

**RAOUL WALLENBERG INSTITUTE
of HUMAN RIGHTS and HUMANITARIAN LAW**



FACULTY OF LAW
LUND UNIVERSITY

**Responsibility Denied:
the Bretton Woods Institutions
in International Law**

Duncan Wilson

Master thesis
20 points

Supervisor
Prof. Gudmundur Alfredsson

Field of study
Master of International Human Rights Law
January, 2001

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Abbreviations.

BWI	Bretton Woods institutions
CESCR	Committee on Economic, Social and Cultural Rights
CEDAW	Convention on the Elimination of all Forms of Discrimination Against Women
ECOSOC	Economic and Social Council of the United Nations
ESCR	Economic, Social and Cultural Rights
FAO	Food and Agriculture Organisation
IBRD	International Bank for Reconstruction and Development
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICJ	International Court of Justice
IFI	International Financial Institution
IHRL	International Human Rights Law
ILO	International Labour Office
IMF	International Monetary Fund
NGO	Non-Governmental Organisation
NJIL	Nordic Journal of International Law
NQHR	Netherlands Quarterly of Human Rights
OHCHR	United Nations Office of the High Commissioner for Human Rights
SAP	Structural Adjustment Programme
UDHR	Universal Declaration of Human Rights
UN(O)	United Nations (Organisation)
UNDRD	United Nations Declaration on the Right to Development
UNDP	United Nations Development Programme
UNEP	United Nations Environment Programme
WTO	World Trade Organisation

Acknowledgements.

I just want to say thanks to some people.

Firstly my parents. I don't always show my appreciation but I have been very lucky with the freedom and support. Thanks.

To Emilios for his time and relaxed approach at Edinburgh University.

To Jorge and all my friends at the Instituto Latinoamericano de Servicios Legales Alternativos (ILSA) in Bogota for being the inspiration that made me determined to stick with human rights.

To all the fantastic colleagues, students and staff, at the Wallenberg Institute who have made the time here so fruitful and so entertaining.

To all my friends throughout the first period in Lund. Hopefully we can keep the bonds between us long into the future, keep in touch and be supportive.

To Marité, Gregory, Kimiko, Shane, Pitikan, Paul, Dinga, Manuel, Ilhami and Johanna, the Master House neighbours and everyone else who has taken pity on me with their hospitality and offered friendship.

To the Young Abusers Project in London for being such incredible people and for making me feel useful.

To those lovely London people who made those months bearable. I think I have already thanked you all in person. You remember you promised to visit?

Lastly to my supervisor Gudmundur and to my opponent Ma.

Thanks.

Duncan Wilson, Lund January 2001

Contact: dunk76@hotmail.com

1 Introduction

Seattle, Washington, Prague¹: three cities lately become battlegrounds; ideology in crisis.

Jubilee 2000 gains papal support and a pop singer an audience with the President of the United States². Anti-globalisation and anti-debt are the cries of today's wealthy revolutionary, whose association with a rowdy element and whose advocacy of radical change set her against huge conservative machinery of global government and United Nations impotence.

Society's most vilified figures are the global capitalist and money-lender. The World Trade Organisation is attacked, as democratic people resent its clandestine nature and fear that it serves the interests of the true power holders in this world, parastatal corporations. Those same people despise two organisations set up for what seem like the most benign of motives, the reconstruction of countries decimated by war and the reestablishment of global trading. Yet the International Monetary Fund and World Bank have come to perform functions so far removed from those initially envisaged that one might ask whether they are the same organisations at all.

Dogma inevitably prevails, splashed across the banners carried by the new century's remnants of the spirit of 1968, and spouting from Bank President and Legal Counsel. While those young believers in social justice and global equity struggle to articulate their gut instincts, the more eloquent and slickly evasive voices of Bank, Fund and capitalist representatives successfully discredit their naïve idealism. Conservative journalists keenly deride protestors' values pointing out the inconsistencies of their Nike trainers³ and Gap sweatshirts.

The form which global protest has taken, vacuous and destructive, has led the average person reading of these issues whilst stuffing down breakfast to the obvious conclusion that this is the activity of a mindless or misguided idiocy. An irrelevance, just hyper-active and unwise young people meddling in things over their head. This is unfortunate as it has meant that academics, practitioners and politicians have been slow to support the alternative view, that change is necessary and desirable.

It is also, according to prominent "movement"⁴ writer Naomi Klein, untrue. Klein, author of the definitive anti-capitalist text *No Logo*⁵, the *Das Kapital* of the video game generation, claims that these protests are cross-generational, uniting students with union representatives the age of their parents. Klein, who describes herself as "really radical"⁶, may sit on her global publishing deal and have different motivations for claiming the uniqueness of today's protests. What is undeniable is that the targets of frustration at inequity have changed over the last 35 years. While in the sixties protests were directed

¹ As noted by Professor Sen, while these Northern cities may have grabbed the majority of media attention, they have been joined by "national capitals, all the way from Jakarta and Bangkok, to Abidjan and Mexico." Observer, 25th June 2000.

² "Bono Appeals to US leader" Guardian, 4th October 2000

³ US translation = sneakers

⁴ Klein herself refers to the anti-capitalists in a Burgessian twist simply as "the movement"

⁵ Klein, Naomi *No Logo: no space, no choice, no jobs, taking aim at the corporate bullies* London: Flamingo 2000

⁶ Observer Review 12 November 2000

towards the state, today we see a new level of enterprise. The study of international law has been slow to reflect this. As has been said: “a number of international organisations have reached the point where their function as separate legal entities is underestimated.”⁷

Yet protest diverted from state responsibility misses a central issue in international relations. States remain the main subjects of international law and retain sovereign independence. While states are complicit in the abuses of corporate giants they are *central* to the work of international organisations. The World Bank, the International Monetary Fund and the World Trade Organisation are composed of countries of the world. States are responsible for their actions in international organisations particularly via Executive Directorship, and for their co-operative arrangements with the transnational corporations.

It is also true, however, that the institutions themselves have limited personality in international law and consequent responsibilities under the international normative system, which encompasses not only international private law and liberal tenets of contract, credit and property, so-called capitalist law, but also human rights. The process of globalisation is changing the nature of actors in all areas of life. While once the dichotomy between state and individual seemed to encompass the ambit of relations affecting the human rights of people, this is no longer the case. We live in a world where the policies and practices of Van Heusen clothing, or of the Board of Governors of the World Bank Group is as likely to affect quality of life as a budget announcement by national government.

The question here is whether international human rights law reflects the changed actors.

The “movement”, according to Klein, follows in the footsteps of Las Zapatistas in Chiapas; its greatest unifying belief is self-determination. In international law the term self-determination has a very specific meaning. From Article 1(2) of the UN Charter it has come to be interpreted as external and relative to other nations. “Internal self-determination”, argued for by no less a jurist than ICJ judge Roslyn Higgins, is economic and political recognition and participation of peoples (as opposed to minorities). This right is guaranteed in Article 21 of the African Charter on Human and Peoples Rights. Despite the weight of argument by Rosalyn Higgins, the analogy with Las Zapatistas is, I think misplaced. The more apt claim would be under article 2 (1) of the Charter, and the sovereignty of nation states. Conditionality imposes economic and other changes on a country in return for the loans debt burdens require. Weighted voting in the World Bank based on fiscal contribution denies the sovereign equality of states. Participation and democracy are the new keywords in the burgeoning area of development law and it is these organisations *intra se* that threaten the concepts.

Without any real debate, there has been no real concession. While, as I will discuss, debate within the United Nations System has led the World Bank to admit some form of

⁷ Marc Cogen “Human rights, prohibition of political activities and the lending policies of the Worldbank (sic) and the IMF” in Chowdhury et al The Right to Development in International Law

social responsibilities, there has been very little concrete. There may be vague suggestions of the value of human rights but no subjugation to the body of human rights law. What reformist critique there has been of the Financial Institutions has been attacked on various grounds:

1. Misattribution of responsibility: failing to notice that there was crisis in recipient states *before* BWI projects took effect. (Blaming everything on the World Bank/IMF). In evaluating the performance, particularly of the Structural Adjustment Programmes, NGOs tend to ignore the without project situation.
2. Denying the importance of macroeconomic policy and setting up Structural Adjustment Programmes in opposition to development and the elimination of poverty.
3. Lack of analytical support.
4. Presented as purely negative critique, offering no radically different alternative.

Accordingly, it has been said, in a review of criticism of the IMF that, to the extent that so-called “leftists”, “convey the message that macro management is of second-order importance, or that an excess of demand over supply can be eliminated painlessly, ...[they] ... are doing a disservice to those whose welfare they are trying to promote.”⁸

Perhaps unremarkably, almost exclusively the form of debate has been economic. There has been very little consideration of the international law issues and indeed a great deal of unconventional use of legal terms in support of specious argument. So this paper will not deal in detail with a great many of the mainstays of contemporary discussion of the BWI: the Heavily Indebted Poor Countries Initiative, debt relief and Structural Adjustment Programmes, among others. This for two main reasons: firstly, as stated above, there has been disproportionate economic focus in discussions, with campaigners talking of the immorality and inequity of economic policy. I would not take issue with the point but there is little international precedent for results from argument based along such lines. Secondly, these are also the areas where human rights lawyers have focussed in their studies; I choose a more general discussion of the place of the two organisations in international law.

In this paper I will focus on two central actors, the World Bank and the International Monetary Fund. While discussion will touch the World Trade Organisation, it will not dwell there. The mandate of the WTO centres on trade and only indirectly on development. Sufficient consideration of this organisation’s place in international law is well beyond the space limitations of this paper. I will argue that these organisations *do* have human rights duties and responsibilities, not only due to the fact of their composition by states and their place in the UN System, but also due to their separate international legal personality. This is an attempt to remove discussion to a constructive level. On the plane of law, which must be dynamic and cognisant of genuine paradigm shift, as opposed to mere political trend, discussion is framed around accepted standards of behaviour and obfuscation is diffused. As international organisations, the World Bank and IMF do not exist in a legal vacuum but are subsumed in a fairly well developed corpus of international law.

⁸ Tony Killick [IMF Programmes in Developing Countries](#)

The Financial Institutions often *appear* self-regulating, indeed this capacity is often left unchallenged, seen as though in the nature of their work. This is dangerous assumption, and a worrying precedent. International law sets boundaries, not only to the activity of states, but also all other international actors with elements of international juridical personality.

While the case for the regulation of multinational enterprises is somewhat skeletal and requires some “leaps of faith”, the two organisations here under discussion can be more readily seen as bound into the fabric of the international legal world, being, as they are, specialised agencies of the United Nations. One must also not forget that the “shareholders” in the IMF and World Bank are states, and states are the primary subjects of international law.

We know from the International Court of Justice decision in the Reparation for Injuries⁹ case that personality in international law is not an “all or nothing” concept but rather is based on empirical fact and necessity. We know too that the United Nations is a “family” of organisations. This analogy implies that each element has responsibility to the totality and may be subject to sanction when acting as though fully autonomous. While implementation of international law is weak, and co-ordination in the United Nations perhaps even weaker, as any Professor of law will tell you, law and reality are two different realms. This means that what is reality may not be law as much as it means the opposite. While practice may be erratic this of itself will not change the law. In international law two elements exist for the creation of a new norm of customary international law viz. practice and *opinio juris*¹⁰. If a practice is not challenged it may in fact become the law. It is thus important that it be challenged if it is undesirable.

Yet there is little in the challenges of the Jubilee Coalition¹¹ in the way of structured legal argument. The vast majority of discussion can be centred on Article 2(1) of the United Nations Charter, the sovereign independence of nation states. This is the main thrust of critique on globalisation, notably espoused by Amartya Sen: “the real debate associated with globalisation is, ultimately, ... about inequities of power.”¹² The argument also clearly has some force in relation to the IMF and World Bank given their weighted system of voting, but the scope of potential legal grounding of the organisations is far wider than this. In addition, there are many elements of human rights already evident in, particularly the World Bank, operational policies and directives, and failure to respect these could far more frequently lead to challenge through the Inspection Panel, and, in the case of the IMF, in future, the Independent Evaluation Office.

Whilst these organisations exist international lawyers carry a burden of responsibility to ensure that their activities do not go unregulated. In as far as the BWI act in a manner contrary to international law, each of their members is in breach. The intention is not to attempt a comprehensive trawl through UN documents, commission, sub-committee and

⁹ For case citation and analysis, see later section devoted to International Legal Personality.

¹⁰ Nicaragua (merits) ICJ Rep 1986 p 14

¹¹ Also known as Jubilee 2000, a coalition of charities campaigning for the diminution of world debt burden.

¹² Observer, 25th June 2000.

human rights body agenda items in order to include all pronouncements on human rights and the IFIs. Neither would I wish to do as so many others have so usefully done before, and point out the inequities in loan conditionality. Rather I would like to create a broad picture of the Institutions' role, perceived and potential, in the promotion and protection of human rights, a central purpose of the United Nations.

This paper then, is a timely investigation of the extent of responsibility of these organisations in international law.

1.1 Aims

The aims of this paper are:

1. To place the Bretton Woods Organisations within their international legal context, particularly in relation to international human rights law and United Nations law.
2. To discuss the work of the BWI and its relation to international law, that is, the relation of development to human rights.
3. To consider ways of enforcing international legal obligations of the BWI in existence today.
4. To consider other ways of the enforcement, respect and implementation of Public International Law and especially international human rights law in the BWI.
5. To attempt to illustrate how this interaction works in practice and how it might in fact work in a way more in line with international law.

This is certainly not to attempt a comprehensive analysis of the work these huge institutions but is rather an indication of their place within international law, how this affects and how it might affect their work. I will attempt to identify current relevant trends in the area of development and human rights and within the BWI themselves with the aim of predicting future changes. Finally I hope to make some suggestions on improvements in working practices within the BWI and in co-operation with other specialised agencies.

2 THE BRETTON WOODS INSTITUTIONS IN INTERNATIONAL LAW.

In order to understand the rights and responsibilities of the Bretton Woods Institutions as international organisations, it is essential to place them within a legal framework. The World Bank and IMF are specialised agencies of the United Nations. The World Trade Organisation is the successor to the General Agreement on Trade and Tariffs (GATT), originally to be one part of the International Trade Organisation. As it stands, however, the World Trade Organisation is no part of the UN system although it has co-operating arrangements and practices.¹³

Although the Bretton Woods Agreements were signed in 1944 – and hence before the San Francisco meetings which established the United Nations by the adoption of the United Nations Charter – the institutions resulting therefrom, like the International Labour Organisation, now have Relationship Agreements with the UN. It is these relationship agreements that were envisaged by Article 57 of the UN Charter to bring the Specialised Agencies "into relationship" with the Organisation. The responsibility for overseeing these agreements lies with the Economic and Social Council under Article 63 (1), and by 63(2) ECOSOC also has responsibility for the *co-ordination* of the many specialised agencies within the UN System.

As this is such a complex labyrinth of responsibility and limited mandate organisations, proper co-ordination is essential to avoid competing and conflicting practice. To this end the specialised agencies participate in the Administrative Committee on Co-ordination (ACC) which, according to the United Nations,¹⁴ "ensures full co-ordination between all branches of the UN System". That statement appears over ambitious when compared to the conflicts in the rhetoric between different members of the UN family. They do not all appear to be pulling in the same direction. Indeed at times they may appear to be conflictual in their priorities and policy statements. An apposite example of this would be the seeming disharmony between the World Bank and the UNDP¹⁵.

Despite the elevated claim made for the ACC by UN propaganda, it is valid to question its effectiveness. Far from a picture of unified harmony, the UN system at times creates the appearance of a group of independent organisations bound only to their specific mandatory documents, failing to view the broader picture of the purposes and principles of the UN as a whole. Specifically, as regards the Bretton Woods Institutions, the self-imposed isolation of the two organisations within the UN System is central to their reluctance to accept human rights responsibilities and I will return to it later.

The legal responsibilities of the BWI are affected by a number of factors, among which are:

1. Their constitutional documents i.e. the Articles of Agreement and Relationship Agreements.

¹³ Basic Facts About the United Nations, 1998 p 23

¹⁴ Basic Facts p 21

¹⁵ On this, see later discussion.

2. Their place in the UN system – i.e. to what extent are they bound by the UN Charter and to co-operate with other members of the UN family?
3. International legal personality – are they bound by norms of international law directly?
4. The legal obligations of the Member States.

Before moving to the broader discussion of the place of the Bretton Woods Institutions in the United Nations, and their consequent responsibilities within the organisation, let us begin with a look to their constitutional documents.

2.1 Constitutional Documents.

The constitution of each institution is contained in two documents, the Articles of Agreement and the Relationship Agreement. It is these two documents that set the limits of their respective competencies. Until very recently they were reluctant to look any further than their Articles of Agreement to determine obligations. Indeed it remains questionable to what extent that position has altered¹⁶. It is, then, essential that this Statute be fully considered.

Over time the constitutional documents have come to be interpreted and re-interpreted, along with fluctuating policy showing the malleability of the documents, and permitting questioning of the underlying motivation to interpretation.

2.1.1. The Articles of Agreement

2.1.1.a. A Conception of Development.

As we will later discuss, there are two broad paradigms in current development thought and practice, economic centred development and human centred development. Both the IBRD and the IMF Articles of Agreement (from now on the Articles) contain purposes that, to modern ears, sound more like pledges to further *human* than *economic* development¹⁷. Yet both institutions determine those provisions to require purely economic motivation.

Looking to the stated purposes of each institution, IBRD Articles foresee: “the development of productive facilities and resources in less developed countries.” While the equivalent provision in the Articles of the IMF (article I s 2) proposes: “to contribute...to the promotion and maintenance of high levels of employment and real income and to the development of the productive resources of all members as primary objectives of economic policy.” Are not the people a country’s primary productive resource and the development of people human development? One must be careful in such analysis to distinguish the “human capital” policies of the World Bank whereby the right to education, for example is guaranteed only in so far as it is deemed of productive

¹⁶ This will be touched on throughout the paper.

¹⁷ This distinction is discussed further when we turn to the new paradigm adopted by the UNDP. For the moment it is sufficient to consider the basis of human development as the development of human potential through the maximisation of individual freedoms and removal of obstacles to freedom (following the conceptualisation of Amartya Sen), or the fulfilment of human rights obligations.

value to market economy. Technical subjects are highlighted and people are seen as means and not as ends in themselves¹⁸. This is antithetical to the fundament of human rights, respect for the dignity of human beings, as it is aligned to what is known as the “fetishism of commodities”, where commodities and not people rule the market, and people, in turn are turned into commodities. What is meant here, rather is that the full development of the human personality, in line with the standards of international human rights law benefits society in that its citizens are inured to the values of tolerance and respect and in turn the scope of their possibilities will be increased as they are empowered intellectually and free from negative and restrictive influences.

In the IBRD Statute is found a pledge to, “[assist] in raising productivity, the standard of living and conditions of labor (sic).” These purposes have been overlooked and overshadowed by an overbearing interpretation of the later Article IV 10.

The phrase standard of living would now be understood by reference to Article 25 Of the UDHR. This contains an expanded definition of the term including food, clothing, medical care and necessary social services, among other factors. So the IBRD is mandated to work towards the provision of basic social services. This is something the Bank claims to be doing with its controversial “user fees” scheme for primary services. The logic of this argument will be considered in Part III: Practice.

Continuing this analysis of the Statutes, in IBRD Article III s1 we see that the institution will conduct “projects for development”- whether economic or human is not specified.

From section 4, the bank shall have regard to the position of the borrower to meet her obligations under the loan. One factor affecting the “position” of the Borrower State is her international obligations. This will include, in the case of over 130 member states of the World Bank and IMF, the obligation to “take steps” towards the realisation of economic, social and cultural rights under Article 2 of the ICESCR. From the interpretation of this phrase by the Committee on Economic, Social and Cultural Rights (the ESCR Committee) we now know that a state is bound to actively pursue the rights embodied in the Covenant i.e. indolence and pure rhetoric are to be considered breaches. The economic burden of debt servicing places strain on developing or emerging economies and can adversely affect their ability to comply with this obligation; all of this was noted by the ESCR Committee in its General Comment No. 2.

2.1.1.b. Prohibition on Non-Economic Criteria.

Argument on human rights and the World Bank has for the most part settled around this set of provisions. Close analysis of what they actually say is thus central to the whole human rights and development debate, and to the focus of this paper: the Bretton Woods Institutions in international law.

¹⁸ The distinction is Kantian. It is the underlying principle of the Metaphysics of Morals, that no-one should treat his fellow as a means only but as an end in him-/herself.

By Section 5 (b) the proceeds of loans are to be used only for the purposes for which granted {this is the sanctioning of loan conditionality} without regard to political or other non-economic influences or considerations. In traditional arguments by World Bank Legal Counsel, such excluded considerations have included human rights. Human Rights is legal obligation. In prohibiting recipient states from using the funds to fulfil their legal obligations the Bank appears to be compelling breach of International Law. If this is so and legal obligation is indeed to be included under “other non-economic influences” then this provision goes against the general legal principle that there can be no legally binding duty to break the law.

This provision should be clearly distinguished from the prohibition on BWI consideration of non-economic factors in *project decisions*. Whereas the provision under discussion proscribes the deflection of loan capital to extra-conditionality purposes (i.e. focuses on the *project*), Article IV 10 concerns the consideration of a loan application in respect of the government of the state (i.e. focuses on the political climate and *government*).

Article IV s10: political motivation is prohibited. This is an article around which much argument has centred, commentators seem in confusion as to its meaning, as indeed does the Bank itself.

In order to see what was originally meant by this provision one may look to the words of the “founding fathers” of this document. The two main progenitors were Harry White of the US and Lord John Maynard Keynes of the UK. In his original draft of the provision Mr White envisaged a Bank that was not politically neutral. His first draft plan, submitted in 1941 included the following purposes:

To make easier the solution of many economic and political problems that will confront the peace conference; (10) to enhance the opportunity throughout the world for a healthy development of democratic institutions.¹⁹

These purposes were squeezed out to be replaced with Article IV (10). This was apparently as a result of the US desire to remove any reason that could prevent the Soviet Union joining. The provision read, in the *travaux preparatoire*, as being that the Bank and its officers “shall scrupulously avoid interference in the political affairs of any member.” Thus clearly a guarantee of non-interference in the internal affairs of a member state, along the lines of Article 2(7) of the UN Charter. Such a provision could not cover the case of human rights, which has not been seen as within the internal jurisdiction of sovereign states at least since the Namibia decision of the ICJ.

In this case²⁰, in the process of answering three questions as to the status of what is now Namibia and the legal obligations of the Union of South Africa, the ICJ had cause to consider issues of the human rights of the people. Invoking Article 80 of the Charter, the ICJ declared that the rights of peoples, and *not only of states* were safeguarded until

¹⁹ Quoted in E Mason and R Asher *The World Bank Since Bretton Woods*, Washington DC, The Brookings Institution 1973 p19

²⁰ Officially known as the *Advisory Opinion on the International Status of South-West Africa: Advisory Opinion of 11 July 1950*. Taken from www.icj-cij.org/idecisions/isswasummary500711.htm

trusteeship agreements are concluded. The court further declared that the General Assembly had authority to exercise supervision over compliance with the Article 80 guarantee by virtue of Article 10 of the Charter (a catch-all provision empowering the General Assembly to discuss and make recommendations to, *inter alia*, the Security Council and the Member States). In so deciding the Court effectively held that human rights were no longer exclusively a matter of internal competence but had an international character and could also be internationally monitored and enforced.

So the Bank could not invoke the original meaning of the provision to ignore human rights. The argument is complicated, however, by the fact that the Bank may now consider the economic effects of political events²¹. So, precluded from considering the political character of Member States in considerations of loan applications, the Bank may now bear in mind the economic consequences of the same political conditions. This distinction is illusory. The Bank *can* thus consider political factors as they effect economic expediency. Surely it is prudent for an institution seeking to encourage private investment to secure the political (liberal) conditions that will allow the so-called “free” market to flourish. So the Bank has (given itself) a political mandate in loan decisions, and yet irreconcilably ignores human rights issues in those same decisions. And all this it does by contriving to apply the same principles in each case, which, interpreting the original meaning of the constitution through the new rules of international law, produces precisely the inverse result. In other words considerations of the political character of governments would *still* be prohibited by article 2(7) of the UN Charter and considerations of human rights would be *permitted* following the Namibia decision of the ICJ. In fact, as I will argue, consideration of human rights is *mandatory*.

The Fund Articles do not contain such express, if widely misinterpreted, provisions. The two relevant provisions are Article I on the purposes of the Fund (already touched on) and Article IV section 3(b) which deals with regulation: “these principles shall respect the domestic social and political policies of members, and in applying these principles the Fund shall pay due regard to the circumstances of members.”

2.1.1.c. Conditionality.

Article XXX lit d, the euphemistically entitled “stand-by arrangements”. Under these provisions recipient states are required to complete certain measures to reverse balance of payments deficit, in the case of IMF loans, and internal economic decline, in the case of the World Bank. Although this is included in the Articles, according to Akehurst, it does not amount to a treaty obligation. In effect, however, developing nations have been enslaved since the early gung-ho days of granting loans without greatly considering the likelihood of repayment. In order to service debt, nations need to take on more.

2.1.1.d. External Relations.

Article V s8 deals with the relationship to other International Organisations. The Bank is pledged to co-operate with general International Organisations in related fields (such as UNCTAD, UNDP, ILO). The Bank’s co-operation with the UN community of

²¹ By virtue of UN Doc.A/C.4/SR.1645 (30 November 1966)p17.

international organisations will be considered in the section on problems in the UN System. It is, however, useful to bear in mind that the institutions are *bound by their constitutional documents*, that is the Articles of Agreement and the Relationship Agreements (to which I shall turn in a moment) to co-operate with the United Nations²².

It is expedient for the BWI to look no further than their own constitutional documents as they are entrusted with the interpretation of these documents and so find them more predictable. While IHRL may expand over time in a more or less predictable manner, which in turn may be more or less in tune with the dominant development politics within the BWI, the interpretation of their constitutions will always be determined by those same politics. The efficacy of this practice for the BWI has no bearing on its legality. Institutions do not live in a fully self-regulated world, but one where there exists a reasonably developed corpus of Public International Law to which they are subject to the extent that their international legal personality is recognised.²³

2.1.2. Relationship Agreements.

The Relationship Agreements between the specialised agencies and the United Nations ECOSOC are those agreements envisaged in the UN Charter in Articles 57 and 60. Their purpose is to regulate the interaction of the agencies with the parent organisation, to create the framework for co-ordination of all agencies and to place them “in relationship to” the United Nations. Those of the Bretton Woods Organisations differ substantially from those of the other agencies. As an apposite example:

- IFIs must *consider* the decisions and recommendations of the UN²⁴.

In contrast with agreements of other specialised agencies such decisions and recommendations of the United Nations are not required to go before the agency’s governing body *as soon as possible* leading to the initiation of dialogue between UN and the agency. The IFIs are simply required to give “due consideration” to requests for the introduction of agenda items; and to arrange “to the fullest extent possible” for the exchange of information. In other words there is a certain amount of deference to the mighty power base of the two Bretton Woods institutions on the part of the United Nations. Whilst this may have seemed natural in 1948, when these Relationship Agreements were concluded and when the UN was a fraction of its current size and importance, it seems odd today.

2.1.2.a. Relationship Agreement of UN and IMF²⁵

Given that these Agreements form the basis for the interaction between BWI and the UN, it will be necessary to consider them in detail in order to have a clear grounding of the nature of the relationship which in itself is far from self-evident. Whilst it may be

²² The question of co-operation with regional international organisations is an interesting one but is beyond the scope of this paper.

²³ See discussion of the [Reparations for Injuries](#) case.

²⁴ Agreement between UN and IMF art IV(2); Agreement Between UN and WORLD BANK art IV (2)

²⁵ UNTS 1948 p 327

tiresome trudging through the articles of another constitutional document, it should be remembered from the first that key provisions turned out to be more permissive of the inclusion of human rights obligations²⁶ than would be thought from pronouncements and action of the BWI themselves.

Art I (2) The Fund is a specialised agency having wide international responsibilities 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 *responsibilities is and is required to function as independent international organisation*.

i.e. the institutes are specialised agencies of the UN, having responsibilities as a result, but maintain a level of independence.

Art II (1) Representatives of the United Nations shall be invited to participate without vote in meetings especially called by the Fund for the particular purpose of considering the United Nations point of view in matters of concern to the United Nations.

It would be interesting to consider what matters considered by the Board of Governors would not be of concern to the United Nations other than points of purely procedural relevance. For my part I find this incredibly difficult. This is indicative of the anachronism that this document has become²⁷, it is true, as Professor Sen argues in his Observer editorial that “this is not the world of Bretton Woods”²⁸, the world in 2000 is a different place from that of 1944.

Art III “due consideration” should be taken of agenda items requested by the UN

Art IV (1) IMF and UN shall “consult together and exchange views on matters of mutual interest.”

Terms such as these vindicate Dias’ assertion that the Relationship Agreements foresee a relationship of equals, which is unwarranted today. The global community entrusts the United Nations as the foremost International Organisation with overall responsibility for the maintenance of peace and security and the co-ordination of the international community’s response in other areas.

(2) any formal recommendations [from one to the other] will be considered *as soon as possible*.

Art VI (1) THE SECURITY COUNCIL “The Fund *takes note* of the obligation assumed, under paragraph 2 of article 48 of the UN Charter, by such of its members as are also members of the UN, to carry out the decisions of the Security Council through their action in the appropriate

²⁶ that are after all legal obligations, if not on the BWI themselves at least on their members.

²⁷ This point will be taken up later when looking at the arguments of Clarence Dias.

²⁸ The Observer UK 25 June 2000.

specialised agencies of which they are members, and will, in the conduct of its activities, have due regard for decisions of the Security Council under articles 41 and 42 of the UN Charter.”

Once again this weak obligation seems absurd in the context of international law today where the Security Council is at the forefront of international legal decision making. It is the Security Council alone which may determine legally to impose economic or military sanctions under Chapters VI and VII. The idea that two agencies of the United Nations would be, as the wording here implies, at least semi-autonomous in determining the regard due to Security Council resolutions is simply infeasible. This provision would now have to be interpreted as a strong obligation otherwise this would constitute a serious and illogical quirk in the international legal order.

The Bank’s governors spontaneously extended the effect of this provision to resolutions of the General Assembly adopted under the “Uniting for Peace” resolution of 1951. In effect here the Bank was recognising the equivalence of such resolutions to those taken by the Security Council under Articles 41 and 42. This seems reasonable given that the specific purpose of the “Uniting for Peace” resolution was to allow the General Assembly to assume the responsibility for the maintenance of peace and security where the Security Council failed properly to execute this task due to the exercise by one of its members of the veto power. The matter is full of controversy. Although it has been used twice it may, for the purposes of this paper, be considered an anomaly where the General Assembly is effectively acting *as* the Security Council. It is perhaps indicative of its rarity that the General Assembly did not choose to invoke the resolution in 1999 when the Security Council feared Chinese veto of any Resolution on “humanitarian intervention” in Kosovo. In the end, the NATO alliance acted without any United Nations sanction, and hence illegally.

The distinction in the view of the Bank between this situation and other resolutions of the General Assembly was shown dramatically by the attempt of the General Assembly, fifteen years later, to enforce an economic embargo on South Africa and Portugal. The World Bank refused to co-operate, claiming that its Articles of Agreement (it pointed to the ubiquitous Article IV section 10) precluded it from political considerations in the disbursement of loans. The Bank also quoted Article VI (1) of the Relationship Agreement, which did not envisage such directives from the General Assembly *prior to reasonable consultation*. In effect the Bank felt an imposition of power from above; something which it clearly resented.

The UN representative, Mr Stavropoulos, replied²⁹ that he felt the Bank was interpreting “political” too broadly and that the term was never meant to cover *fundamental Charter obligations* (such as, in this instance the imposition of economic sanctions and the respect for human rights). In fact, in his view, this provision was intended to cover issues of *internal* political affairs and non-discrimination against a member on the grounds of the political character of its government.³⁰ This was noted earlier with a look at the

²⁹ UN Doc. A/C.4/SR.1653 (8 December 1966), p5 under the Heading “Statement of U.N. Legal Counsel to U.N. Fourth Committee and Discussion.”

³⁰ 21 UN GAOR 4-20, UN Doc. A/C 4 SR1653, taken from Rschofen and Parra

preparatory work of Harry White and Lord Keynes. He made no comment, however, on the legitimacy of the Bank's claim from the Relationship Agreement that it could only apply General Assembly Resolutions after reasonable consultation.

Article VIII: IMF cannot request an advisory opinion of the ICJ on its relationship with UN.

But could a member request such an advisory opinion? According to the Statute of the International Court of Justice, although only states may be parties to contentious cases before the court (Article 34 (1)), the question as to whether a member state of the United Nations also member of the IMF/ World Bank might request an advisory opinion on the relationship between the UN and IMF/World Bank is left open. From Article 65, "1. The court may give an advisory opinion on any legal question at the request of whatever body may be authorised by or in accordance with the Charter of the United Nations to make such a request." The court is competent to consider the construction of constituent documents of international organisations as is implicit in Article 34 (3).

Art X (2) "To the extent consistent with the provisions of this agreement, the Fund will participate in the work of the Co-ordination Committee".

The extent to which this actually takes place is nominal. The Administrative Committee on Co-ordination and its subordinate bodies is mostly a cosmetic meeting place where very little concrete action is determined. This will be more closely examined under the section on "Problems within the United Nations". Contrast the reality with the expressed intention:

Art XII (1) the purpose of the agreement is the belief that it will contribute to the maintenance of effective co-operation.

2.1.2.b. Significant Differences in Relationship Agreement of IBRD.

Art IV (3) decisions on individual loans are best left to the expertise of the Bank but "the Bank recognises that the UN and its organs may appropriately make recommendations with respect to the *technical aspects* of reconstruction or development plans, programmes or projects."

This provision is best understood as an insistence of independence on the part of the Bank, and very little concession to the other agencies in the UN System.

2.1.2.c. Contemporary Views on the Relationship Agreements

Broadly speaking there are two "camps" holding differing views on the significance of the Relationship Agreements in today's world:

1. “Extreme” view³¹: “the management of the two institutions clearly believe that they are only answerable to their Boards of Governors, who meet once a year, and to the two full time Boards of Executive Directors representing the Governors on the day-to-day approval of policies and operations.”
2. A more sanguine interpretation of the text is that of Clarence Dias³². His view is that the document envisages a relationship of equals. Through the weak language used there is a lack of compelling obligation on the BWI to submit themselves to their position within the UN System and this is “untenable” today given the importance of the United Nations.

There are tentative signs an optimist would read as Bank and Fund involvement and respect for the UN System. Such signs include increasing involvement in the Administrative Committee on Co-ordination (although as I will explain later this remains a largely obsolete club), increasing co-operation on research and statistical gathering with among others the UNDP, and early and central involvement of BWI the UN event on Finance and Development in 2001 seen through their early involvement in its organisation. Consequently the latter view seems more useful.

The Relationship Agreement is undoubtedly out-of-date and unhelpful. The BWI as specialised agencies have responsibilities not to act in breach of the UN Charter. As Bleicher notes, “the Bank...is now capable of acting as a source of strength for the U.N.”³³ and so it should. It is the Bank of Reconstruction and Development, the *conception* of development is crucial. Only human development is attuned to current UN work and thought.

It is unacceptable for the agencies to exist in a legal vacuum and indeed they do not. The UN is not an organisation with a central power administering authority, but all agencies, funds and programmes are bound by the central purposes and principles of the Organisation.

³¹ From Douglas Williams *The Specialised Agencies and the UN: the system in crisis*

³² Dias, Clarence “Influencing the Policies of the World Bank and the International Monetary Fund” in Human Rights in Domestic Law and development Assistance of the Nordic Countries, Rehof and Gulman (eds.) p 60.

³³ See *ibid* n13.

2.1.3 Understanding the Constitutions:

2.1.3.a. The Law of Treaties.

Should the earlier Articles of Agreement now be read in the light of the later human rights covenants? Having highlighted the vague nature of certain of the key provisions, this point is apposite, as it would appear *prima facie* possible to interpret the Articles through the ideology of human rights. Through the human development-type provisions noted above, the Articles *could* actually further the ICESCR. Yet the interpretation favoured by the IFIs excludes this possibility, something which may itself be illegal.

The Articles of Agreement and Relationship Agreements are international treaties. In order to answer any question on the law of treaties the natural starting point today is the Vienna Convention on the Law of Treaties of 1969. In looking to the Vienna Convention one must be careful to recall that, by force of Article 4, the Convention applies only to treaties concluded after its entry into force (27th January 1980). Its importance is not negated, however, as it attempted to codify existing Customary International Law.

The Vienna Convention extends to statutes of international organisations by virtue of Article 5. Article 30 lays down rules for the situation of two successive treaties relating to the same subject matter. The most cogent principle is Article 30 (4) which, when read with Article 30 (3), states that, where the provisions of an earlier treaty conflict with those of a later treaty, then the provisions of the latter treaty prevail in respect of states parties to both. However it is contestable whether this is the case when the latter treaty (the human rights covenants) appears to set the framework for the interpretation of the former (the Articles of Agreement of the BWI). The question is whether the Articles should be read in the light of the Covenants for those states parties to both treaties, and whether there thus exists an obligation to follow the interpretation of the Articles most favourable to International Human Rights Law. While Article 30 envisages situations of clear conflict, it is arguable that the exclusion from consideration of the states' obligations under IHRL in loan disbursement means that the two treaties are, to this extent at least, in direct conflict. The Articles, through the dominant interpretation, oblige the diversion of funds *away* from the public sector, where they may be used to comply with ICESCR obligations. Through *operation* of the Articles this leads, not only to a breach of the obligation to "take steps" towards the realisation of economic, social and cultural rights but even to retrograde steps through the imposition of Structural Adjustment Programmes and the newly designed "Poverty Reduction Growth Facility". The aim of these programmes has been "to eliminate uneconomic, ineffective and wasteful programs (sic)."³⁴ In fact this has meant the reduction in public spending in *inter alios* key areas of health and education.

Further authority comes in Article 31(3)(c) of the Vienna Convention stating that in interpreting a treaty one must consider "any relevant rules of international law applicable between the parties". The obligation is then clear upon those (over 130) states parties to

³⁴ Protecting The Poor During Periods Of Adjustment, The IMF/ World Bank development Committee, August 1987, p 31, quoted in Tomaševski, 1995, p61.

the Covenants who sanction BWI interpretation of their statutes³⁵ to comply in this regard with their human rights obligations. This means the BWI (as constituted by these states' parties to the human rights Covenants) must interpret its Articles in a manner not inconsistent with IHRL. This view is consistent with the judgement of the ICJ in the Reparation for Injuries Case where the court found that the United Nations Charter should be considered in the light of international law.³⁶

Several maxims of "general international law" are also instructive in this consideration. Indeed they set the framework of understanding the provisions of the Vienna Convention and its reflection of customary international law, effective for treaties concluded before the entry into force of the Vienna Convention. *Lex posterior derogat lex priori* is the general principle stating that a latter law replaces an earlier one, this is specifically in the situation where the two laws are in conflict. More relevant to the instant argument are the two maxims: *lex speciali derogat lex generali* and *lex posteriori generalis non derogat lex priori speciali* whereby a specialist law will override a general rule, and secondly, a later general law will not override an earlier specific law. Which of these most closely approximates the extant situation is a moot point. Both the Articles of Agreement of the World Bank and IMF and the human rights covenants are specific in their fields. The articles are specific in the economic field (although covering areas of human rights law) and the human rights Covenants are specific to human rights (although covering areas of international economic law). The correct interpretation would be that which does the least offence to the underlying principles of both. In my estimation this would be that whereby the Articles, which are so capable of interpretation be understood within the context of human rights. The alternative would, and does cause offence to the body of human rights law.

2.1.3.b. Interpretations of Article IV section 10; definitions of "political".

Classically, the World Bank interprets Article IV section 10 as prohibiting any political considerations, including, in its view, human rights. This can no longer be said with certainty to be the case given some inconsistent statements issued by the Bank. So what is the most coherent interpretation of this provision?

Following the argument of Yokota³⁷, the World Bank is only precluded from political considerations when taken in isolation and not from their effect on economics within a member state. This view is mirrored by a Memorandum of the Bank Legal Department of 1967 and more recently by a 1987 paper by then World Bank legal adviser Shihata³⁸. According to the Memorandum, the Bank does on occasion take into account the political character of recipient states and of the censures and condemnation of UN organs. It continued that the Bank is to consider such criteria in addition to all other relevant economic factors. What it may not do, is consider such facts in isolation. The paper of

³⁵ And arguably to all members if one sees IHRL to be, at least in part, *Customary International Law*.- see later discussion on the customary character of the UDHR.

³⁶ Advisory Opinion. ICJ Reports 1949, p174

³⁷ Y Yokota "Non-political character of the World Bank", *The Japanese Annual of International Law*, no2, 1976, p43

³⁸ Memorandum: UN Doc A/6825, 15 September 1967; Speech: I.Shihata, "Prohibition of political activities under the IBRD Articles of Agreement and its relevance to the work of the executive directors", Sec. M87-1409, 23 December, 1987 – unpublished.

Ibrahim Shihata simply stated that “political events which have a bearing on the economic conditions of a member...may be taken into consideration by the Board.”

Thus it is not true to say that the Bank does not consider political criteria, rather that it will not consider them in isolation from pertinent economic implications.

Shihata has gone on to say, in 1988³⁹ that human rights may become a relevant issue in loan consideration but the degree of respect paid by a government to human rights cannot be considered in itself a basis for Bank decision on the granting of loan to that State.⁴⁰

All of this is hardly clear. The result is that the Board of Directors has broad discretion in the assessment of loans and the implications on respect of human rights.

2.1.3.c. And in the Fund...?

There is no such clear provision in the Articles of Agreement of the Fund. The doctrine has developed from the compendious writings of Joseph Gold, former IMF Legal Counsel⁴¹. Gold considers that the Fund is prohibited from consideration of political criteria by Article IV section 3(b), and, through Article I, national policies are social or political if they do not fall within the purposes outlined in Article I. In the analysis above we noted the scope of this article. Essentially “the development of productive resources”, “promotion of full employment” and other such phrases found in among the purposes should now be interpreted in the light of advances made in development discourse to include human development, and thereby the respect for and promotion of human rights.

So it is that from a very narrow base - introspection (the failure to look outward to seek the assistance of fellow organisations working in related fields); conservative interpretation of vague provisions (outdated now in more progressive times); and the reliance on writings of a previous age (Gold wrote well before the upsurge in interest in the relation between human rights and development) – a blinkered economic focus overriding human considerations has become entrenched.⁴²

³⁹ I Shihata, The World Bank and human rights – an analysis of the legal issues and the record of achievements, 8 January 1988, p 14.

⁴⁰ Number 1 on the scetch on page 36.

⁴¹ Gold, J “Political considerations are prohibited by Articles of Agreement when the Fund considers requests for its resources”, IMF Survey 23 May 1988, pp 146-148.

⁴² Sanford turns the whole discussion around by claiming that development banks can never truly be non-political. To suggest that economic development as practised by the two institutions (the promotion of the free market) is neutral is itself a product of liberal hegemony. It cannot be questioned that the development banks do seek to interfere in the internal politics of recipient states as the purpose of their loans is to create the kind of predictable market system based on strong institutions of contract, property and credit where foreign investment can flourish. The question then is not *whether* they can be political at all. They are. Rather it is how they can promote human rights within the countries in which they work. J Sanford US Foreign policy and multilateral development banks, Westview Press 1982, p 21.

2.2 Relations with the United Nations

In arguments on the extent to which the IMF and World Bank are required to protect and promote the principles of the United Nations in their work, account is often taken merely of the Articles of Agreement and the Relationship Agreement. In this regard a common claim is that, following Article V, Section 8(a) of the Articles, the co-operation of the two bodies⁴³ is only required to the extent that it does not require a modification of their respective Articles of Agreement. It may be challenged either that this is a correct reading of the cited provision or that co-operation for the promotion and protection of human rights would be impossible under the Articles as they stand. Taking the second option: throughout the aperçu of the Articles set out above it has become apparent that received interpretation of many of the provisions is highly contingent on the agenda of the institutions themselves. In other words several of the key provisions cited as denying the incorporation of human rights considerations, and hence UN Charter obligations, need not be interpreted so restrictively and do not in fact exclude human rights from Bank/Fund discourse.

2.2.1 Resolutions of the General Assembly.

As members of the UN Family, are specialised agencies not also bound to follow Declarations of the General Assembly (the principal legislative organ of the United Nations)? While Declarations have no binding character as such under Public International Law⁴⁴, unless they pass into or reflect Customary International Law, they are coherent statements of policy by the largest political forum of the United Nations. So, are the BWI bound by two important resolutions impacting on their area of work: the Universal Declaration of Human Rights and the United Nations Declaration on the Right to Development? Also, argues James Paul⁴⁵, they may be bound by the body of principles set out in the Vienna Conference and in the Agenda for Development, norms he claims are rooted in the mandates of the International Bill of Rights, CEDAW and others.

The strongest argument for the importance of the UDHR to the work of the IFIs is that this resolution of 1948 has now passed into customary international law. Such argument is not outrageous. One simply has to look to the ICJ in the Legality of Nuclear Weapons Advisory Opinion, to see that “General Assembly Resolutions...may sometimes have normative value.” The import the Court placed on the instant resolution in that case was reduced due to the substantial numbers of negative votes and abstentions. In the case of the UDHR, however, there were no negative votes whatsoever, and a mere eight abstentions⁴⁶.

This argument is vindicated by a statement of the influential *Institut de Droit International* in a resolution of its 1987 session in Cairo. It was said that certain provisions of a General Assembly resolution, particularly those that purport to have a

⁴³ stipulated in the Relationship Agreement

⁴⁴ They form part of the “soft law” in international law.

⁴⁵ In a speech delivered at the Oslo Symposium of the UNDP and OHCHR.

⁴⁶ The Communist bloc as was, Saudi Arabia and the then apartheid Republic of South Africa.

normative function (e.g. the UDHR), may represent a mere restatement of Customary International Law or may contribute over time to the formation of new custom.⁴⁷

From the Nicaragua (Merits) case, there are two elements of the creation of customary international law: a “[1]general practice [2]accepted as law”. Practice, however, need not be perfect⁴⁸ and instances of state conduct inconsistent with the emerging norm should normally be considered as breaches and not as emerging counter-norms.

Continuing with this argument, in the Fisheries Jurisdiction case the existence of a norm of international law was inferred from claims without *any* consistent practice at all. The view of prominent international lawyer Professor Malanczuk is that there ought to be a balance in the fulfilment of the necessary practice element between what states say, and what they do and, further, that contradictory practice should be less prejudicial where it provokes protest from other nations.

Applying this to human rights: although, as is frequently pointed out in such discussions, states are far from perfect in living up to the aspirations of international human rights law, they are reluctant to speak out openly against the norms themselves, generally denying the alleged breach. It is also true that there are many protests at alleged breaches of human rights law the vast majority of which cite the UDHR as authority. Whilst it is true that they are mostly politically motivated, they clearly stem from a belief in the legal force of the norms, that is the *opinio juris* (the second requirement for the creation of customary norms).

Discussion on the import of the UNDRD is entirely different. The Declaration on the Right to Development provides that human development is the goal of development. It defines individual, collective, national and international aspects of responsibilities and participation in the realisation of the right. The UN System has repeatedly been urged by the General Assembly, and also at the Vienna Conference, to implement the UNDRD as a “practical plan of action” yet it is unlikely that the Declaration will pass into the tome of “hard law” given the unprecedented level of disagreement in the General Assembly.

The right to development is part of positive international law in Africa, by virtue of Article 22 of the African Charter on Human and Peoples’ Rights. This contains a narrow interpretation of the right, however, limiting it to economic, social and cultural rights elements while not countenancing the participatory element it has generally been seen to contain. The African right to development is consequently bereft of an essential element as the stakeholders in the development process are excluded from voicing their concerns, opinions and perspectives. It is a view of development that well suited the politicians who agreed to it. Indeed, following the restrictive criteria they left with Charter drafter Keba M’Baye J, it is remarkable he felt able to include the right at all.

⁴⁷ See Tschoffen and Parra (eds.) p 100.

⁴⁸ Akehurst p 41.

More recent than either of these, although clearly of far lower standing in international law than the UDHR, are two resolutions adopted in 2000. The first was the follow-up to the Copenhagen Social Summit of 1995 and the second the Millennium Declaration.

It is interesting to compare the results of a more democratic forum like the General Assembly of the United Nations with the Executive Directors of the World Bank and IMF. In the first of these two Resolutions, there are pledges to follow people centred development, promoting democracy, Rule of Law, human rights and governance initiatives. There is acknowledgement of the cost of debt servicing in terms of economic, social and cultural rights, the promotion of universal access to high-quality education and health services. There are calls to the BWI to “strengthen the quality and consistency of their support for sustainable development” and develop co-ordinated stratagem in order to “close the gap between goals and achievements” i.e. in order to *do* and not merely *say*. There are several calls to ensure that macro economic policy actually achieves stated goals, and importantly, to place development co-operation under the international Rule of Law, including UN law, as is stated, “so that the objectives and policy approaches of the United Nations conferences and summits (are) given due consideration by those institutions.”

There is thus clear acknowledgement within the United Nations of the current problems the BWI cause to the furtherance of the aims of the parent organisation. What is it then that stops the UN from enforcing its law?

2.2.2 Problems Within the UN.

2.2.2.a. Co-ordination.

There is a glut of Funds, Committees, Programmes and Specialised Agencies working in areas which often overlap. The extent to which their roles are duplicated and at times inconsistent increases with time as their mandates become the subject of auto-extension by liberal interpretation. In the case of the two organisations this widening of focus, whilst it has led to greater co-operation between the two organisations⁴⁹ it has not done so consistently with other organisations concerned with activities BWI are now engaged in⁵⁰. I will come to the problem of co-ordination in a moment, but first to consider the enormity of the UN as it is today. A brief tour through the various UN bodies working in the area of social development will focus the problem.

In the area of social development one may note the Social, Humanitarian and Cultural Committee of the General Assembly, the intergovernmental Commission for Social Development of ECOSOC and the Department of Economic and Social Affairs of the Secretariat. The Secretary General in 1997 set up co-ordination groups on economic and social affairs: the Executive Committee on Economic and Social Affairs and the Executive Committee on Development Co-operation, known as the UN Development

⁴⁹ e.g. Policy Framework Paper (World Bank Operational Manual, Operational Directive 2.20)

⁵⁰ Bradlow and Grossman, “Limited Mandates and Intertwined Problems” 17 HRQ p433

Group. These are comprised of the relevant secretariat departments and offices, regional commissions, the Funds and Programmes but *not* the BWI.

This is of course to make no mention of other huge Funds and specialised agencies such as the UNDP, ILO, UNEP, FAO, UNCTAD⁵¹ and a host of others working in development related areas. Indeed in one way or another the entire United Nations System is working towards the goals of development, particularly if one accepts, as one surely must, the structure of the Agenda For Development that Peace is the foundation for development.⁵²

So, the United Nations Organisation is huge. Yet, despite lay perceptions, it contains no effective central authority. Competencies are delimited along functional lines. With such diversity of disciplinary experts ruling over Specialised Agencies in their fields, chosen on the basis of equitable representation of the 189⁵³ UN members, is it reasonable to expect consistency? What of the agencies or other bodies whose area of work infringes on many disciplines (i.e. most, if not all of the elements of the UN System)? Does there not exist some governing document, judiciously enforced by some central governing body?

Yes, and no. The organisation as a whole is governed by a single document: the United Nations Charter. As I have already commented, the Charter contains human rights guarantees in the preamble, in Articles 55 and 56 and, in fact, much more widely spread throughout its 101 substantive articles. It is the Charter too which lays down the formal framework for co-ordination.

The Framework for Co-ordination in the UN Charter.

Looking to the Charter one begins to understand why co-ordination is so difficult in practice. The UN is to make *recommendations* for the co-ordination of the policies and activities of the specialised agencies⁵⁴. This responsibility lies with the General Assembly, and under its authority, the Economic and Social Council⁵⁵. ECOSOC may carry out this co-ordination role through consultation and recommendations to the specialised agencies directly, through recommendations to the General Assembly and to the member states⁵⁶. ECOSOC may also initiate studies in economic and social areas and make recommendations on this basis *inter alia* to the specialised agencies⁵⁷. It may make recommendations for promoting universal respect for, and observance of, human rights. This power is also vested in the General Assembly directly by Article 13 of the Charter.

In this way the system seems straightforward. Things become more incomprehensible when one considers that the majority of human rights work of ECOSOC is actually

⁵¹ “the most important [UN body] for developing countries”: Malanczuk’s Akehurst p224, now apparently to be scrapped. Clearly a full discussion of the implications of this would be outside the scope of possibility of the present document.

⁵² Report of the Secretary-General A/48/935, 6 May 1994.

⁵³ Source: <http://www.un.org/Overview/unmember.html> correct at 26 September 2000

⁵⁴ Article 58 UN Charter.

⁵⁵ Article 60, UN Charter.

⁵⁶ Article 63, UN Charter.

⁵⁷ Article 62, UN Charter.

carried out by the Commission on Human Rights, which has, since 1979, had responsibility for assisting ECOSOC in its co-ordination activities concerning human rights⁵⁸. The Committee for Programme and Co-ordination has parallel responsibility.⁵⁹

Clearly so called “unity of purpose”⁶⁰ is a significant problem for the United Nations. From the earliest moment, the General Assembly placed the responsibility firmly on the member states to ensure a co-ordinated policy at the national level⁶¹. This leaves open the possibility for disparities in UN policy from country to country. Secretary General Boutros Boutros-Ghali devoted much attention to this issue in “An Agenda For Development” of 1995. He particularly noted the need for “fostering closer co-operation between the UN and the Bretton Woods institutions”⁶².

The Administrative Committee for Co-ordination

Carrying a large share of the burden of co-ordinating United Nations activity is the ACC. Although nominally delimited to administrative considerations, the ACC in fact seeks to co-ordinate policy areas. It is composed of the Secretary General of the United Nations as chairman and the heads of the specialised agencies, the Bretton Woods Institutions and the World Trade Organisation.

The ACC meets twice a year for two days each session. It then reports annually to ECOSOC through its Annual Overview Report. The Report is set at such a high level of generality, stating vague policy priorities such as “Enhancing interactions between the Economic and Social Council and the ACC”; “Meeting the challenges of globalisation”, in relation to which the Executive Heads in 1999 apparently indulged in such practical activity as “reflect[ing] on the strengths [and] weaknesses of the United Nations System in relation to these challenges.”⁶³ Where areas of “common action” are agreed to in this forum, they seem on the whole, if not exclusively, to be incredibly vague. There is no concrete action to be taken, merely e.g. “to contribute to more inclusive mechanisms...to build capacity...to devise more effective partnerships...”. Or more simply, the agreements tend simply to be to agree to the continuance of the forum itself (for after all, these are the goals of the ACC itself). The Executive Heads agree to continue to agree to continue to agree.

What the ACC may do is allow the agencies to see in which areas they are in agreement, in order that they might work together in those areas, whilst continuing to work in a competing and incoherent way in others. This was the case in the 1999/2000 Report, where the HIPC initiative of the BWI for poverty reduction was seen as one aspect of the institutions’ work permitting closer inter-agency co-operative relationship. What the ACC seems unlikely ever to do is iron out the differences between the organisations themselves. There simply is not the power in the Committee to enforce United Nations

⁵⁸ ESC Res.1979/36.

⁵⁹ This section is inspired by the article “Human Rights Co-ordination within the UN System” by Klaus Samson. (in Alston (ed.) The United Nations and Human Rights. 1992 OUP)

⁶⁰ Agenda for Development, p10

⁶¹ GA Res 125(II)

⁶² *ibid.*

⁶³ E/2000/53 p 6.

law on the specialised agencies, particularly not the BWI which are seen as the powerful partners given their obvious financial strength. So when working together in terms of the HIPC initiative, the ACC can lightly pressure the BWI towards human-centred development, something it is unable to do in other circumstances.

It is in fact only recently that the ACC has spent any of its energy considering follow-up to its decisions including decisions of United Nations Conferences.⁶⁴ While this development is clearly to be welcomed, it is a measure of the token nature of the Committee that it has taken until its fifty-fourth year for this to occur.⁶⁵

Under the ACC proper exists subsidiary machinery, entrusted with the day to day responsibilities of co-ordinating activity. There are five committees each of which focuses on a particular aspect of co-ordination: the Organisational Committee (OC), the Consultative Committee on Administrative Questions (CCAQ), the Consultative Committee on Programme and Operational Questions (CCPOQ) and the Inter-Agency Committee on Sustainable Development (IACSD), the Inter-Agency Committee on Women and Gender Equality (IACWGE). In the front line is the Resident Co-ordinator. It is the Resident Co-ordinator who, as the title suggests is “in residence” in a state and oversees the coherent activity of the various United Nations agencies, funds and programmes. In order to guide these individuals, the CCPOQ adopts guidelines, the most recent of which relate directly to the subject matter of this essay “The United Nations and Human Rights: Guidelines and Information for the Resident Co-ordinator System”. The guidelines themselves are voluminous, what is notable, though is that the Bretton Woods institutions are barely mentioned.

In an article written in 1992, it was noted that “over the past twenty years or so, items specifically referring to human rights have only rarely appeared on the agenda of the (ACC)”⁶⁶. A recent exception was the First Regular Session of 2000, where the Executive Heads discussed Globalisation and the United Nations System. It was accepted that “international law and norms must become an integral part of the language of globalisation.”⁶⁷

So what strength of momentum does such an agreement of the ACC have in shifting the determinably lacadazical interest in all matters Human Rights of the BWI? Firstly globalisation is a related phenomenon to global financial markets and international borrowing. It is the conditionality of BWI loans and the standardising effect this has on the economies and superstructures of nation states, that has paved the way for the globalisation process. It is the spread of liberal law, the strengthening of contract, property and credit, that has allowed sophisticated multinational enterprises to overrun previously “volatile” markets. It is seen as the responsibility of the WTO to reconvene for another “round” as soon as is possible to secure the involvement of all states in the process, and to ensure more equitable distribution of the fruits of globalisation.

⁶⁴ Decision in E/2000/53 p 8.

⁶⁵ The ACC was established in 1946.

⁶⁶ Klaus T. Samson, “Human Rights Co-ordination within the UN System” in Philip Alston *The UN and Human Rights*, 1992 OUP

⁶⁷ ACC/2000/4 p12

The WTO is also entrusted as Lead Partner, to establish an integrated framework between the IMF, World Bank, UNDP, UNCTAD, ITC and the WTO. Thus far the organisations have met once in July 2000, and agreed to “mainstream trade priorities into the national development and poverty reduction strategies of the Least Developed Countries”, improved governance between the agencies, division of labour and a proposed trust to seek donor support.

What does this mean in practice? As yet very little, the beginnings in the incorporation of trade as a development priority need not be detrimental to human rights in and of itself: trade is an ageless activity, exchanging resources and wealth. Indeed trade is essential to securing the resources necessary to improve human rights in developing nations. What is important is that the original emphasis on the incorporation of international law in the globalisation process and the focus on the redistribution of the fruits of the process in a more equitable way is not a by-product of concentration on the involvement of emerging market economies in the global trade system, for the overall benefit of the already rich nations and their peoples. That is, once again, this initiative must be checked against the criteria it was set up to fulfil: human rights and international law.

2.2.3 Suggestions for improvement in the relationship between the BWI and the UN.⁶⁸

Under the Charter, the Fund and Bank, as specialised agencies are brought into special relation with the Economic and Social Council of the United Nations by articles 57 and 63 and have obligations stemming from that: theoretically at least they are obliged to report to ECOSOC and to usefully participate in ACC. This is the view of Danilo Turk.⁶⁹ Yet the BWI clearly consider themselves as beasts apart from UN System, as somehow at once within and without the rest of the Organisation. This is one of the principal stumbling blocks to the inclusion of human rights law in the work of the agencies.

It has been said correctly that it is out-with the expertise of the BWI to interpret when and in what ways their operations affect the enjoyment of human rights. As Robichek says of the Fund, “the IMF was designed to be a specialised doctor and not a general medical practitioner, ... as a consequence it lacks the technical competence to deal with problems in many important fields of socio-economic policy.”⁷⁰ From this follows the necessity of sharing the experience of partners in the UN “surgery”. Co-ordination facilitates this exchange. It should go beyond the previous interaction⁷¹ which focused on diminishing the negative effects of the Structural Adjustment Programmes and move into all areas of Bank and Fund work. Such change of practice would mean that the BWI would be agencies of the United Nations, active in promoting and protecting the key principles of the parent Organisation, whilst remaining faithful to their constitutional documents.

⁶⁸ This section is inspired by the article “Limited Mandates and Intertwined Problems” 17 HRQ 411

⁶⁹ UN Special Rapporteur E/CN.4/Sub2/1991/17 paragraphs 53, 168-9 and 203

⁷⁰ Walter Robichek. “The IMF’s conditionality re-examined”, in Joaquín Muns (ed), *Adjustment, conditionality and international financing*. Quoted in Tomaševski, 1995.

⁷¹ Such as joint seminar of Fund/Bank and UNDP, UNFPA, UNICEF, IFAD and WFD, reported in IMF Survey, 12 November 1990.

Ways of incorporating the IMF and World Bank as more active and compliant members of the UN Family are clearly in the interests of any who seek to promote human rights, social justice and equity. It is, frankly, essential for the cause of justice and for the credibility and integrity of the United Nations that the Financial Institutions do not act autonomously and in an unregulated manner.

Such initiatives have been suggested as a means of promoting understanding within the Bank and Fund of the responsibilities that flow from membership of the UN System. These include, as a basis, the strengthening of the co-ordination machinery within the UN. Expanding from this: joint staff training programmes; the incorporation of mutually useful information in reports - which should also include relevant findings and recommendations of other UN agencies; involvement in the UN Development Group – the group of major development agencies seeking to integrate human rights in development assistance. At a more operational level, involvement in UNDAFs (UN Development Assistance Frameworks) which are, according to the Oslo Symposium, “now becoming the basis for a co-ordinated effort at the country level”; and the strengthening of ECOSOC to monitor the implementation of human rights by UN development agencies.⁷²

The International Labour Office provides an example of a limited mandate specialised agency respecting its broader human rights responsibilities. Whilst its mandate is social justice through the promotion and protection of rights in work, the Organisation takes cognisance of the spectrum of human rights responsibilities, notably taking an active interest in the work of the United Nations Committee on Economic, Social And Cultural Rights as it is obliged to do under Articles 16-20 of the ICESCR. It is then possible and certainly desirable to respect international law, including International Human Rights Law while fulfilling the mandate of a specialised agency.

In terms of respect for United Nations internal regulation it has been said that “in addition to acknowledging that the Security Council Resolutions adopted pursuant to Chapter VII of the UN Charter are binding, the IFIs need to recognise evolving trends in international law and to make explicit their interpretations of international law’s applicability to their field of operation.”⁷³ This is in line with the argument of this paper that the IFIs ought to be more cognisant of the recent shift in the development paradigm.

⁷² Suggestions garnered from the above article and the Oslo Symposium of the UNDP and OHCHR.

⁷³ From “Limited Mandates” article p438

2.3 International Law Beyond the UNO.

As Specialised agencies of the UN, the World Bank and IMF work against the background of the fundamental principles of that organisation, primarily the UN Charter and the human rights covenants.⁷⁴ The promotion and protection of human rights is one of the key aims of the UN, mentioned as such in the preamble and reiterated throughout, including explicitly in articles 55 and 56 of the body of the charter.

International human rights law is not limited to United Nations law, but is given expression in a great number of international conventions and customs. Prominent in this corpus is the international Bill of Rights, composed of the Universal Declaration of Human Rights of 1948, the International Covenant on Economic, Social and Cultural Rights of 1966 and the International Covenant on Civil and Political Rights also of 1966. In addition to these there are many important treaties concerning the rights of children and women, non-discrimination, minority and indigenous rights and many others, most of which will be considered at some time during this paper.

To start however with the two Covenants of 1966, these instruments are central to the United Nations having been adopted in fulfilment of the first expressed task of the Commission on Human Rights, established in 1946 as a functional commission of ECOSOC. Philip Alston believes that the “primary thrust of the [ICESCR’s] implementation procedure is directed at the agencies.”⁷⁵ This view is confirmed by a consideration of Articles 16(2) and 17(3). The former provides that the Secretary General will transmit copies of state reports to Specialised Agencies where deemed relevant to their work. The latter states that information previously provided to a Specialised Agency need not be repeated in the state report, clearly presupposing a close working relationship between the Agencies and ECOSOC, the principal organ of the UN responsible for implementation of the Covenant.

We should also consider Articles 18, 19, and 21-24. Article 18 “... provides for the agencies reports...requires the agencies to report on the progress made in achieving the observance of the provisions of the Covenant falling within the scope of their activities, including ‘*particulars*’ of decisions and recommendations on such implementation adopted by their competent organs...on the basis of the UN Charter, their own constitutional instruments, and innumerable declarations and resolutions of the world community, the specialized (sic) agencies have a fundamental responsibility to promote the realisation of human rights in all the facets of their work.”⁷⁶ The other articles cited from Part IV all envisage a co-operative relationship between the Commission on Human Rights, ECOSOC, the specialised agencies and states. A view was expressed at the Oslo Symposium on Human Rights in Development that articles 18 and 23 mean the Covenant anticipates the Agencies reporting on states and making “decisions and recommendations” in relation to the states and the Covenant.⁷⁷

⁷⁴ Rehof and Gulman *Human Rights in Domestic Law and Development Assistance Policies of the Nordic Countries* (1989) p 16

⁷⁵ Alston, P., “The United Nations’ Specialised Agencies and Implementation of the International Covenant on Economic, Social and Cultural Rights” (1979) 18 *Columbia Journal of Transnational Law* 79, 117

⁷⁶ *ibid.*

⁷⁷ Paul Hunt “Reflections on Human Development and Human Rights”, paper presented to the Oslo Symposium. <http://www.undp.org/hdro/Osloreps5.html>

As to whether these obligations extend to the BWI, General Comment No 2 of 1990 issued by the Committee on ESCR states that Article 22 – which describes an ideal working relationship between ECOSOC and specialised agencies working together to further respect for the Covenant - includes an obligation on all specialised agencies *including* the IMF/ World Bank. The Committee pays special attention to the spectacularly low levels of interest among Specialised Agencies other than the ILO, UNESCO and WHO⁷⁸.

As of the year 2000, none of these responsibilities is recognised by the BWI, not even in their more progressive paper "Human Rights and Development"⁷⁹.

The Limburg Principles⁸⁰ on the realisation of the rights contained in the Covenant state that the obligation to “take steps” towards the fulfilment of Covenant rights in Article 2 paragraph 1 of the ICESCR necessitates a respect of “minimum subsistence rights” for all, regardless of the level of economic development. The level of resources available for the completion of this duty *encompass those from the international community*, and there is a duty that all of these resources contribute to the realisation of the rights in the Covenant in an equitable way. In other words, funds from the international community must help redistribute wealth, and combat extant inequalities. The extension of this obligation to the lending institutions is implicit as the donor states are obliged to follow these principles in their development aid.

All of this represents compelling evidence of the responsibility held by the BWI for the realisation of economic, social and cultural rights.

⁷⁸ General Comment No 2 CESCR, UN Doc. E/1990/23 and Corr.1 para 4

⁷⁹ See discussion below under "Changing attitudes of BWI to Human Rights".

⁸⁰ The Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights. UN Doc. E/CN.4/1987/17, 8 January 1987. paras 28 – 28.

2.3.1 The International Legal Personality of the BWI

Reparation for Injuries Suffered in the Service of the United Nations Case⁸¹

In determining the legal personality of international organisations the Reparation for Injuries Case must still be the main legal authority. It was in this case that the ICJ first stated that the subjects of international law may differ in their nature and in the extent of their rights: “their nature depends upon the needs of the [international] community.”

Analysis of and analogy from this case should help answer the question of the international legal personality attributable to the Bretton Woods Institutions.

The case involved the fatality of a United Nations functionary. Central to the legal argument was the question of legal personality of the UN: did it exist and how did it compare to the personality of states, the traditional subjects of public international law.

Decisive in consideration of the *attribution* of international personality to the UN Organisation was the position of the Organisation in respect of its members. The U.N. was found to “occup[y] a position in certain respects in detachment from its Members, and...[to be] under a duty to remind them, if need be, of certain obligations.” Can the same be said of the BWI? Well for the first point, *prima facie* both the IMF and the World Bank seem to qualify; decisions are made for the most part within the bureaucracy of the organisations with minimal state interference and for this reason both have faced accusations of being undemocratic. Article V, Section 5(c) of the Articles of Agreement of the IBRD clearly shows that the duty of the staff and President is to the Bank and that Member States shall respect the *international* character of this obligation. In the second case we need look no further than loan conditionality. The BWI enter into agreements with, and actually impose obligations on their members, through loan disbursement.

In determining the *level* of international personality the court stated that, “the rights and duties [of the international organisation]...must depend upon [the purposes and functions of the organisation] as specified in its constituent documents and as developed in practice.” It was thought to be particularly relevant that the functions of the UN were of such a specialised character that they could not be undertaken by a collective of the foreign offices of the Member States. This is equally true of the BWI, organisations that pride themselves on their political neutrality. Such a stance would clearly be impossible were the organisations not seen as independent in character. It is for this reason that they must have separate international personality.

Thus, following the syllogism embodied by the *ratio decidendi* of the ICJ, the conclusion they reach must be equally appropriate in the case of the BWI. As is stated, “it cannot be doubted that the [o]rganisation has the capacity to bring an international claim against one of its Members which has caused injury to it by a breach of its international obligations towards it.” Just as Newton discovered that for every action existed an equal

⁸¹ Advisory Opinion ICJ Reports 1949, p 174

and opposite reaction, so for every right exists an obligation. Consequently, the conclusion of the ICJ has a logical corollary *viz.* the organisation may also be the subject of a claim for breach of a legal obligation it holds.

The extent and nature of the rights and obligations depend on the functions and purposes of the organisation. With the increased recognition of the relevance of human rights law to the development process it does not seem outrageous to suggest that the BWI have duties in respect of human rights law. This seems more reasonable given the customary nature of many of the provisions of the UDHR and the position of the BWI within the UN system (the crucible of human rights law).

The World Bank itself had to consider the character of its staff and Executive Directors following the US Public Law 95-118 of 1977. This enacted in the United States that its representative in among other fora, the IBRD, should consider in his or her voting, the human rights performance of the recipient state. The question for the Bank hierarchy was whether this amounted to a twofold breach of the Articles of Agreement, flouting Article IV (10) on the prohibition of political considerations, and also Article V, Section 5(c) on the international character of the Bank and its staff. The cogent provision of Article V binds the Members to “respect the international character of [Bank staff’s duty] and ... refrain from all attempts to influence any of them in the discharge of their duties.”

Did this provision apply equally to Executive Directors who were officials of the Bank but appointed directly by the Members? It was the view of the Bank’s Legal Counsel that, while this provision applied only to the President and employees of the Bank, the Article IV (10) prohibition applied equally to Executive Directors. The Bank did however recognise that there was no legal sanction available against an Executive Director motivated by unexpressed political considerations.⁸²

So the Bank certainly believes in a distinction between state representatives and Bank employees. While the distinction may not be clear, it suggests at least a “position in certain respects in detachment from its Members”. The staff of both the BWI and the United Nations have varying levels of independence. In the UN the distinction is between delegates to political fora such as the Commission on Human Rights and ECOSOC, staff members of the Secretariat and independent experts. Precisely the same is true of Executive Directors of the Bank as compares with staff members and experts sitting on the Inspection Panel.

The attribution of rights and responsibilities to the BWI raises two questions. Firstly who would be empowered to hold the BWI accountable for breaches of obligations and secondly, how. The nationality of claims principle was cited in the Reparations case: only the party to whom an international obligation is due can bring a claim in respect of its breach. This is problematic as in human rights as classically understood, individuals hold rights against states, specifically their own state (as “aliens” may benefit from only limited protection of human rights law). Now, however, states may claim breach of human rights law by other states under the optional article 41 of the ICCPR; article 11 of

⁸² See Tschofen and Parra eds, p 105-109.

the International Convention on the Elimination of All Forms of Racial Discrimination of 1965; optional article 21 of the Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment of 1984; article 10 of the Convention on the Prevention and Punishment of the Crime of Genocide, article 47 of the African Charter on Human and Peoples Rights of 1981 – the African Commission on Human Rights having recognised communications made by NGOs since the cases of Maria Baess v Zaire (31/89) and Amnesty International v Tunisia (69/92); article 45 of the American Convention on Human Rights of 1969 – article 44 of which recognises *locus standi* of NGOs legally recognised in one or more member state; and various ILO Conventions where collective complaints may be entertained prepared by states and Trade Unions. There is also an emerging principle of shared responsibility most clearly expressed in the Declaration on the Right to Development⁸³ of 1986, notably in articles 2 and 3.

The paradigm of individual against state complaints is thus changing. There is also emerging discussion of the human rights responsibilities of transnational enterprises and a proliferation of “codes of conduct” having questionable international legal force, and of course discussion of the legal responsibility of the Bretton Woods Organisations.

Irrespective of one’s position on the legal personality of intergovernmental organisations⁸⁴ such as the Bank, the Fund and the WTO, it cannot be denied that the vast majority of members of the organisations are themselves parties to the ICCPR, ICESCR, CERD, CRC, the ILO Conventions and other IHRL treaties.

2.3.2 Obligations of Member States.

Given that the majority of BWI Executive directors, in representing their countries are constrained by their state’s international obligations, the donor nations are legally bound to apply IHRL. The peculiar organisation of the BWI where the day-to-day running is by a non-political body cannot mask the fact that the organisation is still intergovernmental and that the loans are essentially unidirectional: from North to South.

States are the primary subjects of international law. Over 130 members of the BWI are members of one or other or both of the ICCPR and the ICESCR. The main method of monitoring compliance with these treaties is through reporting whereby the states discuss the efforts they have made to comply with their international obligations under each Covenant at the appropriate treaty body. This often involves suitability and sufficiency of legislation, implementation, review and policy but rarely of the activity of the state as a member of the BWI sitting on the Executive Board of the World Bank and IMF. In the interests of transparency the treaty bodies should be aware of and should bring attention to these activities, which have such a profound impact on the implementation of the rights embodied in the treaties.

Whether or not one accepts the argument that the Articles should now be read in the light of IHRL, it is clear that where states’ obligations under the Articles conflict with those

⁸³ UN General Assembly Resolution 41/128 of 4 December 1986.

⁸⁴ For a view on this see Bradlow and Grossman, “Limited Mandates and Intertwined Problems” HRQ 17 No. 3 (1995) 411-442: at 428, “international organisations...are both subjects of international law and bound by its norms.”

under the UN Charter (notably with Articles 55 and 56) then the Charter must prevail. This is following Article 103 of the UN Charter and constitutes a recognised exception to the general rules of Article 30 of the Vienna Convention.

In addition to this, the treaty bodies would be well placed to look to state practice through Executive Directorship of the institutions as one way of promoting the documents they seek to uphold. For example, although as has been said, the CESCR has remarked on the failure of the BWI to promote the rights contained in the ICESCR, they could also consider the practice of the Executive Director of a state when looking at the periodic state report.

2.3.3 Obligation in Operational Directives of the World Bank to Respect Human Rights.

Despite all countervailing argument, all protestations and a huge amount of ignorance of its existence, there is, in the Operational Policy of the World Bank a commitment to promoting human rights in its development activity. Indeed this provision contradicts many statements of Bank General Counsel, speeches of World Bank Presidents and basic practice of the Bank as such. It has yet to be used in the Inspection Panel, where it could be the basis of claims that the Bank has violated its own policy in failing to promote and uphold human rights law. The provision is to be found tucked away in the heart of the main Operational Directive on Indigenous Peoples.⁸⁵

6. The Bank's broad objective towards indigenous people, *as for all the people in its member countries*, is to ensure that the development process fosters full respect for their dignity, human rights, and cultural uniqueness...

This document, however is an Operational Directive. According to the Bank "Operational Directives included elements of policy, procedure, and guidance."⁸⁶ By the 1990s the Bank found it necessary to differentiate these distinct areas, with their varying levels of binding force. It was felt that such confusion may make the work of Bank officials in combating pressure from NGOs and the work of the Inspection Panel in dealing with complaints of materially affected persons, complicated. So now, were this point to come before the Inspection Panel, it would first have to determine the nature, not of this document, which is an Operational Directive, but of this provision, or perhaps even of the (emphasised) phrase. If the obligation to further human rights in all member countries were to be seen as less than an Operational Policy (under the new system the binding elements of the Operational Manual) and perhaps as a mere point of guidance for the implementation of the Policy (and hence not binding), then the claim on the basis of this provision would be inadmissible. The reality is that the mandate of the Inspection Panel refers only to Operational Policies and Procedures⁸⁷ (the new system) and there has been a huge delay in the reworking of the Operational Directives into Operational Policies.

⁸⁵ Operational Directive, September 1991, OD 4.20, Indigenous Peoples para. 6

⁸⁶ <http://www.worldbank.org/whatwedo/policies.htm#defs>

⁸⁷ Inspection Panel Operating Procedures, adopted 19 August 1994, I(1).

3 Development and Human Rights

3.1 General Discussion of the Place of Human Rights in Development Assistance.

There are at least three distinct areas of discussion on the inclusion of human rights criteria in development aid:

1. *Selective Lending*: that is using an assessment of the human rights performance of the national government as a basis for decision on whether in effect they are worthy of receiving funds. In essence this amounts to sanctioning the population under governments who systematically and flagrantly breach human rights norms⁸⁸.
2. *Human Rights Assessment*: Using human rights to assess the effect of extant loans. Under this heading loans would be seen as successful if they can be shown to have improved the situation of human rights in a particular recipient state. This is the fusion of human rights and development (see the later section on “The New Paradigm”). Tomaševski uses the style “remote-controlled development” for such policy-oriented loans, which have become increasingly common over the past twenty years. As was considered at the Oslo Symposium, integrating human rights concerns into programmes of the BWI should *not* result in more human rights conditionality. Instead, human rights should serve as a framework of norms and standards that the multilateral lending institutions should respect in order to avoid the negative impact of their assistance and policies. As it was there expressed, “the Bretton Woods Institutions need to be ‘brought under the rule of international law’”.⁸⁹ This method involves the use of human rights impact assessment by the BWI themselves and by their peer organisations and the UN principal organs and co-ordinating bodies.
3. *Human Rights and Debt*: The impact of the debt burden on the ability of states to comply with their human rights obligations. Clearly debt servicing will account for a large percentage of the annual budget of indebted nations diverting money from *inter alia* health and reforms of justice⁹⁰. In this connection look to the General Comment No 2 of the CESCR para 9 on the impact of the debt burden and Structural Adjustment Programmes on ESCR: “endeavours to respect the most basic ESCR become more, rather than less, urgent. State parties to the covenant, *as well as the relevant UN Agencies*, should thus make a particular effort to ensure that such protection is, *to the maximum extent possible*, built into the programmes and policies designed to promote adjustment.” (emphasis added). The obligation held by international organisations in this regard is thus express.

⁸⁸ What Tomaševski calls “Punishment for the sins of their rulers”, 1993 p 95

⁸⁹ Report of the Oslo Symposium Human Development and Human Rights, 2-3 October 1998 organised by UNDP, UNOHCHR and The Royal Ministry of Foreign Affairs of Norway. Introduction page 9 <http://www.undp.org/Oslore2.html>

⁹⁰ This should not be confused with the resource allocation question brought up by Tomaševski.

The weak obligation of the IFIs is here made explicit as it is expressed “to the maximum extent possible” as opposed to “as a key priority” or some similar phrase. Yet it remains clear that the CESCR *do* consider the IFIs to hold obligations under the Covenant.⁹¹

3.2 The Historic Underpinnings for the Inclusion of Human Rights in Loan Assessment.

The UN first suggested Human Rights impact assessments in 1979.⁹² At the Vienna Conference in 1993 the international community called on BWI to “assess the impact of their policies and programmes on the enjoyment of HR”. Seizing on this pronouncement a year later the OHCHR called on the international development finance agencies to organise an expert seminar on their relation to ESCR and stated that foreign debt payments should not take precedence over fundamental rights, specifically food, shelter, employment and health⁹³.

Not everyone agrees on the wisdom of such a move. It is felt by Moller that the World Bank could not be consistent if it took cognisance of human rights breaches: they are inherently vague and it is not in the expertise of the Bank officials to find breaches. He attempts a partial answer to this problem suggesting that the Bank may seek the opinion of the UN Commission on Human Rights each time it were to consider sanctions on the basis of human rights abuses. Considering this proposition: firstly this would be a subversion of UN competencies. The Security Council is the principal organ empowered by Chapter VI of the Charter to enforce economic sanctions. Secondly, the involvement of the Commission in determining the legality in human rights terms of specific projects may be problematic as the Commission is a political body composed of Finance Ministers meeting once a year in the spring with an already overcrowded agenda. As the World Bank and IMF currently have a great many projects active, monitoring all of them would involve a considerable workload.

This kind of specialist function would be far more suited to a dedicated *ad hoc* subcommittee or to the existing subcommittee for the Promotion and Protection of Human Rights. Such subcommittees are composed of independent experts rather than politicians, far more appropriate in this case of effectively imposing a penalty for breach of IHRL thus maintaining the distinction between human rights *law* and politics. Alternatively, there is the example of the Economic Advisory Council foreseen by Article V s6 As the influence of the IBRD is now seen as crossing over between economic and social development (see the Issue Paper Development and Human Rights discussed later), and given that the Bank claims its expertise ends with economic issues, it seems incredible that there exists no Advisory Council on human rights issues.

The more workable solution respecting UN division of labour, would be human rights impact assessments along the lines of those suggested by Tomaševski⁹⁴. Such

⁹¹ See also Commission on Human Rights Draft Declaration on the effects of SAPs and External Debt (adopted at the 56th Session).

⁹² UN Doc E/CN.4/1334, para 314

⁹³ from Katarina Tomaševski, 5th session of OHCHR HR/CN/559 of 15 Mar 1994.p2

⁹⁴ See Tomaševski, Katarina, “The influence of the World Bank and IMF on Economic and Social Rights” NJIL 64 p 393-395

assessments would need to consider both the effect of World Bank projects in comparison with the no project situation (which is not in fact what the Inspection Panel does)⁹⁵ and the overall human rights impact of the loan in terms of supporting human rights violations and the extent to which the project alters the situation in relation to human rights in either a positive or negative way. They could be conducted either by the Sub-commission on the Promotion and Protection of Human Rights or by an Advisory Council of the Bank, or even by an invigorated Inspection Panel. Whichever were chosen it should, in the spirit of openness, accountability and democracy, report regularly to the UN Commission on Human Rights. Such assessment of BWI work against the norms of human rights was recommended in the Vienna Declaration and Programme of Action of 1993, where it was stated that “prominent international and regional finance and development institutions to assess the impact of their policies and programmes on the enjoyment of human rights”⁹⁶. Recent support for this came at the Special Social Summit of the UN General Assembly.⁹⁷

So what kinds of Impact Assessments? Straightforwardly, these assessments involve a consideration of the potential effects of development policies on human rights, a possible balancing of differing rights of differing stakeholders and the implementation of plans to mitigate or obviate any adverse effect. Obviously this is not at all a simple task, the balancing of importance of competing rights is perhaps the hardest task in human rights jurisprudence. Yet the difficulty in applying this conceptually very simple formula should not detract from the importance of making the effort.

Tomaševski advocates both pro- as well as re-active assessments, based on the view that the “negation and violation of human rights contradicts the declared aim of development”. Consequently such assessments could operate both prior to the commencement of the loan package and *ex post facto*. The value of one is immediate and of the other lies in subsequent practice. This process would require “participatory mechanisms for monitoring and evaluation.”⁹⁸

According to Moller, this does not yield a set of guidelines that could actually work. I do not understand why. The “guidelines” are nothing more or less than IHRL, Moller in effect questions the basis of IHRL when he argues that, “even...core human rights are not free of controversy” as they are breached all the time. Whilst unfortunately it is undeniable that human rights norms are regularly breached, they are almost never openly challenged. Breaches of the law do not undermine the law. We are after all talking about the same states that create(d) the norms.

The implication of Moller’s view is that his criticisms are somehow unique to human rights. This is far from true. All posited law is open to interpretation, the problems of human rights are no more or less than the particularity void spoken of by Professor Detmold in respect of all domestic law. Klaus Gunther’s “U” (theory of universalism)

⁹⁵ See below on the Inspection Panel.

⁹⁶ UN, Vienna Declaration and Programme of Action, World Conference on Human Rights, Vienna 14-25 June 1993, UN Doc A/Conf.157/23 of 12 July 1993, PART II A, para. 2.

⁹⁷ See press Release SOC/00/15

⁹⁸ Global Consultation on the Right to Development as a Human Right. Report prepared by the Secretary-General pursuant to Commission on Human Rights resolution 1989/45, UN doc. E/CN.4/1990/9/Rev.1 of 26 September 1990, para 190.

provides the closest approximate answer. Any interpretation – and this applies equally to human rights law – is only the best approximation available, based on received knowledge at that time. The certainty Moller craves is unattainable in law, a dynamic discipline. His argument against the application of human rights law is consequently specious. Whilst it is true that there are no definitive answers on the question of interpreting the provisions, their application at any time will be sufficiently clear to meet the requirements of the Rule of Law. This has been shown by the jurisprudence of the Human Rights Committee in implementing the ICCPR and by the Inter-American Court of Human Rights and the Commission implementing the American Convention of Human Rights. The European Court of Human Rights has most effectively demonstrated the application of precedent in its jurisprudence on both CPR and certain ESCR.

3.3 The Evolution of Development Thought

In order to place the recent battle and tentative reconciliation between human rights and development practitioners in some form of context, it may be useful to attempt a crude analysis of the evolution of development policy and practice over the past forty or fifty years.

The 1948 Havana Charter seeking to establish the International Trade Organisation according to some, sought to further the attainment of higher standards of living, full employment and conditions of economic and social progress envisaged in Article 55 of the UN Charter. It was this single failure which, according to three acknowledged experts in International Law from the University of Amsterdam, “prevented international trade and international monetary and financial relations from being effectively linked with human development.”⁹⁹

Whether or not this is indeed true, international development law and practice has had to wait many decades for an integration of the development and human rights disciplines.

Current development discourse really only began with the de-colonisation process and subsequent discussion of the New International Economic Order. This was much influenced by neo-Marxist class and structuralist theories in the 1970s seeking redistribution and equity in international relations. In the 80s came the World Bank’s contra-revolutionary focus on economic efficiency, structural adjustment and macro-regulation: a huge error of judgement which increased the need for mutual dialogue between what Professor Alfredsson calls “development people” and “human rights people”. Quite simply economic development in this model ignored the means for the sake of the (perceived) end. And so people suffered intolerably and, importantly, *visibly* as national governments were guided away from what was seen to be inefficient investment in public sector services.

The economically obsessed vision faced a backlash beginning in 1987 with the publication by UNICEF of *Adjustment With a Human Face*¹⁰⁰, and more significantly in

⁹⁹ Weiss, Denters and de Waart *International Economic Law with a Human Face* p119

¹⁰⁰ Giovanni Andrea Cornia et al, eds 1987

1990 from the UNDP Human Development Report and the World Bank “World Development Report”.

In the Words of Otto Sano, in direct contrast with the dominant World Bank policy throughout the 1980s, “the UNDP’s goal was to create a framework for development of peoples’ opportunities in all their cultural and historical varieties.”¹⁰¹ Development theory shifted from economic development to human development.¹⁰²

The resurgence of the profile and respect of human development philosophy, although made necessary by IFI policy during the 1980s, was shaped by the writings of Professor Amartya Sen and Martha Nussbaum.

3.4 “Development as Freedom”: the Influential Views of Amartya Sen.

For Professor Sen development is a process of maximising freedom and, as a corollary, minimising what he terms “unfreedoms” of individuals. The extent of an individual’s freedom is dependent on his income (standard liberal economic logic), but for Sen it also depends on level of education, health care and on the realisation on his civil and political rights.

Sen’s argument goes further, however, and it is here that it differs most strongly from World Bank orthodoxy. For him focussing on the role of development in maximising individual freedom is to concentrate on the *end* sought and ignore the *means*. Development also requires the removal of major sources of *unfreedom* such as poverty, tyranny, poor economic opportunities, systematic deprivation, neglect of public services, intolerance, corruption....and so the list goes on to include the ambit of ESCR, CPR and “good governance” democratic principles.

Freedoms are important on their own without the need to refer to their efficacy in promoting economic development; yet equally they are as much the means as the end of ultimate development. In order to understand the dichotomy in development thought, it is instructive to bear in mind a schema outlined by Sen: he sees two conceptions of development in the modern world:

1. Development is a tough process in which various “soft headed” approaches are to be avoided. (This is illustrated by the inaugural speech by the new Finance Minister of Colombia in discussing the impact of the SAP process in the country: “Esperen sudor y lágrimas”¹⁰³ Literally warning the population to expect sweat and tears.)
2. Development is a friendly process, which improves peoples’ lives.

¹⁰¹ HRQ vol 22 (3) 2000 p 740

¹⁰² see also the words quoted from Nanda in the section headed “Poverty Reduction”

¹⁰³ Cambio Magazine, September 2000.

The two approaches take different views on what *constitutes* development itself and what are simply its *instruments*. The former may be identified with Structural Adjustment Programmes and the latter with human development.

3.5 Human Development: A “New” Paradigm.

The human development vision sought to change the framework of development and place the human dimension at the centre. For the most part though it has remained at a high level of abstraction. The benefit of human rights is that, as rights they focus on the individual and the specific infraction. Whether this is equally true of economic and social rights as it is of civil and political rights is contested but at the very least the rights paradigm allows this possibility. Today we can see attempts to bridge the disciplinary gap, to integrate human rights into development. Rather than simply the end goal of development there are current trends towards their inclusion throughout the process.

Examples of this trend are article 10 of The Vienna World Conference on Human Rights, (defining development as part of human rights and elsewhere in the declaration stating the indivisibility of all human rights); The Oslo Symposium of the UNDP/OHCHR; a “major event¹⁰⁴” planned by the United Nations for 2001; the UNDP paper “Integrating Human Rights With Sustainable Development” of 1998; the UN General Assembly Declaration on the Right to Development of 1986 and its agreement on an Agenda for Development of 1994¹⁰⁵; the recent co-initiative of the OHCHR and UNDP to strengthen human rights development at the country level, the so-called HURIST venture¹⁰⁶ and even, to a lesser extent, the World Bank consultation paper “Human Rights and Development”¹⁰⁷. The reluctance to recognise the human rights obligations in development is inspired by the knowledge that with the introduction of human rights discourse comes a defined monitoring and enforcement machinery. The development agencies are simply reluctant to submit their activities to review of relatively sophisticated UN monitoring network.

Even in the Human Rights and Development publication of the World Bank it is ambiguous the extent to which the World Bank sees itself as bound to uphold the promotion and protection of human rights rather than merely to “create the conditions for the attainment of human rights”. This document of 1998 will be discussed later.

Human Rights and Development: The Responsibility of the World Bank from 1998 remains the most eloquent statement of World Bank policy towards human rights. It is precisely written, managing to be high-sounding without actually committing to human rights, far less so to human rights law. To explain, the document describes the UDHR as a “*challenge* for the World Bank and other members of the United Nations (U.N.) family to advance through their work the *ideals* represented in the U.N. Charter.” The use of language is instructive of the position the Bank holds towards human rights. Both

¹⁰⁴ A/Res/54/196

¹⁰⁵ Report of the Secretary-General A/48/935, 6 May 1994

¹⁰⁶ Mentioned in the Speech of Mary Robinson “Constructing an International Financial, Trade and Development Architecture: The Human Rights Dimension”, given at the Swiss Federal Institute of Technology on the 1 July 1999.

¹⁰⁷ I will have cause to consider many of these progressive steps in more detail.

“challenge” and “ideals” are terms alien to positivist lawyers. To use the term challenge in relation to the UDHR is one thing, as the argument above will have demonstrated its force in law is questioned, but the UN Charter is a legal document, indeed it is the foremost treaty in the world.¹⁰⁸ Its provisions are consequently not ideals, but legal obligation. One might just as logically say that citizens should strive to achieve the ideal of stopping at red lights.

World Bank development thought is also exposed in this document. Whilst conceding that “the world now accepts that sustainable development is impossible without human rights” and that “global economic integration will not open doors to people if they remain illiterate and cut off from knowledge and technology” the Bank insists that “*creating the conditions for the attainment of human rights is a central and irreducible goal of development.*” Adopting the schema of Professor Sen, the World Bank still views development as a goal and not as a process. The advancement of human rights has no place in development, it may begin at the end point of development.

3.6 Steps Towards a Reconciliation.

Sen: “It is not enough to concede verbally (as many advocates of basic reliance on the market do) that non-market institutions may be important; it is necessary to make sure that these institutions are strong and can supplement the market mechanism appropriately and adequately.”¹⁰⁹

This statement is a sensible benchmark for assessing the progression of the BWI in their acceptance of the human development paradigm. Despite the overall policy towards human rights as discussed above, there have been many official statements which have, in one way or another, expounded the necessity of inclusion of certain human rights criteria in (particularly) World Bank¹¹⁰ projects. The next question is whether this interest has been translated into changed practices.

Firstly one must understand what is being said, and then affect a comparison with what is being done. In this section it is appropriate to consider the rhetoric. The reality will be investigated in PART III: Practice.

3.6.1 Speeches of James Wolfensohn, President of the World Bank Group.

Looking through the key speeches made by the President of the World Bank over the past two years one is struck by the frequency with which they talk of human rights. This is generally done indirectly and without recognition of the underlying body of public international law on the topic. Mr Wolfensohn has made reference¹¹¹ to the importance of a strong legal and justice system for the goal of *distributive justice* – a concept which

¹⁰⁸ Article 103 of the UN Charter “In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail.”

¹⁰⁹ Observer, 25 June 2000.

¹¹⁰ Although as we shall see from our discussion on equity and social justice this is also true of the IMF.

¹¹¹ Speaking at Fontainebleau on the 6 March 1999: <http://www.worldbank.org/html/extdr/extme/speech.htm>

would be understood by human rights lawyers essentially in reference to Article 25 of the UDHR.

In the same speech he suggested the fundamental importance of education, although his view of the most effective way in which the World Bank can involve itself in this area – through its “knowledge bank” and virtual classrooms – is far from that suggested by the United Nations Special Rapporteur on the right to education as expressed in her periodic reports to the Commission on Human Rights.

He has said that “the number one issue that we are trying to deal with is poverty and equity.”¹¹² A stance much removed from that suggested by ex- World Bank hierarchy members Joseph Stiglitz and Eugene Black who suggest rather the opposite, that the main purpose and effect of the World Bank is, not only the perpetuation of poverty – admittedly with beneficial side-effects, and contrary results on occasion – but the enrichment of North American business men (and they are almost invariably United States citizens, male, and white).

Still more controversially Mr Wolfensohn issued an apology for globalisation in his speech to the Board of Governors at the colloquium organised in Prague last year. He claimed a link between rising enrolment figures in primary schools, higher attendance at secondary school level, longer life expectancy, lower infant mortality and falling inflation, market liberalisation, and rising foreign direct investment (FDI). In doing so he fails to consider the effect which the privatisation programmes linked with FDI in BWI conditionality have had on the right to work, a central aspect for the realisation of many other economic, social and cultural rights. He also does not discuss the likely higher increase which would have resulted had recipients of World Bank loans not been so heavily restricted in their public spending on, e.g. health and education.¹¹³ Mr Wolfensohn states “The last decade has not only seen an acceleration in globalisation; it has also seen real progress in the quality of policies in developing policies”¹¹⁴ before going on these advances which, it has constantly been argued by human rights professionals, the policies of the World Bank have done little to promote.

Directly on the theme of human development and the inclusion of human rights in development (although without mentioning either of those terms) Mr Wolfensohn states: “development must be comprehensive. It must embrace education and health, but it must also embrace good governance, the fight against corruption, legal and judicial reform, and financial sector reform...all these elements depend on and reinforce each other.”¹¹⁵ It will be noted that this tactic of avoiding all encompassing terms like human rights and human development allows the Bank to autonomously redefine their limits, whilst at once appearing to promote them. It is consistent Bank policy to select elements of human rights to adopt as flagships. The following section will review its efforts in respect of these rights. The interesting thing about this speech is that it shows so clearly selectivity in action. Human Rights, and consequently human development, is a broad discipline,

¹¹² Speech of 6 October 2000, Kiev, “Challenges and opportunities of the 21st Century.”

¹¹³ To be considered in the following section.

¹¹⁴ “Building an Equitable World” Speech by J D Wolfensohn, Prague 26 September 2000.

¹¹⁵ Ibid.

and it is legal obligation, a fact Mr Wolfensohn seems remarkably ignorant of, considering he was once a lawyer¹¹⁶.

Could it be that the reason for this is that the Bank, and its major shareholders (e.g. the United States with a 15% overall stake in the Organisation) demand a return on their investment? Whilst they are prepared to accept cosmetic concessions to the people of recipient nations, they do not wish to jeopardise their prospects of profit by a rash recognition either of the Organisation's responsibility to improve the human rights of the people in these nations or, which amounts to the same result, to admit that a fully integrated approach to development would mean that the respect of the broad spectrum of rights would, in turn further a community's contribution to economic prosperity international trade¹¹⁷.

The final interesting comment from the Prague speech I would like to draw attention to is this protestation of useful compliance within the United Nations System: "we are working with our colleagues within the United Nations System...on selectivity and the division of labor (sic) among us." This is welcome news. Indeed this comment adds to the selection of signs given above justifying the conclusion that BWI integration in United Nations co-ordination may be burgeoning. Much will depend, in this regard on the outcome of the much hyped "financing development event" due to take place this year.

The most direct suggestion I have been able to find in the speeches of Mr Wolfensohn that the paradigm of the Bank may be shifting from economics to include the individual is found in a speech made in June 2000.¹¹⁸ Quoting the view of Joe Stiglitz, that the World Bank had become too economic-oriented, Mr Wolfensohn goes on to state explicitly that "The Bank...agree[s] with Amartya Sen's view that development is freedom...the individual has returned to the forefront. The Purpose of development is...to positively impact on the life of individuals."

What I believe these statements show is a willingness, at least among senior Bank staff, to accept the shifting consensus on development and human rights. How this will be transmitted to practice in Bank projects remains to be seen. The problems with this aspect will be discussed in the following section.

3.6.2 The IMF view

The position of the IMF has traditionally been as noted by Skogly, "that human rights is a matter of domestic redistribution and outside the Fund's mandate". It does now recognise the responsibility to reduce the adverse effects of SAPs.¹¹⁹ Killick, in his work for the Overseas Development Institute of the United Kingdom has noted an important policy shift in the Fund in respect of the effects of their programmes on the most disadvantaged. In a review of thirty Stand-By Programmes of the 1960s and 70s only one was found to

¹¹⁶ "As an ex-lawyer..." from speech "what is the role of legal and judicial reform in the development process?" 5 June 2000

¹¹⁷ The Same line is preached in the introduction to "Human Rights and Development" strategy paper of the World Bank, 1998.

¹¹⁸ "Remarks at the Second Annual ABCDE Conference in Europe on Development Thinking At the Millennium", Paris, 26 June 2000. Speech by JD Wolfensohn.

¹¹⁹ In Finance and Development: an IMF sponsored study

make even the most basic provision to protect the poor from any negative impact.¹²⁰ By 1991, this policy had changed to the extent that, in the Annual Report of that year, the Fund committed itself to the position that Policy Framework Papers should “identify measures that can help cushion the possible adverse effects of certain policies on vulnerable groups...in ways consistent with the program’s (sic) macroeconomic framework.”¹²¹

But, this only extends to protecting “the health and nutritional levels of groups already at the bare subsistence level.” This does, however, still represent a new interpretation of the Articles of Agreement. The apparent broadening of perspective has been delimited in respect of the Bank by Shihata to ESCR and not CPR although he has said that “no balanced development can be achieved, in my view without the realisation of a minimum degree of all human rights.”¹²² For its part the Fund, through then Director Michel Camdessus, ventured into human rights promotion in the 1990s, favouring “economic policies, in all countries, that are sensitive to issues of equitable distribution of the fruits of growth.”¹²³ There has, however, as Tomaševski notes, been “no evidence...from the IMF of putting this into practice”.¹²⁴

The consistent stance of the two Organisations when recognising the value of human rights to (economic) development, has been to draw distinctions between civil and political rights and economic and social rights.¹²⁵ Even stronger than the reluctance to submit to the ICESCR is the ignorance of the ICCPR. The Bank uses its governance initiatives to “cherry pick” elements of the ICCPR most appropriate to capital development and refuses to consider those civil rights less directly impacting on the economy¹²⁶. This subverts the typology presented by no less liberal (i.e. capitalist) an establishment than The Economist magazine, “observing civil and political rights seems to offer the best hope for the economic development that permits the provision of basic necessities. ... Lumping the two sets of rights together – and thus trying to ‘legalise’ issues which should be left to politics and the market – has only muddied the issue of human rights and relieved the pressure on governments to observe civil and political rights.”¹²⁷ Contrasting these two visions of importance in economic development helps show the random nature of the economic view of expediency in human rights. All this inconsistency is of course avoided by acceptance of the legal authority of international law, and international human rights law in particular.

3.7 Suggestions for further improvement.

¹²⁰ See Killick *The Quest*, p225 table B

¹²¹ IMF Annual Report 1991, pp51-52.

¹²² This is in tune with the new development paradigm discussed below.

¹²³ Michel Camdessus, “For sustained, high-quality growth world-wide”, *International Herald Tribune*, 27 September 1989. Quoted in Tomaševski, 1995, p 60.

¹²⁴ Tomasevki, 1995, p 60.

¹²⁵ For Cultural Rights in development, see below, p 45

¹²⁶ For example, speech of former Bank President Robert McNamara, “What we are not capable of is action directly related to civil rights. Such action is prohibited by our Charter” “McNamara on the larger issue: world economy”, *NY Times*, 2 April 1978. Quoted in Tomaševski, 1995, p 64

¹²⁷ *The Economist Human Rights Law Survey* 5th Dec 1998

A solution to this fractured responsibility is suggested by Otto Sano: there is a need for a broader conceptualisation of accountability in human rights thinking.¹²⁸ States are responsible for their violations of treaties to which they are a party *and* of Customary International Law. What is lacking is the recognition of the responsibilities of other international actors, such as international organisations. An alternative vision was suggested by the UN General Assembly in the Declaration on the Right to Development of 1986, where responsibility for breaches is explicitly shared among the international community. This view was also seen above in discussion of the shared international responsibility for the realisation of the rights enshrined in the ICESCR, notably expressed in General Comment Number 2 of the CESCR.

Sano's claim is that seeing human rights through development, and not only development through the lens of human rights, adds something to the realisation of human rights. While it is often argued that ESCR is essentially reducible to non-discrimination, when viewed from the development perspective it is given a meaning in the realisation of human potential.¹²⁹ The emergence of this integrated approach owes much to the work of Amartya Sen and Martha Nussbaum.

The linkage between human rights and development must be concretised in order to be effective¹³⁰, it must be comprehensible and human rights law must retain its binding character. It has been suggested that development *is* human rights, the Declaration of the Right to Development gives nothing more than a framework for understanding rights which were already extant. Others feel that human rights law sets the minimum obligations of those involved in development work; the human rights situation must not be worsened.

The right to development is an amalgamation of human rights and it contains a complex set of duty holders, reflecting the complex responsibilities for the development of states and the capabilities of their people. In the modern internationalised order BWI cannot claim immunity from this understanding of human rights. They very directly affect the spending powers and financial systems of emerging economies. They also sponsor specific development projects in the furtherance of the right to development.

As Sotto also notes, however, there is no institutional crossover between the two disciplines. The International monitors and enforcers of human rights are separate from those of development policy. Also, while human rights is a body of law, development is a body of transient principles. Yet, he believes human rights law cannot solve all problems in development, "what human rights can achieve...relates to the creation of a space of protection and dignity around the human person from where development can move forward." This to me is a confusion of human rights with civil and political rights. These rights to freedom *from* undue, unnecessary and unfair interference are extremely important in "creating the space" in which human being may then flourish, they will also have a voice with which to help shape their society. From civil and political rights alone

¹²⁸ HRQ vol 22 (3) 2000 p 747

¹²⁹ Sotto article in HRQ p 748

¹³⁰ The Committee ESCR noted this in its General Comment Number 2: "[the integration of] human rights concerns into development activities...can too easily remain at a level of generality"

does not follow his next claim, that “Human rights can serve to concentrate the focus of development around the human person.” Rather this should be the great achievement of economic and social rights. Viewing development as a process, economic and social rights provide a *standard for analysing progress*. With civil and political rights providing the “space” and economic and social rights providing the standard by which to assess progress, the process of human development will help realise human potential by improving the standard of living – shelter, sanitation, clothing etc; education; employment; health and so on.

What remains is cultural rights, essential to ensure that the process of development does not lead to global “sanitation” and increasing sameness.

3.8 The Place of Cultural Rights in Development.

The right to culture is guaranteed by Article 27 of the ICCPR. This is the protection of the right to culture of minorities, to be enjoyed “in community with the other members of the group”. There are also legal safeguards of the right to development in Article 15 of the ICESCR and provisions in CERD, CEDAW, CRC and in three places of the African Charter on Human and Peoples’ Rights¹³¹.

Cultural rights are largely omitted from discussions on human rights and development. This is due to the special nature of these rights. It is often considered that development and culture do not mix, that modernity is somehow devoid of culture in the sense of traditions. This is aligned with the liberal view that developed states have attained the situation of global neutrality in which culture is corporeal, culture is *things*, not attitudes: paintings and buildings, not sacred practices and conventions. This view is backward to the point of the imperialist notions encapsulated in Norbert Elias’ famous Nineteenth Century pronouncements on the “Civilising Process”. It is also patently wrong.

Whilst the majority of metropolitan Europeans and North Americans may not feel the impact of culture in their daily lives, it is not necessarily true that there are none within the borders of their states who so view culture. Culture may be just as relevant to communities in the Outer Hebridean islands of Scotland as in rural Zimbabwe. The stance taken by the African Commission on Human and Peoples Rights is progressive. The Commission draws a distinction between positive cultural values and practices to be promoted, as part of the Africans right to culture, and negative cultural practices and values, which intrude on the human rights of others. An example of the latter would be Female Genital Mutilation.

In effect the exclusion of cultural rights from development discourse is in itself a form of cultural imperialism. Although I would deny that there exists any coherent “Western” culture, it is undeniable that liberal ideology has, in these parts, reached the level of hegemony such that it may easily be confused with a dominant culture. It is through a simple application of this ideology that societies appear culturally neutral and globalisation reaches its zenith: we cannot be culturally different as we all drink Coca-Cola, buy our coffee in Starbucks and our clothes in Benetton. That is our shared, global culture.

The systematic exclusion of cultural rights, particularly the recognition of the individual right to culture¹³² in discourse on development and human rights, will inevitably result in the negation of the right by the process of development. This “oversight” must surely stem from the confusion of ideology raised to the level of hegemony, with culture classically understood. If we are to avoid the situation where development means riding ruff-shod over cultural sensitivities, then cultural rights *must* be included in this debate. If

¹³¹ In the preamble, in article 17(3), article 18(2) and the need to balance the right to culture with the other human rights in article 29(7).

¹³² See articles by Asbjorn Eide “Cultural Rights as Individual Human Rights” in Eide, Krause and Rosas (eds.) 1995; and Michelo Hansungule “Individual Cultural Rights” RWI 2000, unpublished.

we do not take this precaution then development, even although sensitive to (most) human rights, will become part of the globalisation process.

Cultural rights are the check against the fears of cultural relativists that universal human rights may be the tool of imperialism. It is essential that they are included in this discourse in order that human rights maintain its place in populist hearts. The cause of human rights would in no way benefit from being subsumed as an element of globalisation. Rather it must remain as the individual, the community and the nation's guarantee of their right to self-determination.

The inclusion of cultural rights is important even if one takes the view that development is not a human but an economic process. I say this because the Human Rights Committee, enforcer of the ICCPR, has held in the case of Kitok v Sweden¹³³ that the right to culture under Article 27 of the ICCPR may extend to economic activity. In the instant case the case involved the Reindeer herding of the Sami people. The HRC expressed the view that traditional economic activity and way of life may fall under the protection of article 27 when such conduct is so closely related to the culture of a group that the activity forms an essential part of its cultural traditions.

Development must no longer be seen as “civilising” and nor must it be seen as this paradigm shift to capitalism. A capitalist society is not necessarily developed in terms of its human potential, and neither is a socialist or mixed economy (like Sweden) necessarily under-developed. As World Bank critic Claude Alvarez observes, “The established dichotomies – backward-forward, traditional-modern, primitive-sophisticated, developing-advanced, inferior-superior-[have] lost the sharp dividing lines that once separated them.”¹³⁴ To expand the Swedish example, from the words of Goran Persson, Swedish Prime Minister “It’s not despite welfare, but because of it that Sweden has developed well”.¹³⁵

3.9 The European Bank for Reconstruction and Development: A new Paradigm?

Finally in this section I would like briefly to mention an example of a development bank with a wholly opposite view of the integration of human rights.

The European Bank for Reconstruction and Development offers a new paradigm of a development bank. In its constitutional document the EBRD promotes multi-party democracy and human rights. Why then is the EBRD capable of doing what the World Bank is not?

There are many differences between the two institutions, the prevailing conditions in the European model facilitating the inclusion of human rights. Primary among these reasons is that the EBRD is a more or less homogenous group springing from what Nicholas Moller describes as “a unique set of circumstances” leading to complete agreement on

¹³³ HRC Communication no 197 of 1985.

¹³⁴ Claude Alvarez, “Deadly Development,” *Development Forum* 11 (October 1983):3 at 4.

¹³⁵ FT Survey on Sweden, Monday 4 December 2000.

political aims of development. He points out that its mandate is in any event limited to specific rights, those central to the market economic model these countries in transition lust after.

Set up in order to integrate the newly independent states of Eastern Europe into the European market its mandate and regulations stem in effect from the extremely strong position of one set of states (the EU members) and their consequent ability to control the development of the emerging democracies. The selectivity of inclusion of human rights in the EBRD betrays the underlying political motivation with which they are being used.

Whilst it is encouraging to note that a development bank may function in the furtherance of human rights, it is disappointing to see the overtly political way this is being done. Human rights, as I have said innumerable times now, is legal obligation and the creation of artificial distinctions between different rights undermines their force and undermines the cause of human development. The Lawyers Committee for Human Rights has pointed out that, in assessing country progress on human rights, the EBRD will only consider “those rights which, in accordance with international standards, are essential elements of multiparty democracy, pluralism and market economics.”¹³⁶

¹³⁶ See the EBRD memorandum, approved by its Board of Directors, “Procedures to implement the political aspects of the mandate of the European Bank for Reconstruction and Development”, London, 28 May 1991, p 4 and LCHR “The World Bank: Governance and Human Rights”, New York, 1993 pp 24-25.

4 Practice.

The Reality: Specific Human Rights Policies of the IFIs

The World Bank in particular has adopted policy documents on human rights in response to violations connected to Bank projects, which have been the subject of exposé and generally scandal. Instrumental in the decision to create an internal monitoring mechanism of respect for policy and procedure were the Narmada dam project and the Narmada canal project¹³⁷.

There have been many examples given in literature of the inclusion of human rights in BWI practice. Rather than indulging in discussion on the “type” of rights the Bank prefers,¹³⁸ I would like to attempt analysis of the Operational Policies (OPs) in this area. I shall briefly compare those to the equivalent standards in international human rights law, and then consider another way of bringing human rights considerations into Bank dam projects. Finally will come consideration of enforcement mechanisms.

Why dams?

Particular controversy has centred around dams. The World Bank has been and continues to be a proponent of large-scale infrastructure projects such as the building of dams for the generation of hydro-electric power, irrigation systems, and the provision of clean water. The other side of these projects has often been the denial of the rights of indigenous populations, the rights of the resettled and other less visible impacts on human rights.

There are three issues related to dams for consideration in this paper: the effect of World Bank Operational Policies and Procedures (OPs), the effect of large World Bank projects on areas where no internal human rights guarantees exist, and the effect of failures by the Bank to comply with its own OPs. The latter is the mandate of the Inspection Panel and so will be considered under that heading. In order to facilitate discussion on the first two, I would like to take as a point of reference the recent World Commission on Dams Report “Dams and Development: a New Framework for Decision Making”. This being an independent and multidisciplinary investigation on the effects of dams on the lives of people it will provide a measure of the effectiveness of World Bank OPs.

Now to consider certain of the Bank’s pet human rights themes in turn.

¹³⁷ This was conceded by Ibrahim Shihata. See Shihata, I “The World Bank Inspection Panel – a background paper on its historical, legal and operational aspects”, paper submitted to Expert Meeting on the Inspection Panel, Lund 1997.

¹³⁸ For discussion of this and the question of the rights promoted see Gillies, David “Human Rights, Governance, and Democracy: the World Bank’s problem Frontiers” NQHR 1 (1993) 3. He believes the World Bank actually to be concerned more with civil and political rights. Cf. and Rhoda Howard “The Full Belly Thesis” 5 HRQ no 4 1983 pp 467-490, who argues for the distinction between CPR and ESCR, and considers the Bank more involved in the latter. Both of whom seem to be wrong given the Bank’s obsession with “good governance” and indigenous peoples rights and the economic and social rights I list here: poverty reduction, education, health and so on.

4.1 Poverty Reduction

The early days: World Bank analysis of poverty reduction in 1974 was that it could be eradicated in 10 years by an investment of \$125bn in food & nutrition, education, water, housing, transport, population and wealth {i.e. human rights}. The World Bank also considered that a 2% income transfer from the Upper Classes to the bottom 40% in developing countries would end poverty in 15 years. Clearly this has not come to pass, but one would expect that the Bank would have had some significant impact over the last 27 years. In contrast, however, it is often questioned whether the World Bank benefits the poor at all. As Ian Skogly states, “the evidence of increased hardship for vulnerable groups as a result of the activities supported by the World Bank is overwhelming.”¹³⁹

There has been an enormous amount of discussion on the effect of World Bank and other development assistance in reducing poverty. Oxfam¹⁴⁰ accuses politicians in both the North and South of “comprehensively renegeing” on promises made in Copenhagen¹⁴¹. Its study found that child mortality was declining at less than half the rate needed to meet the target of a two-thirds reduction by 2015. “The figures reflect a criminal complacency on the part of governments willing to tolerate mass poverty in the face of rising global prosperity.” (Kevin Watkins, Oxfam’s senior policy adviser). Governments in the North had “put debt repayments before the lives of children”, he said. The official line as stated by Clare Short, Minister for International Development, UK, is that the results have been mixed, progress has been made in some areas, and “what we now need is stronger pressure, particularly on developing country governments that are not focused on poverty reduction”.

Available evidence points overwhelmingly to the fact that in capitalist Third World nations growth has been accompanied by massive concentration of wealth and a drastic increase in inequality; thus, “millions of desperately poor people throughout the world have been hurt rather than helped by economic development.”¹⁴²

In reply to a World Bank statement that the poor would benefit as much as any other group from globalisation, Oxfam feel that, “contrary to the claims of the World Bank, there is clear evidence that globalisation is intensifying income inequalities.... poor people are excluded from market opportunities by inadequate access to assets, poor health and limited education.” Oxfam felt that the World Bank had returned to the “trickle down” policies of the 80s.

If, as James Wolfensohn indicated, poverty is “the number one issue that we are trying to deal” why does such controversy subsist so long after the Bank expressed interest in the theme? Is it because everybody has their own definition of “poverty”? Poverty is not a legal concept, human rights is. Once again we see the obfuscatory power of Bank policies

¹³⁹ Skogly, I. “The Position of the World Bank and the International Monetary Fund in the Human Rights Field.” 193 in Hanki and Suksi *An Introduction to Human Rights Law* at 194.

¹⁴⁰ Guardian 22nd June 2000

¹⁴¹ At the World Summit for Social Development 6-12 March 1995, attended by 117 world leaders.

¹⁴² Sylvia Ann Hewlett “Human Rights and Economic Realities: Trade-offs in Historical Perspective” *Political Science Quarterly* 94 (Autumn 1979) 453 at p 471 quoted in Ved Nanda “Development and Human Rights: The Role of International Law and Organizations” chapter 12 of *Human Rights and Third World Development*, Shepherd & Nanda (eds) 1985 Greenwood Press.

cherry-picking human rights-like concepts without actually submitting to international human rights law, and affecting impact assessments.

There have been two claims in respect of OD4.15 on Poverty Reduction, neither of which were found by to amount to breaches by the Panel. In the first, the Lagos Drainage and Sanitation claim of 1998, the Board denied the violation, and the Panel did not recommend an investigation. In the second, the Argentina Structural Adjustment loan of 1999, the Government of Argentina and the Bank Management reached an agreement whereby the Government of Argentina would supplement the additional allocation, and so the claim was settled without the need for a Panel investigation.

As an aside, Amartya Sen, in “Development as Freedom”, considers poverty to be “capability deprivation”. So that the reduction of poverty will be the realisation of human capacity, human potential, and hence will be commensurable with human development and the realisation of human rights. This argument is extremely interesting from the point of view of shifting Bank paradigm while still, as it were “speaking their language” i.e. the language of poverty.

4.2 Social Justice, the IMF Conception.

On the 22nd of October 1998 Michael Camdessus, then Managing Director of the IMF, delivered a speech entitled "Addressing Concerns for the Poor and Social Justice in Debt Relief and Adjustment Programs" at a conference on the Ethical Dimensions of International Debt in front of an audience of international NGOs. He here tentatively attempted to implicate the IMF in the promotion of social justice and equity. That he should make such an attempt may mark a nascent shift in attitude for the economically centred Fund, and something of a victory for the representatives of civil society who have long advocated the obligations of the Fund in these two areas.

The IMF had previously shown an awareness that purely economic policies of development towards the capitalist market economy paradigm may not ease the immediate problems faced by many in recipient societies in its conference "Economic Policy and Social Equity" in July of the same year. There the issue paper, in outlining the framework of the conference, stated "[there is] growing concern that economic growth and social equity do not necessarily go hand in hand."

Whilst this paper highlighted several areas to improve state infrastructure and improve basic social programmes (health and education), it is doubtful whether it started from a useful conception of equity. Equity in the true sense, i.e. viewed out-with capitalist hegemony, is substantive not merely formal equality, and fairness in the sense of need.

Suggestions such as reduced excessive spending (if the oxymoron has any sense at all), prudent taxation including redistributive elements and "enhanced government" may increase efficiency in the progress of capital but they clearly have little to do with a conception of equity as substantive, not merely formal equality, and fairness in the sense

of need. Prudent taxation for example may bear little resemblance to equitable taxation, which would have to be redistributive.

For the IMF, equity never deflects from their fundamental belief in the capitalist economic system. This much is clear from a look below to Mr Camdessus' conceptualisation of his term "high quality growth". Primarily an economic paradigm, human issues are of secondary importance.

The crux of the plan for equity and social justice is a five-point development plan.

1. Priority should be concentrated on improving the prospects of the least fortunate in society. How? By improved access to education, health services, credit, and justice.
2. Social safety nets that are cost-effective and well targeted are essential to shelter the most vulnerable during difficult times.
3. Sound macroeconomic policies are essential for promoting equity and growth in the medium to long term. The pursuit of equity need not hamper growth. It enhances growth. Certainly equitable policies will reinforce public support for economic reform and adjustment.
4. Equity ... is not simply a question of income distribution. It is a multidimensional concept that encourages distribution of opportunity, wealth, consumption, and availability of employment opportunities.¹⁴³
5. Equity ... is not a rigid concept: each society must decide through consultation with its citizens and civil institutions at what pace inequality must be reduced.¹⁴⁴

In looking at this manifesto for growth several issues should be borne in mind. IMF realisation of the potentially negative impact of their Structural Adjustment Programmes (SAPs) on the poor is encouraging. It represents a significant step towards the respect of indivisible, interdependent and interrelated human rights *in* development.¹⁴⁵ The need for this has long been recognised. To take as an example the words of UN Special Rapportuer on Economic, Social And Cultural Rights, "SAPs continue to have a significant impact on the overall realisation of economic, social and cultural rights, both in terms of the ability of people to exercise these rights and of the capability of government to fulfil and implement them. Human rights concerns continue to be conspicuously underestimated in the adjustment process."¹⁴⁶

The consistency of the criticism of SAPs culminated in these words in a resolution of the UN Commission on Human Rights (the key political arm of the UN in the human rights field)

Para. 6 The exercise of the basic rights of the people of the debtor countries to food, housing, clothing, employment, education, health

¹⁴³ During the 1970s and the burgeoning of the New International Economic Order, a stronger conception of equity was promoted, expanding from the conception in Article 28 of the UDHR. Equity on the international level. From the preamble to the 1974 Charter of Economic Rights and Duties of States – a document never to become binding international law – "mindful of the need to establish a just and equitable social order...". During this period equity began to be associated with global distributive justice. Whether this may be claimed as international law today is a topic beyond the scope of this essay.

¹⁴⁴ This speech can be found under social policy on the IMF web page at <http://www.imf.org>

¹⁴⁵ See discussion of conceptions of development, below.

¹⁴⁶ The realisation of economic, social and cultural rights: final report submitted by Mr Danilo Turk, Special Rapportuer, Commission on Human Rights, Sub-Committee on the Prevention of Discrimination and the Protection of Minorities, 49th Session, at para. 11 E/CN.4/Sub.1/1992/16 (1992)

services and a healthy environment cannot be subordinated to the implementation of SAPs and economic reforms arising from the debt.¹⁴⁷

This led the BWI to review the whole process of SAPs, which have in fact now been replaced with another regime, the “Poverty Reduction Growth Facility”, the aim of which is expressed as assuring “social and sectoral programmes aimed at poverty reduction ... be taken fully into account in the design of economic policies.”¹⁴⁸ From a human rights point of view, such formal pronouncements of intent, while certainly welcome, must be followed upon by consistent complementary practice. It is still too early to comment on this.

Also encouraging is point four, which edges towards a conception of equity in line with this current globally accepted view of human rights. It is to be hoped that this new attitude will be carried forward by the new Fund President, Horst Koehler. On the other hand, point five is incongruent. On the surface at least this appears to open up the can of worms that is cultural relativism, something anathema to universal realisation of human rights.

Clearly there are other things to be said about the relation this expressed policy bears to actual BWI practice (notable here is the express policy of the BWI to reduce spending in the public sector, access to primary services to be available at a price, the so-called “user fees”) but essentially this is a positive step. How far these five points are realised is yet to be seen. There mere expression is, however, a standard that civil society, very active in criticising the IFIs, will no doubt use as a measure of the integrity of the Fund, and we will then see the effect publicity will have on national governments’ disposition to be associated with Fund policies contradicting stated policy. Also significant in holding the Fund management to count will be the new Independent Evaluation Office, which I will discuss below.

4.3 Equity, a Long Way Off.

A useful reminder of the lengths yet to be gone to before the BWI can truly be said to be equitable came from World Bank Senior Vice President and Chief Economist Joseph Stiglitz, speaking in Helsinki in 1998. In the view of Mr Stiglitz, the search of the World Bank for “increases in living standards – including improved health and education...equitable development which ensures that all groups in society enjoy the fruits of development...and democratic development” cannot succeed on this basis of an obsessive drive for higher GDP.

In a sustained attack on the “Washington consensus” he claimed that moderate inflation was not harmful; budget deficits should at times be acceptable; that macro-economic stabilisation was the wrong target for development; that privatisation was not necessary for economic prosperity - competition was more important than ownership; and that markets were not necessarily more trustworthy developers of economies than

¹⁴⁷ E/CN.4/RES/2000/82

¹⁴⁸ Communiqué of the Interim Committee of the Board of Governors of the International Monetary Fund, Press Release No. 99/46 of 26 September 1999 (corrected on 27 September 1999), para 5.

governments. His call to the IMF and World Bank powers to concede that they “do not have all the answers”, shows frustration at the apparent hegemony of the organisations’ strategies. As he concluded, “the dogma of liberalisation has become an end in itself and not the means to a better financial future.”

Given that one of the world’s leading economists feels the organisations are getting it strategically wrong, attacking every central tenet of the neo-liberal model on which recent development economics has been based, is it time for a new paradigm? One respectful of the law and current development thought, as Stiglitz clearly thought, one that is less arrogant. Integrating human rights in development may well provide the answer. Clearly little is gained on either side by keeping the two so rigidly apart when they are evidently so closely related. I will come to this again with a discussion of the new development paradigm of, *inter alia*, the UNDP. For now I will simply note the suggestion of the Oslo Symposium that the human rights framework be used to “set limits to the sway of the market, providing a normative framework to optimise the way in which the market can contribute to human rights and human development rather than impinging on the human rights of many whilst benefiting only some.”¹⁴⁹

4.4 Indigenous Peoples

The Bank has increasingly learned the public relations importance of indigenous rights.¹⁵⁰ This has happened for the reason outlined in the introduction to this section: there have been high profile cases of Bank project leading to breaches of international standards for these populations.

As a consequence, rather than submitting to the international standards and hence adding legitimacy to public international law, the Bank adopted an Operational Directive on the question of indigenous populations.

The World Bank is now in the process of updating its policy on indigenous peoples. For nearly ten years the operations of the Bank in this regard have been governed by OD 4.20, Indigenous Peoples, of 1991. Only recently did the Bank issue an “approach paper” setting out its vision of a renewed policy for comments of civil society.

OD 4.20 as a document may be partly inspired by the standards of international law, but it is a Bank Directive and contains unique provisions. It seeks to integrate indigenous peoples into World Bank development projects through designing Indigenous Peoples Development Plans (IPDPs). The main thrust of the Directive lies in paragraphs 6 and 8, where the Bank pledges to foster full respect of their dignity, human rights and cultural uniqueness, and to ensure that development projects involving indigenous peoples proceed on the basis of their *informed consent*. The medical analogy notwithstanding (although this surely sets the tone for the Bank consideration on indigenous populations), this is evidence of the Bank reaction to adverse publicity emanating from previous

¹⁴⁹ Oslo Symposium page 10 of 15.

¹⁵⁰ see Sandstrom, “Poverty Reduction: Learning the Lessons of Experience.” in Finance and Development September 1994 p 30.

disastrous projects in India and Brazil, ultimately the impetus for the creation of the Inspection Panel. The obligation is weak in comparison with ILO Convention 169 which establishes “as a matter of priority” the “improvement of the conditions of life and work and levels of health and education of (indigenous) peoples and mandates “(s)pecial projects...to promote such improvement.”¹⁵¹ Where the ILO make the improvement of the human rights of indigenous people a stated priority and positive obligation, the World Bank seeks primarily not to harm such populations in the pursuance of its development projects. The World Bank thus adopts a negative approach to the issue.

As a prerequisite, a group must qualify under the definition of indigenous peoples. This is not the accepted definition of international law standards in the area, but is an unprecedented definition of the Bank: “social groups with a social and cultural identity distinct from the dominant society that makes them vulnerable to being disadvantaged in the development process”¹⁵². This could potentially have such a broad and unworkable meaning as to include all minorities in a state, and, if one takes the view that we are all minorities of one form or another, then this could include all members of society. The Directive then attempts a closer definition, linking the category to occupation, attachment to land, self-identification and external identification, indigenous language, customary social and political institutions and subsistence-oriented production. In the end, the determination of status comes down (explicitly in the text) to the judgement of the Task Managers, i.e. the Bank official.

Whether this definition approximates to the reality of indigenous groups is doubtful, particularly given that it differs in important aspects from the standards agreed by the international community of nations. Actually to say this suggests a coherent expression of the issue in international law, which is in fact far from the case. The reality is that distinction between peoples and groups has been one of the most intransigent problems in international law discourse this century.

The latest “Approach Paper” seeks to “(give) greater attention to national and international legal definitions and to consultations with governments, regional and national indigenous organisations, NGOs and academic experts.” This shift towards greater participation and legality (respect for the international Rule of Law) is to be welcomed, should it indeed pass into future Operational Policy of the Bank, and should it then be followed!¹⁵³ Another important new addition in the Approach Paper is the commitment to, “where appropriate, use ILO Conventions 107 and 169 Concerning Indigenous and Tribal Peoples in Independent Countries, where the borrower has ratified either or both of these Conventions”¹⁵⁴. Hopefully this will be included in the new Operational Policy to replace OD 4.20, and will signal a general willingness to include international human rights standards in policy documents.

¹⁵¹ ILO Convention (no 169) Concerning Indigenous and Tribal Peoples in Independent Countries, 27 June 1989, art 7(2).

¹⁵² World Bank Operational Manual, OD 4.20, September 1991, Indigenous People, para 3

¹⁵³ Of course, at least in theory, should the former happen and the latter not, recourse may be had to the Inspection Panel. Later discussion of this body will, however, show how rarely this monitoring process actually reaches a conclusion.

¹⁵⁴ World Bank, “Approach Paper on revision of OD 4.20 on Indigenous Peoples”, from <http://www.worldbank.org/essd/essd.nsf>

Looking to Table 2 on the work of the Inspection Panel, one sees that of the eight projects where the Panel has recommended an investigation, there has been allegation of breach of OD 4.20 in six, the Panel has found this allegation to be substantiated in three. Two of the three were dam projects: Arun III and Itaparica. This will be further considered in the brief dams case study to follow.

4.5 Education

The right to education is guaranteed in international law in several major international covenants, declarations and regional instruments. Among the fundamental provisions (which all have their separate quirks as to the nature of the standard itself) are, article 26 of the Universal Declaration on Human Rights 1948 (arguably non-binding still, after all these years), article 13 of the International Covenant on Economic, Social and Cultural Rights of 1966; article 2 of Protocol 1 to the European Convention on Human Rights and Fundamental Freedoms of 1950; article 29 of the Convention on the Rights of the Child of 1989; article 7 of the International Convention on the Elimination of All Forms of Racial Discrimination of 1965; article 10 of the Convention on the Elimination of All Forms of Discrimination Against Women of 1979; in article 13 of the Protocol of San Salvador of 1994; and article 17 of the African Charter on Human and Peoples' Rights of 1981.

In this section I would like to draw on the work of the United Nations Special Rapporteur on the Right to Education, in particular on her progress report submitted to the Commission on Human Rights on 1 February 2000¹⁵⁵. The Special Rapporteur has a close understanding of the impact of World Bank policy and practice on economic, social and cultural rights, and especially on the right to education.

The Special Rapporteur highlights discrepancies between the World Bank policy on human rights and development as expressed in their issue paper "Development and Human Rights: The Role of The World Bank"¹⁵⁶, which I have discussed above, and the "Education Sector Strategy."¹⁵⁷ While she believes that the former "is apparently supportive of the Bank's engagement in human rights,"¹⁵⁸ (to which I would add: without moving any closer to an integration of human rights into Bank operations) the latter seems not to be.

Points highlighted by the Special Rapporteur as conflicts with the various international and regional standards include the failure to support free primary education. Indeed the strategy paper supports schemes whereby non-poor parents may have to pay fees¹⁵⁹ to supplement government subsidies to poor children. This is the so-called "Thobani rule", named after the author of a World Bank report Charging user fees for social services, which claimed that this would not reduce enrolment figures. This was subsequently proved wrong. There is a clear conflict with the principle expressed in article 26 (1) of the

¹⁵⁵ UN Doc E/CN.4/2000/6

¹⁵⁶ "Development and Human Rights: The Role of The World Bank", The World Bank Washington DC, September 1998.

¹⁵⁷ "Education Sector Strategy", The World Bank, Washington DC, July 1999

¹⁵⁸ UN Doc E/CN.4/2000/6, page 11

¹⁵⁹ In July 2000 the United States Congress attempted to ban the IMF and World Bank from imposing "user fees" on primary health care and education. This has been the single most controversial aspect of BWI policy on these two services.

UDHR “education shall be free, at least in the elementary and fundamental stages.” Despite the priority given to primary education in the UDHR and in the ICESCR, the proportion of World Bank loans directed to primary or fundamental education is 30% of lending for education; and loans by the IDA (loans, in other words at the favourable rates afforded to the poorest states) account for only 40% of lending in education. The Rapporteur is not of the view that lending for education is conducive to free primary education in any event due to the nature of loans: they must be repaid.

Fundamentally the problem is that in the area of education, as in other areas directly protected by human rights law, the World Bank does not recognise the binding nature of international human rights law. In education this is true of the standards outlined above which are neither respected in the general formulation of policy, nor are they actively promulgated among Bank staff¹⁶⁰ such that they might be able to use discretionary powers available to them in order to give the maximum protection to the guaranteed rights within the limits of their mandates (they are not lawyers, they cannot do this in a state of ignorance). It is also true of the labour rights of teachers, guaranteed through ILO treaties on the international level and also through domestic law¹⁶¹. This questions the underlying belief the World Bank has in the respect of human rights, and in its own paper Development and Human Rights. “It is not self-evident – at least not to the Special Rapporteur – why human rights problems that typically emerge in education have not been addressed.”¹⁶²

4.6 Health

Currently, the Bank is obsessed with the AIDS pandemic. Why this should be so when statistically more people die in Africa from malaria is dubious. Nevertheless, in the Bank’s Spring meeting 2000 President Wolfensohn pronounced that: there will be *no limit* to funds available to fight HIV/AIDS.

This is another example of a Bank pet topic. Rather than attempting to generally improve the standard of health-care in recipient nations – and indeed through the charging of user fees actually reducing access to basic health care services – the Bank focuses on named diseases.

The Bank argues¹⁶³ for “an enhanced role of the state in providing strong stewardship in the health sector.” But it denies the efficacy of state control over health services, expenditure it sees as wasted. Yet the problems with this “private participation in public service” policy and associated user fees are not new to note, indeed this discussion was considered under the topic of “education”.

¹⁶⁰ As has been the case in other areas of international law eg Decentralization (sic) of Education. Legal Issues, The World Bank, Washington DC, June 1997.

¹⁶¹ See Education Sector Review, pp 3 and 19.

¹⁶² E/CN.4/2000/6, page 12.

¹⁶³ “The Economics of Private Participation in Health Care: New Insights from Institutional Economics” Alexander S. Preker, April Harding, Navin Girishankar, 1 August, 1999, World Bank

4.7 Women In Development

To illustrate how central a place women ought to have in the development process, here are the words of Hilde Johnson, Minister for International Development of Norway¹⁶⁴: “World Bank studies consistently show that investing in the education of girls is the single most profitable investment of all. It means higher productivity, lower infant and maternal mortality, and lower fertility rates. Only healthy children can fully benefit from schooling. Only healthy adults can realise their full potential in the service of their families and communities.”

Given this importance one would expect to see concrete adherence, even expansion on, the provisions of the Convention on the Elimination of Discrimination Against Women by the World Bank.

Bank policy contains a concrete determination to increase the participation of women in development, “The Gender Dimension of Development”, World Bank Operational Policy, OP 4.20, 1999. This amounts to a declaration of intent to work in partnership with governments in order to enhance the involvement of women in the development process, improve the sensitivity of development approaches to the specific challenges of empowering women. As with all World Bank policies it does little to reflect current strategies and thinking in other agencies, principal organs and funds of the United Nations, nor does it recognise the authority of international law (the Convention on the Elimination of Discrimination Against Women is not mentioned).

It is however of course a welcome pronouncement, but like most is irrefutable given its vagueness. One can simply not hold the Bank against this standard in the same way one might compare Bank performance with international standards which are more defined. This was proved in the Lagos Drainage and Sanitation claim: the only claim before the Inspection Panel which has alleged breach of OP4.20 on gender. The claim was found unsubstantiated for the simple reason that the standard itself is so partial, it is inconceivable that the Bank could contrive to breach it, the Panel did not even recommend an investigation and that was an end of it.

4.8 Allocation of Resources: Military Spending.

The interest in the allocation of resources stems from the need to “take steps to the maximum of available resources” in Article 2 of the ICESCR. Evidently a state must show, by this test that its resources are being distributed in an efficient way, and it would not be in the spirit of the Covenant were a far higher percentage of funding to be made available to the military than to either the education or health budgets. To put things more simply, from the Agenda for Development, “Societies whose economic effort is given in substantial part to military production inevitably diminish the prospects of their people for development.”¹⁶⁵

¹⁶⁴ Hilde Johnson, Minister for International Development of Norway observed by in Chronique ONU no. 3 1999 p 42

¹⁶⁵ Agenda For Development, para 17.

Looking to the Bank, we see the standard arguments on resultant economic efficiency when resource allocation is considered: “political choices, along with their underlying values and trade-offs, are for each country to make; the Bank’s concern is for the economic effects and resultant degree of efficiency in the allocation of resources.”¹⁶⁶

Both the Fund and Bank have changed their stance on military spending throughout the 1990s. They now attempt to “eliminate uneconomic, ineffective and wasteful programs (sic).”¹⁶⁷ Military expenditure was added to the set falling within this definition in 1994 under the policy aim of ensuring that, “economic and social priorities are not crowded out by other budgetary items.”¹⁶⁸ Further, as mentioned in a key speech by the High Commissioner for Human Rights, for a reduction in military spending, higher spending on social welfare and increased aid flows¹⁶⁹. Killick also comments on the changed IMF policy towards potential recipient governments, the Fund, he says, is increasingly interested in the amount of military spending. According to Polak (1991: 29) in at least one country the Fund sought and obtained assurances about plans for military spending and has exerted pressure to reduce such expenditure in a few other cases¹⁷⁰.

4.9 Involuntary Resettlement

The World Bank issued a draft resettlement policy in 1999. It has yet to become an OP proper. For the purposes of this paper, the interesting section relates to the scope of loss which will be compensated. The policy extends to economic and physical displacement, but will *not* cover and indirect social or economic impacts¹⁷¹. To give a clearer idea of what this might mean in practice, a closer consideration of one of the Bank’s favoured projects, the dam.

The diagram in the appendix shows the result of a collaborative effort by human rights professionals, engineers, government officials and community representative groups to explore the impact, positive and negative, of large-scale dam projects. It highlights the range of implications and effects on the lives of people, some of whom would be protected by World Bank policy and some who would not.

In order to fully understand this diagram it will be necessary to look to the chapter of the World Commission on dams report on “People and Large Dams: Social Performance”.

4.10 Dams: A Case Study.

The World Commission on Dams was¹⁷² a joint venture between the public and private sector including representatives of civil society. It was an international venture involving

¹⁶⁶ from Gillies p17

¹⁶⁷ World Bank/ IMF Development Committee, August 1987 “Protecting the Poor During Periods of Adjustment” p 31.

¹⁶⁸ From Learning from the Past, 1994.

¹⁶⁹ From Speech of Mary Robinson “Constructing an International Financial, Trade and Development Architecture: The Human Rights Dimension”, given at the Swiss Federal Institute of Technology on the 1 July 1999.

¹⁷⁰ This part taken from Tony Killick, IMF Programmes in Developing Countries. (Routledge)

¹⁷¹ World Bank “Posting of Draft OP/BP 4.12: Involuntary Resettlement, 9 July 1999” <http://www.worldbank.org/essd/essd.nsf>

¹⁷² The Commission was disbanded on completion of its Report on the 16 November 2000.

all concerned constituencies from NGOs, affected peoples' organisations, private companies, to financial and political institutions.

The Commission produced a final report entitled “Dams and Development: a framework for decision making”. Throughout this report, although particularly in the chapter under discussion, is discussion of a range of limitations in received practice in relation to dams. For example the range of “affected persons” (using World Bank terminology) is unrealistically limited. There is no place in the current World Bank conception for those who are “economically displaced” and none even in the proposed new OP for those affected by subsidiaries to the main project such as canals, powerhouses, project infrastructure, and associated compensatory measures, such as biological reserves and so on.¹⁷³

The WCD also highlights the problem of undercounting of the displaced, estimating that the true global figure to be anywhere between 40 to 80 million people physically displaced. And, as is stated “among the projects involving displacement funded by the World Bank, large dams account for 63% of displacement.”¹⁷⁴ So this is a huge problem for the Bank.

Among the “excluded” from compensation, re-housing and the guarantee of the same living standards as previous to the project are the landless, downstream communities and the indigenous: “among those assessed, compensation has usually gone only to those in possession of legal titles”¹⁷⁵.

The report also highlights the problems of timely compensation, noting that this may take in excess of twenty years to materialise, a period which is clearly beyond that permitted by the major legal systems of the world. There are also problems of inappropriateness of resettlement, to areas chosen without sensitivity to living cultures, or simply on to infertile land.

The possibility that dams may lead to improvements in living conditions even for the displaced is noted, when the process is carried out sensitively: “An inclusive process involving all groups-including host communities-enables initiatives to promote *resettlement as development* to be managed jointly by the people and project and government institutions as a long-term process”¹⁷⁶.

The complexity of effects stemming from large scale infrastructure projects such as dams shows the difficulty in acting as a development agency whilst fully respecting the human rights of individuals. The Bank, expert in all things economic, is just beginning to awaken to the need for such human safeguards and the central place of the individual in development. It will need to seek the co-operation of its fellow specialised agencies in order that it may have the kind of broad-based approach and vision in regard to its projects that is demonstrated by the interdisciplinary report of the WCD.

¹⁷³ WCD Report p 104.

¹⁷⁴ Ibid, and World Bank 1996 p 90-92.

¹⁷⁵ Ibid, p 105.

¹⁷⁶ Ibid p 110.

4.11 Good Governance or Human Rights¹⁷⁷?

While the Bank has, as I have explained, been reluctant to integrate human rights into its lending criteria, it has embraced the political notion of good governance. Good governance promotes effective democratic institutions of government. There is no international treaty of good governance as such, although it has precedents in the *corpus juridicus* including provisions in the ICCPR relating to free and fair elections, and obligations in the ICESCR to build upon the respect of ESCR that currently exist in a country to actively do “the best possible”. While this latter may be a somewhat progressive interpretation it is by no means out of the spirit of the Covenant and the subsequent General Comments of the CESCR.

It was after the South African and Portuguese loan controversies that the World Bank began expanding its conception of economic issues to include areas affecting economic performance. The restrictions of the Articles, as initially understood, ceased to exist, becoming instead the malleable subject of the whims of world Bank officials. Successive World Bank Legal Counsel, have been able to act through fiat, and constructive interpretation, to determine what affects economic development and thus the limits of the World Bank mandate. This was facilitated by impotence within the UN System to control their specialised agencies, the World Bank and IMF even more so than the others; by a lack of disposition among members of the United Nations, constituents of the General Assembly, to change this arrangement or to bring the question of interpreting the Articles before the ICJ (as discussed above).

Rather, however, than submitting to the relative certainties of international human rights law over which the Bank has little control, the Bank determined to invoke more pliable political guidelines, known as good governance. In effect what these represent is a model of liberal governance- or as the bank itself describes it “the manner in which power is exercised in the management of a country’s economic and social resources for development” - the inevitable corollary of which is predictability in the market. The government of a country is disempowered from central control of trade. As they are forced to act in a transparent, accountable and participatory way so central stakeholders, notably foreign (mostly North American) companies, more used to this form of open government and its opportunities are able to enforce the Rule of Law. Simultaneously, national commissions set up for the purpose expose official corruption, nepotism, and the phenomenon, once seemingly endemic in Latin America, of oligarchy, that is the dominance of all areas of politics, business and justice, by several powerful families.

The concept has been open to fluid definition, being interpreted differently according to political expedience. There exists what is often, geographically inaccurately and destructively, called a “Southern” conception of the concept and a competing World Bank interpretation, seen as more amenable to “Northern” interests. Quite apart from the odious “them and us” connotations of this dichotomy the World Bank ought to work to avoid this apparent schism for the simple reason that it is counterproductive to the

¹⁷⁷ This section was partly inspired by a reading of the draft paper of Gregory Thuan, fellow student of the Master of International Human Rights Law, entitled “Good Governance as a Crucial Means to Development” .

legitimate aims of good governance itself. While both “sides” enunciate important factors in the efficient and just running of society, the Bank definition is understandably seen as market centred and thus of benefit mostly to the interests of capital, and hence (primarily) United States business. One may note the words of former Bank president Eugene Black: “Our Foreign Aid programmes constitute a distinct benefit to American business”¹⁷⁸.

Bank definition of Good Governance¹⁷⁹:

The Bank defines good governance as having three distinct elements:

1. The form of political regime.
2. The form in which authority is exercised in the management of economic and social resources for development.
3. The capacity of governments to design, formulate and implement policies and in general to discharge government functions.

The Bank considers that it is precluded from promoting the first aspect by virtue of Article IV section 10 of its Articles; it therefore focuses on elements two and three.

Politics vs Law

Individuals are *politically* accountable for a far greater variety of offences under good governance than is the case under human rights. Yet human rights impose *legal* obligations on states and are enforceable by individual members of the polity via the action of tutela in many countries, and through constitutions in many more. The effect of the World Bank emphasis on good governance is evident for example in Colombia, which has a strong anti corruption commission, huge inequality in distribution of wealth, reduced access to primary services through the introduction of user fees, and massive violations of civil and political rights and humanitarian law.

Is the result of BWI policy favouring good governance initiatives of benefit to capital and not people?

The Rule of law as a Means....to What?¹⁸⁰

A key element in the World Bank conception of good governance was, and still is what the Bank somewhat euphemistically describes as “a legal framework for development”; this is the Rule of Law. It will here be assumed that the reader is familiar with the concept as developed by key legal philosophers including Hayek¹⁸¹ and Joseph Raz. Taking the conception of Lon Fuller who talks of the “internal morality of law”¹⁸² it is clear that the Rule of Law is of central importance in establishing a system of legal regulation that is predictable.

¹⁷⁸ Quoted in “Economic Justice Now!” website

¹⁷⁹ From The World Bank “Governance and Development” Washington DC, 1992 and The World Bank “Governance: The World Bank’s Experience” Washington DC 1994.

¹⁸⁰ Gillies 13-15. “The rule of law is not an end in itself”

¹⁸¹ Hayek, Fredrich A *The constitution of liberty* Chicago University Press, 1960

¹⁸² L.L. Fuller *The Morality of Law* Harvard University Press, 1969.

The market economic system relies on the operation of such a system in its key realms of contract, credit and property, what Professor Stone calls the “essential legal relations”¹⁸³, the legal institutions which, subverting the traditional Marxian structure-superstructure archetype, he sees as underpinning capitalism. It is not the purpose of this essay to indulge in ideological discourse but it is useful to bear in mind that it is the very notions of good governance, required by the Bank in its loan conditionality agreements, and represented as neutral and universally desirable, that crucially supports a *political* vision of economic interaction. Not only this but also a system at which the most powerful stakeholder in the World Bank, with 15% of overall voting power, the United States of America, excels. Seven out of the top ten multinational companies rated on profit have their registered head quarters in the US.

If assertions that reforming judicial systems and a move towards the Rule of Law are politically motivated seem uncharitably sceptical, consider the words of a World Bank expert on the field: “judicial reform is part of a larger effort to make the legal systems in developing countries more market friendly.”¹⁸⁴ Further, “a well functioning judicial system is important to the development of a successful market economy.”^{185 186}

Problems Associated with a lack of Internal Good Governance.

The core good governance issue within the Bank is the weighted voting system which ensures that certain states hold a disproportionate share of the votes, one investigation puts the share of the United States *alone* at 15%. Votes are distributed according to the following equation:

$$250 + x; \text{ where } x = \frac{\text{contribution in US\$}}{\text{US\$ 100,000}}$$

Douglas Williams: “not only has the weighted voting system ensured the dominance of the economic superpowers, but in addition there has been a widespread use of more complex special voting procedures, particularly on major issues of policy...in order to provide a veto power”. So the system is dominated by a north Atlantic alliance of super economy interests. Contrast this with the view of Gillies, “the central message in rethinking states sovereignty is that the concerns of citizens, not states, should be the primary focus of all development aid.”

The distance from day-to-day political control has meant that at times the institutions “act like technocracies out of control”. This is a more pressing problem considering the lack of communication and hence lack of participation of those affected by the decision

¹⁸³ Stone “The Place of Law in the Marxian Structure-Superstructure Archetype”, in Law and Society Review, vol. 19 (1985).
¹⁸⁴ “Judicial Reform and Economic Development: a survey of the issues” Richard E Messick, The World Bank Research Observer, vol. 14 (February 1999) p 118
¹⁸⁵ *ibid*, p 119
¹⁸⁶ A full critique of the Reform of Justice programme is beyond the scope of this paper. A particularly instructive attempt was made by the Lawyers Committee on Human Rights in co-operation with ProVea – the Venezuelan Programme for Human Rights Education and Action. The report, entitled “Halfway to reform: the World Bank and the Venezuelan justice system” is available from <http://www.lchr.org/pubs/halfway.htm>

making. As the Lawyers Committee for Human Rights says, of the need to improve good governance *within* the Bank, the accountability and transparency of the World Bank must improve in its decision making, by *inter alia* broadening contact with NGOs and other workers in the field, and open access to information, and improving the awareness of those affected by loans.¹⁸⁷

Each of the two BWI has huge problems with internal governance. Aside from the obvious problem of the inequality of states within the voting procedure, there is the fact that basic authority vested with 21 Executive Directors. The full complement of members meeting only once a year. In addition, there is no open election of President of either Organisation. The President of the World Bank is always a United States citizen and the Managing Director of the IMF is always European.

When the issue arose of changing this pattern in relation to the IMF, according to Oxford academic Ngaire Woods, “The United States effectively killed the issue ... before the Annual Meetings by letting it be known that it would not open up the top job at the World Bank to a genuine election.”¹⁸⁸ Calls for increased transparency and accountability in international financial institutions have continued, notably at the Special Social Summit 2000, follow up to Copenhagen 1995 and again in para 13 of Millennium Declaration.

But positive steps *have* been made such as the Inspection Panel and the transparent nature of their work and the Board’s findings. Although transparency alone cannot make the institutions work in a more democratic manner, the Inspection Panel being an excellent example of this. From the table in the appendix on the process of cases before the Inspection Panel it is clear that there are very few indeed that actually reach the level of investigations, and even fewer where the recommendations resulting from these investigations are followed. What is required is that the Institutions themselves submit to higher forces, as it were, the most obvious being a democratic Board with power to oversee implementation of Panel findings.

4.12 BWI, National Governments, Human Rights and Development

Clearly national government autonomy is reduced by conditionality and ready made development packages.

The crux of World Bank/IMF policy towards transition economies has been privatisation in three forms:

- Small scale – shops, small businesses etc
- Large scale – of public services such as education, health and transport
- Freeing trade to encourage foreign investment

¹⁸⁷ LCHR *The World Bank: Governance and Human Rights* 2nd ed. 1995 p 62.

¹⁸⁸ Ngaire Woods, speaking in Prospects Magazine, 2000, ngairewoods@university_college.oxford.ac.uk

All of this has been done at an accelerated rate in order to act in that transition period before public opinion has time to foment. This is what the 1996 World Development Report (the World Bank's main annual deliberation on the state of the world and the efficacy of its policies) called a "window of opportunity - a period of extraordinary politics.... In which far reaching changes could be initiated with little dissent or opposition".

Clearly the human rights, democracy and transparency implications of this process are near limitless. The privatisation of primary services cuts across the guarantees of the UDHR and 1966 Covenants, the inappropriate haste with which the BWI carries through these reforms in a time when national governments are in desperate need of the Organisations' funds strongly suggests a failing in the genuine participation modern development requires. Finally their underlying rationale, which is clear from the quoted words to be using the leverage of upheaval to expedite capitalist reform (a clear benefit to North American and West and North European sophisticated capitalist enterprises) shows a lack of transparency and indeed accountability to those directly effected by the process which the Bank would not brook in one of its member states.

The Save the Children Fund, reporting in the Guardian newspaper, picked up on this problem to highlight the specious nature of loans given to the nascent democracy and its consequent problems with good governance. The process can easily turn into a looting of public property by the few with funds to carry it off. Quoting the World Bank's own World Development Report the problem is "who monitors the monitors Supervision of financial agents ... is severely problematic in transition economies" . In fact in many transition countries the privatisation process was seen by the mass of unemployed and disenfranchised as a glorified theft of social assets, selling off the country assets to a privileged few."¹⁸⁹

It is interesting to note the content of a recent speech of new IMF Managing Director Horst Koehler to an audience of NGOs in London, where he claimed "I have a heart" before noting that the IMF had to become more cognisant of the effects on people in the field and to tackle poverty reduction¹⁹⁰. Indeed the IMF is currently undertaking a huge review of the nature of conditionality, following the appointment of Horst Koehler. The hope is to agree new guidelines for IMF conditionality by April 2001, which better reflect Koehler's commitment to streamline conditionality and increase ownership.¹⁹¹

Such pronouncements are one thing for the future, but the effect of past Fund policy remains, and the Organisations may be held accountable for this. Although not a forum capable of putting the IMF "in the dock", the High Court of Lagos in Nigeria was asked by the Academic Staff Union of Universities, in October 2000, to declare as illegal, pressure by the World Bank and IMF on President Olusegun Obasanjo¹⁹². Amongst the claims before the court are that the IMF/ World Bank are not competent to compel the Federal Government of Nigeria to implement their economic policies and that the

¹⁸⁹ 26 September 2000 Guardian UK.

¹⁹⁰ <http://www.imf.org/external/np/speeches/2000/092600.htm>

¹⁹¹ contact tlane@imf.org

¹⁹² Reported in the Bretton Woods Update, October 2000, of the Bretton Woods Project <http://www.brettonwoodsproject.org>

wholesale planned privatisation of the Nigerian Telecommunication Plc and other telecommunications companies is illegal and unconstitutional. Challenges like these, in domestic courts are an embarrassment to the BWI, and they fundamentally question the working policies of the Institutions. It is perhaps ironic that it will often be the Rule of Law system (including Judicial Review of government decisions) borne of World Bank initiative, which will permit such challenges to their authority to take place. Such domestic judicial challenges may have more lasting impact than the succession of strikes and shutdowns following announcements of IMF sponsored privatisation plans.¹⁹³ These are encouraging democratic signs, the larger question remains though of democracy *within* the BWI.

Koehler has offered little consolation in this regard, repeatedly thwarting calls for reform of voting procedure, and calling for “greater independence” of the IMF from national governments. This could really mean one of two things. Either that he will push for reduced dictatorship of the Fund by the overwhelming voting power of the larger states (unlikely given his reluctance to advocate voting reform) or that he has a vision of an independent Fund¹⁹⁴. This would be bad for global governance, bad for the Fund and bad for human development. It would undoubtedly mean a step backwards, away from accountability and would increase the distance of the Fund from the people it is to assist.

I can see no discernible connection between the two stated aims of Koehler: to “go into the field” and to be more independent. It is simply to be hoped that his intention was indeed to democratise the Fund rather than bureaucratise it and also that the EVO may act as some form of autonomous watchdog for transparency, accountability and participation.

4.13 The Role of the State.

Françoise Hampson¹⁹⁵ notes that the nineties development agenda ignores the role of the state and its international obligations. States have taken onboard the arguments of civil society, stemming from the supra state nature of the human development discourse, and turned them into excuses. Apparently states no longer have responsibility for failures to comply with international human rights law, they are now, within the new paradigm, the natural consequences of the overriding power of developed states, multinational corporations or the “laws” of economics. As Hampson notes, states *should* have a monopoly on law making, both domestic and international, and they have obligations to respect human rights “not just [of those] within their territory, but all those directly affected by their decisions”¹⁹⁶. This last comment no doubt a reference to the continuing relevance of human rights obligations for states when taking decisions in international organisations.

¹⁹³ One of the most recent being in Honduras, where the Bloc Popular strike caused severe disruption to health, education and transport services.

¹⁹⁴ See above discussion of “technocracies out of control”.

¹⁹⁵ Member of the United Nations Sub-Committee for the Promotion and Protection of Human Rights and Professor of the Human Rights Centre of the University of Essex in the United Nations Chronicle No4 1999 p 70.

¹⁹⁶ *Ibid.*

Bearing this in mind as a warning, one should be wary of absolving sovereign states of all responsibility in international law and development.

5. Implementation

5.1 The Inspection Panel of the World Bank

In terms of human rights monitoring, enforcement and implementation within the Bank, the closest and most effective machinery that exists is the Inspection Panel.

The Panel was set up following a Resolution of the Executive Directors adopted on the 22nd of September 1993. It has since had its mandate “clarified” or revised (i.e. restricted) on two occasions, in 1996 and in 1999. Its objectives, although not listed in that original Resolution, have been enunciated by Bank Chief Legal Counsel Ibrahim Shihata as follows: “to enhance quality control ... improve transparency ... and accountability”¹⁹⁷.

At a time when the Bank was facing increasing pressure from campaigners with strong claims that it was disregarding people in favour of (American) dollars, the birth of the Panel as an institution deflected some of this criticism. Simultaneously this internal, Bank regulated, investigatory body allayed calls for Bank submission to external performance and human rights auditing or enforcement bodies. Uncertainty about how the panel’s work would impinge on the sovereignty of the Bank in practice led directly to two reviews of function and performance.

The Panel itself abides by a high level of transparency in its work. Communications between the Panel and the Board forming part of the investigation process are publicly available after Board consideration.

At this time it is more instructive to look to the meaning and effect of the two “clarifications” of the Panel’s mandate, as it is from these that the Inspection Panel must work. The 1996 clarification of the Inspection Panel’s mandate noted the extent of its powers (reiterated by the 1999 Review), “the Inspection Panel’s mandate...[is] limited to cases of alleged failure by the Bank to follow its operational policies and procedures with respect to the design, appraisal and or implementation of projects.” Operational Directives are the precursors to Operational Policies and Best Practices. ODs were an all in one package containing differing levels of compulsion, whereas the new system separates recommendations from regulations. In this way the Bank can avoid being held to task for something it did not wish to be bound to.

The 1999 review further limited the powers of the Panel. Only where the management actually admits serious failure of the Bank will they be required to show that, either the Bank has or intends to comply with its operating policies and procedures.

This procedure is of course only applicable to claims passing the eligibility criteria, one of which is the necessity that there have been a “material adverse effect” to the requester of the investigation. Also the Panel is only to consider material adverse effect as the

¹⁹⁷ Shihata “The World bank Inspection Panel – A Background Paper on its historical, Legal and Operational Aspects” A Paper Submitted to the Expert Meeting on the Inspection Panel, Lund 23-25 October 1997 p11.

result of a failure to comply with policy and procedure and by inference *not* from the policy and procedure *itself*.

Reducing further the ambit of power, paragraph 14 of the 1999 Review states, “non-accomplishments and unfulfilled expectations that do not generate a material deterioration compared to the without project situation will not be considered as material adverse effects”. Continuing that “action plans” agreed between Bank and Borrower are outside the purview of the Resolution¹⁹⁸. Thus the Panel cannot consider even material adverse effects of the “action plans” that is the plans hatched to resolve previous Bank failure.

From the above one can see just how restrictive is the mandate of the Inspection Panel. Importantly it is precluded from investigating the effects on human rights of the operational policies and practices of the Bank Group, if you like its operational guidelines. It is restricted to cases where the Bank has failed to follow those guidelines.

To summarise, some of the requirements for claimants to the Inspection Panel are that they:

1. Must be two or more affected people in a Bank loan recipient state;
2. Must show that their rights or interests have been or will soon be directly adversely affected by an act or omission, through Bank failure to comply with Operational Policies, Operational Directives, Operational Procedures, or loan agreement;
3. Must show that 1. And 2. Was brought to the attention of Bank Management and that the response was inadequate.

Claimants can be represented by local NGOs, but can only be represented by international NGOs in what Shihata mysteriously describes as “exceptional circumstances”. In case of “serious alleged violations” of Bank policy and procedure, and Executive Director may also file a claim.

There is thus no support in the mandate of the Panel for it to consider the principles of public international law. It has been suggested, however, that the Panel has, on occasion, considered international law. In the Compensation for Expropriation of Foreign Assets in Ethiopia claim of 1995¹⁹⁹, the Panel actually ruled the claim inadmissible on the grounds that domestic remedies had not been exhausted, although there was no support for this in the resolution creating the Panel. Thus the Inspection Panel is cognisant of general principles of international law, if not explicitly authorised to consider them.

5 reasons why a request may be barred:

1. Where it has not first been dealt with by Management.
2. Where it has, where the Panel is satisfied that management has complied, or intends to comply with policies and procedures.

¹⁹⁸ IBRD Res. 93-10, resolution creating the Inspection Panel

¹⁹⁹ in Hansungule, Michelo “Access to panel: the notion of affected party, issues of collective and material interest” RWI, unpublished, 1997.

3. Where the complaint is based on actions the responsibility of bodies other than the Bank, such as the borrower.
4. Barred claims from disgruntled contractors who have lost bids.
5. Where the claim relates to a particular subject matter on which the Panel has already made a decision.

The procedure of the Panel is twofold, with very few cases making it past the first hurdle. The Panel must first decide on the eligibility of the claim – a test that increasingly few of the claims can pass due to the increasingly restrictive nature of the Panel’s mandate. The second stage, where the Panel carries out its investigation deciding whether or not there has been a serious breach of Bank policy or procedure, takes place *only after the Bank authorises investigation*.

In theory, the purpose of the Inspection Panel is to further the internal good governance of the World Bank. In practice, however, as will be seen from the two tables showing the progression of cases within the Inspection Panel, of the seventeen cases received by the Panel at the time of the compilation of the tables, the Panel recommended investigations in seven, and the Board approved this request on only *three* occasions: the Arun III Project in Nepal; the Singrauli/NTPC coal project in India and the China Western Poverty Reduction Project; and to “review and assess” the Yacyreta Hydroelectric Project in Argentina/Paraguay.

This severely undermines the supposed independence of the Panel. Those that sit on it may have the highest intentions, but they are simply impotent when deprived of the sanction of the Board of Directors to carry out the investigations they would wish. Consequently the practical effect of the Panel as a mechanism for the implementation of Bank policies and procedures, which undoubtedly contain human rights inspired principles, is minimal. Its symbolic effect may be far greater, symbolising an openness and transparency the Bank may one day achieve, and the integration of human rights assessment in to its projects which it will, realistically require a sea-change in political pressure from within the member states of the United Nations and the BWI to transpire.

5.2 The Independent Evaluation Office of the IMF

Commenting on the Independent Evaluation Office (EVO) is a speculative exercise at present as it is yet to come into being. Under intense public pressure, notably from The Bretton Woods Project, prime NGO mover in this area, based in the United Kingdom, the terms of reference as agreed are somewhat more consistent with good governance than those initially postulated in the issue paper “Making the IMF’s Independent Evaluation Office Operational”. The EVO will have complete freedom to evaluate all areas of Fund activities except ongoing consultations. The Board has agreed to waive its desired right to approve the EVO work programme, clearly securing a more independent status for the Office.²⁰⁰

Clearly this represents a positive step to be welcomed, improving as it does, the transparency and accountability of the operations of one of the worlds most clandestine international organisations, it is to be noted though that this is not the ideal solution.

5.3 Monitoring Beyond the Inspection Panel/ EVO.

Methods of monitoring BWI compliance have been suggested throughout the paper and include the strengthening of United Nations co-ordination machinery and the regulation of specialised agencies. While each agency has its own specific mandate, they are all members of the same family, sharing the same overall beliefs as expressed in the UN Charter, a legal document which the parent ought to enforce.

Audrey Chapman²⁰¹ suggests a “violations approach” to monitoring the ICESCR. This would involve holding all relevant actors accountable for breaches of the covenant. This idea could be taken further by judging effectiveness against this document as a standard. In this way the ICESCR would more effectively achieve the obligation to “take steps” by national and international players, as described earlier.

There is then a need for a monitoring system embodying both impact assessments of specific projects and the human rights significance of policies. This would need, in terms of the World Bank, a strengthening of the role of the Inspection Panel, and the involvement of the treaty bodies. This monitoring would further benefit from re-conceptualising human rights along the lines of the legal philosophy of Lon Fuller. Each norm is comprised of a spectrum from duty to aspiration. Both are constitutive of the obligation; while the aspiration will never be reached, it must be approximated to (as in the ICESCR obligation in Article 2 to “take steps”) and the duty must never be broken. Monitoring would then be more explicitly and consistently a two pronged activity. Not only are there negative obligations but also positive ones. And this would be the case for *all* human rights CPR as well as ESCR.

²⁰⁰ Issue Paper at <http://www.imf.org/external/np/eval/evo/2000/eng/evo.htm>; terms of reference agreed at <http://www.imf.org/external/np/sec/pr/2000/pr0053.htm>

²⁰¹ Chapman, A, “A ‘Violations Approach’ for Monitoring the International Covenant on Economic, Social and Cultural Rights” 18 HRQ 23 1996

6 Conclusions.

This thesis has explored the position of the International Monetary Fund and the World Bank Group in international law. Starting from the constitutional documents, it was found that these contain many provisions which are capable of a much more benign interpretation than that traditional afforded them. Whereas the Articles of Agreement of the two institutions have generally been taken as unquestionably ruling out the consideration of “political criteria”, it was considered during this paper that it was not at all certain the scope that this prohibition should have. Although the favoured interpretation over the years has been that this denies the possibility of including human rights criteria, it was shown that this was not the intention of the “founding fathers”, and also it was suggested that this flows from a restrictive understanding of the scope of inclusion of international human rights law in the work of the two bodies.

Rather than the more politically controversial stance whereby the BWI may refuse loans on the basis of the human rights record of the recipient state, there were shown to be at least two other ways of promoting human rights through their work. Firstly, affecting human rights assessments of project effectiveness, so that the institutions act in furtherance of *their own* obligation to assist states in “taking steps” to the realisation of economic, social and cultural rights. And secondly through a closer understanding of the relation of the respect for human rights and debt.

The means by which this paradigm shift in BWI praxis may occur was shown to be an acceptance of the prevailing belief that development is a *process*. What this was taken to mean was that, far from the current understanding that the role of the Bank is to create the conditions in which human rights might flourish, it is their role to improve human rights through development. The human development paradigm was taken as occupying the central place in development thought and practice today, and this was explained through the important work of Professor Amartya Sen of Cambridge University.

The place of the BWI in the United Nations system was also analysed. Their relationship agreements were considered to be out-dated. The world of today is indeed not the world of Bretton Woods. In contrast the United Nations now occupies a central role in international relations and in international law, and this is something the Relationship Agreements certainly do not reflect.

Further, it was shown that, while the integration of the BWI into UN co-ordination machinery may be said to be improving, the machinery itself is more or less decorative, its affect is questionable.

Suggestions were made for the improvement of relations between the BWI and their parent organisation which mostly involved strengthening the ECOSOC and Commission on Human Rights. Also there was noted the clear and present need for the BWI to accept the rule of international law, their legal personality and their responsibilities as members of the United Nations family of organisations.

In the final section the focus turned to an analysis of practice. This was necessarily partial, but, it is hoped, gave a flavour of the positive and negative aspects of the work of the IMF and World Bank for the promotion of and protection of human rights. The policy documents of the World Bank were considered in relation to international standards, and a short case study on dams was attempted, in order to show the power of a collaborative approach to development, involving all stakeholders to find the most all encompassing solutions to development problems.

There have been many pronouncements by BWI officials over the last decade on the importance of public international law and particularly human rights. Such statements have been made by James Wolfensohn and Ibrahim Shihata of the World Bank, and by Michel Camdessus and Horst Koehler of the IMF. It is encouraging to note the trend towards subsumption under public international law, including the concepts of good governance entering the internal working of both institutions via the Inspection Panel and the EVO.

There is a long way to go, however, before one can talk of democratic institutions, and still further before they may be considered law abiding and rights promoting and until they might be considered development institutions under the current paradigm of human development.

Nothing has changed in the Articles of Agreement of the World Bank and the IMF in terms of the prohibition of the inclusion of political criteria in loan assessment. The Bank used this provision in the past to exclude the possibility of considering human rights performance, or human rights impact of lending (notably in the cases of South Africa and Portugal). Now increasingly there is talk of the important interrelationship between development and human rights. While this may be due in part to the happy coincidence of the personal friendship fostered between Mr Wolfensohn and Professor Sen²⁰² it is also indicative of the increasingly untenable nature of the previous position in a world more acutely aware of the importance of human development. Yet these are mere pronouncements, there has been no acceptance of the legally binding nature of international human rights law on the financial institutions. Until development is fully realised to be a process, through which human rights norms are to be respected, and until the Inspection Panel, the EVO and the other quasi judicial fora are given (or in the case of the ECOSOC and its subordinate machinery *utilise*²⁰³) the power to consider the effect of policy and procedure, the human rights of people(s) will suffer for the benefit of capital.

Consequently, I have reached the conclusion that the most effective way to integrate human rights into development and the work of the BWI is through number 2 on the schemata laid down on page 35. This involves the routine inclusion of human rights impact assessments in project assessment and UN measures of the effect in promoting and protecting human rights of the work of the BWI.

²⁰² James Wolfensohn has said of Amartya Sen, "He is a person who, amongst all of the people dealing on issues of poverty, on social issues, on economic issues, I think brings it together better than anybody else" in a speech entitled, "What is the role of legal and judicial reform in the development process?", 5 June 2000

²⁰³ Commitment expressed in para 30 of Millennium Declaration to strengthen the ECOSOC "to help it fulfil the role ascribed to it in the Charter.

While the BWI pick and choose human rights to enforce or prioritise, and until they remove the discussion from this level and onto the legal plain, they will be open to the accusation of simply furthering the interests of the North. As pointed out by Fouad Ajami in a conference paper from the Canadian Human Rights and Democracy think-tank, “it is realistic to admit that these matters are decided on the grounds of sheer convenience. It is convenient for Western Governments to speak of civil liberties, and troubling to confront the issue of economic rights.” While this situation is beginning to change at the national level with the broad realisation of the interconnected nature of human rights among Western Governments (see for example the two white papers of the new Department for International Development in the UK), it is still true of the BWI. Although in rhetoric and discussion papers the World Bank and Inter-American Development Bank in particular may concede this, they are reluctant to commit themselves to upholding the full ambit of their members’ obligations under International Human Rights Law.

There is a disparity between the supposed relation of the BWI to the United Nations and the political reality of the legitimacy of the latter in the modern world. The United Nations governance (to use Bank jargon) is far stronger than that of the BWI. It is, in other words, far more democratic. Hence there is an urgent need for a reordering of the relations between the two organisations.

Throughout this paper I have suggested various ways in which this journey towards becoming development agencies of the twenty-first Century may be expedited. These include:

- Interpretation of the Articles of Agreement more sensitive to public international law.
- A more realistic interpretation of the Relationship Agreements given the current importance of the United Nations.
- Improved co-ordination within the United Nations family.
- (which can be achieved by) Increased respect for and power exercised by the Economic and Social Council of the UN and a changed approach by UN monitoring bodies (the Commission on human rights, the treaty bodies) to be more UN policy centred with regard to the BWI. In this regard also a consideration of the voting of states representatives to the BWI by the treaty bodies in their overall consideration of the State’s performance under the treaty.
- The inclusion of International Human Rights Law principles explicitly in BWI policies and procedures

7 Bibliography.

Texts and Official Documents.

ACC “Summary Conclusions of the Administrative Committee on Co-ordination at its first regular session of 2000” UN Doc ACC/2000/4

Alston , Philip(ed.) The United Nations and Human Rights. 1992 OUP

Arnold, Guy The End of the Third World

Boutros-Ghali, Boutros An Agenda for Development, Report of the Secretary-General A/48/935, 6 May 1994.

Cornia, G.A et al eds. “Adjustment with a human face. Protecting the vulnerable and promoting growth, a study by UNICEF”, Clarendon Press, Oxford 1987.

ECOSOC “Annual Overview Report of the Administrative Committee on Co-ordination for 1999” UN Doc E/2000/53

Eide et al eds Economic, Social and Cultural Rights, 1995 Martinus Nijhoff

Fuller, L.L. The Morality of Law Harvard University Press, 1969

Hanki and Suksi An Introduction to the International Protection of Human Rights, Abo Akademi University Press, 1997

Hayek, F The Constitution of Liberty Chicago University Press, 1960

Harris, D. J. Cases and Materials on International Law 5th ed. 1998

IBRD Res. 93-10, resolution creating the Inspection Panel

IMF, Annual Report 1991

IMF, Finance and Development: an IMF sponsored study

Killick Tony, IMF Programmes in Developing Countries. (Routledge), London, 1995

Killick, Tony, The Quest for Economic Stabilisation, (Routledge), Aldershot, 1985

Klein, Naomi No Logo: no space, no choice, no jobs, taking aim at the corporate bullies London: Flamingo 2000

Lawyers Committee for Human Rights “The World Bank: Governance and Human Rights”, New York, 1993

Lawyers Committee for Human Rights The World Bank: Governance and Human Rights 2nd ed. 1995

Malanczuk, Peter, Akehurst's Modern Introduction to International Law 7th ed. Routledge, London, 1997

Mason and, E; Asher, R The World Bank Since Bretton Woods, Washington DC, The Brookings Institute 1973

Melander, G and Alfredsson, A (eds) The Raoul Wallenberg Compilation of Human Rights Instruments, Martinus Nijhoff, The Hague, 1997

Oxfam Policy Department A Case for Reform: Fifty years of the IMF and World Bank, 1995, Oxfam.

Polak, Jacques J. The World Bank and the International Monetary Fund, Washington, D.C. 1994

Rehof and Gulman (eds.) Human Rights in Domestic Law and Development Assistance Policies of the Nordic Countries (1989) Martinus Nijhoff

Sanford, J US Foreign policy and multilateral development banks, Westview Press 1982,

Sen, Amartya, Development as Freedom Oxford, 1999

Shepherd & Nanda (eds) Human Rights and Third World Development, 1985 Greenwood Press.

Shihata, I, The World Bank and Human Rights – An Analysis Of The Legal Issues and the Record of Achievements, 8 January 1988

Tomaševski, K, 5th session of OHCHR HR/CN/559 of 15 Mar 1994.

Tomaševski, K Development Aid and Human Rights Revisited, Pinter, London 1993

Tschofen and Parra eds The World Bank in a Changing World: selected essays of Ibrahim Shihata. Martinus Nijhoff, Dordrecht, 1991

Turk, Danilo “The realisation of economic, social and cultural rights”: final report of Special Rapportuer on Economic, social and cultural rights, Commission on Human Rights, Sub-Committee on the Prevention of Discrimination and the Protection of Minorities, 49th Session, at para. 11 E/CN.4/Sub./1992/16 (1992)

UN, Basic Facts About the United Nations, New York, 1998

UN “Global Consultation on the Right to Development as a Human Right”. Report prepared by the Secretary-General pursuant to Commission on Human Rights resolution 1989/45, UN doc. E/CN.4/1990/9/Rev.1 of 26 September 1990.

UN, Vienna Declaration and Programme of Action, World Conference on Human Rights, Vienna 14-25 June 1993, UN Doc A/Conf.157/23 of 12 July 1993.

UNDP/ OHCHR “Report of the Oslo Symposium Human Development and Human Rights”, 2-3 October 1998 organised by UNDP, UNOHCHR and The Royal Ministry of Foreign Affairs of Norway. <http://www.undp.org/Oslorep2.html>

Watson, J. S. Theory and Reality in the International Protection of Human Rights, Ardsley, New York, 1999

Weiss, Denters and de Waart International Economic Law with a Human Face, Martinus Nijhoff, The Hague, 1998

Williams, Douglas The Specialised Agencies and the UN: the system in crisis, Hurst in association with the David Davies Memorial Institute of International Studies, London, 1987

World Bank “Decentralization of Education. Legal Issues”, Washington DC, June 1997.

World Bank “Development and Human Rights: The Role of The World Bank”, Washington DC, September 1998.

World Bank “Education Sector Strategy”, Washington DC, July 1999

World Bank “The Economics of Private Participation in Health Care: new insights from institutional economics” Pecker, AS; Harding, A; Girishankar, N, Washington DC, 1 August 1999

World Bank “Learning from the Past” Washington DC, 1994

World Bank “Governance and Development” Washington DC, 1992

World Bank “Governance; The World Bank’s Experience” Washington DC 1994.

World Bank/ IMF Development Committee “Protecting The Poor During Periods Of Adjustment”, August 1987.

World Commission on Dams, “Dams and Development: a new framework for decision making” 2000, Report available at www.damsreport.org

Articles.

Alston, P., "The United Nations' Specialised Agencies and Implementation of the International Covenant on Economic, Social and Cultural Rights" (1979) 18 *Columbia Journal of Transnational Law* 79, 117

Alvarez, Claude, "Deadly Development," *Development Forum* 11 (October 1983):3

Bradlow and Grossman, "Limited Mandates and Intertwined Problems" HRQ 17 No. 3 (1995) 411-442

Chapman, Audrey, "A 'Violations Approach' for Monitoring the International Covenant on Economic, Social and Cultural Rights" 18 HRQ 23 (1996)

Cogen, Marc "Human rights, prohibition of political activities and the lending policies of the Worldbank (sic) and the IMF" in Chowdhury et al The Right to Development in International Law

Dias, Clarence "Influencing the Policies of the World Bank and the International Monetary Fund" in Human Rights in Domestic Law and development Assistance of the Nordic Countries, Rehof and Gulman (eds.)

Eide, A "Cultural Rights as Individual Human Rights", in Eide, Krause and Rosas (eds.) 1995

Gillies, David, "Human Rights, Governance, and Democracy: The World Bank's Problem Frontiers" NQHR 1 (1993) 3

Gold, J "Political considerations are prohibited by Articles of Agreement when the Fund considers requests for its resources", IMF Survey 23 May 1988, pp 146-148.

Hampson, Françoise, Comment in *United Nations Chronicle* No4 1999 p 70

Hansungule, Michelo "Individual Cultural Rights" RWI 2000, unpublished

Hansungule, Michelo "Access to panel: the notion of affected party, issues of collective and material interest" RWI, unpublished, 1997.

Hewlett, Sylvia Ann "Human Rights and Economic Realities: Trade-offs in Historical Perspective" *Political Science Quarterly* 94 (Autumn 1979) 453

Howard, Rhoda "The Full Belly Thesis" HRQ vol5 no 4 1983 467

Johnson, Hilde, Minister for International Development of Norway "Observations" in *Chronique ONU* no. 3 1999 p 42

Lawyers Committee on Human Rights in co-operation with ProVea – the Venezuelan Programme for Human Rights Education and Action. The report, entitled “Halfway to reform: the World Bank and the Venezuelan justice system” <http://www.lchr.org/pubs/halfway.htm>

Messick Richard E “Judicial Reform and Economic Development: a survey of the issues”, The World Bank Research Observer, vol. 14 (February 1999)

Moller, Nicholas “The World Bank: Human Rights, Democracy and Governance” NQHR vol 15 no 1 (1997) 21-45

Nanda, V “Development and Human Rights: the role of international law and organisations” in Shepherd and Nanda (eds.) 1985

Robichek, W “The IMF Conditionality Re-examined” in Joaquín Muns (ed.) Adjustment, Conditionality, and International Finance

Samson, K “Human Rights Co-ordination Within the United Nations System” in Alston (ed.) 1992

Sandstrom, J “Poverty Reduction: Learning the Lessons of Experience.” in Finance and Development Sep 1994

Shihata, Ibrahim, “The World bank Inspection Panel – A Background Paper on its historical, Legal and Operational Aspects” A Paper Submitted to the Expert Meeting on the Inspection Panel, Lund 23-25 October 1997.

Skogly, I “The Position of the World Bank and International Monetary Fund in the Human Rights Field”, in Hanki and Suksi (eds.) 1997

Sotto, H O “Development and Human Rights: the necessary but partial integration of human rights and development” HRQ vol 22 no.3 (2000) 734

Stone, A “The Place of Law in the Marxian Structure- Superstructure Archetype”, Law and Society Review, vol 19 (1985)

Thuan, Gregory, “Good Governance as a Crucial Means to Development” unpublished.

Tomaševski, Katarina, “The influence of the World Bank and IMF on Economic and Social Rights” NJIL 64, p 393

Tomaševski, Katarina, “Measuring Compliance with Human Rights Obligations” 1993 NQHR 109

Yokota, Y “Non-political character of the World Bank”, The Japanese Annual of International Law, no2, 1976

Speeches.

Camdessus, M “Addressing Concerns for the Poor and Social Justice in Debt Relief and Adjustment Programmes” New Jersey, 22 October 1998,
<http://www.imf.org/external/np/speeches/1998/102298.htm>

Koehler, H “Address to the Board of Governors” 6 September 2000,
<http://www.imf.org/external/np/speeches/2000/092600.htm>

Robinson, M “Constructing an International Financial, Trade and Development Architecture: The Human Rights Dimension”, at the Swiss Federal Institute of Technology on 1 July 1999. <http://www.un.org>

Stiglitz, J “The Washington Consensus” Speaking in Helsinki in 1998,
<http://www.economicjustice.org/resources/media/stiglitzHIPC.html>

Wolfensohn, J, “What is the role of legal and judicial reform in the development process?”, 5 June 2000; <http://www.worldbank.org/html/extdr/extme/jdwsp060500.htm>

Wolfensohn, J, “Remarks at the Second Annual ABCDE Conference in Europe on Development Thinking At the Millennium”, Paris, 26 June 2000;
<http://www.worldbank.org/html/extdr/extme/jdwsp062600.htm>

Wolfensohn, J, “Keynote Address at the INSEAD International Council Meeting”, Fontainebleau, 6 March 1999: <http://www.worldbank.org/html/extdr/extme/speech.htm>;

Wolfensohn, J, “Challenges and opportunities of the 21st Century.”, Kiev, 6 October 2000; <http://www.worldbank.org/html/extdr/extme/jdwsp100600a.htm>

Wolfensohn, J, “Building an Equitable World” Prague, 26 September 2000;
<http://www.worldbank.org/html/extdr/am00/jdwsp/jdwsp-en.htm>

Cases

Amnesty International v Tunisia African Commission on Human Rights case number 69 of 1992

Advisory Opinion on the International Status of South-West Africa: Advisory Opinion of 11 July 1950 www.icj-cij.org/idecisions/isswasummary500711.htm

Fisheries Jurisdiction case (merits) ICJ Rep1974 pp3,175

Kitok v Sweden HRC Communication no 197 of 1985.

The Legality of the Threat or Use of Nuclear Weapons case ICJ Rep1996

Maria Baess v Zaire African Commission on Human Rights case number 31 of 1989

Nicaragua (merits) ICJ Rep 1986 p 14

Reparations for Injuries Suffered in the Service of the United Nations, Advisory Opinion.
ICJ Reports 1949, p174

In addition, the cases referred the Inspection Panel of the World Bank, as Listed in Appendix I, tables 1 and 2

Newspaper and Magazine Articles

Economic Justice Now “World Bank senior VP admits HIPC conditions wrong”
<http://www.economicjustice.org/resources/media/stiglitzHIPC.html>

FT, 4th December 2000

Guardian, 4th October 2000; 22nd June 2000; 26 September 2000.

Observer, 25th June 2000.

Observer Review 12 November 2000

Cambio Magazine, September 2000.

The Economist “Human Rights Law Survey 5th Dec 1998

Prospects Magazine, 2000