be to do no justice to the actual strength of this body of law.

There is no doubt that the addition of a human rights-based operational policy would be a costly exercise for the Bank and one that might offend certain political sensitivities. However, these are difficulties commonly associated with innovation and progress. They should not impede action where there is much to be gained.

210 Low and Harrison, above n 199.

211 'Mugabe Signs Aid Deal With China', *BBC News World Edition* (London), 26 July 2005, BBC, <<http://news.bbc.co.uk/2/hi/africa/4713961.stm>> at 27 August 2005.

212 Ibid.

213 For a discussion of human rights and cultural relativism see Sunstein, above n 206, 323–403.

214 Both China and Zimbabwe have signed five of the six major human rights treaties. For updated information on the signature and ratification of international human rights treaties, see <<http://www1.umn.edu/humanrts/research/ratification-china.html>> at 10 December 2008.

215 *Vienna Declaration and Programme of Action*, UN Doc A/CONF 157/23 (25 June 1993).

V CONCLUSION

When the IFC published its new *Performance Standards* in 2006, it missed an important opportunity to formalise the Bank's engagement with international human rights law. However, the topic is not closed for consideration. The Bank's new General Counsel, Ana Palacio, has officially stated that the relationship between human rights law and the work of the World Bank is an 'issue ripe for analysis in light of the evolving connection between human rights and development'.²¹⁶

The opportunity for the advancement of human rights within the Bank is there. Since James Wolfenson recommended in 2002 that the World Bank should be 'quiet' about human rights, opinions within the Bank have changed considerably. The *Legal Opinion* issued by Roberto Dañino is an important indication that the Bank will no longer whisper or speak in code when human rights are at issue. However, more should be done to recognise that human rights protection 'does not merely relate to development, but is central to the development process'.²¹⁷

The effects of the Bank's desultory practical commitment to human rights law can be seen in its project operations and outcomes which have been shown to have discernible effects – both positive and negative – on people's enjoyment of their human rights. It is time that the Bank recognises this reality and accepts its obligation to respect international human rights law.

216 The World Bank, 'Human Rights Day 2006' (Press Release, 7 December 2006), World Bank, <<http://web.worldbank.org/WBSITE/EXTERNAL/NEWS/0,,contentMDK:21153872~pagePK:64257043~piPK:437376~theSitePK:4607,00.html>> at 18 September 2008.

217 Jan Pronk, 'Development and Human Rights' (1981) 18 *UNCTAD Reprint Series* 3.